Articles

The Unitary Executive Theory in Comparative Context

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The debate over the unitary executive theory—the theory that the President should have sole control over the executive branch of government—has proven extremely parochial. Supporters of the theory argue that the original intent of our country's founders requires presidential control, including a power to remove federal officials from their posts for political reasons. Opponents of the theory rely on functional considerations and our practice of dispersing power more widely. But neither side examines developments abroad to see what light other countries' experience might shed on the question of whether the Supreme Court should craft a new rule of constitutional law cementing presidential control over the executive branch of government. This Article examines that experience, primarily through case studies of recent democratic decline in Hungary, Poland, and Turkey.

It shows that centralization of head-of-state control over the executive branch of government provides a pathway to autocracy. Indeed, unilateral presidential control of the executive branch constitutes a defining characteristic of autocracy.

In all of these countries, authoritarian leaders secured legislation or constitutional amendments establishing effective head-of-state control over key bureaucracies that usually enjoy substantial independence in a well-functioning democracy, such as the prosecution service, the electoral commission, and the media authority. Autocrats use this power to shield their supporters from prosecution while persecuting political opponents, to tilt the electoral playing field in favor of the ruling party, and to shrink the public space for debate; thus, severely impairing democracy and the rule of law.

Realization that the unitary executive paves the way for autocracy reframes the unitary executive debate. We must ask whether the Supreme Court should establish a practice by judicial fiat that authoritarians established through legislation and constitutional amendment. This Article explains that our tradition favors a construction of the Constitution that reduces the risk of losing our democracy and urges rejection of the unitary executive theory.

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INTRODUCTION

The debate over the unitary executive theory—the theory that the President must have sole control over the executive branch of government—has been extremely parochial.[1] Unitary executive theory proponents (unitarians) claim that the original intent of the Constitution's Framers and Ratifiers (collectively, the Founders) justifies the theory.[2] Most of the theory's opponents make functional claims, describing an American constitutional custom of distributed authority and suggesting that this practice fosters a desirable dialogue between experts at various government agencies and the President.[3] Yet, contemporary scholars do not generally discuss experience abroad in debating the unitary executive theory.[4] This Article draws on comparative constitutional law to inform the debate about the unitary executive theory.

It turns out that heads of state working to substitute autocracy for constitutional democracy obtain centralized control over key government agencies, such as the prosecution service. This centralized control enables them to protect corrupt regime supporters, persecute political opponents, tilt the electoral playing field, and shrink the public space for debate and opposition.[5] The experience of autocrats undermining democratic government strongly suggests that creating a unitary executive paves the way for autocracy. A despotic President who obtains sole control over the executive branch of government will likely use his authority to entrench himself in power and undermine democracy and the rule of law upon which it depends.

Nevertheless, the Supreme Court embraced the unitary executive theory, with some exceptions, in *Seila Law LLC v. Consumer Financial Protection*

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1. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary,* 105 HARV. L. REV. 1153, 1158 (1992) (noting that "unitary executive theorists" claim that the President must have "direct control" over all executive officers); *cf. id.* at 1166 (discussing some differences in the nature of the required control among supporters of the theory).

2. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550 (1994) (stating that the Constitution's text and history support the unitary executive theory); *see also* Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers,* 102 YALE L.J. 991, 991–94 (1993) (arguing that the Framers' intent supports the unitary executive theory); *cf.* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 37–38 (2008) (arguing that the history of presidential support for the unitary executive theory over time supports it).

3. *See, e.g.*, Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759 (2007) [hereinafter Strauss, *Overseer*] (arguing that the President oversees government agencies, but that the Constitution does not require the President to have the power to decide all issues himself); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987) [hereinafter Strauss, *Formal and Functional*] (suggesting a functional approach to deciding separation of powers questions affecting administrative agencies); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573, 581 (1984) [hereinafter Strauss, *Place of Agencies*] (assuming that useful analysis must largely accept existing reality).

4. *Cf.* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 651, 653 n.125 (2001) (describing fragmentation of power within branches of government as "our assurance against threatening concentrations of government power").

5. *See generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

Bureau.[6] The *Seila Law* Court struck down a for-cause removal provision preserving the independence of the Consumer Financial Protection Bureau (CFPB), on the ground that the President has a constitutional right to fire its director for political reasons.[7] But *Seila Law*, a 5-4 decision, stands in considerable tension with earlier cases.[8] The Court should consider the capacity of a unitary executive to unravel democracy in future cases as it reconciles its holding in *Seila Law* with prior cases less hospitable to the unitary executive theory. Indeed, this Article's analysis suggests that the Court should consider overruling *Seila Law* in light of the potential danger its extreme unitary executive theory poses to democracy and the rule of law.

In spite of the lack of recent domestic legal scholarship considering whether head-of-state control over the executive branch catalyzes autocracy, the idea that unchecked presidential control over the executive branch of government endangers democracy and the rule of law in the long run is not new to the American constitutional law tradition.[9] The founders of this country appreciated that danger and denied the President sole control over the executive branch of government based on their study of experience abroad and their desire to preserve a republic, providing a congressional role in both the appointment and removal of executive branch officials.[10] Furthermore, some of our most esteemed statesman and Supreme Court Justices—such as Alexander Hamilton, Joseph Story, Daniel Webster, and Louis Brandeis—recognized the danger complete presidential control over the executive branch poses to democracy.[11]

Yet, the contemporary debate on the unitary executive theory pays little heed to this ancient wisdom and contemporary experience, exhibiting the parochialism that characterizes much of American constitutional law in recent years. Neither the majority nor the dissent in *Seila Law* address the lessons of comparative constitutional law for the unitary executive theory. In the United States, unlike in most constitutional law courts, the practice of considering experience of other countries in constitutional adjudication has proven controversial.[12] A devout originalist may reject consideration of any recent

6. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

7. *Id.* at 2197–98.

8. *See* Morrison v. Olson, 487 U.S. 654, 659–60 (1988) (upholding a statute making a counsel investigating high level wrongdoing independent of presidential control except in the case of breaches of duty); Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (upholding the independence of the Federal Trade Commission).

9. Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 516 (2018) (stating that "presidential administration is morphing into autocracy").

10. *See Morrison*, 487 U.S. at 670–75 (holding that the Appointments Clause authorizes vesting the power to appoint an independent counsel in the judiciary and quoting the Appointments Clause, which requires Senate approval of principal officers); *id.* at 723 (Scalia, J., dissenting) (recognizing that the Constitution authorizes Senate removal after impeachment); *see also* Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 389 (2019) (discussing George Washington's concern that a "chief" of a faction could inaugurate "permanent despotism").

11. *See infra* notes 63–66 and accompanying text.

12. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 752 (2005) (discussing the debate). I do not mean to imply that the Supreme Court constitutes a constitutional court

experience, especially foreign experience, as inappropriate.[13] In other words, originalists may believe that constitutional interpretation requires the rejection of all experience and wisdom, save that captured in the statements of our Constitution's Framers.

This parochialism, however, proves ironic, for the Framers extensively studied experience abroad before drafting the Constitution.[14] Nor is learning lessons from other countries foreign to our separation of powers jurisprudence. As recently as the *Youngstown* decision in 1952, the Supreme Court extensively considered the experience of democracy loss (in Nazi Germany) in reaching a judgment about the scope of presidential power.[15] In other words, our tradition does not require that contestable originalist claims defeat all wisdom and subsequent experience.

Furthermore, the Framers did articulate concerns about where sole presidential control over the executive branch could lead based on their study of history.[16] And they assured anxious citizens deciding whether to ratify the Constitution that they had not left the executive branch completely separated from control by Congress. Instead of adopting a pure system of separation of powers, Alexander Hamilton explained, they hedged their bets by introducing numerous checks on presidential power.[17]

This Article presents the background debate on the unitary executive theory, evaluates the experience from democracy loss abroad, and then explains how an appropriate response to this experience can safeguard our democracy, in spite of the Court's misstep in *Seila Law*. The first Part presents the background. It explains the unitary executive theory and discusses its reception in the Supreme Court and the executive branch. It then turns to the scholarly debate on the unitary executive theory, showing that previous work has often focused on formalist claims based on constitutional text and history or upon practice and general functional considerations, rather than upon the role of centralized power over the executive branch in undermining the rule of law and democracy abroad. It establishes that the Founders sought to craft a Constitution immune from democratic backsliding. It argues that this intent, which united the Framers' views with those who made the Framers' proposal into an enacted charter of government by ratifying the Constitution, creates a principle of constitutional construction, which should influence how a Court resolves the more specific

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in a strict sense. But it shares with the constitutional courts a leading role in the adjudication of constitutional claims.

13. *Id.* at 885 (noting that the Court rarely refers to foreign law cases "where the decision . . . depends primarily on an interpretation of the original meaning" or in structural constitutional law cases).

14. *See* WILLIAM R. EVERDELL, THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS 150–70 (2d ed. 2000).

15. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593, 649–51 (1952) (Frankfurter, J., concurring) (Jackson, J., concurring) (explaining that the "experience through which the world has passed" in Nazi Germany shows the need to construe the Constitution to maintain checks and balances).

16. *See, e.g.*, THE FEDERALIST NO. 68 (Alexander Hamilton) (explaining that the Constitution places "every practicable obstacle" in place to combat foreign influence upon and corruption of the President).

17. *See infra* note 140 and accompanying text.

debates over the unitary executive theory. The Court should construe the Constitution to preserve democracy and the rule of law.

The next Part analyzes the role that centralized administration plays in undermining the rule of law and democracy. It explains that democracies generally rely heavily upon a civil service insulated from political interference, formally independent agencies, and a tradition of limiting centralized control over prosecution and other government decisions in order to establish a rule of law. It shows, using case studies of democratic erosion in Hungary, Turkey, and Poland, that autocrats seeking to subvert democratic governments secure constitutional changes restructuring the executive branch to facilitate centralized control over key bureaucracies. It then describes how this centralization substantially impairs the rule of law by defeating the principle that the law applies equally to all. Once an autocrat establishes control over prosecution and administration, the autocrat's minions apply the law vigorously to regime opponents, while giving corrupt supporters of the autocratic regime a free pass. This politically skewed application converts laws designed to achieve legitimate public policy goals into a pretext for repressing opposition and empowering regime supporters. The defeat of the rule of law impairs fair elections and tilts the media space toward the ruling regime, thereby undermining democracy. All of this implies that a unitary executive poses a threat to constitutional democracy's survival.

The final Part analyzes the implications of the realization that a unitary executive provides a pathway to autocracy. It considers the possibility that even with the opening up of a path to autocracy, an autocratic American President may not go down that path because of external constraints. It argues that Senate tolerance of an autocratic President probably provides a sufficient condition for autocracy to greatly undermine the rule of law and imperil democracy, an argument anticipated by the Anti-Federalists at the Founding. It explains why the lessons from democracy loss abroad suggest that judicial enforcement of constitutional rights does not provide an adequate check on a President able to command prosecutors and other civil servants to do his bidding. The experience abroad and a sound combination of political science and constitutional theory also show that political remedies likely will fail to protect a country from autocracy when partisan division makes the danger most acute.

This final Part continues by analyzing *Seila Law*'s likely effect on autocracy's long term prospects in the United States. It argues that the Court should keep its older precedent rejecting the unitary executive theory intact, including precedent that accepts statutory provisions that only provide for removal of executive branch officials for cause. The Court should therefore narrowly construe or overrule *Seila Law*. It shows, in particular, that for-cause removal authority suffices to allow the President to perform the role of taking care that the law be faithfully executed, and that the Constitution therefore does not clearly require at-will removal authority. Therefore, the Court should allow the Congress some latitude to decide whether for-cause or at-will removal authority should govern under the Horizontal Sweeping Clause, which

authorizes Congress to structure the executive branch of government, as the *Seila Law* dissent argued.[18]

The final Part also analyzes several less direct potential implications of the *Seila Law* Court's embrace of the unitary executive theory—namely rejection of the possibility of presidential obstruction of justice and sharp limitation of congressional authority over subpoenas. It argues that *Seila Law* makes subpoena authority and acceptance of the possibility of presidential obstruction of justice even more important to democracy preservation than they have been in the past, even as that case diminishes the likelihood of executive branch prosecution of obstruction of justice claims against the President. Each of these issues merits its own article, so the analysis of these specific matters remains suggestive and limited. Still, this Article explains that the Court should take the role head-of-state power over the executive branch plays in establishing autocracies into account, and that doing so has important ramifications.

I. THE UNITARY EXECUTIVE THEORY

This Part begins with a description and analysis of the unitary executive theory and the Supreme Court cases addressing it. It then explains that even before *Seila Law*, the executive branch practice had moved toward a unitary model. It canvasses the recent scholarly debate on the unitary executive theory, showing that original intent and United States constitutional custom have dominated the debate, with no attention paid to experience abroad. On the other hand, it shows that both the Founders and Supreme Court Justices have paid attention to experience abroad in the past. Finally, this Part argues that the Founders aimed to create a Constitution to preserve a republic through a rule of law and that the Supreme Court should construe the Constitution to further that aim.

A. THE SUPREME COURT AND THE UNITARY EXECUTIVE THEORY

Justice Scalia's dissent in *Morrison v. Olson* provides the most succinct and cogent judicial articulation of the unitary executive theory.[19] The *Morrison* majority upheld provisions of the Ethics in Government Act (Act)[20] creating an independent counsel to investigate and prosecute high ranking officials' crimes.[21] In order to prevent presidential interference with independent counsel investigation and prosecution, Congress lodged the authority to appoint an independent counsel in the judiciary and only authorized the Attorney General

18. *See* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "the Sweeping Clause"*, 36 OHIO ST. L.J. 788, 793–94 (1975) (arguing that the Horizontal Sweeping Clause authorizes Congress to imply presidential powers); *see also* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2227 (Kagan, J., dissenting). Justice Kagan concurred in the judgment on severability and dissented on the relevant issue of for cause removal.

19. Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

20. 28 U.S.C. §§ 591–99 (1982) (current version at 28 U.S.C. §§ 591–99 (2018)).

21. *Morrison*, 487 U.S. at 659–60.

to remove her for "good cause."[22] While the Supreme Court upheld the Act's removal and appointment provisions and rejected the unitary executive theory,[23] Justice Scalia dissented on the grounds that these provisions interfered with presidential control over the executive branch of government.[24]

Justice Scalia's dissent relies on the proposition that the President possesses "all executive" power under the Constitution.[25] This proposition, Scalia argued, stems from the Vesting Clause, Article II, § 1, cl. 1, which provides, "The executive Power shall be vested in a President of the United States," without using the word "all" found in describing Congress' legislative power in Article I.[26] Since the statute "deprive[s] the President . . . of exclusive control over the exercise" of a "purely executive power" (namely prosecution), argued Scalia, it conflicts with the Framers' decision to give the President "all" executive power.[27] This statement treats the Vesting Clause's grant of "executive power" as a grant of "exclusive control," thereby implying that the President does not share control of the executive branch with Congress or other federal officials.

Justice Scalia equated control with the power to appoint and remove executive branch officials.[28] For Scalia, the President's ability, through the Attorney General, to remove the Prosecutor "for cause" does not suffice; the President must have the ability to remove without cause.[29] He strongly suggested that presidential control implies rejection of "an attitude of independence against the" President's "will" among officers of the executive branch of government in favor of a system where all hold their office only if their conduct pleases the President.[30] In other words, he equated control over the executive branch of government with the power to fire all of those carrying out executive duties for any reason or no reason whatsoever. Likewise, Justice Scalia found the inability of the President, through the Attorney General, to exercise control over the appointment of the independent counsel inconsistent with presidential control over the executive branch.[31]

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22. *Id.* at 660–64 (majority opinion) (describing these provisions in detail).

23. *Id.* at 670–97.

24. *Id.* at 705 (Scalia, J., dissenting).

25. *Id.* (describing U.S. CONST. art. II, § 1, cl. 1 as lodging "*all of* the executive power [in the President]").

26. *Id.* (citing U.S. CONST. art. II, § 1, cl. 1). *But see* U.S. CONST. art. I, § 1 (vesting "all" legislative authority in Congress).

27. *Id.*

28. *Id.* at 726 ("[T]he constitutional principle that the President had to be the repository of *all* executive power . . . necessarily means that he must be able to discharge those who do not perform executive functions according to his liking.").

29. *See id.* at 706–07 (explaining why good cause removal does not amount to complete control).

30. Scalia implies this through his argument that "good cause" removal provisions limit the removal power. *See id.* at 706–07. He points out that a person who can only be removed for good cause does not serve at the President's pleasure. *Id.* at 707. Indeed, the purpose of a good cause removal provision is to allow the person protected by it to "maintain an attitude of independence against the latter's will." *Id.* (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935)). By rejecting good cause removal, Scalia implicitly rejects executive branch independence from presidential will.

31. *See id.* at 701–03, 707 (criticizing the appointment provisions because they "severely confine" the Attorney General's ability to refuse appointment of an independent counsel). Justice Scalia also emphasizes the

I shall refer to the idea that presidential control over the executive branch implies presidential control over appointment and removal as the "patronage state theory."[32] While this term highlights the possibility that presidential control can be used to advance a faction's interest, a chief concern of the Framers, I do not mean to deny that Presidents can use their power to serve rule of law values instead. The patronage state theory constitutes a central element of the larger theory of the unitary executive.[33]

Justice Scalia justified this control, in part, by endorsing a presidential prerogative to make political decisions about prosecution. Justice Scalia described prosecutorial discretion as involving a balance of "legal, practical, and *political*" considerations.[34] Prosecutors must balance these factors, wrote Scalia, in deciding whether to prosecute "technical violation[s]" at all.[35] He then claimed that the Constitution lodges control over prosecutorial discretion, including decisions about when not to prosecute violations, in the President.[36] Moreover, Justice Scalia envisioned an executive branch "attuned to the interests and the policies of the Presidency."[37]

I will refer to this idea that the President must have exclusive control over the politics of executive branch decision-making as the unitary executive theory's "political dimension." The political dimension implies that a President could choose which law violators to prosecute based on political considerations. Accepting the unitary executive theory's political dimension allows the President to refrain from prosecuting his supporters' illegal conduct, while unleashing the government's full prosecutorial wrath upon his opponents. More

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separation of powers principle that each department must have "defense . . . commensurate to the danger of attack." *Id.* at 704. Justice Scalia applies this principle to the executive branch, which he sees as under attack in *Morrison. See id.* at 703 (criticizing the statute for commencing investigations without the assent of the "President or his authorized subordinates"). He identifies the constitutional need to defend the executive branch as giving "comprehensible content to the Appointments Clause." *Id.* at 704. And this content leads him to reject the majority's decision to uphold judicial appointment of the independent counsel. *See id.* at 713.

