Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867

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Abstract

The disputed scope of the President's authority to remove subordinates in the executive branch, and to direct them in the performance of their functions, is one of the central issues of federal constitutional law. On the one hand, some argue that Article II gives the President such authority. By contrast, others claim that the Constitution allows Congress to regulate the tenure of office of executive branch officers by limiting the President's removal power.

In the context of this debate, some have argued that financial institutions—the components of the "treasury"—were historically insulated from presidential control. They rely on early Congresses' creation of several commissions with the Chief Justice as a member, establishment of the First and Second Banks of the United States, and use of distinct language to establish the Department of the Treasury and some of its officers. This Article shows that these claims are incorrect. Drawing on congressional and executive sources, case law, and contemporaneous treatises, this Article demonstrates that the prevailing view in the years between the Constitution's adoption and the impeachment trial of Andrew Johnson was that financial government institutions were no different from other parts of the federal government for purposes of presidential control. The President had the constitutional authority to remove officials within the Department of the Treasury. The institutions over which presidential control was conspicuously lacking—the First and Second Banks of the United States—were generally understood to be private, rather than arms of the government, and to perform non-sovereign functions. But to the extent the Bank was understood to perform sovereign functions, its opponents argued that it did so impermissibly, using a variation of the modern argument that Congress may not delegate such functions to private entities. This Article's exploration of these issues both bears on contemporary debates

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about the scope of the President's removal power and shows how early expositors of the Constitution understood the allocation of federal government control over national financial policy.

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INTRODUCTION

In the waning days of the Convention that drafted the Constitution of the United States, John Rutledge, a delegate from South Carolina, Chair of the Committee of Detail, and a future Chief Justice of the United States,[1] moved to "strike out" a provision in the then-existing draft.[2] The draft Constitution the Framers debated on that day—September 14, 1787—authorized Congress to appoint a "Treasurer" by "joint ballot."[3] Rutledge, along with delegates such as Gouverneur Morris and Charles Cotesworth Pinckney, argued that authorizing the President, rather than Congress, to appoint the "Treasurer" in the same manner the President appoints other "Officers of the United States" would ensure that the Treasurer was "more narrowly watched" and would avoid "bad appointments."[4] Other delegates, however, disagreed. They claimed that presidential control of the Treasurer would "have a mischievous tendency" and would "multiply objections" to the proposed Constitution—in part because Congress "appropriate[s] money, and it is best for them to appoint the officer who is to keep it."[5]

By an eight to three vote, the states at the Convention voted for Rutledge's motion and to strike the provision creating a congressionally appointed Treasurer.[6] That result reversed a six to four vote, almost a month earlier, to retain the congressionally appointed Treasurer.[7] Three days later, on September 17, 1787, the Convention closed.[8] The delegates who had signed the draft document then submitted the proposed Constitution to the various states for ratification.[9]

So it was that the federal Constitution of 1787 did not create a "Treasurer" whose appointment departs from the general form provided in the Appointments Clause of the Constitution. Instead, like other "Officers of the United States," the "Treasurer" would have to be appointed by the President with the advice and consent of the Senate (if a principal officer) or, perhaps, appointed by the "Head of a

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1 *See* JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 232–36, 553, 748 (1971).

2 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614 (Max Farrand ed., 1937) [hereinafter 2 Farrand].

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 315.

8 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 4 (2005).

9 *See id.* at 5–6.

Department," a "Court of Law," or the President alone (if an "inferior" officer).[10] Equally important, the Constitution conferred on the President the "executive Power" and authorized him to "take Care that the Laws be faithfully executed."[11] To the extent that these provisions also conferred on the President the authority to *remove* "Officers" that he had appointed—a question that was itself the subject of debate shortly after the Constitution's adoption[12]—Rutledge's successful motion necessarily gave the President the power to fire the Treasurer.[13] The Treasurer's "tenure of office," in other words, would be at the President's pleasure, thereby giving the President, acting through a Treasurer, a significant measure of control over the nation's finances.

From a big-picture perspective, Rutledge's motion raised the following question: Who should control and govern a nation's financial and banking system? This question lies at the heart of a significant portion of the literature on monetary policy.[14] Because of the centrality of the First and Second Banks of the United States to the development of public administration, it also underpins a significant historical literature.[15] Finally, because of the numerous legal questions that

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10 U.S. CONST. art. II, § 2, cl. 2; Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (holding that administrative law judges within the Securities and Exchange Commission are officers who must be appointed under the Appointments Clause). For recent treatments of the Clause, see Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501 (2018); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 517 (2018); E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166 (2018).

11 U.S. CONST. art. II, §§ 1, 3.

12 *See infra* Section II.A.

13 *Cf.* Myers v. United States, 272 U.S. 52, 109–10 (1926) ("The subject [of the President's removal authority] was not discussed in the Constitutional Convention."); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839) ("In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.").

14 *See, e.g.*, CURRENT FEDERAL RESERVE POLICY UNDER THE LENS OF ECONOMIC HISTORY 2–3 (Owen F. Humpage ed., 2015); JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970, at 6–7 (1973); PAUL STUDENSKI & HERMAN E. KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 16–17 (1952); Mary M. Schweitzer, *State-Issued Currency and the Ratification of the U.S. Constitution*, 49 J. ECON. HIST. 311, 311 (1989); Richard Sylla, *Monetary Innovation in America*, 42 J. ECON. HIST. 21, 21, 25–26 (1982); Roger W. Weiss, *The Issue of Paper Money in the American Colonies, 1720–1774*, 30 J. ECON. HIST. 770, 770–72 (1970).

