

Remove *Morrison v. Olson*

Steven G. Calabresi* & Christopher S. Yoo**

I.	TEXTUAL ARGUMENTS	104
II.	ORIGINAL MEANING AND THE REMOVAL POWER.....	107
III.	ARGUMENTS FROM PRACTICE.....	111
IV.	POLICY ARGUMENTS	116
V.	WHY <i>MORRISON V. OLSON</i> SHOULD BE OVERRULED.....	117
VI.	CONCLUSION	119

On January 20, 2009, President Barack Obama took the oath of office as the forty-fourth President of the United States of America. President Obama’s election followed a titanic and decisive debate in which millions of American citizens participated and voted. One of the most important issues facing the country during the presidential election was the financial crisis that hit Wall Street in September 2008. The monetary policy of the Federal Reserve Board and decisions about how the Securities and Exchange Commission (“SEC”) might better police Wall Street thus represented critical concerns during the campaign as well as the opening months of the new Administration.

One might think that President Obama, as of his inauguration, would have the power to place officials of his own choosing in control of the Federal Reserve Board and the SEC. Anyone thinking so would be wrong. The Federal Reserve Board and the SEC are independent agencies with commissioners appointed by former President George W. Bush who, according to Supreme Court doctrine, cannot be removed except for cause. President Obama may have won the 2008 presidential election, but as to monetary policy and the regulation of Wall Street, former President Bush’s appointees remain in charge.

We think such restrictions on the removal of executive officials are bad policy, undemocratic, and contrary to the Constitution.

* George C. Dix Professor of Constitutional Law, Northwestern University School of Law.

** Professor of Law, University of Pennsylvania Law School. This essay grows out of and includes portions of an amicus brief that we co-authored with Professor Gary Lawson filed in the Supreme Court in support of the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.

Happily, there is a case before the Supreme Court this Term—*Free Enterprise Fund v. Public Company Accounting Oversight Board*¹—that directly challenges the Supreme Court precedents that unconstitutionally constrain President Obama. The Supreme Court articulated its current doctrinal test for congressional limitations on presidential removal power in its path-breaking 1988 opinion in *Morrison v. Olson*.² *Morrison* was itself a sharp departure from more than fifty years of Supreme Court precedents on removal power, including the Court’s 1926 decision in *Myers v. United States*³ and its 1935 decision in *Humphrey’s Executor v. United States*.⁴

In *Morrison*, the Supreme Court held that a statutory limitation on the President’s removal power violates the Constitution if it “impermissibly interfere[s] with” the President’s ability to supervise the execution of federal law.⁵ We consider in separate parts below arguments from the constitutional text, pre-framing history, the settled practice of the last 220 years, and policy concerns—all of which suggest that *Morrison* ought to be overruled. We believe that the Supreme Court should replace the balancing test adopted in *Morrison* with a rule that Presidents have the power to remove at will all persons exercising executive authority on their behalf. While *Free Enterprise Fund v. PCAOB* can be decided in favor of petitioners without overruling *Morrison*, it provides a welcome opportunity to clarify the law by rejecting *Morrison* as a problematic and flawed precedent.

I. TEXTUAL ARGUMENTS

The Framers’ decision to give the President control over all officials wielding federal executive authority is clearly articulated by the Constitution’s text.⁶ Article II, Section 1 provides, “The executive Power shall be vested in a President of the United States.” The leading eighteenth-century dictionary defines “vest” as “[t]o place in

1. 129 S. Ct. 2378 (2009) (granting certiorari).

2. 487 U.S. 654 (1988).

3. 272 U.S. 52 (1926).

4. 295 U.S. 602 (1935).

5. 487 U.S. at 660, 685. In other portions of the opinion, the Court asked whether the statutory restriction “unduly trammel[s] on,” “impermissibly burdens,” “interfere[s] impermissibly with,” or “impermissibly undermine[s]” the president’s authority to oversee the execution of the law. *Id.* at 692, 693, 696.

6. For a more complete explication of the textual argument, see Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 559–99 (1994).

possession of” an individual or entity.⁷ It derives from the Latin word “vestis” for outer garment and is related to the word “vestments” (i.e., the robes of church office).⁸ “Vest” signifies the “clothing” of an official or of an institution with the general trappings and realities of power. The Article II Vesting Clause (“Vesting Clause”) thus naturally reads as an affirmative grant to the President of the power to execute the laws.