32. *See* Myers v. United States, 272 U.S. 52, 151 (1926) (explaining that Congressional opposition to a custom of presidential removal arose in response to the "use of patronage for political purposes"); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 408–09 (2006) (describing President Jackson's introduction of the policy of wholesale removal of holdover appointees as an innovation justified as serving democracy that soon "degenerated into a 'spoils system' of patronage and cronyism"); *cf.* John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 425–26 (2008) (citing President Jefferson's introduction of the spoils system—the practice of rewarding supporters with offices in the government—as an effort to assert personal presidential control over "all law enforcement").

33. *See* CALABRESI & YOO, *supra* note 2, at 4 (characterizing presidential claims of removal power as decisive evidence that Presidents "have believed in the theory of the unitary executive").

34. *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting) (emphasis added) (describing the balancing of these factors as "the very essence of prosecutorial discretion").

35. *Id.* at 707–08.

36. *Id.* (stating that taking control of this balancing from the President "remove[s] the core of the prosecutorial function" from "Presidential control"); *accord* Friends of the Earth v. Laidlaw Env't Servs., 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (suggesting that the President's duty to faithfully execute the law requires him to be able to decide to refrain from prosecuting violators of environmental statutes). *But see* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1594–95 (2007) (explaining that nonenforcement of statutes can undermine the rule of law).

37. *Morrison*, 487 U.S. at 712.

broadly, this political dimension empowers the President to exercise more power than is strictly necessary to ensure faithful execution of the law.[38] In a situation in which an executive branch official must choose between two actions, both of which comply with the law, the "political dimension" insists that the sitting President's political preference becomes the determining factor in making the decision.[39] More troubling, the President and loyal subordinates may support policies in considerable tension with the goals of the law they should administer. The political dimension—the idea that the President's personal preferences must govern administration—can lead to opportunistic construction of the law, which can distort it.[40]

The unitary executive theory's political dimension lies at the heart of the unitary executive theory's tendency to undermine the rule of law.[41] While unitarians do not endorse perversion of statutes or consider selective prosecution for political purposes, the political dimension of the unitary executive theory can significantly undermine the rule of law.

Prior to *Seila Law*, however, the Supreme Court had not accepted the unitary executive theory. The *Morrison* majority held that the statutory provision allowing the Attorney General to remove the independent counsel "for cause" provides for sufficient presidential control over prosecution under the Constitution.[42] It recognized that a "for-cause" removal provision suffices to ensure the rule of law.[43] An ability of the President through the Attorney General to use for-cause removal authority to fire a special prosecutor who commits abuses of office by persecuting the innocent, exonerating the guilty, extorting money from the accused, and the like suffices to allow the President to "take care that the laws be faithfully executed."[44] The majority's holding, however, rejects the political dimension of the unitary executive theory, at least implicitly.[45] It does not accept the notion that the President's political

38. *See* 1 Op. Att'y Gen. 624 (1841) (recognizing that an officer honestly exercising discretion within statutory bounds faithfully executes law); *cf.* U.S. CONST. art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed").

39. Prakash, *supra* note 2, at 992 (opining that whenever a statute grants an executive branch official discretion, the Constitution authorizes the President to "control that discretion").

40. *Accord* EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, 80–81 (4th ed. 2008) (opining that allowing the President to substitute his own judgment for that of any agency would convert all law enforcement questions into discretionary questions controlled by "an independent and legally uncontrollable branch of the government").

41. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2077 (2009) (the unitary executive theory "discounts . . . objective . . . administration . . . and advances . . . an administration run in strict accordance with the President's priorities").

42. *See Morrison*, 487 U.S. at 691–92 (holding that the for-cause removal provision does not strip the President of all means of removing the officer).

43. *See id.* at 692 (discussing that the for-cause removal provision provides "ample" authority to secure "'faithful execution' of the laws").

44. *See id.* (noting that the removal provision does allow removal for misconduct).

45. *See id.* at 695–96 (finding the lack of complete presidential control over the independent counsel acceptable because of the for-cause removal provision and the requirement that the independent counsel generally follow Justice Department policy).

preferences must control decisions about whom to investigate or prosecute under the Constitution.[46]

The *Morrison* majority also considered the independent counsel an inferior officer and therefore upheld the statute's provision providing for judicial appointment of an independent counsel.[47] It justified this characterization by noting the narrowness of the independent counsel's responsibilities.[48] Scalia, however, in keeping with his view that Article II requires strict hierarchical presidential control over the executive functions of government, would have interpreted the term inferior officer as only including those subject to direction by a superior.[49]

The *Morrison* decision rejecting subordination of prosecution to presidential politics comports with our early history and long-standing traditions of prosecutorial independence. In the early days, Congress relied heavily on state officials and private parties to enforce federal law.[50] The Judiciary Act of 1789 authorized the President to appoint a U.S. Attorney in each judicial district to enforce federal law, but in practice they acted quite independently and the Judiciary Act did not explicitly authorize presidential removal.[51]

We also have a constitutional custom of generally insulating prosecutorial decisions from political influence.[52] While the President always appointed the Attorney General with the advice and consent of the Senate, that official in the early days merely advised the President and defended the United States in the Supreme Court, leaving prosecution to the independent district attorneys.[53] In 1891, when Congress expanded the Attorney General's power by creating the Department of Justice (DOJ), the President lacked the power to remove the Attorney General, the District Attorneys, and other high ranking DOJ officials because the Tenure of Office Act prohibited their removal without the Senate's consent.[54]

Scalia's advocacy of the political dimension of the unitary executive theory, however, had some precedential support even before *Seila Law*, albeit only in dicta. He drew upon former President and Supreme Court Justice Taft's

46. *See id.* at 692 (finding that the President's ability to have the Attorney General remove an independent counsel who fails to perform his duties suffices to allow the President to ensure faithful execution of the laws).

47. *See id.* at 671–77 (holding that independent counsel is an inferior officer and therefore that the literal language of the Constitution authorizes her appointment by the judiciary).

48. *See id.* at 671–72 (referring to the independent counsel's "limited duties" and "limited . . . jurisdiction" as justifications for characterizing her as an inferior officer).

49. *See id.* at 719–21 (Scalia, J., dissenting) (defining an inferior officer as a "subordinate" officer).

50. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 128–29 (2014) (characterizing the early system of law enforcement as "incredibly" decentralized in part because of its reliance of state and private enforcement).

51. *See id.* at 129–30.

52. *See id.* at 170–71 (explaining that the DOJ Act contributed to fostering norms of independence sought by its drafters over the long term).

53. *See id.* at 129 (setting out the Attorney General's limited statutory duties and stating that the Attorney General "exercised no control" over the district attorneys).

54. *See id.* at 164.

opinion for the Court in *Myers v. United States*.[55] *Myers* held that Congress could not condition presidential removal of an executive officer upon the consent of the Senate.[56] In dicta, former President Taft suggested not only that the Senate could not control the removal decision, but also that Congress must permit the President to remove Officers of the United States at will, thus endorsing the political dimension of the unitary executive theory.[57] Justice Taft, however, limited the effect of this position by stating that Congress could protect officials not appointed by the Senate from politically motivated removal by statutory provisions only permitting removal for cause.[58] Otherwise, Taft recognized, his position would doom the civil service law that Congress had enacted a few decades earlier to defeat the patronage system, under which political support for the President (often in the form of a campaign contribution) was necessary to gain a post in the federal government.[59] Similar civil service laws seeking to insulate administration from partisan politics have become a hallmark of constitutional democracies around the world.

Furthermore, Taft affirmed that Congress could expand the class of those subject to civil service protections.[60] The *Myers* Court assumed that Congress could determine who constituted an inferior officer subject to appointment by the judiciary, a head of department, or the President acting alone; and who was a principle officer that must be appointed by joint action of the Senate and the President. Thus, in spite of the blow *Myers* delivered to legislative supremacy by prohibiting Congress from conditioning removal of Senate confirmed officials upon Senate consent, the *Myers* Court implicitly recognized that congressional authority under the Necessary and Proper Clause allowed Congress to decide upon the classification of officers.[61] The entire Supreme Court, however, backed formalist judicial supremacy in *Morrison* rather than deference to Congress, as both the majority and dissent supported judicial definitions of inferior officers.[62]

The dissenting Justices in *Myers* read the Constitution as giving Congress control over both the term of office and removal, partly based on the belief that

55. *See* Morrison v. Olson, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting) (stating that Congress may not restrict the "President's power to remove principal officers" exercising "purely executive powers") (citing Myers v. United States, 272 U.S. 52, 127 (1926)).

56. *Myers*, 272 U.S. at 176 (holding a statutory restriction preventing the firing of a Postmaster General without the Senate's consent unconstitutional).

57. *See id.* at 127 (stating that the Constitution prevents congressional regulation of removal).

58. *See id.* at 162 (suggesting that Congress may avoid the evil of political removal of inferior officers by making sure they are not appointed by the President with the Senate's consent).

59. *See id.* at 173–74 (affirming that the Senate can continue to combat the "evil of the spoils system" through the civil service laws by classifying officers as not requiring Senate approval for their appointment).

60. *See id.* at 174 (stating that by vesting the appointment of officers "in the heads of departments" Congress can extend merit system protections to more officers of the United States).

61. *See id.* (affirming that Congress has power to include more officers in the civil service system, without explicitly identifying the source of the power).

62. *Compare* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (classifying the independent counsel as an inferior officer because he has limited powers and can be removed by the Attorney General), *with id.* at 719 (Scalia, J., dissenting) (opining that the independent counsel is not an inferior officer because she is not subordinate to anybody in the executive branch).

a right of removal could become the basis for establishing an autocracy. Justice Brandeis saw the Founders' decision to reject "uncontrollable" presidential removal as part of the separation of powers designed "to save the people from autocracy."[63] He found the inference of such a power inconsistent with the rejection of "customary" monarchial "prerogatives" in Article II and the decision to rely on "representative assemblies for the protection of . . . liberties."[64] Quoting Supreme Court Justice Joseph Story, Justice McReynolds opined that an "unlimited power of removal" may become an "instrument of the worst oppression, and most vindictive vengeance."[65] McReynolds also cited Senator Daniel Webster's concerns that an absolute removal power would turn public officers into "sycophants . . . and man-worshippers."[66]

While Taft's destruction of the Senate's removal authority would prove long-lived, the Court pushed back against the idea of constitutionally required at-will removal not long after it handed down *Myers.* When President Roosevelt relied on *Myers* to remove a Federal Trade Commissioner in order to replace him with somebody supportive of the President's policy views, the Court balked and repudiated the *Myers* dicta requiring at-will removal in *Humphrey's Executor v. United States*.[67] It went on to explain that the *Myers* dicta could not possibly apply to the Federal Trade Commission, because it was carrying out quasi-legislative and quasi-judicial duties, unlike the Postmaster whose removal led to the *Myers* decision.[68] The *Humphrey's Executor* Court held that Congress could make quasi-judicial and quasi-legislative officers independent from presidential control.[69] Subsequently, the Court applied *Humphrey's Executor*'s reasoning to overturn President Eisenhower's decision to remove a member of the War Claims Commission (a quasi-judicial body judging compensation claims).[70] The *Humphrey's Executor* Court, however, suggested that the President may retain power to remove "purely executive officers" without Senate approval.[71]

The *Humphrey's Executor* decision also began the work of correcting Justice Taft's misreading of the "decision of 1789."[72] Justice Taft, unable to find

63. *Myers*, 272 U.S. at 292–93 (Brandeis, J., dissenting).

64. *See id.* at 293–95; *cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., dissenting) (pointing out that even under the English monarchy "Parliament often restricted the King's power to remove royal officers").

65. *Myers*, 272 U.S. at 179 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1533 (1833)).

66. *Id.* (quoting 11 REG. DEB. 469–70 (1835)).

67. Humphrey's Ex'r v. United States 295 U.S. 602, 618–19, 626 (1935) (disapproving of statements in *Myers* tending to support the idea that for-cause removal protection is improper).

68. *See id.* at 627–28 (explaining that the FTC performs judicial and legislative function unlike the executive functions carried out by the postmaster in *Myers*).

69. *See id.* at 629 (stating that congressional authority to make "quasi-legislative or quasi-judicial agencies" independent "of executive control cannot well be doubted").

70. Wiener v. United States, 357 U.S. 349, 356 (1958).

71. *Humphrey's Ex'r*, 295 U.S. at 631–32. *But see* Free Enter. Fund v. Pub. Acct. Oversight Bd., 561 U.S. 477, 492 (2015) (reiterating *Myers*' erroneous discussion of the "Decision of 1789").

72. *Humphrey's Ex'r*, 295 U.S. at 631.

any support for the *Myers* result in the pre-ratification materials bearing on original intent, interpreted a debate among members of the First Congress as endorsing the principle that the President alone had the constitutional authority to remove officers confirmed by the Senate.[73] Legal historians, however, consider the debates ambiguous and note a diversity of views among members of the First Congress about whether the President enjoys unilateral removal authority.[74] The *Humphrey's Executor* Court noted that the First Congress did not make all high officials subject to presidential removal.[75]

Humphrey's Executor and *Wiener* recognized the constitutionality of formally independent agencies, which are set up as non-partisan expert bodies insulated from presidential political decisionmaking.[76] Democracies around the world have adopted the concept of independent agencies. It is common for agencies vital to democracy, like electoral commissions and media authorities, to be independent agencies.[77]

In *Seila Law,* however, the Supreme Court held that Congress could not protect the director of an independent agency not headed by a commission from politically motivated removal. More importantly, it partially embraced the unitary executive theory articulated in Justice Scalia's dissent, albeit without citing it.[78] It created a rule that the President enjoys unrestricted removal authority subject to two exceptions.[79] First, Congress may offer for-cause removal protection for members of "multimember expert agencies that do not wield substantial executive power."[80] Second, the Court accepted restrictions on

73. *See* Myers v. United States, 272 U.S. 52, 176 (1926) (concluding that the congressional decision of 1789 setting up executive departments adopted a view that the President has power to remove principal officers without Senate approval).

74. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 36–41 (1997); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 233–42 (1989); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361–64 (1927); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1023–1026 (2006); Jed Handelsman Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)* 19–27 (Fordham Legal Stud. Res. Paper, No. 3596966, 2020), https://ssrn.com/abstract=3596566.

75. *Humphrey's Ex'r*, 295 U.S. at 631.

76. *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015).

77. Daniel Montalvo, *Trust in Electoral Commissions*, AMERICASBAROMETER INSIGHTS, Aug. 31, 2009, at 1, https://www.vanderbilt.edu/lapop/insights/I0823en_v2.pdf (stating that nations that have a democratic system of government use independent election commissions to ensure that elections are fair and impartial).

78. *Compare* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (stating that "[t]he entire 'executive Power' belongs to the President alone" after quoting the Vesting and Take Care Clauses), *with* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (stating that the President possesses "*all* of the executive power" after quoting the Vesting Clause).

79. *Seila Law*, 140 S. Ct. at 2198; *cf. id.* at 2225 (Kagan, J., dissenting) (denying the existence of a general rule requiring unrestricted removal).

80. *Id.* at 2199–2200.

presidential removal of "inferior officers with limited duties and no policymaking or administrative authority."[81]

The Court's justification for this result, which the dissent and the lower courts found inconsistent with *Humphrey's Executor* and *Morrison*, is not entirely clear.[82] For this Article's purposes, however, two aspects of the rationale loom especially large. First, using strikingly authoritarian language, the Court justified its constitutional rule requiring a presidential power to fire people for political reasons by stating that executive branch officials "must fear and . . . obey" the President.[83] Second, the Court justified requiring unlimited removal authority over the lone director of an agency as a "structural protection[] against the abuse of power . . . critical to preserving liberty."[84] The *Seila Law* Court treats the bureaucrat, not the President, as the threat to liberty that the Constitution must guard against.[85]

B. RECENT EXECUTIVE BRANCH PRACTICE

Even before *Seila Law*, recent Presidents have pushed to establish a unitary executive. In the opinion of Supreme Court Justice (and former Harvard Law School Dean and Solicitor General) Elena Kagan, as well as other legal scholars, governmental practice now resembles the unitary executive model more closely than many had supposed.[86]

The trend favoring centralized control of administration arguably began under President Reagan. Prior to Reagan, even agencies that Congress had not set up as formally independent agencies had a lot of functional independence.[87] President Nixon, for example, had insisted on an independent Environmental Protection Agency (EPA) as a means of ensuring that business elites would not capture it.[88] Reagan promulgated an executive order that ended most government agencies' independence.[89] This order requires a White House

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81. *Id.* at 2200.

82. *See id.* at 2233–36 (Kagan, J., dissenting); Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680, 684 (9th Cir. 2019); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 110 (D.C. Cir. 2018) (en banc); David M. Driesen, *Political Removal and the Plebiscitary Presidency: An Essay on* Seila Law LLC v. Consumer Financial Protection Bureau, 76 NYU ANN. SURV. AM. L. (forthcoming 2021).

83. *Seila Law*, 140 S. Ct. at 2197 (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

84. *Id.* at 2202 (quoting *Bowsher*, 478 U.S. at 730).

85. *Id.* at 2203 (treating the powerful lone director of the CFPB as an affront to the liberty protected principle of divided power and the President as a structural exception to this principle, vindicated by extraordinary political accountability).

86. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246–47 (2001); Kovacs, *supra* note 9, at 562 (claiming that the unitary executive theory is no longer theory in light of the President's growing power); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 685–86 (2016).

87. *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1766 (2019) (noting that prior to President Reagan, Presidents "tried to avoid meddling in agencies' regulatory work").