15 *See, e.g.*, 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES, at v (Herman E. Krooss ed., 1969); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR, at xi, 6–7 (1957); 1 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES, at xxi (2002); JERRY L. MASHAW, CREATING

arose over the First and Second Banks of the United States, this question is also central to a significant constitutional law literature.[16]

Notwithstanding the substantial literature devoted to understanding banking and financial history from an economic, historical, or legal perspective, it remains a question of debate (and one that few have sought to understand) how the Treasury Department and the Banks of the United States fit within the Constitution's structural provisions—such as the Appointments Clause and the President's removal authority.[17] That question is of more than mere theoretical interest. Recently, in *PHH Corp. v. Consumer Financial Protection Bureau*,[18] the D.C. Circuit upheld a restriction on the President's authority to remove the Director of the Consumer Financial Protection Bureau, in part because the Treasury Department "has long been thought to be well served by a degree of independence," due to the "distinctive danger of political interference with financial affairs."[19] But leaving to one side any practical considerations, the developments discussed in this Article were once a critical component of the legal framework against which economic policy was enacted, even if they may now appear to be antiquated and at the periphery of constitutional debate. The nature of the United States' financial system was an obvious focus of the drafters and ratifiers of the federal Constitution, due in no small part

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THE ADMINISTRATIVE CONSTITUTION 156 (2012); MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 1 (1970).

16 *See, e.g.*, MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND*: SECURING A NATION 9 (2006); Kenneth W. Dam, The Legal Tender Cases, 1981 SUP. CT. REV. 367, 368–69 (1982); Oliver Wendell Holmes, Jr., *Review of* the Legal Tender Cases of 1871, 7 AM. L. REV. 146, 146 (1872); Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting* The Legal Tender Cases, 95 GEO. L.J. 119, 122–23 (2006); Ajit V. Pai, *Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535, 535–36 (1998); James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 73 (1887).

17 Indeed, to my knowledge, the possibility of a congressionally appointed Treasurer—floated at the Constitutional Convention—has itself gone relatively unnoticed, often relegated to footnotes and passing comments in the legal literature. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 649–50 (1994); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 223 (1989) (noting in passing that the proposal to allow the appointment of the Treasurer by joint ballot of both houses was struck "in the interest of conformity"); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1724–25 n.294 (2002); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 26 n.101 (2002); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1174–75; Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107, 125 n.44 (2009).

18 881 F.3d 75 (D.C. Cir. 2018).

19 *Id.* at 91.

to the American colonies' experience with currencies in the first half of the Eighteenth Century and during the Revolutionary War.[20] It is therefore worth studying for that reason alone.

This Article examines the legal treatment of the Treasury Department and banking corporations from the period of the early Republic to immediately after the Civil War—specifically, to understand the relationship between "tenure of office" and the "treasury." By the "tenure of office," this Article means the conditions under which an officer could be removed from an office.[21] By the "treasury," this Article means in particular two aspects of the federal government's financial practices. First, this Article considers the treatment and control of the government's accounting officers, who disbursed appropriations to private persons, sometimes as a result of claims that the government owed money. Several officers of this kind (such as the Comptroller of the Treasury or the aforementioned "Treasurer" proposed during the Constitutional Convention) formed the basis for important precedents about the President's control over the executive branch. Indeed, the debate surrounding the creation of the Court of Claims—where Congress considered, but rejected, a commission of claims subject to presidential removal—provides further evidence for the view that the background understanding was that the President had the authority to remove officers within the executive branch. Second, this Article addresses banking corporations and the creation of a Comptroller of the Currency to oversee banks during the Civil War. In doing so, the Article focuses not on Congress's authority to incorporate a bank, nor on Congress's authority to issue paper money as legal tender—two well-trodden scholarly paths—but rather the banking corporations' conformity with Article II of the Constitution. Such corporations performed important public functions but were historically viewed as private entities. Their treatment thus provides evidence for whether, and how, Congress may delegate public functions to private entities

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20 *See* STUDENSKI & KROOSS, *supra* note 14, at 16–17; Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1039–40 (2008) (stating that "the currencies in all four New England colonies performed as poorly as a pessimist might expect" while the other colonies had a "more mixed record"); *id.* at 1049–50 (detailing depreciation of continental currency beginning in 1777); Elmus Wicker, *Colonial Monetary Standards Contrasted: Evidence from the Seven Years' War*, 45 J. ECON. HIST. 869, 869–71 (1985).

21 *See, e.g.*, Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1784 (2006).

without violating the Constitution's structural requirements for appointment and political control over "officers of the United States."[22]

In brief, the Article makes three core contributions. First, it details neglected debates addressing presidential control of the bureaucracy that arose in the context of officials within the Department of the Treasury, such as the Comptroller of the Treasury and the Comptroller of the Currency. Members of Congress, on several occasions, sought to insulate such officers from presidential control, but after debating the constitutionality of such insulation, elected not to do so. Against the backdrop of the principle that congressional practice can form the basis for constitutional doctrine, these debates are highly revealing on the question of presidential control over the executive branch. Second, the Article addresses how the First and Second Banks of the United States fit within the Constitution's separation of powers. The Directors of these institutions largely were not subject to the appointment process specified in the Constitution, thus raising the question whether the staffing of the Banks violated the Appointments Clause of the Constitution. This Article argues that they did not, because the Banks were viewed as private entities. In doing so, this Article addresses when Congress could delegate functions outside of the executive branch and to private entities.

Finally, this Article will link the debates over control of the nation's finances to one of the most important episodes in the development of American governance: the impeachment trial and near-conviction of President Andrew Johnson during the Reconstruction period that immediately followed the Civil War. One of the reasons for Johnson's impeachment and near-conviction was his alleged violation of the "Tenure of Office" Act,[23] a statute that Congress enacted in 1867 to limit Johnson's control of the executive branch by requiring the Senate's advice and consent before the President could remove certain executive branch officials.[24] During the debates over the Tenure of Office Act's enactment and Johnson's impeachment trial, Representatives and Senators naturally focused on precedents that would justify, or contradict, a limitation on the President's authority to remove subordinates he had appointed. The primary precedents on

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22 This Article will not address other aspects of the nation's financial system—including, for example, presidential control over federal officers engaged in the nation's revenue-raising functions, such as taxation and customs. For a related treatment of that topic, see Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691 (2018).