Indeed, the Supreme Court has long recognized the Vesting Clause as a grant of the power to oversee the executive branch, which itself includes the removal power. For example, in *Myers v. United States*, the Court construed the Vesting Clause as a “grant of the power to execute the laws,” which carried with it “the reasonable implication, even in the absence of express words,” of the “power of removing those for whom he cannot continue to be responsible.”⁹ Similarly, in *Nixon v. Fitzgerald*, the Court described the Vesting Clause as a “grant of authority establish[ing] the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity,” including “management of the Executive Branch—a task for which ‘imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.’”¹⁰

Construing the Vesting Clause as a grant of authority to execute the laws and remove subordinate executive officers falls far short of recognizing a prerogative power to legislate or to act in the absence of legislation, a concern that confronted the Court in *Youngstown Sheet & Tube Co. v. Sawyer*.¹¹ It need encompass nothing more than the power to oversee the proper execution of the duly enacted laws. Although Justice Jackson suggested in *Youngstown* that the Vesting Clause simply specifies the President’s title rather than serves as a grant of power,¹² such a construction would not accord with the ordinary meaning of the word “vest,” which connotes a conferral of power.

7. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed., London, J.F. & C. Rivington et al. 1785).

8. THE BARNHART DICTIONARY OF ETYMOLOGY 1201 (Robert K. Barnhart ed., 1988).

9. 272 U.S. 52, 117, 163–64 (1926); see also *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (reaffirming the above-quoted language from *Myers*).

10. 457 U.S. 731, 750 (1982) (quoting *Myers*, 272 U.S. at 134–35); see also *Clinton v. Jones*, 520 U.S. 681, 699 n.29 (1997) (reaffirming the above-quoted language from *Fitzgerald*); *id.* at 712 (Breyer, J., concurring) (construing art. II, § 1, as a “constitutional delegation” that “makes a single President responsible for the actions of the Executive Branch”).

11. 343 U.S. 579, 587–88 (1952).

12. *Id.* at 640–41 (Jackson, J., concurring in the judgment).

Furthermore, interpreting the Vesting Clause as a grant of authority to execute the laws is consistent with the usage of the word “vest” in other clauses of the Constitution. For example, the Necessary and Proper Clause provides, “The Congress shall have power . . . To make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all others Powers *vested* by this Constitution in the Government of the United States, or in any Department or officer thereof.”¹³ Furthermore, the Appointments Clause provides that “the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁴ Both provisions use the term “vest” as the empowerment of an institution, just as the Vesting Clause empowers the President to execute the laws.

Lastly, construing the Vesting Clause as a grant of the executive authority is consistent with the traditional construction of the Article III Vesting Clause, which provides, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁵ This clause is generally regarded as a grant of judicial power that limits Congress’s authority to limit the Court’s jurisdiction.¹⁶ Both the Article II and III Vesting Clauses stand in stark contrast to the Article I Vesting Clause, which provides, “All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁷ The inclusion of “herein granted” in the Article I Vesting Clause has long been understood to limit the powers granted to Congress to those enumerated in Article I, in contrast to the broader language—namely, the lack of “herein granted”—employed in Articles II and III.¹⁸

13. U.S. CONST. art. I, § 8, cl. 18 (emphasis added). Although the Necessary and Proper Clause gives Congress considerable flexibility in the means to implement its constitutional powers, that flexibility does not authorize any infringement of the President’s constitutional powers. See *Buckley*, 424 U.S. at 135–36 (drawing an analogy to the removal cases to hold that the Necessary and Proper Clause does not give Congress the authority to interfere with the President’s appointment power).

14. U.S. CONST. art. II, § 2, cl. 2.

15. U.S. CONST. art. III, § 1, cl. 1.

16. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 826, at 589 (Boston, Hilliard, Gray & Co. 1833).

17. U.S. CONST. art. I, § 1 (emphasis added).

18. *Myers v. United States*, 272 U.S. 52, 138 (1926); Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969).

Furthermore, it is imperative to determine what type of power is exercised by officials like the governors of the Federal Reserve Board, commissioners of the SEC, or members of the PCAOB. To start, the Constitution's text clearly divides all government into three categories: legislative, executive, and judicial power. There is no fourth unenumerated administrative power of government in the text of the Constitution. Under the plain text of the Constitution, legislative power can only be exercised by following the rules of Article I, Section 7: bicameralism and presentment. Judicial power can only be exercised by a life-tenured federal judge deciding a case or controversy.

The previously mentioned officials clearly exercise executive power. They do not act through bicameralism and presentment, or by deciding cases or controversies. The inescapable conclusion therefore is that these officials exercise executive power, all of which the Constitution vests in the President. The constitutional text is crystal clear: these officials must be subject to presidential powers of direction and control, or they must be removable by the President at will. Thus, the President must either be able to remove members of the PCAOB, or he must be able to direct and control it.