88. *See* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 131–32 (1991) (noting that Nixon endorsed "a strong, independent" EPA in spite of some opposition within his cabinet).

89. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1982); *see* Mannheim & Watts, *supra* note 87, at 1766 (characterizing Reagan's order as "set[ting] the stage for greater presidential involvement" in regulation).

office—the Office of Management and Budget—to review major agency rules.[90] While the order formally relies on the need for cost-benefit analysis (CBA) to justify this review, in practice, OIRA reviews rules even in the many cases when CBA is not possible and insists on changes for a variety of reasons having little to do with CBA (even when a CBA is done).[91] One might view the use of CBA as an aid to dynamic statutory interpretation conforming statutes to emerging elite views about what sensible law does,[92] but the DOJ recognized that changing law through executive order raises rule of law issues and insisted that the order's instructions only permit changing rules "to the extent permitted by law."[93] Critics of the order have charged that the order has nonetheless triggered a host of illegal actions and it certainly contributed significantly to widespread violation of statutory deadlines.[94] Thus, it undermined the rule of law in at least some respects and moved us closer to having a unitary executive.

Subsequent Presidents found OIRA oversight of government agencies desirable and retained it.[95] And Congress endorsed OIRA involvement, to some extent, in the Unfunded Mandates Act of 1995.[96] The centralization, however, has undermined the rule of law even when Presidents more supportive of government regulation than Reagan won election. For example, President Obama's administration held up rules required under statutes for political reasons, to avoid antagonizing Republican opponents of regulation.[97] Thus, President Obama undermined the rule of law to enhance presidential influence over future policy, subordinating law to politics.

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90. Exec. Order No. 12,291, 3 C.F.R 127 (1981), *reprinted in* 5 U.S.C. § 601(1) (1982).

91. David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 376–78 (2006) (showing that in most cases OIRA review takes place where no CBA has been done and often produces significant changes having nothing to do with CBA); Claudia O'Brien, *White House Review of Regulations Under the Clean Air Act Amendments of 1990*, 8 J. ENV'T L. & LITIG. 51, 73 (1993) (suggesting that industry lobbying and OIRA personnel's personal views influenced its review more than cost-benefit analysis).

92. David M. Driesen, Thomas M. Keck & Brandon T. Metroka, *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism*, 75 WASH. & LEE L. REV. 1781, 1794–95, 1853 (2018); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1846–48 (2013).

93. *See* Percival, *supra* note 88, at 196 (noting that Reagan's Office of Legal Counsel had insisted that the order did not displace the relevant agencies in discharging their statutory functions).

94. *See, e.g.*, *id.* at 175–76 (noting that the Reagan executive order was criticized for displacing agencies statutory responsibilities and for lengthy delays); Driesen, *supra* note 91, at 372–73 (discussing cases where rule changes recommended by OMB caused reversal of agency action in court); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RES. L. 1, 26–27 (1984) (providing an example of OMB intervention causing a statutory violation and suggesting that in general it drives agencies to decisions that illegally rely on non-statutory factors).

95. Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2511–13, 2528–39 (2011) (discussing the Obama and Clinton executive orders modeled after Reagan's).

96. Unfunded Mandates Act of 1995, Pub. L. No. 104-4, § 202(a), 109 Stat. 64 (codified at 2 U.S.C. § 1532 (1995)).

97. Watts, *supra* note 86, at 699–700 (noting that EPA officials reported being instructed to hold up proposed rules to avoid controversy prior to the 2012 election).

President Obama's administration, in keeping with the trend toward centralized control, sought to establish his preferred immigration policies through a policy of nonenforcement of immigration laws against children living here and immigrant parents of American citizens.[98] The Court of Appeals for the Fifth Circuit reversed the policy protecting parents of U.S. citizens as contrary to the Immigration and Naturalization Act, and the U.S. Supreme Court affirmed that decision by an equally divided vote.[99]

President Trump built on this legacy to broadly undermine the rule of law. He put forward a slate of nominees to cabinet positions more systematically and completely dedicated to undermining the laws than any previous President, and, with one exception, they sailed through the Senate on lock-step party-line votes.[100] Trump's EPA administrator—Scott Pruitt—however, proved so corrupt that Trump removed him under pressure.[101] Trump more often has dismissed or triggered the resignation of officials because they show allegiance to the rule of law on matters important to him. For example, Trump fired James Comey—who investigated Russian interference in the 2016 election, Jeffrey Sessions—who respected conflict of interest rules governing government attorneys, and Inspector General Mike Atkinson—who complied with a statute requiring him to report whistleblower complaints to Congress.[102] He also triggered the resignation of Kirstjen Nielsen—who wanted the administration to follow immigration law offering asylum to refugees fleeing persecution.[103] Thus, Trump used his appointment and removal authority to undermine the rule of law.

Moreover, President Trump promulgated a set of executive orders that attacked the rule of law, including some that sought to substitute presidential for legal control over administrative agencies.[104] The most sweeping of these orders attack much of the United States Code, which tasks administrative agencies with

98. *See* Texas v. United States, 809 F.3d 134, 146–48 (5th Cir. 2015) (describing this policy), *aff'd sub nom.* 136 S. Ct. 2271 (2016) (mem.).

99. *See id.* at 186 (finding the DAPA policy "manifestly contrary" to the Immigration and Naturalization Act).

100. David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 516, 517 n.185 (2019) (noting that then presidential advisor Steve Bannon stated that Trump chose cabinet members to "deconstruct the administrative state" and that they had backgrounds of opposing the laws they were supposed to administer).

101. Richard L. Revesz, *Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy*, 34 J. LAND USE & ENV'T L. 211, 212 nn.1–4 (2019) (explaining that Scott Pruitt resigned "after months of controversy and investigations into alleged ethics violations").

102. Peter Baker, Katie Benner & Michael D. Shear, *Jeffrey Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html; Charlie Savage, *Inspector General Fired by Trump Urges Whistle-Blowers "To Bravely Speak Up"*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/us/politics/michael-atkinson-inspector-general-fired.html; Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html.

103. Zolan Kanno-Youngs, Maggie Haberman, Michael D. Shear & Eric Schmitt, *Kirstjen Nielsen Resigns as Trump's Homeland Security Secretary*, N.Y. TIMES (Apr. 7, 2019), https://www.nytimes.com/2019/04/07/us/politics/kirstjen-nielsen-dhs-resigns.html (explaining that the resignation stemmed from Trump's demand that she close the border to asylum seekers, which she found "inappropriate").

104. *See* Driesen, *supra* note 100, at 497–509 (discussing relevant executive orders).

protecting the public from various kinds of harm, such as financial chicanery, pollution, occupational hazards, and unsafe products (for example, food, drugs, and automobiles).[105] Trump, in effect, commanded the agencies to faithlessly execute the law by not protecting people from harms, telling them instead to protect the businesses they regulate from any net cost.[106] He did this by issuing an executive order instructing all agencies to repeal two rules for every new one promulgated and to ensure that all the rules changed together impose no net cost.[107] President Trump also instructed the government to undermine the Affordable Care Act (ACA), directing federal officials to "waive, defer, grant exemptions from, or delay the implementation" of the ACA's requirements.[108] Notwithstanding the "to the extent permitted by law" caveats (maximum extent in the ACA context), these orders instruct government agencies to substitute Trump's policies for the law's policies.[109]

These and other orders substantially undermined the rule of law in much of the federal government. In their wake, the Trump administration lost an astonishing 91% of its regulatory cases between the beginning of his administration and June 25, 2020.[110] These cases involve violations of the Administrative Procedure Act, which requires legal and reasonable decision-making and use of procedures permitting public input.[111] Normally, the government wins about 70% of regulatory cases.[112] Judicial reversal only produces remand; it does not secure proper enforcement of regulatory statutes.[113]

President Trump also incentivized the exodus of about 17,000 civil servants.[114] He triggered this exodus by freezing pay, leaving vacancies unfilled, creating a work environment hostile to rational discussion of policy, and shutting

105. *See id.* at 507.

106. *Id.* at 507–08.

107. *Id.*

108. *Id.* at 508–09 (quoting Exec. Order No. 13,765, 3 C.F.R. 260 (2018)).

109. *See* Gresham v. Azar, 950 F.3d 93, 104 (D.C. Cir. 2020) (invalidating decision to allow Arkansas to impose work requirements on recipients of Medicaid under the Act's waiver authority); New York v. U.S. Dep't of Lab., 363 F. Supp. 3d 109, 141 (D.D.C. 2019) (holding that the Trump Administration's exemption of many employer sponsored health plans from ACA regulation effectuates an "end run" around the ACA as directed by the executive order); California v. Health & Hum. Servs., 351 F. Supp. 3d 1267, 1284 (9th Cir. 2019) (enjoining rule creating exemptions to the ACA's contraception mandate), *aff'd sub nom.* California v. U.S. Dep't of Health & Hum. Servs., 941 F.3d 410 (9th Cir. 2019), *cert. granted and judgment vacated sub nom.* Dep't of Health & Hum. Servs. v. California, No. 19-1038, 2020 WL 3865243 (U.S. July 9, 2020) (mem.).

110. *See Roundup: Trump-Era Agency Policy in the Federal Courts*, INST. FOR POL'Y INTEGRITY, N.Y.U., https://policyintegrity.org/trump-court-roundup (last visited Nov. 23, 2020).

111. Revesz, *supra* note 101, at 213 (noting that Trump's losses stem from failure "to take required procedural steps, such as" adequately "explaining its reasoning or allowing for public comment").

112. *Id.*

113. *See* Baez-Sanchez v. Barr, 947 F.3d 1033, 1035, 1037 (7th Cir. 2020) (discussing a rare case of outright defiance of a remand order but noting that even after a remand the government may follow its contrary policy in another case).

114. Lisa Rein, Robert Costa & Danielle Paquette, *Shutdown Gives Some Trump Advisers What They've Long Wanted: Smaller Government*, SEATTLE TIMES, https://www.seattletimes.com/nation-world/nation-politics/shutdown-gives-some-trump-advisers-what-theyve-long-wanted-smaller-government/ (Jan. 16, 2019, 9:28 AM).

down the federal government.[115] I am not aware of any studies examining whether these moves, which some small government advocates support, have contributed to the decline of the rule of law. Legislative decisions to repeal regulatory statutes or abolish government agencies, while distressing to liberals, conform to the rule of law. Disabling the law by securing the resignation of people dedicated to carrying out laws remaining on the books harms the rule of law. And a President operating under a unitary executive theory can, over time, replace all officials inclined to follow the laws with quislings dedicated to carrying out his orders, at least with the connivance of a loyal Senate.[116]

C. THE ACADEMIC DEBATE

The academic debate has focused mainly on the original intent of the Founders and on domestic constitutional custom, not on experience with loss of democracy before or after the Founding. This review of the debate will focus on a few key elements of original intent and administrative practice, as an exhaustive review of all the arguments involved would require a separate article.

Academic supporters of the unitary executive theory, many of them former Scalia clerks, have elaborated and defended Scalia's claims. Steven Calabresi and Saikrishna Prakash have argued that the Constitution creates a "hierarchical executive branch" under presidential control administering all federal laws.[117] They derive this proposition from the existence of three separate branches of government and the combination of the Vesting Clause—which grants the President executive power—and the Take Care Clause—requiring the President to take care that the laws be faithfully executed. Thus, they rely on a structural and textual argument about original intent.

The structural argument warmly embraces separation of powers at the expense of checks and balances.[118] Calabresi and Prakash argue that the Constitution puts the executive branch under presidential control, just as it places legislation under the control of Congress and the judicial branch under the control of the courts.[119] But the Constitution's text plainly refutes the notion that the entities at the head of the various branches of government enjoy exclusive control over their branches' operation. Congress has complete control over which courts other than the Supreme Court shall exist, and almost limitless

115. *See id.*

116. *Cf.* Nat'l Lab. Rels. Bd. v. Noel Canning, 573 U.S. 513, 523 (2014) (noting that the purpose of Senatorial confirmation was to prevent appointment based on presidential "favoritism" leading to appointment of "unfit" nominees personally attached to the President).

117. Calabresi & Prakash, *supra* note 2, at 549–50 (claiming that the historical evidence overwhelmingly supports their textualist case for "a hierarchical executive branch under the control of the President").

118. *See generally* Strauss, *Place of Agencies*, *supra* note 3, at 577–78 (contrasting separation of powers with checks and balances).

119. *See* Calabresi & Prakash, *supra* note 2, at 544, 566 (advocating a "'high school civics' conception" of separation of powers where Congress controls the legislative power, the judiciary controls the judicial power, and the President alone controls the "executive power").

control over the Supreme Court's appellate jurisdiction.[120] While Congress has legislative authority, so does the President, as he can veto legislation.[121]

The Constitution does not leave the executive branch unchecked by other branches of government under the Constitution either. The text pointedly denies the President sole control over either appointment or removal of officers of the executive branch.

The Appointments Clause does not allow him to appoint a single cabinet member without the Senate's approval.[122] It allows Congress to remove "Inferior Officers" from presidential control, by expressly authorizing Congress to assign their appointment to the judicial branch.[123] This strongly suggests the lack of a strict hierarchy of control. The Appointments Clause also permits Congress to vest appointment power for inferior offices in the head of a department or the President.[124] But the choice of whether to provide for presidential control or influence over the appointment of inferior officers generally lies with Congress.[125]

The Constitution contains only one Removal Clause—the clause authorizing the Senate to remove federal officials upon impeachment by the House.[126] And that Clause empowers Congress to remove officials of the federal government from office, not the President. Thus, no express constitutional authority supports the idea of any presidential authority for removal, although the custom has certainly evolved since the Founding, even before *Myers*.[127]

Alexander Hamilton explained in the Federalist Papers that the Constitution provides for "stability of the administration" because the Senate's approval would be required in order to remove an executive officer.[128] It is not entirely clear whether Hamilton's insistence that the President lacks the power to remove federal officials unilaterally relies on the exclusivity of the Constitution's Removal Clause or the principle that the power of removal goes with the power of appointment (which the Senate shares). But Hamilton defended the Constitution's denial of unilateral presidential control over

120. U.S. CONST. art. III, §§ 1–2, cl. 2; *Ex parte* McCardle, 74 U.S. 506, 513 (1868) (noting that the Constitution expressly grants the Congress power to limit the Supreme Court's appellate jurisdiction). *But cf.* United States v. Klein, 80 U.S. 128, 146 (1871) (holding that Congress may not promulgate a rule deciding cases pending before the Court).

121. *See* Clinton v. City of New York, 524 U.S. 417, 438–39 (1988) (describing the provision authorizing a veto).

122. *See* U.S. CONST. art. II, § 2, cl. 2.

123. *Id.*

124. *Id.*

125. *Cf.* Morrison v. Olson, 487 U.S. 654, 673–77 (1988) (recognizing that Article II expressly authorizes Congress to choose whether to lodge appointment of an inferior officer in the judiciary, but suggesting that separation of powers principles may occasionally limit this power).

126. *Accord id.* at 723 (Scalia, J., dissenting) (acknowledging that the only express provision in the Constitution authorizing removal of an executive officer is the clause authorizing the Senate to remove an officer upon impeachment).

127. *Cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2225 (2020) (Kagan, J., dissenting) (ignoring the Senate's removal authority in cases of impeachment and stating that "nothing" in the constitutional text "speaks of removal").

128. THE FEDERALIST NO. 77 (Alexander Hamilton).

executive branch officials as promoting a stable rule of law, rather than a rule of presidential personality:

> A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself.[129]

The endorsement of retaining competent officers and the rejection of replacing them with new politically aligned officials reflects the disinterested leadership thinking at the founding—the widely held view that all objective, reasonable officials would agree upon the proper course of action.[130] And the reference to the President as the "Chief Magistrate," a locution found throughout the Federalist Papers, suggests that the Framers viewed the President's role as a more modest one than the dramatic role he plays today.[131] They sought to avoid autocracy by establishing a rule of law rooted in a set of duties, checks, and balances.[132]

The requirement of a congressional role in removal also reinforces the values Hamilton articulated with respect to the reasons that the Constitution denies the President sole control over appointments. As Hamilton put it, the Senate's advice and consent role discourages the President from nominating candidates "personally allied to him, or . . . possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[133] This statement suggests that the Framers did not envision or support an attitude of compliance with presidential will, thereby casting doubt on the political dimension of the unitary executive theory and the supposition that the Constitution embraces fear-based presidential domination, as suggested by the *Seila Law* Court.

Hamilton's statements rejecting unilateral presidential removal authority appeared in the Federalist Papers, written to influence those considering

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129. *Id.*

130. *See* GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 81 (1993) (describing George Washington's belief in a single public interest to which all men of good will would subscribe); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 165 (2002) (discussing the Framers' "vision of disinterested leadership"); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 103–04 (2009) (explaining that the Framer's envisioned disinterested leadership, not a President shaping law execution to reflect the preferences of a political faction).

131. *See* THE FEDERALIST NOS. 18, 66, 68–74, 77 (Alexander Hamilton), NOS. 39, 47, 48 (James Madison), NOS. 3–4 (John Jay).

132. *See* Nat'l Lab. Rels. Bd. v. Noel Canning, 573 U.S. 513, 579 (2014) (Scalia J., concurring) (noting that the Founders viewed the Senate's role in appointments as a "critical protection against despotism" (citing Freytag v. Comm'r, 501 U.S. 868, 883 (1991))).

133. THE FEDERALIST NO. 76 (Alexander Hamilton); *Nat'l Lab. Rels. Bd.*, 573 U.S. at 523 (majority opinion) (citing Alexander Hamilton's statements that Senate approval provides a "check upon a spirit of favoritism in the President").

ratification of the Constitution. Since original intent properly focuses on the intent of "We the People" who adopted the Constitution, Framers' statements that likely informed the Ratifiers' decision merit special respect.[134]

The political dimension of the unitary executive theory smuggles twentieth-century notions of presidential political power into an eighteenth-century document seeking to create a magistrate.[135] We now look at the President as the leader of a political party establishing a policy program for the entire federal government.[136] This reflects not original intent, but the proliferation of broad delegation of quasi-legislative authority to the executive branch, the rising political force of the presidency because of mass communication, the emergence of the United States as a world power, and the President's role as leader of a political party.[137] The Framers, far from seeking to empower the President to implement his party's policy preferences, sought to avoid the creation of "factions."[138] They viewed the Chief Magistrate's role as one of faithfully superintending efforts to carry out policies reflecting the preferences of Congress, not the political preferences of the "chief magistrate," even though they understood that administration of law requires exercise of some discretion.