23 Ch. 154, 14 Stat. 430 (1867) (repealed 1887).

24 *Id.* § 1.

which they relied are the limits and attempted limits placed on the removal of financial officers discussed in this Article. In this manner, this Article's analysis lays the groundwork for understanding the Tenure of Office Act debates, which form the inflection point from the pre-Civil War practice of unconstrained presidential removal to the modern practice of placing good cause limits on such removal authority.

Lest my ultimate meaning be obscure, let me make clear the normative takeaway from this Article's historical analysis. If original understanding of the Constitution and historical precedent is to play a role in the present-day understanding of constitutional provisions—as I believe it should and must—this Article shows the Constitution included no "treasury"-related exception to the principle that the President had the authority to remove officers within the executive branch. Treasury officers, like other officers, were subject to presidential removal. The debates over the Comptroller of the Treasury, President Andrew Jackson's actions during the "Bank Wars," and the creation of the Comptroller of the Currency demonstrate that the prevailing view made no distinction between treasury and other officers for purposes of presidential removal. In addition, the reason why Directors of the Banks of the United States elected by stockholders were not subject to presidential removal is because they were understood to be private individuals who held private offices. Although serious debates about these issues arose repeatedly during the pre-Civil War period, the view that the President controlled the Department of the Treasury prevailed until Congress enacted the Tenure of Office Act—an enactment that effectively ensured that the President did *not* control the executive branch at all without the Senate's consent.

The Article proceeds in three parts. In Part I, this Article lays out the provisions of the Constitution that bear on financial policy and the debates that occurred at the Convention surrounding those provisions. Part I also discusses the legal framework that emerges from these provisions and the existing case law and academic literature. In Part II, this Article walks through the significant debates that occurred during the nation's early years on presidential control of monetary and financial policy. Specifically, this Article focuses on the establishment of the Department of the Treasury, various commissions, and the First Bank of the United States during the First and Second Congresses; the controversy surrounding Andrew Jackson's removal of his Treasury Secretary, William Duane, in 1833; and the Civil War Congress's legislation on presidential removal authority in the National Bank Acts of

1863 and 1864. Part II also shows how the precedents created in the context of the Treasury Department became the backdrop for the enactment of the Tenure of Office Act and the impeachment of President Andrew Johnson in the Reconstruction Period. Finally, Part III returns to the present day to assess how the lessons of history bear on current doctrine relating to the scope of the President's authority to remove executive branch officers and the limits on Congress's authority to delegate functions to private entities.

I. Of Treasurers, Banks, and Coin

A. The Proceedings at the Constitutional Convention

1. The "Treasurer"

On August 6, 1787, the Committee of Detail released to the delegates the first workable draft of the Constitution at the Convention.[25] Among other things, the draft authorized Congress to "appoint a Treasurer by ballot."[26] That provision would have come as no surprise to the delegates at the Convention, because many state constitutions of the era contained comparable provisions.[27]

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25 Richard Beeman, Plain, Honest Men: The Making of the American Constitution 276 (2009).

26 2 Farrand, *supra* note 2, at 177, 182, 314–15. As best I can tell, the proposal to have a separately appointed Treasurer stems from a draft Constitution prepared by Charles Pinckney—the so-called "Pinckney Plan" at the Constitutional Convention. A copy of the Pinckney Plan, obtained from Charles Pinckney by John Quincy Adams many years later, contains such a provision. *See* 3 The Records of the Federal Convention of 1787, at 595, 598 (Max Farrand ed., 1937). *But see id.* at 504, 508 & n.1 (Madison's note suggesting that this copy of the Pinckney Plan was not the one submitted at the Convention based on discrepancies between Pinckney's ideas and the text of the copy). So, too, does a copy of a plan drafted by Alexander Hamilton, but that plan (according to Farrand) "was not submitted to the Convention and has no further value than attaches to the personal opinions of Hamilton." *Id.* at 619, 628. Along with the "Virginia Plan," the "Pinckney Plan" was considered by the Committee of Detail as a template for the proposed Constitution. *See* William Ewald, *The Committee of Detail*, 28 Const. Comment. 197, 219–21 (2012). A draft of the Committee of Detail's handiwork in Edmund Randolph's handwriting, with edits by John Rutledge, was found in the George Mason Papers (the "Mason Draft"). 2 Farrand, *supra* note 2, at 137 & n.6. The Mason Draft suggests that Rutledge added the provision "[t]o appoint a Treasurer by (joint) ballot" to Randolph's version, *see id.* at 137 n.6, 144, though Rutledge later argued in favor of its removal, *see supra* notes 2–6 and accompanying text. A separate Committee of Detail draft found among the papers of James Wilson appears to have contained the "Treasurer" provision before Rutledge edited it. *See* 2 Farrand, *supra* note 2, at 163 & n.17, 168. It may well be that Rutledge, as the Chairman of the Committee, was seeking to harmonize the various views of the Committee's members before presenting the text to the entire Convention.

27 Professor Shane has collected these state constitutional provisions in an article, though he does not address their relationship to the debate at the Constitutional Convention. *See* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const. L. 323, 338–39 (2016). Highlighting the connection between the power to appoint and the power to remove,

During the Convention's closing weeks, the Constitution's drafters debated this provision on two occasions, with some delegates to the Convention seeking to eliminate it entirely.[28] The objectors to the provision failed the first time but succeeded the second—with several states changing their positions over the course of the Convention's final month.[29]

The first debate occurred on Friday, August 17, 1787.[30] After initially voting to amend the original provision to insert the word "joint" before "ballot,"[31] the delegates turned to George Read's proposal to "to strike out the [entire] clause, leaving the appointment of the Treasurer as of other officers to the Executive."[32] Read's motion was seconded by John Mercer, a delegate from Maryland who ultimately left the Convention and voted against the Constitution altogether.[33]

According to James Madison's notes, Read contended that the "[l]egislature was an improper body for appointments," with the "proof" being the troublesome appointments made by "State legislatures."[34] "The Executive," Read argued, "being responsible would make a good choice."[35] In opposition to Read's motion, George Mason argued that, because the money belonged "to the people," "the legislature representing the people ought to appoint the keepers of it."[36]

The delegates then voted on Read's motion to strike the "Treasurer" provision. The vote was six to four against striking the provision: New Hampshire, Massachusetts, Connecticut, Virginia, North Carolina, and Georgia voted to retain the provision, whereas Penn-

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Shane conjectures that "where state constitutions vested appointment authority in state legislators, they and only they would likewise have the power of removal." *Id.* at 343 n.66.