II. ORIGINAL MEANING AND THE REMOVAL POWER

In addition to the plain meaning of the constitutional text, the original meaning of the Vesting Clause renders the structure of the PCAOB unconstitutional. The Framers of the Constitution understood the grant of the "executive Power" to the President as encompassing the power to remove all non-legislative and non-judicial personnel. Multiple sources confirm this view: (1) the seventeenth- and eighteenth-century English understanding of the King's powers, (2) the seventeenth- and eighteenth-century colonial American understanding of the power of the royal Governors sitting in council, (3) the experience with an ineffectual, plural executive that Americans experienced under the Continental Congress and the Articles of Confederation between 1776 and 1787, and (4) the 1787 Constitutional Convention debates about the executive power.

We begin with seventeenth- and eighteenth-century English law, which served as the backdrop for the Framers' understanding of the scope of the executive power under the Constitution. During the seventeenth century, the King of England possessed the power to remove all judicial and executive officers.¹⁹ King James I famously

19. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE* 370–90, 477–504 (1956).

removed Lord Coke as Chief Justice of the Court of King's Bench, and no one—including Lord Coke—doubted the king's power to make the removal. In 1701, the Act of Settlement specified that judges would thereafter hold their offices during good behavior.²⁰ The Act provided no such tenure for executive officials, and English kings continued to remove executive officers. Indeed, Parliament did not even ask the king to remove a prime minister until Lord North lost the American War of Independence in 1783.²¹

The same broad understanding of executive power was held in colonial Virginia and Massachusetts in the seventeenth and eighteenth centuries. Governors in those colonies, acting together with their councils, exercised the executive power—which was understood to include a power to remove.²² Colonial Virginia and Massachusetts did not have a unitary executive, but they recognized that the governor-in-council could remove anyone who was not an officer of the colonial legislature. Additionally, the king of England could himself have removed any colonial official, including the governor, as indeed the king did with great frequency.

After July 4, 1776, eleven of the thirteen states composed their own new state constitutions for the first time. Immediately after the Declaration of Independence, the antipathy toward strong executive power—engendered by the despotism of King George III and the royal governors—led the earliest post-1776 state constitutions to embrace legislative supremacy as the touchstone of democracy and to ignore the separation of powers. These constitutions further limited executive power by dividing it among more than one person.²³

The thirteen newly independent states soon discovered, however, the dangers of making the executive subordinate to the legislative branch. Thomas Jefferson called vesting all power in the legislature “precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one.”²⁴ In addition to the problems posed by

20. 12 & 13 Will. 3, c. 2, § 3 (Eng.).

21. PETER WHITELEY, LORD NORTH: THE PRIME MINISTER WHO LOST AMERICA 201–04 (1996).

22. Student senior research projects written by Micah Cogen and Kenton Skarin (on file with Professor Calabresi).

23. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 30–33 (2008).

24. Thomas Jefferson, Notes on Virginia (1781–82), *in* 3 THE WRITINGS OF THOMAS JEFFERSON 85, 223 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897); *see also* James Madison, Vices of the Political System in the United States (Apr. 1787), *in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 325–26 (Phila., J.B. Lippincott & Co. 1867).

unadulterated legislative supremacy, contemporary commentators bemoaned the shortcomings associated with divided executive authority. Madison regarded the executive branch established in Virginia to be “the worst part of a bad Constitution.” Not only was it too subordinate to the legislature, its members were also “too numerous and expensive, their organization vague & perplexed” to be effective.²⁵

It was thus no accident that future state constitutions, particularly the New York Constitution of 1777 and the Massachusetts Constitution of 1780, created a state chief executive who was less dependent on the legislature—an arrangement the Framers cited with approval during the Constitutional Convention. Thus, when the Framers gathered on May 25, 1787, to revise the Articles of Confederation into the Constitution, the general antipathy toward executive power that dominated the post-independence period had given way to a consensus in favor of a more independent and energetic executive.²⁶

The experience under the national government prior to the framing reaffirmed the need for strong centralized control over the executive branch. Between 1776 and 1787, the Continental Congress performed both the executive and legislative functions of the new government. In the absence of a separate executive branch, Congress established hundreds of committees to oversee the execution of the law. History soon proved that plural bodies like the Continental Congress are poorly suited to exercising executive power. One leading commentator notes that lodging executive power in a plural body rather than a single executive led to “inefficiency and waste,” thereby leading “this system [to] fail[], and fail[] lamentably.”²⁷

Congress’s inability to provide supplies for the Continental Army aptly demonstrated the problems accompanying divided executive authority. George Washington complained bitterly that executive-by-committee governance reflected a “vital and enherent Principle of delay incompatible with Military service” and asked that Congress instead place the responsibility for supplying the army in a single commissary general.²⁸ Placing executive authority in single

25. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 24, at 179.

26. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789, at 51–53 (1922); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 435–37, 471–74, 521, 551–52 (1969).

27. THACH, *supra* note 26, at 62.

28. Letter from George Washington to the President of Congress (July 10, 1775), in 3 THE WRITINGS OF GEORGE WASHINGTON 320, 324 (John C. Fitzpatrick ed., 1931).

officers would promote “Order, Dispatch and Discipline” as well as “a Measure of Oeconomy,” in contrast to the “Delay, the Waste, and unpunishable Neglect of Duty arising from these Offices being in commission in several Hands.”²⁹

Congress attempted to rectify these shortcomings initially by establishing boards staffed by commissioners who were not members of Congress and later by creating executive departments headed by single officers. However, Congress’s languor in filling these positions dissipated much of the benefits. And notwithstanding these reforms, Washington continued to be frustrated by his inability to receive any acknowledgement when he sought guidance or recognition of his authority.³⁰

One late-nineteenth-century commentator sums up the experience as follows: “It is positively pathetic to follow Congress through its aimless wanderings in search of a system for the satisfactory arrangement of its executive departments.”³¹ A more modern commentator similarly concludes from this experience “that the power to appoint and remove subordinates is essential to control and responsibility on the part of the real head; . . . and that a legislative body should not concern itself with the details of administration.”³² Thus, by the time of the framing, leading thinkers from across the political spectrum saw the need for a more independent and energetic executive.³³

29. Letter from George Washington to the President of Congress (July 20, 1775), in 3 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 28, at 346, 350; *see also* Letter from George Washington to the President of Congress (June 13, 1776), in 5 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 28, at 127, 128; Letter from George Washington to James Duane (Dec. 26, 1780), in 21 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 28, at 13, 14.

30. Letter from George Washington to James Duane (Sept. 30, 1782), in 25 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 28, at 222.

31. Jay Caesar Guggenheimer, *The Development of the Executive Departments, 1775–1789*, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 116, 148 (J. Franklin Jameson ed., Boston, Houghton Mifflin 1889).

32. THACH, *supra* note 26, at 74.

33. *See, e.g.*, John Adams, *Thoughts on Government* (Jan. 1776), in 4 THE WORKS OF JOHN ADAMS 191, 196 (Books for Libraries Press 1969) (1851); Letter from John Adams to John Penn (Jan. 1776), in 4 THE WORKS OF JOHN ADAMS, *supra*, at 203, 206; Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 PAPERS OF ALEXANDER HAMILTON, *supra* note 18, at 400, 404–05; Letter from John Jay to Thomas Jefferson (Dec. 14, 1786), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 223 (photo reprint 1970) (1891); Letter from Thomas Jefferson to James Madison (June 20, 1787), in 4 WRITINGS OF THOMAS JEFFERSON, *supra* note 24, at 390, 424–25; Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), in 4 WRITINGS OF THOMAS JEFFERSON, *supra* note 24, at 423, 424–25; Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 132 (Max Farrand ed., 1911) [hereinafter FARRAND]; Letter from Gouverneur Morris to George Washington (May 21, 1778), in 3 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 260 (Peter Smith 1963) (1926) (Gouverneur Morris).

The issue of presidential control over the executive branch arose repeatedly during the Constitutional Convention. On June 1, 1787, James Wilson moved that the executive consist of a single person based on his belief that “a single magistrate” would “giv[e] most energy dispatch and responsibility to the office.” A plural executive, in contrast, would lead to “nothing but uncontroled, continued & violent animosities” that would “interrupt the public administration” and poison politics at all levels. The Convention approved Wilson’s motion by a vote of seven states to three, rejecting both Edmund Randolph’s counterproposal that executive authority be divided among three officials and Elbridge Gerry and Roger Sherman’s suggestion that the President be supplemented with an executive council.³⁴ Similar proposals by Oliver Ellsworth, Charles Pinckney, and Gouverneur Morris to supplement the President with an executive council were referred to the Committee of Detail.³⁵ As Madison noted, “On the question whether [the executive] should consist of a single person, or a plurality of co-ordinate members, . . . tedious and reiterated discussions took place. The plurality of co-ordinate members had finally but few advocates.”³⁶

There can be no question then but that the original historic meaning of the Constitution points in favor of the conclusion that the President must be able either to direct or to fire his subordinates.

III. ARGUMENTS FROM PRACTICE

Arguments from practice also point toward the conclusion that the President has the constitutional authority to direct or fire all non-legislative and non-judicial personnel, including members of the PCAOB. The Supreme Court has said that sustained historical practices “can be treated as a ‘gloss on “Executive Power” vested in the President by § 1 of art. II.’ ”³⁷ Whatever one’s view on practice in constitutional law, our review of American practice reveals a longstanding tradition recognizing the President’s constitutional power to remove.