The originalist argument for the unitary executive theory also must grapple with the Framers' rejection of Alexander Hamilton's unitarian proposal at the Philadelphia Convention. He and other proponents of executive power proposed that the President have the power to appoint all executive officers "at pleasure," meaning that the President could both appoint them and remove them at will.[139] The Framers rejected this proposal in favor of the "skillfully contrived" (in Hamilton's words) checks and balances now found in the Constitution's Appointment and Removal Clauses.[140] They did this because many of the

134. *See* Calabresi & Prakash, *supra* note 2, at 552 (stating that originalism properly focuses on the constitutional text as "*understood by the people who enacted or ratified*" it (emphasis added)).

135. Driesen, *supra* note 130, at 83 (arguing that the unitary executive theory smuggles modern notions of expansive presidential power into the Constitution).

136. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (discussing the tendency of the public to focus its "hopes and expectations" for the country on the President in light of the "drama, magnitude, and finality" of his decisions).

137. *See id.* at 653–54 (explaining that the President's role as leader of a political party, his "access to the public mind through modern" communication methods, his "prestige as head of state," and "vast accretions of federal power" have magnified the President's power in the years since the founding).

138. *See* THE FEDERALIST NO. 9 (Alexander Hamilton) (expressing "horror and disgust" at the history of faction and insurrection in Greece and Italy); THE FEDERALIST NO. 10 (James Madison) (characterizing faction as a "dangerous vice"); THE FEDERALIST NO. 77 (Alexander Hamilton) (praising the stability encouraged by the Constitution's denial of a presidential removal authority).

139. *See* Driesen, *supra* note 130, at 98–99 (explaining that the Framers rejected sole presidential control over appointment and removal as it would lead to monarchy); 2 RECORDS OF THE FEDERAL CONVENTION of 1787, at 233–35, 342–43 (Max Farrand ed., rev. ed. 1966) (1911).

140. *See* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, NEW YORK 1953 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 1976) (statement of Alexander Hamilton) (describing the Constitution as eschewing a pure system of separation of powers in favor of incorporation of "all the checks which the greatest politicians and the best writers have ever conceived," to thwart "wicked measure[s]").

Founders feared that sole presidential control over the executive branch would lead to monarchy.[141]

Edward Corwin pointed out decades ago that the New York Constitution contained Take Care and Vesting Clauses precisely mirroring the U.S. Constitution's clauses, but did not allow the Governor to either appoint or remove officers, vesting those functions in a council.[142] Several scholars have also pointed out that the Oath Clause requires executive branch officials to swear an oath to obey the Constitution, reflecting the Framers' conscious decision to reject the European tradition of swearing allegiance to the head of state.[143] As a result, all federal officials must disobey illegal presidential orders, even if they reflect the President's will.[144] Scholars have argued that reading the Vesting and Take Care Clauses as giving the President sole control over the executive branch of government does not provide a plausible reading of the whole Constitution's text in light of the Appointments Clause, the Removal Clause, the Oath Clause, and numerous other clauses.[145] Justice Jackson made a similar point in *Youngstown*, when he explained that a broad construction of the Vesting Clause as embracing royal prerogative was incompatible with the need to have explicit constitutional clauses granting the President the right to commission members of the armed forces and to get opinions from the heads of executive departments.[146]

While a few scholars have engaged the unitarians on their own originalist terms, most of the theory's opponents have not. Instead, most opponents have argued that whatever the original understanding, constitutional practice has from

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141. *See* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 17 (2000) (pointing out that a number of delegates objected to allowing the President alone to appoint executive officers, because "it would lead to monarchy"). *But see* ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 1, 7, 22, 110–11 (2014) (showing that some of the Framers supported a strong executive and feared a tyrannical legislature).

142. EDWARD S. CORWIN, CORWIN ON THE CONSTITUTION: THE FOUNDATIONS OF AMERICAN CONSTITUTIONAL AND POLITICAL THOUGHT, THE POWERS OF CONGRESS, AND THE PRESIDENT'S POWER OF REMOVAL 354 (Richard Loss ed., Cornell U. Press 1981) (1948) (explaining that in spite of a Vesting Clause and a Take Care Clause in New York's Constitution, its governor had "very little voice in either appointments or removals"); *see* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., dissenting) (citing Corwin for this point).

143. *See* U.S. CONST. art. VI, cl. 3; THE FEDERALIST NO. 27 (Alexander Hamilton) (stating that the "sanctity" of the oath will bind all officers of the government to obey federal law); Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, 21 J. LEGAL HIST. 1, 1–2 (2000) (detailing the history of oaths of office in England); Driesen, *supra* note 130, at 84–87 (analyzing the Oath Clause); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (describing the Oath Clause as establishing allegiance to the Constitution in much the same way as religious oaths aim to establish fidelity to a religion).

144. *See* Driesen, *supra* note 130, at 85–86.

145. *See id.* at 83–96 (engaging in a detailed intertextual analysis); Michael A. Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 799–801 (1987); *see also* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967–69 (2001) (offering a brief textualist argument for limited presidential power).

146. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640–41, 641 n.9 (1952) (Jackson, J., concurring) (rejecting the view that the Vesting Clause grants the President "all the executive powers of which the Government is capable" as incompatible with explicit grants of "trifling" authorities, such as the authority to get opinions from department heads and commission members of the armed forces).

the beginning to the present day involved a variety of power-sharing arrangements with respect to administration, including quasi-private corporations, independent prosecutors, independent agencies, a merit-based civil service, and the like.[147] They suggest that these arrangements serve the rule of law well by creating forces tending to foster legal compliance and a dialogue between experts and elected politicians about wise policy.[148]

D. THE PRINCIPLE OF CONSTRUING THE CONSTITUTION TO PRESERVE THE REPUBLIC

The foregoing material establishes, at least, that the available information does not make an overwhelming originalist case for the unitary executive theory, which may help explain why *Seila Law* produced a 5-4 decision.[149] While the unitary executive theory offers a fairly natural construction of the Vesting and Take Care Clauses in isolation, it stands in considerable tension with many other provisions in the Constitution, statements of the Framers that likely influenced many of the Constitution's ratifiers, and the history of the Constitution's drafting. Nor is it an inevitable construction of the Vesting and Take Care Clauses, as New York's Constitution demonstrates. The Constitution does not require the President to execute the law faithfully, but only to "take care" that it be faithfully executed.[150] The "take care" locution suggests not exercise of unbridled authority, but rather an effort to get others who implement the law to do so properly.[151] The passive voice in the Clause ("be faithfully executed") indicates that people other than the President would often execute the law, because even in George Washington's time, presidential execution of all law by

147. *See, e.g.*, David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 708 n.3 (2008) (discussing the U.S. tradition of prosecutorial independence); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 38–74 (2018) (discussing prosecutorial independence and its history); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 9–10 (1994) (noting that the early practice of the new republic did not create a hierarchy under tight presidential control); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1303–04 (2006) (discussing the establishment of private corporations and other institutions independent of presidential control during the founding era); Shugerman, *supra* note 50, at 125, 128 (discussing the norm of DOJ autonomy and its roots in the practice of decentralized prosecution in the early republic); Strauss, *Place of Agencies, supra* note 3, at 583–86 (discussing the role of administrative agencies in modern government).

148. *See, e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 121–32 (2009); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 321–22 (2006) (arguing that delegation of powers to administrative agencies tends to support the rule of law by countering presidential tendencies to go beyond statutory authority).

149. *Accord* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 145–161 (2015); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 504–13 (2016).

150. U.S. CONST. art. II, § 3.

151. *Accord* Driesen, *supra* note 130, at 83–84 (explaining that the Take Care Clause requires the President to attempt to secure proper law enforcement from others); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (noting that the Take Care Clause's language suggests "some sort of [presidential] duty" to "get those who execute the law" to "act with some sort of fidelity").

the President personally was impossible, and it certainly is impossible now.[152] Justice Roberts acknowledged this point in his *Seila Law* majority opinion.[153] Reading the web of compromises embedded in the Constitution as embodying an unstated agreement on something as fine-grained as for-cause removal seems quite problematic, as the delegates to the Philadelphia Convention barely agreed on a Constitution at all, and it scarcely survived the ratification process partly out of anxiety about presidential power.[154]

But some features of the original understanding germane to the unitary executive theory are not controversial. The Framers sought to establish a "rule of law."[155] While the idea of the "rule of law" has become an integral part of our understanding of democracy, its precise contours excite controversy. Still, our history does flesh out its basic contours. The rule of law means that the whims of a single person do not determine the course of government action. The Declaration of Independence complains about arbitrary executive action, including the King's tendency to protect his friends and harshly punish his opponents (a characteristic of centralized autocratic government highlighted in the next part).[156] As Julian Mortensen exhaustively demonstrates, the Constitution gives the President executive powers in order to execute laws passed by Congress.[157] Thus, the rule of law contains the principle of legislative supremacy, expressed in the Constitution with the long list of congressional powers in Article I, section 8.[158]

A rule of law, however, envisions more than just a set of rules that might provide a source of power for an autocrat. China and Russia have laws, but almost no one thinks that they have a rule of law.[159] The rule of law means that

152. Driesen, *supra* note 130, at 83 (noting the impossibility even in George Washington's time for the President to execute all law by himself); Goldsmith & Manning, *supra* note 151, at 1836 (linking the Take Care Clause's passive voice to the idea that it imposes a duty for the President to get others to properly implement the law); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–76 (2015) (noting that the Take Care Clause's passive voice indicates that others beside the President implement the law and that any other result is impossible).

153. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020).

154. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 213–56 (2016) (discussing the Framers' struggle to reconcile their competing views and interests and their fear that too strong a presidency would lead to a failure to obtain ratification); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788, at 46–49 (2010) (discussing leading antifederalists' fear of the powers of the President and Senate and Randolph's fears that the People would reject the Constitution as drafted).

155. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (describing the Constitution's purpose as to secure a "government of laws, and not of men").

156. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (finding a broad construction of the Vesting Clause incompatible with the Declaration of Independence's rejection of King George's royal prerogatives).

157. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1169, 1269–71 (2019).

158. U.S. CONST. art. I, § 8.

159. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004) (quoting a Chinese law professor as saying that "Chinese leaders want rule by law, not rule of law").

law limits not just the ruled, but also the rulers.[160] Hence, the Constitution aims to make the President and the rest of the executive branch servants of the policies Congress enacts into law.[161] The idea of faithfulness in the Take Care Clause connotes faith to somebody or something outside oneself.[162] Thus, faithful execution of the law means execution faithful to the policy decisions of the enacting Congress.[163] This ideal of the rule of law lies behind the stability referenced in Hamilton's statements in the Federalist period and the Framers' hatred of faction. For laws enacted by Congress might remain in place for a long time and faithfulness to the Constitution would mean that each successive President would seek to realize the law's objectives, whether the "Chief Magistrate" agrees with them or not.[164]

The rule of law also implies equal treatment under the law. The law applies to all, regardless of their political views or identity.[165] If the government only enforces the law against its opponents, no rule of law exists.[166] While the purpose animating the law appears to govern, law applied only to regime opponents simply masks arbitrary authority. While the precise scope and operation of equal treatment under the law changes over time and is open to debate, the existence of the basic principle constitutes an essential element of the rule of law.

Finally, the rule of law implies limits on government power to protect individual liberty, an idea expressed in our bill of rights.[167] While all western democracies protect a set of individual rights, the precise scope and nature of the rights protected varies across polities.

The rule of law constitutes an essential component of democracy under our Constitution and the constitutions of subsequent democracies. The People elect legislators to enact the laws governing the society, and these elected officials must use their judgment about what laws work best, subjecting themselves to periodic elections so that the People may remove legislators who oppose needed laws or support improvident legislation. The People also elect the President because the proper superintendence of the law constitutes an important function, and faithless execution can lead to tyranny.

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160. *See id.* at 114–15 (saying that a broad understanding of the rule of law for over two thousand years includes the idea that the law limits the sovereign power).

161. *See* Driesen, *supra* note 130, at 72–73 (arguing that the Founders aimed to secure "allegiance to the [rule of] law in all executive branch officials" and to have the President generally cede policymaking authority to Congress).

162. *See* Goldsmith & Manning, *supra* note 151, at 1857 (noting that the word "faithfully" suggests some kind of "fidelity").

163. *See id.* at 1855–58 (suggesting that at a minimum the Take Care Clause indicates a duty to seek proper implementation of statutes).

164. *See* Driesen, *supra* note 130, at 102–03 (explaining that the Founders sought legal stability, not government by presidential preference).

165. *See* TAMANAHA, *supra* note 159, at 116 (discussing the assumption that the law applies to "everyone").

166. *See id.* at 122 (associating the rule of law ideal with shielding individuals from the passions and prejudices of those administering the law).

167. *See id.* at 118 (discussing the idea of a set of human rights limiting the sovereign power as an aspect of the rule of law).

This last point proves crucial. The Founders of this country could barely agree on the specifics of a Constitution. But they all agreed that they wanted to create a republic with the means of surviving the challenges that might destroy it. The Framers had studied the demise of previous republics and strove to prevent a repeat.[168] And they recognized the danger of "despotism," that the head of state might one day threaten the republic's survival.[169]

The intent to preserve the republic from the dangers of despotism should guide construction of the scope of presidential power today.[170] It constitutes not just an institutional arrangement that the Founders barely agreed upon, but an essential widely agreed purpose of the entire process of framing and then ratifying our Constitution.[171]

Youngstown provides support for this mode of constitutional construction, as it animates many of the Justices' opinions.[172] Justice Douglas' concurring opinion quotes the Brandeis dissent from *Myers*, which advocated construing the Constitution to "save the people from autocracy."[173] The same passage links this republic preservation principle to construction that "preclude[s] . . . arbitrary power" even at the expense of executive branch efficiency.[174] The Douglas opinion associates efficient executive power with the "reign of ancient kings" and "rule of modern dictators."[175]

Justices Jackson and Frankfurter, who embraced broader views of presidential power than Justice Douglas, likewise construed executive power to preserve the republic (based on the experience of democracy loss abroad). Justice Jackson's concurring opinion, which scholars often treat as establishing the guiding framework for deciding issues of presidential power,[176] expressly relies on the Framers' intent to preserve a republic in supporting a construction of the Constitution that did not allow the President to seize steel mills in support of an ongoing war effort (in Korea). After laying out his influential tripartite framework, which made congressional attitude toward asserted presidential power important in resolving questions about that power's scope, he rejected the

168. *See* EVERDELL, *supra* note 14, at 150–70 (discussing the Founders' study of ancient history in order to understand how to avoid loss of the republic).

169. *See* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1417 (2012) (describing the culture at the founding as "deeply fearful" of monarchy) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010)).

170. *Cf.* Richard L. Hasen, *The Democracy Canon,* 62 STAN. L. REV. 69, 71 (2009) (noting that the "Democracy Canon" in election law has enjoyed long and broad support in state courts dating back to the 1800s).

171. *See Ex parte* Milligan, 71 U.S. 2, 121, 125 (1866) (stating that the Founders were aware of the history of rulers resisting restraints on their power and designed the Constitution to prevent "anarchy and despotism" even under the pressure of war).

172. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

173. *See id.* at 629 (Douglas, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

174. *See id.* (quoting *Myers*, 272 U.S. at 293) (the Constitution's doctrine of separation of powers aimed "not to promote efficiency but to preclude the exercise of arbitrary authority").

175. *See id.*

176. *Cf.* Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 115 (2015) (describing "Justice Jackson's familiar tripartite framework" as sanctified in the law reviews even though the Supreme Court has only deployed it in four cases).

view that the Vesting Clause grants the President "all the executive powers of which the government is capable."[177] He analogized such broad presidential power to the executive powers enjoyed by "totalitarian" governments.[178] He rejected the claim for implied power, even in the face of an emergency, explaining that granting the President of Germany emergency powers led to the end of the Weimar Republic.[179] He then insists that the Constitution must be construed to preserve the republic, stating that "emergency powers are consistent with free government" only when their control is lodged outside of the executive branch.[180]

In deciding whether to construe the Constitution to grant the President emergency powers, Jackson took into account the possible threat of increased presidential power to free government in light of its growth through the time of decision. His opinion discusses the rise of presidential power through the President's emergence as a party leader and the growth of the President's authority and prestige owing to the emergence of mass communication.[181] It then concludes that the country will not "suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress."[182] And he insisted on interpreting the Constitution to limit the President's power in order to maintain the rule of law.[183] In the last line of his opinion, he declared it the duty of the Court to preserve the rule of law.[184]

Justice Frankfurter's influential concurring opinion in *Youngstown* likewise supports the principle of construing the Constitution to preserve the republic in light of history abroad. His opinion begins by affirming that our democracy requires a "reign of reason," which one might contrast with a rule of presidential will.[185] He then argued that the experience of Nazi Germany affirms the Framers' wisdom in insisting on a system of "checks and balances."[186] He rejected the theory that we enjoy "immunities from the hazards of concentrated power" and embraced the Founders' study of "the experience of man" (in other

177. *See Youngstown*, 343 U.S. at 640–41 (Jackson, J., concurring) (finding that view difficult to square with inclusion of specific trifling executive powers in the Constitution).

178. *See id.* at 641 (noting a match between the "executive powers in those governments we disparagingly describe as totalitarian" and the royal prerogative that the Founders rejected).

179. *See id.* at 651 (granting the President the right to exercise emergency powers led to their invocation on more than 250 occasions and finally the permanent suspension of rights under Adolf Hitler).

180. *Id.* at 652.

181. *See id.* at 653–54.

182. *Id.* at 654.

183. *See id.* at 654–55 (describing the governance of the "impersonal forces which we call law" as the "essence of our free Government").