28 2 Farrand, *supra* note 2, at 614.

29 *See id.* at 315, 614.

30 *See id.* at 314.

31 Nathaniel Gorham of Massachusetts proposed the amendment, arguing that a joint ballot was preferable to "requir[ing] the separate concurrence of the Senate." *Id. But see id.* (noting that Roger Sherman of Connecticut "opposed [the proposal] as favoring the larger States"). The amendment carried by a vote of seven to three, with New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia in favor, and Connecticut, New Jersey, and Maryland opposed. *Id.* at 315, 320 (notes of James McHenry).

32 *Id.* at 314.

33 *See id.* at 315; BEEMAN, *supra* note 25, at 278; GOEBEL, *supra* note 1, at 366.

34 2 Farrand, *supra* note 2, at 314–15.

35 *Id.* at 315.

36 *Id.* Mason's views on the appointment of a Treasurer was, in this respect, consistent with his views on the appointment of Article III judges. *See id.* at 41–42 (statement of Mr. Mason) (arguing that, because the judges might "form a tribunal" for "trying impeachments," "they surely ought not to be appointed by the Executive").

sylvania, Delaware, Maryland, and South Carolina voted to eliminate it.[37]

On September 14, 1787, however, the objectors to an independently appointed Treasurer rallied. On that date, John Rutledge moved to strike the provision and to "let the Treasurer be appointed in the same manner with other officers."[38] His motion received support from Gouverneur Morris, who argued that a presidentially appointed Treasurer would "be more narrowly watched, and more readily impeached."[39] It also received support from Charles Cotesworth Pinckney, who—pointing to his home state's mechanism of appointing a Treasurer by joint ballot—argued that, under such a system, "bad appointments are made, and the Legislature will not listen to the faults of their own officer."[40]

Rutledge's motion was met with objections from Nathaniel Gorham and Rufus King, two delegates from Massachusetts who both argued that the motion, "if agreed" to, "would have a mischievous tendency."[41] They contended that "[t]he people are accustomed & attached to that mode of appointing Treasurers, and the innovation"—namely, the decision *not* to have a separate, congressionally appointed Treasurer—"will multiply objections to the System" of the proposed Constitution.[42] In addition, Roger Sherman of Connecticut argued

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37 *Id.* at 315. The later drafts from the Committee on Style include the provision authorizing Congress to appoint a Treasurer by joint ballot. *See id.* at 565, 570, 590, 594.

38 *Id.* at 614.

39 2 Farrand, *supra* note 2, at 614.

40 *Id.* Charles Cotesworth Pinckney was a cousin of Charles Pinckney, who had produced the "Pinckney Plan" from which the independently appointed Treasurer provision appears to have originated. *See supra* note 26.

41 2 Farrand, *supra* note 2, at 614.

42 *Id.* Indeed, the possibility of congressionally appointed treasury officers was raised during the debates surrounding the ratification of the Constitution. During those debates a pseudonymous Anti-Federalist author who argued against the Constitution's adoption in a series of essays using the moniker "The Federal Farmer" suggested "giving the appointment of a few great officers to the legislature"—among them, "the commissioners of the treasury . . . the comptroller, treasurer, master coiner, and some of the principal officers in the money department." *The Federal Farmer XIV* (Jan. 17, 1788), *in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 119, 120 (Michael P. Zuckert & Derek A. Webb, eds., 2009). The Federal Farmer noted that "[o]fficers of the above description are appointed by the legislatures in some of the states, and in some not." *Id.* at 121. Later, in the New York ratifying convention, Melancton Smith (a prominent Anti-Federalist believed by some to be the Federal Farmer, *see id.* at xvii) listed in his notes a proposal for Congress to "appoint the Commissioners of the Treasury, and the Treasurer of the United States." Proposed Amendments to Article 2 of the Constitution, *in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra*, at 349.

that, because "the two Houses appropriate money, it is best for them to appoint the officer who is to keep it."[43]

This time, the vote was eight to three, with New Hampshire, Connecticut, New Jersey, Delaware, Maryland, North Carolina, South Carolina, and Georgia voting to strike the provision, and Massachusetts, Pennsylvania, Virginia voting to retain it.[44] From the prior vote, the States of New Hampshire, Connecticut, North Carolina, and Georgia had changed their votes to eliminate the provision, whereas the State of Pennsylvania had changed its vote in the other direction.[45]

The participants in the debate did not discuss precisely what duties the congressionally appointed "Treasurer" would perform. But it is likely that they would have understood the office of the "Treasurer" in the same sense in which the term had previously been used at the federal level. In 1778, in the midst of the Revolutionary War, the Continental Congress organized the fledgling nation's finances through a treasury composed of the offices of the "comptroller," "auditor," "treasurer," and two "chambers of accounts," each to be appointed by Congress and some with the authority to appoint one or more clerks.[46] The series of offices reflected an obvious effort by Congress to build a system of checks and balances into the financing of the government.[47] As established in 1778, the "treasurer" was tasked with "receiv[ing] and keep[ing] the moneys of the United States" and "issu[ing] them on bills drawn by the comptroller," as well as an array of related bookkeeping functions.[48] The Continental Congress significantly over-

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43 2 Farrand, *supra* note 2, at 614.

44 *Id.*

45 *See supra* note 37 and accompanying text.

46 12 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 956 (Worthington Chauncey Ford ed., 1908).