The question of whether the President held the removal power arose immediately after George Washington began his first term in

34. FARRAND, *supra* note 33, at 65–66, 96–97.

35. 2 *id.* at 329, 342–44.

36. 3 *id.* at 132.

37. *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)); *accord Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

office as President.³⁸ The initial draft of the bills creating the State Department included language recognizing that the secretary was “to be removable from office by the President of the United States.” Representative Egbert Benson was concerned that this language might imply that the power to remove the secretary was conferred by statute rather than by Article II of the Constitution. To forestall this implication, Benson proposed an amendment to delete this provision.³⁹

Benson’s proposal touched off one of the most famous debates in congressional history, during which congressmen offered a variety of constitutional interpretations of the removal power. Notably, Madison supported Benson, arguing, “The [removal] question now resolves itself into this, Is the power of displacing, an executive power? I conceive that if any power whatsoever in its nature is executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”⁴⁰

In the end, Benson’s amendment carried, thus demonstrating that a majority of both houses of the First Congress thought that Article II placed the removal power in the President.⁴¹ Congress similarly amended the framework statutes creating the War Department⁴² and the Treasury Department, although the latter amendment engendered considerable conflict between the House and passed the Senate only by the tiebreaking vote of Vice President John Adams.⁴³

This series of congressional constructions of the Constitution, which came to be known as the “Decision of 1789,” was regarded by future Presidents and members of Congress, as well as by constitutional law scholars, as settling that the Constitution vested the removal power in the President.⁴⁴ Presidents George Washington,

38. See CALABRESI & YOO, *supra* note 23, at 35–36; JAMES HART, THE AMERICAN PRESIDENCY IN ACTION, 1789, at 155–248 (1948); THACH, *supra* note 26, at 141–65.

39. 1 ANNALS OF CONG. 578–79 (1789).

40. *Id.* at 463.

41. *Id.* at 585.

42. *Id.* at 592.

43. *Id.* at 55, 71–72, 674, 676, 688–89, 778, 782, 786. See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1063–67 (2006).

44. See *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Myers*, 272 U.S. at 174–75; *Parsons v. United States*, 167 U.S. 324, 328–30 (1897); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). Even Hamilton, who indicated some ambivalence about presidential removal in *The Federalist No. 77*, regarded the Decision of 1789 as settling the matter. See 4 PAPERS OF ALEXANDER HAMILTON, *supra* note 18, at 638 n.3 (reprinting the 1804 version of *The Federalist Papers* personally edited by Hamilton, which noted that “it is now settled in practice, that the power of displacing belongs exclusively to the president”). But see Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149 (2010), available at

John Adams, Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams all removed executive officers without incident and without anyone questioning their power to do so. Jefferson in particular removed a number of Federalist executive officers simply because they were Federalists, including all of the district attorneys (as U.S. attorneys were then called).⁴⁵ The presidency of Andrew Jackson saw extensive debate over the President's removal power. Jackson made more removals than his six predecessors because of his policy of encouraging rotation in office.⁴⁶ Jackson also removed Treasury Secretary William Duane as part of his war against the Bank of the United States. Jackson's political foes in the Senate reacted by censuring Jackson for removing Duane. After Jackson took his battle to the ballot box and won the midterm elections, the removal stood, while the censure resolution was formally expunged from the records of the Senate.⁴⁷

By this time, the leading authorities on constitutional law, including those who might have reached a different conclusion if presented with the question as a matter of first impression, universally regarded the removal power question as unequivocally settled.⁴⁸ Furthermore, all presidents from Jackson until the advent of the civil service in the 1880s removed executive officials who did not share their partisan loyalties.⁴⁹

The next serious challenge to the President's removal power did not arise until the 1860s when Andrew Johnson, a southern Democrat added to the Republican ticket to broaden its appeal, became President following Abraham Lincoln's assassination. Despite his lack of political support, Johnson opposed the Republican Congress's civil rights and reconstruction policies with nearly reckless abandon. Exasperated by Johnson's stubbornness, Congress passed

<http://ssrn.com/abstract=1331664> (questioning whether *Federalist No. 77* signals ambivalence about the president's power to remove).

45. CALABRESI & YOO, *supra* note 23, at 42, 61, 68–69, 79–81, 85–86, 92–93. Although some have purported to find practices prior to the presidency of Andrew Jackson to the contrary, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12–78 (1994), the historical record is actually consistent with strong presidential control over the administration.