184. *See id.* at 655 (stating that even though the institution of a government of laws "may be destined to pass away," "it is the duty of the Court to be last, not first, to give them up").

185. *See id.* at 593 (Frankfurter, J., concurring).

186. *Id.* (explaining that "the experience through which the world has passed in our own day has made vivid" the Framers' wisdom in building a structure of government based on "checks and balances").

countries), which showed the need for "limitations on the power of governors over the governed."[187]

Justice Black's majority opinion more subtly alludes to the principle of republic preservation at the end of his opinion by referencing the "fears of power" that lay behind the Founders' decision to "entrust[] the lawmaking power to the Congress alone."[188] Justice Black, however, placed much less emphasis on this principle than the concurring Justices, because he saw the formal limits on presidential power as making *Youngstown* a simple case.[189]

II. THE UNITARY EXECUTIVE ABROAD: LESSONS FROM DEMOCRATIC EROSION IN TURKEY, HUNGARY, AND POLAND

This Part offers case studies of democratic erosion in Turkey, Hungary, and Poland to illustrate the role that head-of-state control of the executive branch plays in undermining the rule of law and democracy. All three of these countries, when they enjoyed a constitutional democracy, employed administrative arrangements protecting the independence of the civil service, the prosecutorial service, and important state agencies vital to maintaining a democracy, such as the electoral commissions and media authorities. While precise institutional arrangements vary, around the world functioning democracies rely on independence for prosecution services and other agencies vital to democracy to ensure a robust rule of law.[190]

In Turkey, Hungary, and Poland, however, the head-of-state, with the backing of his political party, changed the constitutional order by creating centralization, functionally similar to that called for by the unitary executive theory.[191] In all of these cases, and many more, centralized control undermined the rule of law and democracy. Indeed, one might define autocracy, at least in part, as a regime where the head of state exercises effective political control of the administration of law, rather than relying primarily on reasonably independent administration. Elections continue to take place, as they do in China and Russia, but the authoritarian leader and his party enjoy a vice-grip on

187. *See id.*

188. *See id.* at 589 (majority opinion) ("It would do no good to recall the historical events, the fears of power, and the hopes for freedom that lay behind [the Founders'] choice" to "entrust[] the lawmaking power to the Congress alone in both good and bad times.").

189. *See id.* at 585–88 (holding the President's seizure of steel mills unconstitutional, because that action did not execute a law passed by Congress nor constitute an exercise of commander-in-chief authority).

190. *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 102–07 (2018) (explaining how independent bureaucracies tend to support democracy).

191. In Poland, the head of the Law and Justice Party (called by the Polish acronym PiS)—Jaroslaw Kaczyński—serves as a de facto head of state, even though he does not personally serve as Prime Minister or President. *See* WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 14–15 (2019) (noting that even although Poland employs anti-communist rhetoric, it follows a communist model of government in having the head of a party serve as de facto head of state); Watson Institute for International and Public Affairs, *Anthony Levitas—What Is Happening in Poland and Why it Matters (Again)*, YOUTUBE (May 6, 2016), https://www.youtube.com/watch?v=rao7f0Q0OlU (showing that 57% of Poles consider Kaczyński the most powerful person in Poland, whilst only 17% think that the Prime Minister or the President is the most powerful person).

national power in Hungary, Turkey, and other autocracies that has become very difficult to break.[192]

This process takes time. The literature on democratic backsliding emphasizes that a process of erosion taking place over a decade or more can destroy democracy, just as a sudden coup would.[193] While establishing centralized control over the executive branch of government plays a crucial role in establishing autocracy, the elected autocrats destroying democracy also capture courts and rely on party-line lockstep voting to end deliberative democracy based on parliamentary compromises.[194] While the political factors leading to these institutional changes vary, partisan division plays a leading role in loss of democracy across many polities and across time.[195]

A. ESTABLISHING CENTRALIZED CONTROL IN TURKEY, HUNGARY, AND POLAND

While all three autocrats undermined independent administration, the most radical example of creation of centralized administration undermining the rule of law comes from Turkey. Recep Tayyip Erdoğan became Turkey's Prime Minister in 2002.[196] After a decade of amassing personal power, he obtained a constitutional amendment converting Turkey to a presidentialist system and became President in 2014.[197] In 2017, he secured enactment of Russian-style constitutional amendments to entrench himself firmly in control of the government, primarily by creating personal power over the executive branch through a tainted referendum passed after using emergency powers to suppress civil liberties in the wake of a failed 2016 coup attempt against his government.[198] The amendments give the Turkish President the authority to

192. *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018) (the new autocrats create a "superficial appearance" of democracy because elections continue). Political scientists sometimes refer to this style of authoritarianism as "competitive authoritarianism." *See* STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 3 (2010).

193. *See* Huq & Ginsburg, *supra* note 5, at 83–84 (distinguishing between sudden collapse of democracy and "constitutional retrogression" where competitive elections, rights of speech and association, and the rule of law decay substantially over time); Scheppele, *supra* note 192, at 555 (it takes "more than a decade . . . before the pretense of democratic . . . government disappears entirely").

194. *See* Scheppele, *supra* note 192, at 549–50 (discussing the Hungarian autocrat's attack on the independence of "crucial institutions, such as the media, the prosecutor's office, the tax authority, and the election commission" as an example of the new authoritarianism).

195. *See* GINSBURG & HUQ, *supra* note 190, at 83–90 (giving numerous examples of partisan degradation—polarization leading political parties to try and game the rules protecting fair electoral competition); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 220–22 (2018) (citing "extreme partisan division" as the biggest threat to American democracy and noting that such division destroyed Chilean democracy); DANIEL ZIBLATT, CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY, at xii (2017) (stating that that democracies require "pragmatic conservative parties" and that their capture by "ferocious right-wing" populists can make democracy "fragile").

196. Ozan O. Varol, *Stealth Authoritarianism in Turkey*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 339, 347 (Mark A. Graber, Sanford Levison & Mark Tushnet eds., 2018).

197. Ella George, *Purges and Paranoia*, LONDON REV. BOOKS (May 24, 2018), https://www.lrb.co.uk/the-paper/v40/n10/ella-george/purges-and-paranoia.

198. Varol, *supra* note 196, at 350–53.

"unilaterally appoint and remove all cabinet members and heads of all administrative agencies," giving him precisely the power that unitarians most clearly advocate.[199] The amendments allow him to appoint half of the members of the Constitutional Court, the Council of State (Turkey's highest administrative court), the Supreme Board of Judges and Prosecutors, and the Higher Education Council.[200] They combine these formidable powers with an authority to issue executive orders that have the force of law on all "subjects necessary to execute the law," thereby making the unitarians' view that the President can make all executive policy decisions a key part of the Turkish Constitution.[201]

Erdoğan removed some 135,000 civil servants from their positions during a two-year state of emergency following the 2016 coup attempt.[202] This attack on the civil service accelerated the establishment of presidential control over administration, which Erdoğan had pursued diligently for many years prior to the coup and solidified with the 2017 referendum.

Viktor Orbán, who destroyed Hungarian democracy over a decade, similarly consolidated power by taking control of prosecution, the bureaucracy overseeing the media, the electoral commission, and the taxation authority during his decade in power.[203] He "removed opposition figures and neutral experts from public institutions."[204] To accomplish this, he had his party, Fidesz, amend the labor law protecting the civil service, implementing the key reform advocated by unitarians—provision for at-will removal of government employees.[205] With that accomplished, "critics of the Hungarian government" began to lose "their jobs at an astonishing rate."[206]

Poland's Peace and Justice Party (PiS) likewise consolidated its leader's power by giving Poland's de facto head of state, Jaroslaw Kaczyński, control over prosecution, the media regulatory authority, the electoral commission, and the taxation authority. Kaczyński also gutted the civil service. Article 153 of Poland's Constitution requires a "professional" civil service to "ensure . . . impartial and politically neutral" administration.[207] Poland's Constitutional Tribunal has interpreted this provision as requiring statutory procedures to prevent any political interference in the civil service and therefore required a recruitment process based on objective criteria "free from suspicion

199. *Id.* at 350.

200. *Id.*

201. *Id.*

202. *See* Bican Şahin, *Two Understandings of Law:* Hayek vs. Schmitt *in the Context of Turkey*, 18 TURKISH STUD. 556, 569 (2017).

203. *See* Scheppele, *supra* note 192, at 549–50.

204. *Id.* at 550.

205. *See id*. at 575–76 n.105; *cf.* Calabresi & Rhodes, *supra* note 1, at 1166 (identifying the contention that the "President has unlimited power to remove . . . principal officers (and perhaps [under this certain approach] inferior officers)" as the "weakest" unitary executive model).

206. Scheppele, *supra* note 192, at 575–76 n.105.

207. THE CONSTITUTION OF THE REPUBLIC OF POLAND (Apr. 2, 1997), chap. VI, art. 153 (Pol.).

of partisan bias."[208] Nevertheless, Kaczyński's government rammed a civil service act enhancing political control of the civil service through Parliament shortly after it took office.[209] The new civil service act provides for at-will removal, exemption of the top posts from an open competitive process, and lessening or eliminating requirements for experience.[210] This law, in combination with others, paved the way for the Kaczyński government to sack more than 11,000 civil servants, many of which it regards as "enemies of the state."[211]

Kim Lane Scheppele explains that the new autocrats—such as Orbán, Kaczyński, and Erdoğan (until recently)—generally avoid gross, massive, and violent human rights violations in favor of using economic repression to consolidate their power and control opposition.[212] The creation of centralized control over the executive branch plays a key role in jump-starting this process. Firing civil servants in large numbers sends a powerful message that opposing the government can imperil one's livelihood. The Orbán government amplified this message by pressuring private firms to fire opponents of the regime, primarily by signaling that firms must cast out dissidents to obtain state contracts.[213] Firing government officials and economic repression create fear, which makes it easier to create further impediments to opposing the regime.

B. CENTRALIZATION UNDERMINING THE RULE OF LAW AND DEMOCRACY

Bearing in mind that removing public servants from government can pave the way for establishing a generalized climate of fear useful for establishing an autocracy, the material below focuses on how the leader's control over the prosecutor's office, the media authority, and the electoral commission advances autocracy. This narrow institutional focus facilitates a cogent look at the links between the creation of central control of administration and the key substantive elements creating an autocracy—impairing the rule of law, reducing electoral competition, and shrinking the public space—without the distraction of an overly complex discussion of all agencies that might help achieve those objectives or help create autocracy through other means.[214]

208. FRANK BOLD, BRIEFING ON THE POLISH CIVIL SERVICE ACT: RISK OF POLITICIZATION IN POLISH CIVIL SERVICE 2 (2016), https://en.frankbold.org/sites/default/files/tema/briefing-risk_of_politicizatin_in_polish_civil_service-2016-03-24.pdf.

209. Beata Springer, *Vicious Cycle. A 20 Years' Perspective on the Changes in the Civil Service Model, in* THE TRANSFORMATION OF THE CIVIL SERVICE IN POLAND IN COMPARISON WITH INTERNATIONAL EXPERIENCE 109, 114–19 (Jolanta Itrich-Drabarek, Stanisław Mazur & Justyna Wiśniewska-Grzelak eds., 2018).

210. *Id.*

211. SADURSKI, *supra* note 191, at 137.

212. Scheppele, *supra* note 192, at 575.

213. *Id.* at 575–76 n.105.

214. *See* GINSBURG & HUQ, *supra* note 190, at 105–19 (discussing erosion of the rule of law "shrinking the public sphere" and impairing electoral competition as key elements of democratic decline).

1. Centralized Prosecution Sidelining Opponents, Shrinking the Public Space, and Undermining the Rule of Law

These new autocrats, like the old ones, compromise the prosecutors' independence and assert political control over the prosecutor's office. When this happens, prosecutors become useful instruments in undermining the rule of law and democracy.

In Hungary, Orbán secured the resignation of a respected chief public prosecutor, possibly by blackmail.[215] Orbán then replaced him and his subordinates with Fidesz loyalists. Through constitutional amendment, Fidesz put itself (and therefore Orbán) in charge of selecting the chief prosecutor, by getting rid of the requirement for multiparty support from parliament (a requirement of two-thirds approval of Hungary's unicameral parliament).[216] It then passed "transitional provisions" giving Orbán's chief prosecutor the power to control case assignments.[217] This ensured that an Orbán-approved prosecutor could control the exercise of prosecutorial authority in key cases.

Poland's leader also subverted the political independence of prosecutors.[218] Legislation passed on January 28, 2016, accomplished this politicization by merging the positions of Minister of Justice and the Prosecutor General, bringing both under the control of Kaczyński's Minister of Justice, Zbigniew Ziobro (a leading politician).[219] The new legislation assigns this Minister comprehensive power to reassign cases among prosecutors and give orders in specific cases,[220] a striking departure from democratic norms prevailing in western democracies. It also breaks down the tradition of walling off prosecution from control of the de facto head of state by explicitly allowing the Justice Minister to share information with outside parties. This provision legitimized Ziobro's prior practice of consulting with Kaczyński about ongoing investigations and prosecutorial decisions.[221]

Even before the 2016 military coup, Erdoğan took steps to establish central control over prosecution. He began to change the mechanisms for prosecutorial control through a 2010 constitutional amendment (approved in a referendum) restructuring the High Council of Judges and Prosecutors (HSYK), which

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215. BÁLINT MAGYAR, POST-COMMUNIST MAFIA STATE: THE CASE OF HUNGARY 50 (Bálint Bethlenfaly, Ágnes Simon, Steven Nelson & Kata Paulin trans., 2016) (citing rumors of blackmail in conjunction with the "unexpected resignation of the . . . generally respected . . . Chief Prosecutor in 2000").

216. Venice Comm'n, Council of Europe, *Opinion on CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career*, CDL-AD(2012)008, at ¶ 14 (June 19, 2012), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)008-e.

217. *See id.* at ¶ 32 (a provision authorizing reassignment of cases without any reason can trigger arbitrary removal of cases).

218. SADURSKI, *supra* note 191, at 124–26.

219. *Id.*

220. *Id*; *cf.* JAMES B. COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 234 (2018) (discussing the norm of the FBI director not meeting privately with a President, lest the meeting undermine the bureau's independence).

221. *See* SADURSKI, *supra* note 191, at 125.

appoints and disciplines prosecutors (and judges).[222] In order to curtail investigation and arrest of Justice and Development Party (AKP) members for corruption, including high-ranking government officials, Erdoğan started attacking the prosecutors verbally and then brought them under the control of the central government beginning in 2013.[223] He did this partly by curtailing the power of prosecutors to secure police support for investigation independently.[224] Erdoğan then transferred prosecutors (and judges) away from the corruption cases and brought the HSYK under the control of political appointees.[225] Erdoğan used the coup to replace career prosecutors with loyalists in huge numbers, thus completing the establishment of a key element of presidential control.[226]

Once the head of state has effective control over prosecution, he can use this power to tilt electoral competition. Government prosecutors attack the regime's opponents and protect its supporters. The forms these attacks take vary based on national law and culture, but in all cases centralized control over administration paves the way for selective prosecution to undermine the rule of law and electoral competition.

In Hungary, Orbán's prosecutors have used the law as a political weapon by charging opposition politicians with corruption.[227] The prosecutor's office announces and publicizes prosecution at times calculated to influence elections.[228] The government usually drops the charges after the election, but charging a politician with corruption can end her career. At the same time, Fidesz corruption, which is rampant, almost never triggers prosecution.[229]

Turkey's prosecutors sideline the regime's political opponents with different techniques.[230] Prior to the coup, they usually charged Erdoğan's opponents with minor crimes unrelated to elections. The prosecution focused on laws that many people violate in Turkey, such as tax laws.[231] With increasing frequency, especially after the coup, they arrest opposing legislators for supposedly supporting terrorist groups.[232]

Turkey also uses prosecution as a weapon to shrink the public sphere. The government arrested 500 defendants in between 2008 and 2011, including some

222. GINSBURG & HUQ, *supra* note 190, at 106. The 2017 referendum renamed this Council as the "Council of Judges and Prosecutors" (HSK), eliminating the word "high."

223. *Id.*

224. *Id.*

225. George, *supra* note 197 (discussing the replacement of prosecutors investigating AKP corruption with "appointees willing to wind down the investigation").

226. *Id.* (noting the huge dimensions of purges of prosecutors and judges).

227. MAGYAR, *supra* note 215, at 50–51, 223–24.

228. *See id.* at 50–51 (referring to prosecution announcements relevant to elections at the "best-timed moments").

229. Péter Krekó & Envedi Zsolt, *Explaining Eastern Europe: Orbán's Laboratory of Illiberalism*, 29 J. DEMOCRACY 39, 43–45 (2018).

230. *See* Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1707–10 (2015).

231. *Id.*

232. *See* Varol, *supra* note 196, at 346.

journalists, and charged eighty-six of those arrested with plotting a coup.[233] The court of appeals, however, dismissed those charges for lack of evidence in 2016.[234] The government sued journalists and other critics for libel.[235] The costly lawsuits had a chilling effect as journalists self-censored to avoid civil suits, and later, criminal prosecution for libel.[236] The government also levied a $2.5 billion fine against the Dogan Yayin media conglomerate, which forced it to sell off important media outlets to groups aligned with the government.[237] Since the coup, Erdoğan's government has become the world's leader in jailing journalists, with emergency powers and its grip on the courts facilitating the repression of opposition journalism.[238]

While Poland has only recently centralized prosecution, already some signs indicate that Kaczyński may likewise exploit his control over the public prosecutor to shrink the public sphere, as he has begun to use prosecution as a weapon against political opponents. The Public Prosecutor launched a criminal investigation against Andrez Rzeplinski, the former head of the Constitutional Court, for "abuse of power."[239] The alleged "abuse" involved resisting PiS' court packing.[240]

Similarly, the Minister of Justice threatened to sue professors and Ph.D. students who criticized revisions to the Criminal Code.[241] The revisions in question protect government officials in control of certain state owned companies from corruption prosecution in a law advertised as enhancing penalties for corruption.[242] The Minister of Justice abandoned this gross invasion of free speech quickly, but still, the announcement served as a warning that anyone criticizing the regime too effectively risked prosecution.[243] Kaczyński's government has brought at least one libel action to silence critical media.[244]

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233. *See* George, *supra* note 197.