47 For more on this scheme, see *infra* Section II.A.2 (discussing the duties of the Comptroller of the Treasury).

48 12 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 46, at 958. In the 1778 schema, the treasurer's other tasks illustrate the complex system of checks that the Congress sought to impose. The treasurer was responsible for the following:

> filing duplicates [ ] with the auditor, day by day, as he shall make payment: that, on receipt of monies, he shall give a receipt therefor, and transmit the same to the comptroller; and that he shall draw out and settle his accounts quarterly, giving the same in to the auditor for examination, by one of the chambers of accounts, to be from thence transmitted, through the auditor, to the comptroller, who shall compare the same with the treasury books, ascertain the balance, and return a copy of the same to Congress.

Id.

hauled the nation's financial system in 1781, but kept the treasurer's core functions the same.[49]

As a result, the debates at the Convention displayed that the Constitution's drafters expressly considered, but rejected, the possibility of a separately appointed "Treasurer"—one who would likely have performed the tasks that the Continental Congress had required of the "treasurer" before the Constitution's adoption.[50] At the same time, a significant minority of the Constitution's drafters believed that the "Treasurer" ought to be treated differently from other executive officers, principally because the "people" should control the disbursement of money through their elected representatives in Congress.[51] Two years later, in 1789, the "Treasurer" would become a part of Congress's organizing statute for the Department of the Treasury—a statute that would be the focus of a later debate about the independence of the treasury, albeit this time about the "comptroller."[52]

2. The "Bank"

Financial policy also arose at the Convention in the context of a debate around Congress's authority to charter "corporations" gener-

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49 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 948–49 (Gaillard Hunt, ed., 1912) (providing that the treasurer would "receive and keep all moneys of the United States, and issue them on warrants drawn by the President of Congress, or the superintendant of finance").

50 *Id.*

51 *See, e.g.*, BEEMAN, *supra* note 25, at 353 (observing that the appointment of a Treasurer was in the early draft "[o]ne of the important powers to be given to Congress," because "that body possessed important powers over the purse," and contending that "during Alexander Hamilton's term of service as President Washington's secretary of the treasury, Americans of all political persuasions would come to appreciate the importance of the treasury secretary as an agency of executive power"). Beeman appears to equate the proposed office of the "treasurer" with the later office of the "Secretary of the Treasury," though it seems to be more accurate to view the "treasurer" as comparable to the later office of the "treasurer," which was established as a component of the Department of the Treasury. *Id.* Indeed, the statute of 1789 establishing the Department of the Treasury used almost identical language to describe the Treasurer's functions as Congress had in 1778. *Compare* An Act to Establish the Treasury Department, ch. 12, § 4, 1 Stat. 65, 66 (amended 1809) (detailing that the Treasurer's duties included "receiv[ing] and keep[ing] the monies of the United States" and "disburs[ing] the same upon warrants drawn by the Secretary of the Treasury, countersigned by the Comptroller"), *with* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 49, at 948–49 (providing that the treasurer would "receive and keep all moneys of the United States, and issue them on warrants drawn by the President of Congress, or the superintendant of finance"). Even the bookkeeping tasks were similar. *See* An Act to Establish the Treasury Department, ch. 12, § 4, 1 Stat. at 66 (requiring that the Treasurer "take receipts for all monies paid by him" and "render his accounts to the Comptroller quarterly"); *see also infra* Sections II.A.1–2 (detailing adoption of statute of 1789 establishing the Department of the Treasury).

52 *See* An Act to Establish the Treasury Department § 4, 1 Stat. at 66.

ally. On the very same day that the delegates eliminated the separately appointed Treasurer—September 14, 1787—James Madison proposed that Congress should have the power "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent."[53] The immediate context of Madison's proposal was a narrower proposal by Benjamin Franklin "to provide for cutting canals where deemed necessary."[54] In light of Franklin's proposal, Madison characterized his purpose as being "to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for."[55]

Rufus King of Massachusetts objected to the proposal. He claimed that the "States will be prejudiced and divided into parties by it," because in Philadelphia and New York, "[i]t will be referred to the establishment of a Bank, which has been a subject of contention in those Cities."[56] "In other places," King argued, "it will be referred to mercantile monopolies."[57] James Wilson, one of the more ardent nationalists at the Convention, argued in favor of the "importance of facilitating by canals, the communication with the Western Settlements."[58] As to banks, Wilson did not believe that the power would "excite the prejudices & parties apprehended."[59] The delegates then voted on a motion "specifying & limited to the case of canals," which they rejected eight to three with the States of Pennsylvania, Virginia, and Georgia voting in favor of the power.[60] In this manner, the delegates did not provide Congress with an express power to charter corporations.

3. Coining Money

Finally, monetary policy arose in the context of the Constitution's provisions relating to "coining" money. The Constitution authorized Congress to "have Power . . . [t]o coin Money, regulate the Value

53 2 Farrand, *supra* note 2, at 615 (internal quotation marks omitted).

54 *Id.*

55 *Id.*

56 *Id.* at 615–16.

57 *Id.* at 616.

58 *Id.*

59 *Id.* It is notable that Wilson believed that "mercantile monopolies" would "already [be] included in [Congress's] power to regulate trade." *Id.* George Mason also spoke in favor of the provision, albeit "for limiting the power to the single case of Canals" to avoid "monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson." *Id.*

60 *Id.*

thereof, and of foreign Coin."[61] It also contained a provision prohibiting states from "coin[ing] Money; emit[ting] Bills of Credit; [or] mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts."[62] Comments during the Constitutional Convention by James Wilson and James Madison suggest that they believed that states could not competently manage the coining power.[63] Nor, according to the delegates, could states competently print paper money.[64] A debate over the federal government's printing authority led the delegates to strike a provision authorizing the federal government to "emit bills on the credit of the [United] States."[65] But it was unclear whether delegates believed that striking the provision would prohibit Congress from issuing paper money or whether Congress would have the authority to issue paper money under some other provision.[66]

4. Some Lingering Questions

In light of these debates, the document produced by the Constitutional Convention gave rise to a series of connected questions pertaining to the federal government's financial policy. First, the Constitution's provisions raised a question about the nature and scope of the federal government's authority to legislate on fiscal matters. The Constitution conferred on Congress "legislative Powers" that were "herein granted"—namely, specified in the document—thereby suggesting that the authority to legislate on other matters had been withheld.[67] The most "sweeping" legislative power granted was Congress's authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[68] The canonical case interpreting this provision is *McCulloch v. Maryland*,[69] which held that Congress had the authority to incorporate the Second Bank of the United States incidental to its enumerated powers.[70] One

61 U.S. CONST. art. I, § 8, cl. 5.

62 *Id.* art. I, § 10, cl. 1.