46. CALABRESI & YOO, *supra* note 23, at 99–101.

47. *Id.* at 108–19.

48. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, lecture 16, at 289–90 (New York, O. Halsted 1826); STORY, *supra* note 16, at §§ 799–800, at 572; 11 REG. DEB. 470 (1835) (statements of Daniel Webster); 10 REG. DEB. 1664, 1687–88 (1834) (same); Letter from James Madison to Edward Coles (Oct. 15, 1834), in 4 LETTERS OF JAMES MADISON, *supra* note 24, at 368. See generally CALABRESI & YOO, *supra* note 23, at 119–22.

49. CALABRESI & YOO, *supra* note 23, at 125–26, 131–32, 135, 137–38, 141–42, 145–46, 150–51, 153–54, 157–58, 171–72, 176–77, 199–201, 212–13.

the Tenure of Office Act, which prevented the President from removing executive officers without senatorial consent.⁵⁰ When Johnson challenged the constitutionality of this law by defying it, he was impeached by the House, only to be acquitted by the Senate in part because senators believed that the Tenure of Office Act was unconstitutional.⁵¹

Johnson's successors—Grant, Hayes, Garfield, Arthur, and Cleveland—all attacked the Tenure of Office Act as unconstitutional and contrary to the Decision of 1789. By the start of Grant's presidency, Congress had watered down the Act, and finally repealed it altogether during Cleveland's first term.⁵² Once again, leading commentators recognized that practice had settled that the Constitution vested unlimited removal power over executive officials in the President.⁵³

Between the 1880s and the Supreme Court's 1926 decision in *Myers*, Congress created several agencies that today are generally thought to be independent, including the Interstate Commerce Commission, the Federal Trade Commission ("FTC"), and the Federal Reserve Board. Strikingly, *Shurtleff v. United States*, which represented the governing precedent at the time, held that a statute limiting removal to inefficiency, neglect, or malfeasance in office only provided the removed official a right to a hearing. Supreme Court jurisprudence did not place any substantive limits on the President's power to remove.⁵⁴ Thus, at the time of their creation, none of these agencies was properly considered independent.⁵⁵

Congress also passed civil service laws during this period to provide for merit appointment of federal administrative officials. Contrary to the popular wisdom, these laws did not include any limits on presidential power to remove.⁵⁶ In 1926, the Supreme Court issued *Myers*, its most important removal decision ever, affirming that the Constitution gives the President the removal power.⁵⁷

50. Ch. 154, §§ 1, 2, 9, 14 Stat. 430, 430, 432 (1867).

51. CALABRESI & YOO, *supra* note 23, at 179–87.

52. *Id.* at 190–92, 203–04, 207–13.

53. *Id.* at 215–16 (citing LEONARD D. WHITE, *THE REPUBLICAN ERA: 1869-1901*, at 106 (1958); Itzhak Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 873 (1969)).

54. 189 U.S. 311, 314–16 (1903).

55. CALABRESI & YOO, *supra* note 23, at 213–14, 233–35, 257–60, 262, 267–69, 299–300, 423–24.

56. *Id.* at 207–08, 220–21, 300, 422–23.

57. *Id.* at 267–69, 299–300, 423–24.

Nine years later, during the tumultuous presidency of Franklin D. Roosevelt, the Supreme Court unexpectedly created an exception to *Myers* in the famous case *Humphrey's Executor v. United States*. *Humphrey's Executor* arose after FDR removed the head of the FTC, William Humphrey, without cause. *Shurtleff* established that FDR had the statutory authority to remove Humphrey, while *Myers* recognized that he had the constitutional authority as well. Nonetheless, consistent with its practice prior to the “switch in time that saved nine,” the Court opposed FDR, holding that removal limits were constitutional for so-called independent agencies that exercised quasi-legislative and quasi-judicial functions.⁵⁸ FDR denounced *Humphrey's Executor* as wrongly decided and unsuccessfully sought legislation to overrule it, as did many of his successors.⁵⁹

Humphrey's Executor was ultimately overruled by *Morrison*, which established the current test for evaluating limits on the removal power. *Morrison* upheld the constitutionality of the Ethics in Government Act, which provided for a set of court-appointed independent counsels—removable only for cause—to investigate and prosecute high-level wrongdoing in the executive branch.⁶⁰ The period between *Morrison* and the expiration of the Act provided the nation with a painful lesson in the abuses that can occur when the President lacks the tools needed to oversee the execution of federal law. President George H.W. Bush had to share the power to oversee the prosecution of the law with Iran Contra special prosecutor Lawrence Walsh, while President Bill Clinton had to share the same power with special prosecutor Kenneth Starr. The widespread dissatisfaction with this situation caused political support for the Act to evaporate. When the statute came up for renewal in 1999, Congress allowed it to sunset out of existence.⁶¹ As we predicted in 1997,⁶² the rise and fall of the Ethics in Government Act, like the rise and fall of the Tenure of Office Act, marked a reaffirmation of the previous 220 years of practice, in which it was nearly universally recognized that the removal power is vested in the President. Indeed, the history shows that the overwhelming majority of our Presidents have defended and asserted unlimited presidential removal powers.