234. *Id.*

235. Varol, *supra* note 230, at 1697–98.

236. *See id.*

237. George, *supra* note 197.

238. ALINA POLYAKOVA, TORREY TAUSSIG, TED REINERT, KEMAL KIRIŞCI, AMANDA SLOAT, JAMES KIRCHICK, MELISSA HOOPER, NORMAN EISEN & ANDREW KENEALY, FOREIGN POL'Y BROOKINGS, THE ANATOMY OF ILLIBERAL STATES: ASSESSING AND RESPONDING TO DEMOCRATIC DECLINE IN TURKEYND CENTRAL EUROPE 11 (2019).

239. Vanessa Gera, *Polish Prosecutors Investigate Court Head for Abuse of Power*, DAILY NEWS (Aug. 19, 2016, 6:24 AM), https://www.nydailynews.com/sdut-polish-prosecutors-investigate-court-head-for-2016aug19-story.html.

240. *Id.*

241. Barbara Grabowska-Moroz, Katarzyna Łakomiec & Michal Ziółkowski, *The History of the 48-Hour Lawsuit: Democratic Backsliding, Academic Freedom, and the Legislative Process in Poland*, IACL-AIDC BLOG (June 28, 2019), https://blog-iacl-aidc.org/2019-posts/2019/6/27/the-history-of-the-48-hour-lawsuit-democratic-backsliding-academic-freedom-and-the-legislative-process-in-poland.

242. Maximilian Steinbeis, *Being a Good Dictator Is Not So Easy*, VERFASSUNGSBLOG (June 15, 2019), https://verfassungsblog.de/being-a-good-dictator-is-not-so-easy/.

243. *See* Grabowska-Moroz et al., *supra* note 241.

244. *Polish Political Party Leader Brings Libel Action Against Critical Newspaper*, COUNCIL OF EUR., https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-2&p_p_col_pos=5&p_p_col_count=10&_sojdashboard_WAR_coesojportlet_alertPK=46102096#block-member-replies (last visited Nov. 23, 2020).

Hence, in Turkey and Hungary establishment of the chief executive's effective control over prosecution undermined the rule of law. It led to selective enforcement where law functions not as a set of general principles limiting everybody's conduct, but as a source of power to sideline opponents. The regimes use prosecutorial power not to implement a rule of law, but to tilt electoral competition in favor of the chief executive and his party and often to shrink the space available for criticizing and opposing the government. In Poland, recently centralized control of prosecution has not destroyed the rule of law as of this writing, but the regime has already signaled its intent to use Kaczyński's enhanced capacity to persecute enemies to punish dissent, in keeping with Kaczyński's declared intent to follow Orbán's lead.[245]

2. Ending Independent Electoral Commissions to Tilt Elections

Most successful democracies around the world use independent electoral commissions to administer elections. By not allowing a single leader or political party to control electoral administration, democracies provide an important structural safeguard to ensure free and fair elections.

Since autocrats want to tilt the electoral playing field, they compromise electoral commissions' independence, allowing the autocrat to control them, either directly or indirectly. In Hungary, under the pre-Fidesz system, the election commission resembled the United States' Federal Election Commission and the electoral commissions in many U.S. states, in that it contained people from more than one political party.[246] Each of the five leading parties in parliament controlled one seat and the parties filled the remaining seats by mutual agreement.[247] Fidesz terminated the mandates of members slated to remain through 2014 and replaced the members formerly chosen by agreement among the parties with its own members.[248] This arrangement allowed Fidesz to defeat a key mechanism for challenging Orbán's monopoly on power, a referendum. Under Hungarian law, the Electoral Commission must certify referenda before placing them on the ballot, and the Fidesz-controlled Commission has blocked this avenue of challenging the ruler's power.[249] Blocking a referendum entrenches the government, as a rebuke of a government

245. *See* Edit Zgut, *Would-Be Autocrats: What Do Orbán and Kaczyński Have in Common*?, VISEGRAD INSIGHT (Sept. 23, 2019), https://visegradinsight.eu/would-be-autocrats/.

246. *See* Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 590 (2000) (Congress only allowed no more than three members of one political party on the FEC); *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx (a number of states have bipartisan electoral commissions).

247. Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 140 (2012).

248. *Id.*

249. *See* Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to a Government Without Checks: Hungary's Old and New Constitution, in* CONSTITUTION FOR A DISUNITED NATION—ON HUNGARY'S 2011 FUNDAMENTAL LAW 237, 256 (Gábor Attila Tóth ed., 2012).

through a referendum in Hungary had provided a means of bringing down the government.[250]

A similar effort to bring the administrative apparatus supervising elections and funding political parties under the control of PiS and therefore Kaczyński lies at the heart of the Polish government effort to tilt the rules of electoral competition.[251] Prior to Kaczyński's ascent, Poland's National Electoral Commission, which supervises Polish elections, consisted of judges, selected by fellow judges, an arrangement well designed to prevent a single party from rigging elections.[252] PiS, citing non-existent "monstrous" irregularities in elections that it kept losing, passed a bill giving the Kaczyński-controlled lower house of parliament the right to select the vast majority of members of the electoral commission.[253] The new law also authorizes commissioners indirectly controlled by PiS to gerrymander election districts.[254]

Turkey also interfered with the independence of its electoral commission, the Supreme Board of Elections (SBE) (a group of judges as in Poland) and lower level administrative bodies. AKP replaced eight of the SBE's eleven members (placing three in custody) and 221 "lower-level election board chairpersons" (placing sixty-seven in custody).[255] It also placed over 500 electoral board staff in custody.[256] The AKP-dominated SBE invalidated the election of an opposition candidate as mayor of Istanbul in 2019 based on the claim that civil servants did not run the elections, a common arrangement in Turkey.[257] This gambit, however, did not prove successful, as the opposition candidate won the rerun by a wider margin.[258]

Sometimes, as in Turkey, the autocrats rely upon their control over electoral agencies to do almost all of the dirty work.[259] In those cases, the chief executive's effective control of the executive branch provides the primary means of tilting elections.

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250. *Id*. at 256 n.31.

251. *Cf.* Richard Albert & Michael Pal, *The Democratic Resilience of the Canadian Constitution*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 196, at 117, 127–32 (arguing that Canada's independent electoral commission and other administrative entities have contributed to Canada's constitutional resilience). *See generally* Bruce A. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

252. *See* SADURSKI, *supra* note 191, at 141.

253. *Id.* at 140–41.

254. *Id.* at 141–42; Wojciech Sadurski, *Constitutional Crisis in Poland*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 196, at 257, 260.

255. OFF. FOR DEMOCRATIC INSTS. AND HUM. RTS., REPUBLIC OF TURKEY, CONSTITUTIONAL REFERENDUM, 16 APRIL 2017: FINAL REPORT 2, 7–8 (2017), https://www.osce.org/files/f/documents/6/2/324816.pdf.

256. *Id.* at 8.

257. Carlotta Gall, *Turkey Orders New Election for Istanbul Mayor, In Setback for Opposition*, N.Y. TIMES (May 6, 2019), https://www.nytimes.com/2019/05/06/world/europe/turkey-istanbul-mayor-election.html.

258. Carlotta Gall, *Turkey's President Suffers Stinging Defeat in Istanbul Election Redo*, N.Y. TIMES (June 23, 2019), https://www.nytimes.com/2019/06/23/world/europe/istanbul-mayor-election-erdogan.html?auth=login-google.

259. Poland seems poised to follow the Turkish reliance on takeover of electoral commissions to subvert democracy. But no election has taken place under the new structure as of this writing.

In Hungary, however, legislation played an even larger role than executive power.[260] The Fidesz-controlled parliament heavily gerrymandered legislative districts and passed laws making it hard for ethnic minorities and those fleeing the regime to vote, while authorizing and facilitating voting among supportive ethnic Hungarians living in countries near Hungary.[261] The heavy gerrymandering and manipulation of the electorate permitted Fidesz to obtain about 69% of the seats in parliament with only about 45% of the vote in 2014.[262] Turkey employed legislative gerrymanders as well.[263]

Even when the parliament passed legislation tilting elections, the partisan electoral commission made its own contributions to the project of tilting the electoral playing field. In Hungary, the partisan Electoral Commission sent out confusing information to groups likely to vote against Fidesz while making it easy for groups thought supportive of Fidesz to vote.[264]

In Turkey, the electoral commission disobeyed Turkish law by accepting unstamped ballots in the 2017 referendum establishing authoritarian rule.[265] Interference with civil liberties during the state of emergency also contributed to this narrow victory for autocracy.[266]

Thus, centralized control over administration regularly contributes to tilting the electoral playing field, as electoral commissions brought under the political control of the autocrat's party shape the electorate to tilt electoral outcomes in the autocrat's favor. But legislating unfair electoral rules has also played a role, especially in Hungary.

3. Supplanting Independent Media Authorities to Shrink the Space for Dissent

Hungary, Poland, and Turkey, like most democratic countries, established formally independent media regulators.[267] To prevent a single ruler and his party from capturing the media authorities, these countries established mechanisms to ensure multiparty representation on their media councils.

The new autocrats' political parties brought the administrative agencies regulating the media under the chief executives' control after amending the media laws to allow their party to select all or most of the councils' members.

260. *See* Kim Lane Scheppele, *Hungary, An Election in Question, Part Two*, N.Y. TIMES (Feb. 28, 2014, 8:28 AM), https://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/.

261. *See* Scheppele, *supra* note 192, at 549–50 n.11.

262. POLYAKOVA ET AL., *supra* note 238, at 14.

263. *See, e.g.*, Cenk Aygül, *Electoral Manipulation in March 30, 2014 Turkish Local Elections*, 17 TURKISH STUD. 181, 183 (2016).

264. *See* Kim Lane Scheppele, *Hungary, An Election in Question, Part 4*, N.Y. TIMES (Feb. 28, 2014, 8:40 AM), https://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-4/.

265. OFF. FOR DEMOCRATIC INSTS. AND HUM. RTS., *supra* note 255, at 21.

266. *See id.* at 1–2.

267. *See* Adriana Mutu, The Formal Independence of National Media Regulatory Authorities: A Cross-Country Comparative Study 61–62, 98 (May 2015) (Ph.D. dissertation, Autonomous University of Barcelona) (finding the model of independent media regulators and public broadcasting the "prevailing model" in Europe).

Their supporters then used the media authorities to shrink the public space for opposition.

Orbán's media council levied hefty fines on broadcast media for failing to provide "balanced" news coverage to intimidate opposition media.[268] The media council also fired unsympathetic journalists employed in public broadcasting and cancelled long running shows with perspectives at odds with the Orbán government.[269] The Orbán government allocates digital, terrestrial, cable frequencies, and crucial state advertising dollars based on political criteria.[270] All of these measures have created a juggernaut propagating state propaganda.[271]

On the other hand, Orbán has interfered with the media council's independence even though Fidesz controls it in order to exert yet greater control over the media. In November of 2018, owners of media outlets donated 476 television and radio stations to a non-profit foundation promoting "Christian and national values."[272] When opposition groups challenged the foundation for violating national media laws, Orbán defeated the media council's jurisdiction over the foundation.[273] By 2019, few media outlets remained independent beyond a handful of websites in Budapest.[274]

Similarly, Turkey's AKP-dominated Supreme Council of Radio and Television (RTUK) supplemented prosecution of journalists with broader attacks on media organizations. That body issued fifty warnings and 112 fines against television channels and seven warnings and eleven fines to radio stations under very broad laws in 2016 alone.[275] In the wake of the failed coup attempt, this body closed two dozen television and radio outlets in the same year.[276] The government also ordered the closure of dozens of newspapers.[277]

Turkey has a Directorate General of Press and Information that controls press accreditation necessary for access to the Prime Minister and his press office.[278] In 2015, the government brought this organization firmly under Erdoğan's control by reducing the number of seats held by media representatives from more than 50% to a third.[279] In the crackdown after the coup, the Directorate revoked nearly 800 press cards.[280]

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268. Bánkuti et al., *supra* note 247, at 139–40.

269. Bánkuti et al., *supra* note 249, at 258–59.

270. Cristina Maza, *Viktor Orban's Authoritarian Media Control Is Spreading to Hungary's Neighbor, Report Warns*, NEWSWEEK (June 5, 2019, 11:22 AM), https://www.newsweek.com/viktor-orbans-authoritarian-media-control-spreading-hungarys-neighbors-report-warns.

271. Krekó & Zsolt, *supra* note 229, at 44–46.

272. *The Entanglement of Powers: How Viktor Orban Hollowed Out Hungary's Democracy*, ECONOMIST (Aug. 29, 2019), https://www.economist.com/briefing/2019/08/29/how-viktor-orban-hollowed-out-hungarys-democracy.

273. *Id.*

274. *Id.*

275. Freedom House, *Freedom of the Press 2017—Turkey*, REFWORLD (Nov. 1, 2017), https://www.refworld.org/docid/59fc67b9a.html.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

Turkey also centralized procurement at the highest level of the executive branch.[281] Turkey used this authority over procurement to bring additional financial pressures to bear in its drive to suppress dissent and support sympathetic media.[282] A few large holding companies that earn a majority of their revenue in construction, energy, mining, and financial services own most of the important private media properties in Turkey. Erdoğan's government uses government procurement and licensing to punish dissent and put important media assets in friendly hands. For example, the government determined which holding company would purchase the Sabah-ATV media group in exchange for a multibillion-dollar airport construction contract.[283] It also withholds state advertising from critical outlets, pressuring them to fire critical journalists.[284] Purges of journalists insufficiently supportive of Erdoğan through prosecution and financial pressures put 10,000 journalists out of work by the end of 2016, according to the Turkish Journalists Association.[285]

Kaczyński's centralization of control over media regulation has converted public broadcasting into a state tool of propaganda reminiscent of the Communist period.[286] Although the Constitution vests the formally nonpartisan National Council of Radio and Television Broadcasting (Broadcast Council) with the authority to appoint public broadcasting managers, PiS passed a "small media law" ending the terms of incumbents prematurely and moving the appointment authority for managers to the Secretary of the Treasury.[287] This Kaczyński supporter then replaced the management of public broadcasting with strong supporters of the government. These changes led to the replacement of some two hundred journalists from public broadcasting with far-right journalists.[288] While Poland never had a fully independent public broadcasting service, the structural changes have effected an extreme capture of public broadcasting. Poland's Constitutional Tribunal held the Small Media Law's provisions consolidating central control over appointment and removal unconstitutional under the Constitution's provisions establishing the Broadcast Council's power over public broadcasting and its mandate to preserve free speech and freedom of information.[289] This ruling acknowledges that changes in structure centralizing control of the executive branch lead to infringements of liberty. Kaczyński's PiS party defied the ruling and passed legislation

281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *See* SADURSKI, *supra* note 191, at 138 (explaining that the government "transformed" the public media into a "propaganda machine").
287. CTR. FOR PEACE STUDS. ET AL., RESISTING ILL DEMOCRACIES IN EUROPE: UNDERSTANDING THE PLAYBOOK OF ILLIBERAL GOVERNMENTS TO BETTER RESIST THEM: A CASE-STUDY OF CROATIA, HUNGARY, POLAND, AND SERBIA 20 (2017), https://humanrightshouse.org/noop-media/documents/22908.pdf.
288. ANNABELLE CHAPMAN, FREEDOM HOUSE, PLURALISM UNDER ATTACK: THE ASSAULT ON PRESS FREEDOM IN POLAND 9 (2017), https://freedomhouse.org/sites/default/files/FH_Poland_Report_Final_2017.pdf.
289. The Act Amending the Broadcast Act, K 13/16 (Pol.).

establishing a Council of National Media in order to supplant the constitutionally established independent Broadcast Council.[290] President Duda and the PiS majority in parliament have appointed the majority of the Council of National Media, which now oversees public broadcasting and has authority to continue the purge.[291]

In a bizarre example of what can happen when an autocrat exercises too much control over administration, the Kaczyński government's politicized public television service turned around and filed lawsuits against Polish Ombudsman Adam Bodnar and law professor Wojciech Sadurski for accusing the service of hate speech in connection with the assassination of the mayor of Gdansk.[292] Bodnar won his case in court, but as of this writing, some of the suits against Sadurski, one of which makes criminal charges, remain pending.[293] Thus, centralized control over the management of public media has led, albeit indirectly, to the state broadcasting service becoming an organ working to suppress speech. Even unsuccessful prosecution can chill free speech.

Kaczyński, like Erdoğan and Orbán also had his government use economic measures to bolster sympathetic media and discourage criticism.[294] Kaczyński's regime cut off public advertising and other income sources from critical media outlets, whilst paying for advertising in sympathetic private media outlets.[295] And the Broadcast Council has acted to chill speech by levying a substantial fine on a television station for reporting on demonstrations around Parliament.[296] When the television station threatened to go to court, the Broadcast Council withdrew the penalty, but the threat sent the message that media outlets that dare to cover anti-PiS activity place them themselves at risk.[297]

In Hungary and Turkey, elected heads of state established centralized control over the executive branch of government and used that control to severely erode constitutional democracy by undermining the rule of law, tilting the electoral playing field, and shrinking the public space for opposition. Poland has asserted similar centralized control recently and has started down the same path. Well-functioning democracies do not permit centralized control over the entire executive branch of government, but autocracy might well be defined by that control.

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290. *See* SADURSKI, *supra* note 191, at 16.

291. *See id.* at 139.

292. Armin von Bogdandy & Luke Dimitrios Spieker, *Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values*, VERFASSUNGSBLOG (Mar. 6, 2019), https://verfassungsblog.de/countering-the-judicial-silencing-of-critics-novel-ways-to-enforce-european-values/.

293. In addition, Kaczyński himself brought a civil case on behalf of PiS against Sadurski for discrediting an organization "in the face of public opinion," which is illegal under Article 212 of the Polish criminal code, albeit with a truth defense available. David Walsh, *Critic of Poland's Ruling Party PiS Slams "Politically Motivated" Libel Cases*, EURONEWS (May 13, 2019), https://www.euronews.com/2019/05/13/critic-of-poland-s-ruling-party-pis-slams-political-motivated-libel-cases.