63 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 331, 413 (Max Farrand ed., 1937) (statement of Mr. Wilson); *id.* at 446–47 (statement of Mr. Madison).

64 2 Farrand, *supra* note 2, at 439.

65 *Id.* at 308–10.

66 *See, e.g.*, Natelson, *supra* note 20, at 1053–59.

67 U.S. CONST. art. I, § 1. Compare the restriction "herein granted" with the unfettered grant of executive power to the President: "The executive Power shall be vested in a President of the United States of America." *Id.* art. II, § 1.

68 *Id.* art. I, § 8, cl. 18.

69 17 U.S. (4 Wheat.) 316 (1819).

70 *See id.* at 424. Precisely which enumerated power was a matter of dispute in *McCulloch* and remained disputed for many decades after. *See id.* at 407 (listing the "great powers to lay and

of the questions raised in *McCulloch*—as Daniel Webster put it during oral argument—was whether a bank was "the proper subject for the choice of Congress" even though it "require[d] to be executed by granting a charter of incorporation."[71] The Court held that "the act to incorporate the Bank of the United States is a law made in pursuance of the constitution."[72]

For similar reasons, the Constitution's provisions raised a question about the federal government's authority to print money and to designate the paper as legal tender. The Constitution vests Congress with the "Power . . . [t]o coin Money, regulate the Value thereof, and of foreign Coin."[73] Whether the power to "coin Money" authorized Congress to issue paper money—and to require paper's use as "legal tender"—in addition to "mould[ing] metallic substances into forms convenient for circulation" was an issue hotly debated until the latter half of the 19th Century, when the Supreme Court decided a series of cases holding that Congress could constitutionally issue paper money and make it legal tender for all debts.[74]

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collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies"); *see also id.* at 324 (argument of Daniel Webster) (arguing that Congress has the authority to incorporate a bank incidental to its "power to raise a revenue, and to apply it in the support of the government" because "[a] bank is a proper and suitable instrument to assist the operations of the government, in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the States"); *id.* at 353–54 (argument of Attorney General) (arguing that incorporation of a bank "was necessary and proper to carry into execution several of the enumerated powers, such as, the power of levying and collecting taxes throughout this widely extended empire; of paying the public debts, both in the United States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several States; of raising and supporting armies and a navy; and of carrying on war").

71 *Id.* at 325.

72 *Id.* at 424. There is a vast literature on *McCulloch*'s interpretation of the Necessary and Proper Clause and Congress's authority to incorporate a bank. For some important treatments, see, for example, William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1753–54 (2013); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1126–44 (2001). In recent years, the Supreme Court has addressed this question in *NFIB v. Sebelius*, 567 U.S. 519, 547–61 (2012), and *Gonzales v. Raich*, 545 U.S. 1, 5–9 (2005).

73 U.S. CONST. art. I, § 8, cl. 5.

74 Juilliard v. Greenman, 110 U.S. 421, 462 (1884) (Field, J., dissenting); *see, e.g.*, Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870) (overruling *Hepburn v. Griswold* and holding that Congress could make paper money legal tender for debts arising before and after the legal tender enactment); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1869) (holding that Congress could not make paper money legal tender for a debt that had arisen before the legal tender law); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869) (approving of Congress's power to issue paper money); *see also* Maryland v. R.R. Co., 89 U.S. (22 Wall.) 105, 115 (1874) (holding that neither the contract at issue nor any other relevant instrument obligated debt repayment in

But more than merely Congress's power to legislate on specific matters, such as the creation of corporations or the use of paper money as legal tender, these debates gave rise to another fundamental question: Who controls? If Congress had the authority to establish a corporation to engage in banking, what was the constitutional status of that corporation and were its directors subject to Article II's appointment and removal procedures? If Congress conferred on an officer within the executive branch the authority over some portion of the nation's finances, could Congress also restrict the President's ability to control that officer? It is this set of questions that will form the focus of this Article.

B. Prior Treatments of the "Treasury" and the Executive Branch

Although the specific role that the "Treasury" played in the development of the separation of powers has gone relatively understudied,[75] prior treatments in cases and scholarship have established the centrality of this issue to understanding the development of administrative governance in America. And recently, when addressing the scope of Congress's authority to restrict the President's removal power, courts have specifically relied on precedents related to the treatment of financial government institutions.

1. Case Law

The Convention's decision to scrap the provision creating a congressionally appointed Treasurer necessarily meant that the Treasurer would be appointed in the very same manner as other "Officers of the

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gold); R.R. Co. v. Johnson, 82 U.S. (15 Wall.) 195, 195 (1872) (affirming tender "good and valid"); Dooley v. Smith, 80 U.S. (13 Wall.) 604, 606–07 (1871) (relying on the recent decision overruling *Hepburn v. Griswold* and holding "these notes to be a valid tender in payment of contracts made before the enactment of the legal tender statutes"); *cf.* Gold Clause Cases, 294 U.S. 240, 316 (1935) (striking down clauses within contracts requiring repayment in gold because such clauses interfere with Congress's power to set monetary policy). For illuminating accounts, see RICHARD C. MCMURTRIE, PLEA FOR THE SUPREME COURT: OBSERVATIONS ON MR. GEORGE BANCROFT'S PLEA FOR THE CONSTITUTION 19–22 (1886) (arguing that Congress's power to "coin money" means the power to "make" money); Natelson, *supra* note 20, at 1079 (arguing that the meaning of the term "coin" encompasses paper money).