58. 295 U.S. 602, 624, 628–29 (1935).

59. CALABRESI & YOO, *supra* note 23, at 284–88, 300, 425.

60. 487 U.S. 654, 691–96 (1988).

61. CALABRESI & YOO, *supra* note 23, at 390, 400–04.

62. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half Century*, 47 CASE W. RES. L. REV. 1451, 1462 (1997).

IV. POLICY ARGUMENTS

The arguments from text, original history, and practice supporting the President's constitutional power to remove are also supported by policy considerations.⁶³ First, ensuring that the President can exercise control over the entire executive branch promotes energy in the executive, a quality widely regarded as essential to good government.⁶⁴ Energy in the executive helps in military and foreign-affairs matters and it leads to the control and suppression of factions and special interests at home.

Second, giving the President responsibility for all aspects of executing federal law enhances political accountability by making clear precisely who is responsible for the executive branch's performance.⁶⁵ Moreover, dividing executive authority increases information costs, which inevitably decreases the public's ability to hold executive officials accountable. The existence of multiple executive entities also increases bargaining costs and can create debilitating collective action problems.⁶⁶

Finally, the more executive branch officials become independent of the President, the more they fall under the control of congressional committees. Such committees are dominated by chairs who are responsive to the needs of a small congressional district or a single state and thus are more likely to be influenced by special interests than the President, who represents a diffuse national majority and is necessarily harder to capture.⁶⁷

63. See generally Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37–55 (1995); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001).

64. See also *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (noting how placing the all executive authority “in the hands of a single, constitutionally indispensable, individual” “encourage[s] energetic, vigorous, decisive, and speedy execution of the laws”); KENT, *supra* note 48, at 253–54 (concluding that the virtues of “promptitude, decision, and force” are “most likely to exist when the executive authority is limited to a single person, moving by the unity of a single will”); THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

65. *Clinton v. Jones*, 520 U.S. at 712 (Breyer, J., concurring) (noting how “consciously deciding to vest Executive authority in one person rather than several” tends to “focus, rather than to spread, Executive responsibility thereby facilitating accountability”); KENT, *supra* note 48, at 254 (“Unity increases not only the efficacy, but the responsibility of the executive power. Every act can be immediately traced and brought home to the proper agent.”); THE FEDERALIST NO. 70, at 475–79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (observing that dividing executive authority “tends to conceal faults, and destroy responsibility”).

66. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1705–12, 1717–21, 1730–33 (2009).

67. See Calabresi, *supra* note 63, at 51–55.

Thus, permitting Congress to place limits on the President's removal power threatens to upset the Madisonian conception of the separation of powers, which envisions all three branches constantly engaged in a state of dynamic tension.⁶⁸ By reducing the President's role in this balance, limitations on the removal power inevitably tip the balance in Congress's favor. The Supreme Court recognized the dangers of changing the balance of constitutional powers in *Clinton v. City of New York*, in which Congress attempted to delegate to the President the unilateral authority to rewrite appropriations statutes. The Court invalidated the attempt because such a change would have removed one branch from the multibranch interaction envisioned by the Constitution.⁶⁹ Even though Congress had voluntarily surrendered its own power and had acted out of the laudable desire to eliminate pork-barrel politics and reduce government spending, the change still would have taken the legislative branch out of this process of dynamic tension that the Framers regarded as the best safeguard for liberty. The Court declined to address whether the structural change effected by the line-item veto "impermissibly disrupts the balance of powers among the three branches of government."⁷⁰ However, Justice Kennedy's concurrence explicitly warned of the dangers of allowing the branches to readjust the balance of power and reminded us that constitutional values must be more enduring.⁷¹ Continuing to sanction congressionally imposed limits on the President's removal power, as in the case of the PCAOB, would create precisely the same dangers.

V. WHY *MORRISON V. OLSON* SHOULD BE OVERRULED

As the Supreme Court has often noted, the mere fact that a precedent was incorrectly decided is insufficient basis to justify overruling it. *Stare decisis* is generally the preferred course because "in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁷²

The Court has identified considerations that justify overruling a precedent. For example, the Court has long exhibited greater willingness to reconsider its constitutional precedents, because "correction through legislative action is practically impossible."⁷³ Thus, given that *Morrison* addressed a constitutional issue, according

68. THE FEDERALIST NO. 70 (James Madison).

69. 524 U.S. 417, 439–40 (1988).