294. CTR. FOR PEACE STUDS. ET AL., *supra* note 287, at 20.

295. *Id.*

296. SADURSKI, *supra* note 191, at 139.

297. *See id.*

III. LESSONS FOR AMERICA

The analysis above suggests that the unitary executive provides a pathway to autocracy. It shows that if an elected chief executive with autocratic tendencies obtains effective control over the executive branch of government, he will likely use that power to erode democracy and the rule of law. This Part demonstrates this conclusion's relevance to American practice and explains why the Court should read *Seila Law* narrowly or, better yet, jettison it entirely, in light of the lessons learned about how autocratic heads of state undermine democracy.

A. THE UNITARY EXECUTIVE PATHWAY TO AUTOCRACY IN AMERICA

The power to remove government officials and replace them with the chief executive's preferred people provides a powerful weapon to convert the government from an instrument of law into the instrument of an autocratic chief executive. A President can simply fire conscientious people and seek to replace them with quislings willing to do his bidding. Part III's account implies that the chief executive's practical ability to fire people helps produce autocracy, even if his appointment power gives him only informal control over key appointments. Effective control by the chief executive matters, not the formal arrangement of empowering the chief executive to choose each appointee by himself.

Comparative constitutional law scholars frequently note that comparative study illuminates our own experience.[298] We can see, in retrospect, that American Presidents have sought to use control over the executive branch to subvert the rule of law and even democracy. It would be naive to think that this cannot happen again and go further.

The Watergate scandal demonstrated the utility of at-will presidential removal authority in subverting not just the rule of law, but free and fair elections. The Watergate story also shows the value of for-cause provisions in protecting the rule of law. President Richard Nixon decided to tilt the electoral playing field in his favor by trying to get dirt on his opponents, ordering a burglary to get documents from the Democratic National Committee housed in the Watergate complex and ordering tax audits of his political opponents (a possible prelude to using the Turkish tactic of selective prosecution for tax violations to sideline opponents).[299] In response to evidence of the Watergate break-in, Attorney General Elliott Richardson appointed a special counsel to investigate.[300] President Nixon responded to this threat of uncovering his effort to tilt the electoral playing field by forcing the resignation of law-abiding subordinates and trying to put more pliant officials in their stead. Nixon ordered Attorney General Richardson to fire the special counsel.[301] But the Justice

298. *See, e.g.*, Vicki C. Jackson, *Narratives of Federalism: of Continuities and Comparative Constitutional Experience*, 51 DUKE L. J. 223, 255–59 (2001) (finding comparative constitutional experience illuminating while noting some limitations).

299. BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 83 (1976).

300. *Id.* at 61.

301. *Id.* at 24.

Department regulations governing the special counsel office only authorized for-cause removal, and no cause existed.[302] Richardson refused to violate his oath of office and resigned in protest.[303] Nixon then ordered his successor, William Ruckelshaus, to fire the special counsel.[304] Ruckelshaus likewise refused and resigned.[305] President Nixon, however, found an "obsequious instrument[] of his pleasure" (in Hamilton's words) in Ruckelshaus' successor, Robert Bork, who agreed to fire the special counsel.[306] Government officials' allegiance to their constitutional duty to not bend to presidential will helped vindicate the rule of law. The reaction to the "Saturday Night Massacre"—the forced resignation of Richardson and Ruckelshaus—led to increased support for impeachment.[307] And Nixon resigned to avoid almost certain impeachment and removal.[308]

The George W. Bush Administration also took steps to centralize prosecution in ways that arguably undermined the rule of law to tilt the electoral playing field. The Bush Administration encouraged U.S. Attorneys to prosecute voting fraud cases and other cases.[309] They reviewed these cases but ultimately demurred for lack of evidence.[310] Bush's Attorney General, Alberto Gonzalez, then fired several well-respected U.S. Attorneys.[311] An uproar in Congress, however, ensued over this attempt to weaponize prosecution to tilt electoral competition, and Gonzalez resigned.[312]

Donald Trump has also sought to use prosecution to tilt the electoral playing field, by protecting his friends and persecuting his enemies. Trump has more broadly encouraged prosecutors not to go after Republicans committing crimes, lest the prosecution damage the Republicans' electoral chances.[313] Conversely, he asked the DOJ to investigate Democratic politicians and other "enemies," including Hillary Clinton, John Kerry, Joe Biden, James Comey, and Oakland Mayor Libby Schaaf, while publicly suggesting that his political opponents (like James Comey and Hillary Clinton) should go to jail without

302. *See* Nader v. Bork, 366 F. Supp. 104, 109–10 (D.D.C. 1973) (explaining that the regulations governing the special counsel only permitted removal for "extraordinary improprieties").

303. WOODWARD & BERNSTEIN, *supra* note 299, at 70.

304. *Id.*

305. *Id.*

306. *Id.* at 70–71; THE FEDERALIST NO. 76 (Alexander Hamilton) (explaining that the Constitution aimed to prevent appointment of "obsequious instruments" of presidential "pleasure"); *Bork*, 366 F. Supp. at 107 (Robert Bork fired special prosecutor Archibold Cox).

307. *See* WOODWARD & BERNSTEIN, *supra* note 299, at 113 (noting that House members drew up articles of impeachment after the firing of Richardson and Ruckelshaus).

308. *Id.* at 412.

309. Driesen, *supra* note 147, at 712.

310. *See id.* at 712–13.

311. *Id.* at 710.

312. *Id.*

313. *See* Adam Liptak, *Conservative Lawyers Say Trump Has Undermined the Rule of Law*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/politics/conservative-lawyers-trump.html (quoting Peter Keisler, a former acting Bush Administration Attorney General, as saying that "the President has attacked the Justice Department for indictments of Republican congressmen on the stated ground that prosecutions would hurt Republican chances in the midterm elections").

citing any evidence of a crime.[314] When Trump's efforts to obtain a DOJ investigation of Joe Biden produced no public announcement of such an investigation, he withheld military aid from Ukraine in order to force Ukraine's government to announce an investigation.[315] This abuse of power triggered his impeachment, but the Senate acquitted him.[316] Trump has also obtained the resignation of key cybersecurity officials, thereby inviting Russian interference in the 2020 election.[317] And Trump exercised authority over the Department of Commerce to place a census question about citizenship on the ballot in order to tilt elections, although the Supreme Court ultimately checked this abuse of power.[318]

Trump has brought the Justice Department under firmer central control by removing Jeffrey Sessions and appointing William Barr as Attorney General, by all accounts a firm believer in the unitary executive theory.[319] Barr has acted more like an agent of autocracy than like a supporter of prosecutorial independence.[320] He redacted parts of the Mueller Report on Russian Interference in the 2016 Election ("Mueller Report"), announced that the report did not show that the President had committed obstruction of justice in advance of release of evidence to the contrary, investigated civil servants investigating Russian interference in the 2016 election, and instigated a process leading to a DOJ request to dismiss charges against Michael Flynn, a Trump aide who had pled guilty to charges of lying to the FBI about his Russian contacts.[321] Thus,

314. Paul Blumenthal, *Donald Trump Publicly Suggested DOJ Investigate Joe Biden*, HUFFINGTON POST, https://www.huffpost.com/entry/william-barr-trump-investigate-biden_n_5ccb54ade4b0e4d7572fdf15 (May 3, 2019); Quint Forgey & Carla Marinucci, *Trump Asks Sessions to Consider Prosecuting Oakland Mayor Over ICE Raid*, POLITICO, https://www.politico.com/story/2018/05/16/trump-sessions-oakland-mayor-prosecution-sanctuary-cities-594470 (May 16, 2018, 5:52 PM); Eric Levitz, *Trump Calls for John Kerry's Prosecution Under the Logan Act*, INTELLIGENCER (May 9, 2019), https://nymag.com/intelligencer/2019/05/trump-calls-for-john-kerrys-prosecution-under-the-logan-act.html; Michael Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N. Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html.

315. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong., art. I (1st Sess. 2019); Memorandum of Telephone Conversation with President Zelenskyy of Ukraine (July 25, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf?fbclid=IwAR2NRvNaYh-nrFMBa2SSG1bumdyNoJhXVCDNtBYugM-klXGctnWce6qDjD0.

316. Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html.

317. *See* Josephine Wolff, *Cybersecurity Officials Are Leaving the Federal Government. That's a Problem*, N.Y. TIMES (Dec. 19, 2019), https://www.nytimes.com/2019/12/19/opinion/cybersecurity-departures-government.html.

318. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573–76 (2019) (holding that the reasons given for adding a citizenship question to the census were pretextual).

319. *See, e.g.*, Emily Bazelon, *Who Is Bill Barr?*, N.Y. TIMES (Oct. 26, 2019), https://www.nytimes.com/interactive/2019/10/26/opinion/william-barr-trump.html (quoting Douglas Kmiec characterizing William Barr's view of executive power as one that George III would have loved).

320. *Cf. id.* (describing Barr as championing the President while diminishing DOJ's credibility).

321. *See* Elec. Priv. Info. Ctr. v. U.S. Dep't of Just., 442 F. Supp. 3d 37, 50–51 (D.D.C. 2020) (declining to credit Barr's defense of his redactions as legally required in light of his misleading statements about the Mueller report's findings on obstruction of justice); Donald Ayer, *Barr's Flynn Dismissal Motion Portends Greater Abuses Ahead*, ATLANTIC (May 17, 2020), https://www.theatlantic.com/ideas/archive/2020/05/barrs-flynn-dismissal-motion-portends-greater-abuses-ahead/611779/; Jack Goldsmith & Nathan Sobel, *The Durham*

belief in the unitary executive has led to pressures to erode the rule of law by discouraging lawful investigation of the President and his minions and going after President Trump's opponents.

The American experience shows that even our Presidents can seek to erode the rule of law in order to entrench themselves in power. A President without an executive branch willing to do his bidding, however, cannot establish an autocracy. A President with control over our prosecution service and other significant government agencies has a chance. If the government officials internalize the unitary executive theory and simply obey the President, the rule of law can readily perish. The President simply has to order underlings to disobey the law or at least apply it selectively. We have rarely seen pervasive undermining of the rule of law in the past partly because our civil servants customarily follow the law and our constitutional culture supports that custom. This culture of fidelity to law, however, comes from a series of political decisions embracing internal separation of powers over time, including the adoption of the Oath Clause, the creation of a civil services insulated from political pressures, the establishment of independent agencies, and our tradition of prosecutorial independence established at the Founding.[322] But the Court's embrace of the unitary executive theory likely will further erode this custom.

In principle, an executive branch following the leader's orders can utterly destroy freedom and the rule of law. The executive branch alone has the capacity to embarrass people with indictments, arrest them, and imprison them. It alone grants broadcast licenses. It disburses government funds and decides whom to enforce the law against. Even an agency like the CFPB, if subject to complete presidential control, can become a tool to entrench an autocratic President in power, prosecuting businesses not kowtowing to the President while allowing businesses owned by supporters to abuse consumers. The new authoritarians have learned to use economic pressures to subdue opposition, and an American President can emulate their tactics.

The case studies, moreover, teach us that once a President controls the executive branch of government, judicial enforcement of the Bill of Rights

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Investigation: What We Know and What It Means, LAWFARE (July 9, 2020, 9:58 AM), https://www.lawfareblog.com/durham-investigation-what-we-know-and-what-it-means (discussing Barr's ordering of the Durham investigation of the Russian investigation and characterizing it as political and inappropriate); Laura Jarrett, *More than 2000 Former Prosecutors and Other DOJ Officials Call on Attorney General Bill Barr to Resign*, CNN POLITICS (Feb. 17, 2020, 5:29 P), https://www.cnn.com/2020/02/16/politics/prosecutors-doj-officials-barr-resign/index.html (discussing Barr's motion to dismiss charges against Michael Flynn after he pleaded guilty twice); *see also In re* Flynn, 961 F.3d 1215 (D.C. Cir.), *order vacated and rehearing en banc granted*, 2020 WL 4355389 (D.C. Cir. July 30, 2020) (issuing an order of mandamus to prevent the Court from holding a hearing on the DOJ's request to dismiss charges against Michael Flynn).

322. *See* Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 479 (2018); Johnsen, *supra* note 36, at 1560–62 (identifying legal advisers with the executive branch as an "underappreciated" source of constraint); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2331–35 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 435–37 (2009); *cf.* Jacobs, *supra* note 10, at 381 (discussing congressional decisions to distribute authorities among administrative agencies "at varying degrees of remove from the White House" to create a particular internal balance of power).

cannot adequately constrain a clever autocratic President.[323] They show that techniques exist to evade the courts and to inflict immense damage to the rule of law and democracy.

Orbán avoids judicial review of abuses of prosecutorial authority designed to sideline opponents by dropping announced corruption charges after elections rather than pursuing them in court. The pre-2016 Turkish government's model of prosecuting political opponents for minor offenses that normally do not trigger prosecution also provides a way of avoiding judicial reversal, as the courts have no legitimate means of avoiding guilty verdicts based on selective prosecution if the evidence justifies conviction. All of these countries fail to prosecute corrupt regime supporters, and no judicial check exists on that.[324] So, a President with the authority to politicize investigations or prosecution, a necessary consequence of the political dimension of the unitary executive theory, can do enormous damage to the rule of law. In addition, some executive branch actions subverting the rule of law can escape judicial review because officials carry them out in secret or because of justiciability barriers.

The point that the judiciary cannot provide an adequate remedy for an executive branch under the political control of an unrestrained despot is consistent with the Framers' view that the Ratifiers insistence on a bill of rights was superfluous. They thought that checks and balances and separation of powers provide more potent security for liberty than a bill of rights, a view echoed in *Seila Law* and other recent cases.[325] The unitary executive theory, while consistent with separation of powers, dismantles checks and balances.

The United States, moreover, has less robust checks on executive power than Turkey, Hungary, and Poland had prior to their election of authoritarian leadership. The constitutions in countries that suffered through Nazi or Communist dictatorship usually secure prosecutorial independence either through requirements for multiparty support for chief prosecutors or a controlling or large role for an independent council (usually of judges) in selecting prosecutors. By contrast, the President of the United States can nominate political friends to key posts under the United States Constitution.

Control of the Senate may suffice to provide a President with complete control over the executive branch of government sufficient to destroy the rule of law and democracy over time. Because the Constitution denied the President authority to unilaterally appoint or remove officials, many of the

323. *See generally* Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293 (2018) (explaining why courts' ability to protect constitutional rights may be quite limited).

324. *Cf.* Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (holding that prosecutors enjoy absolute immunity from liability).

325. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that . . . structural protections against abuse of power were critical to preserving liberty." (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986))); NLRB v. Noel Canning, 573 U.S. 513, 570–71 (2014) (Scalia, J., concurring) (explaining that the Framers found structural protections so important to liberty that they did not at first consider a bill of rights necessary); Clinton v. City of New York, 524 U.S. 417, 449–53 (1998) (Kennedy, J., concurring) (stating that separation of powers secures liberty).

antifederalists—those who opposed ratification of the Constitution without additional amendments—did not cite fear of an autocratic President unilaterally destroying democracy as a reason to vote against the Constitution (although some did). They accepted Hamilton's argument that restraints of the President's power over the executive branch made him too weak to establish an autocracy because that argument fits the constitutional text. Instead, they feared that a "cabal" between the President and the Senate would undo the fledgling American republic.[326]

The Senate, however, might well have the capacity to check an autocratic President. It can refuse to approve the appointment of officials unless they evince a clear commitment to the rule of law. It can also remove a President if the House impeaches a lawless President.

We cannot assume, however, that those weaker constraints will prove so effective as to make a unitary executive safe over time. For one thing, the Senate has largely abandoned the role of making sure that key appointees show dedication to the rule of law and expertise. Instead, it often operates under the principle that the President is entitled to the officials he wants. So, it has in recent times approved appointees who clearly aimed to harm the rule of law. Furthermore, impeachment requires a two-thirds vote, so that it only operates as a constraint when partisan division is mild and dedication to the rule of law pervasive among federal politicians. Political scientists, however, have shown that autocratic leaders usually take over during times of partisan division, when the legislature's failure to function effectively leads to some support for a demagogue.[327] To gain election, any President must have the support over at least a substantial minority of the population, and Senators have incentives not to remove a President with such substantial support from the electorate. Given the robust evidence that most voters know shockingly little about politics or government, we cannot assume that public support for a President driving toward autocracy will diminish substantially because of misconduct, even when carried out in broad daylight.[328]

Even though a majority of voters may come to recognize an authoritarian in the White House, that realization may not necessarily translate into Senate action, because a very small minority of voters can elect the Senate. In fact, because of disparities in state population sizes, less than 20% of the population can create a majority in the Senate (although in practice elections have not

326. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 270–75 (1996).

327. *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 195, at 115–17 (2018) (using Chile's loss of its democracy to illustrate the idea that "polarization can destroy democratic norms").

328. *See generally* Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 818 (2012) (stating that the political science literature "finds scant evidence that the public is even minimally informed . . . about specific national issues"); Pildes, *supra* note 169, at 1421 (raising questions about public awareness of legal issues and the ability of "partisan political actors" to manipulate their views); *cf.* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010) (arguing that law does not check the President but that political checks on the President prove adequate).

realized the theoretically worst outcome).[329] Minority control of the Senate has accelerated, with the Senate in 2019 having a Republican majority after 57% of the electorate voted for Democratic Senatorial candidates in 2018.[330] (Since Senate terms are staggered, majoritarian outcomes in the Senate might not perfectly mirror the results of one year's elections, but this still suggests skewing).

Structural constitutional deviations from majoritarianism played a role in the rise of autocracy in Hungary, Poland, and Turkey. In Turkey, Erdoğan's AKP party obtained a two-thirds majority in Parliament with just 34% of the vote in 2002, thanks to a law denying representation to parties winning less than 10% of the vote. Similarly, Poland's PiS party obtained a parliamentary majority with less than 38% support in an election with low turnout.[331] The constitutional compromises at the founding of Hungary's post-Soviet democracy also gave a boost to larger parties in order to avoid excessive fragmentation in Parliament. That led to Fidesz capturing a two-thirds majority in Hungary's legislature with only 53% of the vote in 2010.[332] That supermajority enabled Fidesz to pass constitutional amendments (and legislation) transforming the Hungarian system to empower Viktor Orbán. Anti-majoritarian features in a Constitution (like the electoral college and the Senate) can enable an autocrat to take power without majority support or obtain a supermajority with only a bare majority of the electorate approving of his party.