75 *See* Shane, *supra* note 27, at 354 ("Separation of powers theorists have largely ignored the Bank, presumably because, as a kind of public-private partnership, it so obviously does not fit comfortably within any traditional view of the administrative state."). Professor Shane contends that "there is no doubt the Bank wielded government power." *Id.* at 355. But the more plausible view is that the Bank was understood as a private entity, and that the authors of the statutes creating the First and Second Banks did not believe that the Bank necessarily performed a government function when it, for example, effectively created a circulating currency. *See infra* Section II.B.2.

United States"—either through presidential appointment with the advice and consent of the Senate or by one of the authorized mechanisms for appointing inferior officers.[76] The decision had other consequences as well. For although "[t]he subject [of the President's removal authority] was not discussed in the Constitutional Convention,"[77] Congress soon decided that the authority to remove, or to fire, a subordinate officer within the executive branch followed from the authority to appoint that officer.[78] Based in part on the President's appointment power and in part on the vesting of the "executive Power" in a single "President" with the authority to "take Care that the Laws be faithfully executed,"[79] James Madison and several of his fellow representatives argued during the First Congress that the Constitution conferred on the President the authority to remove subordinates in the executive branch.[80]

The Supreme Court did not squarely address this constitutional issue until 1926, when it held that the President had untrammeled authority to remove executive branch officers whom he had appointed with the advice and consent of the Senate in *Myers v. United States*.[81] But after *Myers*, the Court's jurisprudence zigged and zagged. In 1935, just nine years after *Myers*, the Court in *Humphrey's Executor v. United States*[82] held that Congress could constitutionally limit the President's authority to remove the members of the Federal Trade Commission to "inefficiency, neglect of duty, or malfeasance in office,"[83] because unlike the officer at issue in *Myers*, the Commissioners of the FTC were "quasi-judicial" and "quasi-legislative" officers.[84] Some decades later, in *Wiener v. United States*,[85] the Court held that the President could not remove members of the War Claims Commission, a body Congress created to adjudicate certain World War II-era claims, even though the statutory scheme establishing the Commission was silent on the question of whether the President could remove the

76 *See* U.S. CONST. art. II, § 2, cl. 2; 2 Farrand, *supra* note 2, at 614.

77 Myers v. United States, 272 U.S. 52, 109–10 (1926).

78 *See infra* Section II.A.

79 U.S. CONST. art. II, §§ 1–3.

80 *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006).

81 *See* 272 U.S. 52, 106, 163–64 (1926) (holding that the President had such removal authority over postmasters of the first class).

82 295 U.S. 602 (1935).

83 *Id.* at 621–23, 626–29, 631–32 (quoting Federal Trade Commission Act, Pub. L. No. 63-203, § 1, 38 Stat. 717, 718 (1914)).

84 *Id.* at 610–11.

85 357 U.S. 349 (1958).

Commissioners.[86] More recently, in *Morrison v. Olson*,[87] the Court appeared to abandon *Humphrey's Executor*'s distinction between "purely executive" and "quasi-judicial" or "quasi-legislative" officers, holding that the touchstone for a removal restriction's constitutionality is whether it "impermissibly burdens" or "interfere[s] impermissibly" with the President's constitutional obligations.[88] Finally, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[89] the Court held that two layers of removal restrictions violated the Constitution, even if one might be permissible under *Humphrey's Executor*.[90] This set of precedents provides complex, and sometimes contradictory, guidance on when a removal provision restricting the President's authority is constitutional.

For purposes of this Article, the key point is that precedents about treasury institutions have long been a core part of the jurisprudence concerning the appropriate balance between executive and congressional control of the executive branch. Two cases—*Myers* and *Humphrey's Executor*—illustrate the central role that such precedents have played in the Court's foundational opinions. Two additional cases—the Supreme Court's decision in *Bowsher v. Synar*[91] and the D.C. Circuit's recent *en banc* opinion in *PHH Corporation v. Consumer Financial Protection Bureau*[92]—illustrate the role that such precedents continue to play.

In *Myers*, a critical part of Chief Justice Taft's analysis was the claim that "from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance" with the principle that the President had the authority to remove executive branch officers.[93] The 1863 reference in Taft's opinion was to the National Bank Act, which imposed such a limitation on the Comptroller of the Currency.[94] As Taft explained, "[i]t is true that, during the latter part of Mr. Lincoln's term, two important, voluminous acts were passed, each containing a section which seemed inconsistent with the legislative decision of 1789."[95] Taft further contended

86 *See id.* at 350, 356.

87 487 U.S. 654 (1988).

88 *Id.* at 689, 692–93.

89 561 U.S. 477 (2010).

90 *Id.* at 492–96.

91 478 U.S. 714 (1986).

92 881 F.3d 75, 77–78 (D.C. Cir. 2018).

93 272 U.S. 52, 163 (1926).

94 *See* National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66 (repealed 1864).

95 *Myers*, 272 U.S. at 165 (citing National Bank Act of 1863 § 1, and Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489).

that the statute imposing a removal restriction on the Comptroller of the Currency was "adopted without discussion of the inconsistency" with the Constitution.[96]

Justice Brandeis's dissent in *Myers* also relied on legislative precedents relating to actors within the "treasury"—namely, the statutes creating the Comptroller of the Treasury and the Comptroller of the Currency.[97] Brandeis claimed that James Madison had "moved to amend the Act establishing a Treasury Department by providing that the Comptroller [of the Treasury] should hold office for a limited period of years."[98] Brandeis further argued that the kind of removal restriction at issue in the case "was first introduced by" the National Bank Act of 1863, "which was approved by President Lincoln."[99] According to Brandeis, "[t]he fact that the removal clause had been inserted in the Currency bill of 1863 shows that it did not originate in the contest of Congress with President Johnson, as has been sometimes stated."[100] And Brandeis characterized the Comptroller of the Currency provision as "[t]he first substantial victory of the civil service reform movement."[101]

Nine years after *Myers*, Justice Sutherland in *Humphrey's Executor* similarly relied on the Comptroller of the Treasury precedent in holding constitutional the provision restricting the President's authority to remove a Commissioner of the Federal Trade Commission. Justice Sutherland contended that, during the 1789 debate creating the first federal departments, when "the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply."[102] By contrast, in *Bowsher v. Synar*, the Court held unlawful Congress's assignment of executive functions to the Comptroller General, an official created during the Twentieth Century who was removable by Congress.[103] The Court thus directly addressed the nature of presidential or congressional control of an officer tasked with financial duties.