70. *Id.* at 447–48 (internal quotation marks omitted).

71. *Id.* at 449–52 (Kennedy, J., concurring).

72. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

73. *Id.* at 407.

to Supreme Court jurisprudence, *stare decisis* applies with lesser force.

In addition, the Court has more readily overruled precedents that have proven unworkable, such as when a balancing test is so amorphous as to defy predictable application.⁷⁴ The test for limits on presidential removal power set forth in *Morrison* represents precisely the type of standardless balancing test incapable of principled implementation that this Court has overturned in the past. As Justice Scalia's dissent in *Morrison* made clear, a bright-line rule giving the President the removal power is necessary to fend off congressional incursions.

Indeed, *ad hoc* balancing is particularly dangerous in the context of the Constitution's structural protections, because such an approach "pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case."⁷⁵ As Justice Kennedy has noted, "The Constitution's structure requires a stability which transcends the convenience of the moment."⁷⁶ It is for this reason that the Supreme Court has consistently rejected calls to allow political exigencies to justify overriding the structural protections embodied in the Constitution.⁷⁷

In addition, the Court has long embraced Justice Brandeis's recognition that precedents should also be overruled when the underlying facts have changed or when the previous decision reflects "views as to economic or social policy which have since been abandoned."⁷⁸ The nation's history following *Morrison* clearly demonstrates just how much our fundamental beliefs and

74. See *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

75. *CFTC v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting).

76. *Clinton v. City of New York*, 524 U.S. at 449 (Kennedy, J., concurring).

77. See *id.* at 447; *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276–77 (1991); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *INS v. Chadha*, 462 U.S. 919, 944–46 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982); *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring); see also *Printz v. United States*, 521 U.S. 898, 932–33 (1997) (drawing a parallel conclusion in the context of federalism); *New York v. United States*, 505 U.S. 144, 187 (1992) (same). Although some have suggested that balancing tests are only problematic in separation of powers disputes involving explicit constitutional provisions, see *Pub. Citizen*, 491 U.S. at 486 (Kennedy, J., concurring), the fact that the removal power is a nontextual, implicit executive power has not stopped this Court from protecting it against legislative incursions. *Bowsher*, 478 U.S. at 723–32. The fact that the Court has cited precedents from the context of the nontextual removal power as a basis for invalidating legislative incursion into the president's textual appointment power, see *Buckley v. Valeo*, 424 U.S. 1, 135–36 (1976), counsels against such a distinction.

78. *Burnet*, 285 U.S. at 412 (Brandeis, J., concurring).

commitments about the optimal governmental structure have changed. The manner in which independent counsels were able to impair the presidencies of George H.W. Bush and Bill Clinton created such a backlash that Congress allowed the Ethics in Government Act to expire without reauthorization in 1999.

Thus, just as *Myers* recognized in 1926 that the previously repealed Tenure of Office Act was unconstitutional, so should the Supreme Court recognize in *Free Enterprise Fund v. PCAOB* that *Morrison's* decision to uphold the constitutionality of the Ethics in Government Act is inconsistent with the text of the Constitution, the original meaning of the Constitution's Framers, the practice of the last 220 years, and good public policy. *Morrison* should now be overruled.

VI. CONCLUSION

The debate over the scope of presidential removal power is one of the oldest and most venerable debates in American constitutional history. It began with the celebrated Decision of 1789, and its echoes were heard again during Andrew Jackson's war against the Bank of the United States, during Andrew Johnson's impeachment trial, during the debate over Franklin D. Roosevelt's reorganization bill in response to the Report of the Brownlow Commission, and, most recently, when the special prosecutor law was allowed by both Democrats and Republicans to lapse in 1999.⁷⁹ *Free Enterprise Fund v. PCAOB* gives the Supreme Court a chance to rectify its previously mistaken removal doctrine by overruling *Morrison v. Olson*—an opportunity that we think a majority of the Court ought to take.

Simply put, the balancing test announced in *Morrison* for determining the constitutionality of a statutory restriction on the President's removal power is inconsistent with the Constitution's text and enactment history, the past 220 years of our nation's practice, and policy considerations. The unworkability of balancing tests and changes in our nation's commitments (reflected in Congress's decision to allow the Ethics in Government Act to lapse after a decade of unsatisfactory experience) support the conclusion that *Morrison* should be overruled.

79. CALABRESI & YOO, *supra* note 23, at 105–22, 179–87, 291–304, 400–04.