Fully evaluating America's vulnerability to autocracy would require a book, and I have written one that addresses the presidential power threat more completely while mentioning many broader vulnerabilities.[333] The literature on democratic erosion teaches us that many elements work together to facilitate democratic decline. Judges considering the matter cannot have clairvoyance about the future of American democracy. But the history of the world shows that democracies are rare, and many have perished. When a judge writes a new rule of constitutional law (even if derived from the judge's understanding of original intent), that creates long-term consequences. If the rule creates a risk for democracy, as a rule creating a unitary executive does, that rule would pose a long-term risk. In light of the role of sudden shocks, personalities, and hard to predict political factors in destroying democracy, the subject would seem to demand judicial humility with respect to future predictions.

But there is little doubt that internal separation of powers—the name scholars have given to intra-branch checks and balances—lessens the risk of democratic decline, at least slowing it down when a despot gets elected. Furthermore, as the Trump impeachment shows, resistance by civil servants able

329. Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 1985–86 (2019).

330. *Id.* at 1987.

331. Sadurski, *supra* note 254, at 257.

332. POLYAKOVA ET AL., *supra* note 238, at 14.

333. *See* DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP AND JUDICIAL ENABLING OF PRESIDENTIAL POWER (forthcoming 2021).

to withstand a despot can play an important role in making political checks on autocracy feasible.

B. UNITARY EXECUTIVE THEORY AFTER SEILA LAW

Seila Law's endorsement of the unitary executive theory could perform the same role as statutes and constitutional amendments played in enabling autocracy in Turkey, Poland, and Hungary. In effect, *Seila Law* amends the Constitution, which has permitted many governmental departments to have some independence from presidential will since 1789, often quite substantial independence, to increase centralization through a new constitutional rule written by the Justices. In Turkey, Poland, and Hungary, parliamentary majorities (Poland), supermajorities (Hungary), and plebiscites (Turkey) drove comparable changes in constitutional principle.

The experience in these countries suggests that the *Seila Law* majority's emphasis on bureaucratic threats to individual liberty, while in keeping with contemporary conservative politics, does not comport with international experience.[334] The primary threat to democracy comes from the head of state's unchecked control over government officials. Functioning democracies, by contrast, employ checks and balances to ensure the independence of key government agencies. Furthermore, Justice Robert's suggestion that government officials must fear the President sounds in authoritarian philosophy, not the practice of democratic government.

The Constitution does not require the Supreme Court to create a constitutional rule facilitating autocracy. The Constitution does not specifically authorize the Supreme Court to imply fine-grained presidential powers from broad clauses not mentioning removal or from principles of separation of powers in tension with checks and balances.[335] It does, however, authorize Congress to regulate removal authority under the Horizontal Sweeping Clause. That Clause authorizes Congress to "make all laws . . . necessary and proper for carrying into execution . . . all powers vested by this constitution in the government of the United States . . . or in any department or officer thereof."[336] The President, of course, only exercises power vested in the United States government and is an officer of the United States government. Hence, the Court could have held that Congress has the right to determine if the President can remove officials without reason or instead only for just cause.

Justice Kagan's *Seila Law* dissent argued that wise judgment about removal requires political judgment more appropriate to Congress than to a

334. *See* TIMOTHY SNYDER, BLACK EARTH: THE HOLOCAUST AS HISTORY AND WARNING (2015) (explaining that civil servants mitigated the Holocaust when states survived Nazi invasion); Max Weber, *The Three Types of Legitimate Rule*, 4 BERKELEY PUB. SOC'Y & INSTS. 1 (1958) (contrasting bureaucratic identification with law with charismatic rule of personality).

335. *See* Van Alstyne, *supra* note 18, at 792–94, 800–04 (arguing that the Court has limited authority to imply additional presidential powers); *see also* Anderson v. Dunn, 19 U.S. (6 Wheat) 204, 233–34 (1821) (rejecting idea that necessity justifies an expansion of executive power).

336. U.S. CONST. art. I, § 8, cl. 18.

group of unelected judges.[337] *Seila Law* limits congressional ability to take the risks of authoritarianism into account in shaping future administration, thereby making it hard to learn lessons from authoritarians abroad or President Trump's assault on the rule of law at home.

The principle that the Court should construe the Constitution to further the Framers' goal of preserving a democratic republic supports a narrow construction of *Seila Law,* at a minimum. Part III demonstrated that media authorities and electoral commissions often play a key role in destroying democracies. Our Federal Election Commission (FEC) and Federal Communication Commission (FCC), as their names suggest, have multi-member commissions at their heads. The rule established in *Seila Law* that the President must have unlimited authority to remove single directors of an agency does not require the President to have the authority to remove the commissioners of the U.S. media and electoral authorities at will.[338] *Seila Law*, however, contains a dictum confining its previous decisions on independent commissions to those that "do not wield substantial executive power."[339] The Court should not use that dictum, which is in considerable tension with *Humphrey's Executor*, to interfere with these commissions' (or other commissions') independence.

Part III also showed that prosecutors can play a large role in undermining the rule of law and democracy. *Seila Law*'s dictum leaves room to secure the independence of lower level prosecutors, as it recognizes that the Court has approved congressional restrictions on presidential removal for "inferior officers with limited duties and no policymaking or administrative authority."[340] In light of the *Seila Law* Court's emphasis on legislative precedent as a measure of the constitutional legitimacy of removal protection, Congress should be able to robustly protect the independence of District Attorneys.[341]

Seila Law, however, likely prevents Congress from taking an important step recommended by Cass Sunstein to protect our democracy and the rule of law from a President abusing prosecutorial authority to punish his enemies and protect his friends—making the entire Justice Department, including its top officials, independent.[342] And a President determined to use executive power can use almost any government power to reward friends and punish enemies, thereby subverting democracy and the rule of law. For these reasons, the Court should

337. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2236–38 (2020) (Kagan, J., dissenting).

338. *See id.* at 2197 (majority opinion) ("We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect or malfeasance violates the separation of powers.").

339. *Id.* at 2199–2200.

340. *Id.*

341. *Cf id.* at 2201–02 (treating the lack of sufficient historical support for the CFPB's structure as an indication of a "severe constitutional problem").

342. *See* Cass R. Sunstein, *Imagine that Donald Trump Has Almost No Control Over Justice*, N.Y. TIMES (Feb. 20, 2020), https://www.nytimes.com/2020/02/20/opinion/sunday/trump-barr-justice-department.html (proposing that Congress make the DOJ an independent agency).

consider overruling or sharply limiting *Seila Law,* which is inconsistent with its holdings in *Morrison* and *Humphrey's Executor*.[343]

Leaving the decision about whether to give various officials for-cause removal authority to Congress would help the Court avoid problematic formalist line-drawing. Under *Seila Law*, the question of whether Congress may protect officials from politically motivated and potentially abusive removal depends upon difficult to define distinctions between executive authority on the one hand and adjudicative and legislative authority on the other with respect to commissions or between principle and inferior officers.[344] The fact that many government agencies exercise several different types of authority makes such line-drawing deeply problematic. Indeed, the Court has largely given up policing one of the major dangers to democracy—delegation of vast powers to the executive branch—on the ground that it cannot distinguish executive from legislative authority in order to enforce the constitutional rule prohibiting delegation of legislative authority to the executive branch.[345] Having permitted vast delegations of authority to the executive branch, the *Seila Law* Court's new limits on the tools Congress may possess to limit presidential abuse of delegated authority are deeply problematic.

C. FURTHER IMPLICATIONS

The need to confine the implications of the unitary executive theory in light of its propensity to create authoritarian government has more fine-grained implications, as the theory has influenced legal practice even before the Supreme Court's recent endorsement of the theory. This final Part suggests possible implications for the laws on presidential obstruction of justice and congressional authority to subpoena information from the executive branch.

The analysis in Part II suggests that authoritarian heads of state have a tendency to obstruct investigations into their own administration's conduct. Indeed, as the Turkish case study suggests, the desire to shield the head-of-state and his supporters from prosecution for misconduct often provides motivation for heads of state with authoritarian tendencies to assert control over prosecution. This tendency to want to obstruct investigations has played a role in impeachment cases in the United States, as the Congress charged Presidents Nixon and Trump with obstruction of their investigations.

The unitary executive theory has an influence over the question of whether a President can commit obstruction of justice.[346] This issue surfaced during the Mueller investigation of Russian interference in the 2016 election and in his

343. *See Seila Law,* 140 S. Ct. at 2233–36 (Kagan, J., dissenting).

344. *See id.* at 2199 n.3 (majority opinion) (recognizing that Supreme Court cases have not established "an exclusive criterion for distinguishing between principle and inferior officers").

345. *See* Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (the Court has not "felt qualified to second-guess Congress regarding the permissible degree of policy judgment" that it may leave to those "executing or applying the law" (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001))).

346. *See* Daniel J. Hemel & Eric. A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1294–1303 (2018) (arguing that notwithstanding separation of powers concerns, the obstruction of justice statute limits presidential conduct).

report to Congress on that matter. William Barr, then a private citizen who had worked at the DOJ, wrote an unsolicited memorandum to his former colleagues arguing that the President's ability to control prosecution makes it inappropriate to charge him with obstruction of justice for seeking to have James Comey "let go" of the investigation of Michael Flynn and firing Comey when he persevered.[347] As Attorney General, Barr concluded that President Trump had not obstructed justice, despite evidence supporting an obstruction charge in the Mueller Report.[348] The Mueller Report itself pointedly disagrees with Barr's suggestion that the President cannot commit obstruction of justice.[349]

Mueller explained that the President only has the right to honestly direct prosecution and investigations; he does not have authority to "corruptly" influence investigations and prosecution, which is what the obstruction of justice statute proscribes.[350] This issue is separable from the question of whether the DOJ can indict a sitting President during his term in office. If the President can be liable for obstruction of Justice but cannot be prosecuted while in office, he could be prosecuted once he leaves office.

Endorsement of the unitary executive theory might suggest that Barr's view is correct. But *Seila Law* does not deny that the Constitution aims to create a rule of law that constrains corrupt presidential administration, even though its limits on Congressional authority to protect the independence of top-level DOJ officials may impede investigation of high-level wrongdoing. The entire *Seila Law* Court failed to consider the possibility of presidential abuse of power. Accordingly, the courts remain free to reign in presidential obstruction of justice in future cases. In the short term, the DOJ and/or Congress should affirm that the obstruction of justice statutes apply to the President.

The Trump Administration also resisted subpoenas, even those issued in support of a House impeachment investigation.[351] In doing so, it defied statutes passed by Congress and signed into law by Presidents for more than 150 years and practice dating back to the founding of the republic.[352] Unitarians sometimes

347. *See* Memorandum from Bill Barr, U.S. Att'y General, to Deputy Rod Rosenstein, U.S. Deputy Att'y Gen., and Steve Engel, U.S. Assistant Att'y Gen. (June 8, 2018), https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf.

348. Mark Mazzetti & Charles Savage, *Standing Where Barr Cleared Trump on Obstruction, Mueller Makes a Different Case*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/us/politics/mueller-barr.html (explaining that William Barr declared that the special counsel "amassed insufficient evidence to accuse President Trump of a crime" whilst Robert Mueller offered "a sharply different perspective" on obstruction of justice).

349. DOJ, II REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 159 (2019), https://www.justice.gov/storage/report_volume2.pdf (stating that the President can commit obstruction of Justice by firing the FBI director or closing an investigation into his campaign corruptly).

350. *See id.* at 168–69.

351. Charlie Savage, *Trump Vows Stonewall of "All" House Subpoenas, Setting Up Fight Over Powers,* N.Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.

352. *See* McGrain v. Daugherty, 273 U.S. 135, 161 (1927) (tracing the practice of securing information needed by Congress back to 1792 and noting the support of James Madison and four other Framers); Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (recognizing that Congress has a right to compel witnesses to appear and answer question in support of impeachment and punish violations); *see, e.g.*, *In re* Chapman, 166 U.S. 661,

resist congressional oversight as an inappropriate interference with executive branch operations.[353]

Because oversight of administrations can yield information pointing to the need for fresh legislation curbing abuses or revealing the need for impeachment, the Supreme Court has repeatedly authorized Congress to investigate alleged executive branch failures to implement the law properly when the inquiry might legitimately lead to legislation.[354] The Court subsequently recognized that Congress has the authority to "probe corruption" and maladministration in the executive branch.[355]

But the unitarian view of law execution as an exclusive domain of presidential power (and the concomitant discounting of checks and balances) has begun to lead the Court to narrow congressional oversight authority. In *Trump v. Mazars,* decided less than two weeks after *Seila Law*, the Court departed from prior precedent to narrow congressional power to obtain a President's private financial information, which can help check corruption in presidential administration.[356] The Court required a rather demanding showing of legislative necessity to justify obtaining President Trump's tax returns and other financial information, imposing stricter limits on congressional authority than it imposes when the President asserts a valid executive privilege (as I have shown elsewhere).[357] On the same day, however, the Court refused to grant the same sorts of documents "heightened protection" from a local grand jury subpoena.[358]

The courts should consider the lessons of democratic erosion in applying *Mazars* on remand and in future cases. The rampant corruption found in

665–66 (1897) (discussing a statute passed in 1857 requiring witnesses summoned by a House of Congress or one of its committees to appear and answer questions posed).

353. *See* Kitrosser, *supra* note 149, at 505 (noting that unitarian objections have been made to statutes requiring executive branch officials to testify before Congress); *cf.* Marshall v. Gordon, 243 U.S. 521, 532, 545–546 (1917) (declining to permit the House to arrest a District Attorney for writing an intemperate letter, which did not disrupt legislative proceedings).

354. *See* Hutcheson v. United States, 369 U.S. 599, 607, 614–17 (1962) (upholding investigation of individual criminal conduct, which led to legislation preventing misuse of union funds); Sinclair v. United States, 279 U.S. 263 (1928) (upholding imprisonment of oil company executive who did not fully cooperate in congressional investigation of an oil leasing scandal, because the investigation might produce legislation); *McGrain*, 273 U.S. at 150–51, 154, 176–80 (approving the arrest of the former Attorney General for failing to cooperate with a congressional investigation of a failure to enforce anti-trust laws and other statutes); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727, 731–32 (D.C. Cir. 1974) (en banc) (approving demand for tapes revealing presidential misconduct in an election by a committee that might recommend legislation, which became a basis for an impeachment investigation).

355. Watkins v. United States, 354 U.S. 178, 194–95, 200 n.33 (1956) (characterizing *McGrain* and *Sinclair* as recognizing congressional authority to encourage "honest and effective government" by investigating corruption and noting established authority to policy maladministration).

356. *See* Trump v. Mazars, 140 S. Ct. 2019, 2033–34 (2020) (repudiating the lower courts' approach of treating a subpoena of presidential papers as just like any other congressional subpoena).

357. *See* David M. Driesen, *Stealth Executive Privilege:* Trump v. Mazars, JURIST: LEGAL NEWS & COMMENT. (July 28, 2020, 7:30 AM), https://www.jurist.org/commentary/2020/07/david-driesen-trump-mazars/ (discussing the test articulated in *Mazars* and comparing it to the balancing test governing executive privilege).

358. *See* Trump v. Vance, 140 S. Ct. 2412, 2429 (2020).

autocratic regimes and the importance of its public disclosure as a check on autocracy suggests that the courts should place a lot of weight on the *Mazars* Court's rejection of a requirement that Congress show that the financial records it seeks are "demonstrably critical" to legislation in order to obtain documents and interpret the necessity showing the Court did require in a permissive manner.[359] By denying Congress a role in safeguarding conscientious employees from abusive removal the Court makes the elections and impeachment even more important as checks on abuse of presidential power toward autocratic ends and the Court should not impede the discovery of maladministration, which can lead to discovery of unknown high crimes and misdemeanors or information that can inform the electorate.[360] Furthermore, the Horizontal Sweeping Clause supports the argument that Congress has a legitimate role to play in ensuring faithful law execution. While *Seila Law* declined to give the Horizontal Sweeping Clause effect in the removal context, the Supreme Court has already held that the Necessary and Proper Clause does protect its subpoena power.[361]

CONCLUSION

The experience indicating that centralized head of state control over the executive branch of government provides a pathway to autocracy suggests that the Court committed a grave error in *Seila Law*. In future cases, the Court should consider the possibility of abuse of presidential power, not just abusive bureaucracy. And it should narrowly construe or overrule *Seila Law* as a long-term danger to the rule of law and democracy.

359. *See Mazars*, 140 S. Ct. at 2032 (disagreeing with the President's argument that the "House must show that the financial information" sought "is 'demonstrably critical' to its legislative purpose." (quoting *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 731)); *see, e.g.*, MAGYAR, *supra* note 215 (describing Hungarian corruption under Orbán in detail); *cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (putting great weight on the President's electoral accountability as a mechanism to check the executive branch's threats to liberty).

360. *Cf. Seila Law*, 140 S. Ct. at 2207 (2020) (arguing that various congressional powers make presidential removal authority more important than it would be otherwise).

361. *See id.* (rejecting the argument that specific congressional powers under the Horizontal Sweeping Clause support congressional power over removal); *In re* Chapman, 166 U.S. 661, 671 (1897) (explaining that the Necessary and Proper Clause authorizes Congress to provide for the enforcement of its subpoenas); *cf. Mazars*, 140 S. Ct. at 2031 ("Congress has no enumerated constitutional power to conduct investigations or issue subpoenas."); David M. Driesen & William C. Banks, *Implied Presidential and Congressional Power*, 41 CARDOZO L. REV. 1301, 1339 (2020) (explaining that the modern Supreme Court does not apply the Necessary and Proper Clause to vindicate congressional rights in separation of powers cases but uses analogous means/ends reasoning to enhance presidential power).