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96 *Id.*

97 *Id.* at 240–94 (Brandeis, J., dissenting).

98 *Id.* at 255 n.21.

99 *Id.* at 252–53.

100 *Id.* at 279.

101 *Id.* at 282.

102 Humphrey's Executor v. United States, 295 U.S. 602, 631 (1935).

103 478 U.S. 714, 726 (1986).

More recently, in *PHH*, the D.C. Circuit addressed the constitutionality of the removal provision restricting the President's authority to fire the Director of the CFPB for "inefficiency, neglect of duty, or malfeasance in office."[104] The primary dispute between the majority and the dissent hinged on whether the removal provision—which contained statutory language identical to the provision upheld in *Humphrey's Executor*—was unconstitutional because the CFPB is run by a single Director, rather than a multimember board.[105] On that question, the majority held that the "single headed" nature of the CFPB was of no relevance to the constitutional outcome.[106]

As part of its analysis, the *PHH* court argued that "[f]inancial regulation . . . has long been thought to be well served by a degree of independence," due to the "distinctive danger of political interference with financial affairs."[107] "History and tradition," the court claimed, "show that Congress may appropriately give some limited independence to certain financial regulators."[108] In reaching that conclusion, the court pointed to three historical episodes of relevance to this Article.

First, the court relied on the difference between the statutes creating two of the original departments—War and Foreign Affairs—and the statute creating the Treasury Department.[109] Specifically, the statutes creating the Departments of War and Foreign Affairs authorized the secretaries to "perform and execute such duties as shall from time to time be enjoined on or intrusted to [them] by the President of the United States."[110] By contrast, Congress detailed the responsibilities of the Treasury Secretary and officers within his department.[111]

Second, the court pointed to the statutory provisions creating one of the subordinate officers to the Treasury Secretary, the Comptroller of the Treasury—an official who "direct[ed] prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States"[112] and whose decisions were deemed "final

104 881 F.3d 75, 77 (D.C. Cir. 2018).

105 *Id.* at 96.

106 *Id.* at 97–98.

107 *Id.* at 91.

108 *Id.* at 92.

109 *See id.* at 91.

110 Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29; *see also* Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (using substantially similar language to endow the Secretary of the War Department with authority).

111 Act of Sept. 2, 1789, ch. 12, §§ 2–6, 1 Stat. 65, 65–67.

112 *Id.* § 3, 1 Stat. at 66.

and conclusive."[113] The court contended that the Comptroller "could be removed if found to 'offend against any of the prohibitions of this act'"[114] and that it was "unclear whether the Comptroller was also thought to be removable by the President for other reasons."[115] Finally, the court pointed to James Madison's argument that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government."[116] Thus, as the court put it, the "nature" of the Comptroller of the Treasury's "office and independence eventually changed, but it is evident that the Comptroller was, from inception, meant to exercise an unusual degree of independent judgment."[117]

Third, the court pointed to Congress's establishment of a separate office, the Comptroller of the Currency, "[a]t the dawn of the modern-day federal banking system" during the Civil War.[118] The court noted that Congress made the Comptroller of the Currency "removable only if the President sends the Senate 'reasons' for removing him."[119] Indeed, the current version of the statute, which dates to the Civil War, provides that the Comptroller of the Currency "shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate."[120] "Whatever the type of reason it requires," the court claimed, "the statute without question constrains the presidential removal power."[121]

Finally, the *PHH* court argued that the "independence of financial regulators remains a prominent pattern today," relying on the structure of the Federal Reserve Board, Federal Trade Commission, and other such agencies.[122] Because these agencies were created dur-

113 Act of Mar. 3, 1795, § 4, 1 Stat. 443, 443.

114 *PHH Corp.*, 881 F.3d at 91 (quoting Act of Sept. 2, 1789, ch. 12, §§ 2–6, 1 Stat. 65 at 67).

115 *Id.*

116 *Id.* (quoting 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834)).

117 *Id.*

118 *Id.*; *see also* National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66; National Bank Act of 1864, ch. 106, § 1, 13 Stat. 99, 99–100.

119 *PHH Corp.*, 881 F.3d at 91–92 (quoting 12 U.S.C. § 2 (2018)).

120 12 U.S.C. § 2.

121 *PHH Corp.*, 881 F.3d at 92. The court found notable that the "U.S. Code [] classifies the Comptroller of the Currency as an 'independent regulatory agency' along with all the other removal-constrained independent agencies." *Id.* (quoting 44 U.S.C. § 3502(5) (2012)).

122 *Id.* at 92. Specifically, the court observed that the Federal Reserve Board's governors may be removed solely for cause during their fourteen-year terms. *Id.*; *see also* 12 U.S.C. § 242 (2018); H.R. REP. NO. 74-742, at 1 (1935) (contending that independence was necessary to "increase the ability of the banking system to promote stability"). And the court noted that the Federal Trade Commission was "another example of an independent financial regulator in the modern era" that had been "expressly approved by the Supreme Court." *PHH Corp.*, 881 F.3d

ing the 20th Century, I will have little to say about them in this Article.[123]

In a dissent, then–Judge (now–Justice) Kavanaugh responded to several of these contentions in a footnote.[124] Then–Judge Kavanaugh argued that, contrary to the *en banc* court's contention, the Comptroller of the Currency was "not independent," but rather "removable at will by the President."[125] Then–Judge Kavanaugh also argued that the Comptroller of the Treasury, when created in 1789, "likewise was not independent" but rather "removable at will by the President."[126] Pointing to the Supreme Court's opinion in *Free Enterprise Fund*, then–Judge Kavanaugh contended that Madison did not believe "that some executive officers, such as the Comptroller [of the Treasury], could be made independent of the President," but rather proposed "that the Comptroller hold office for a term of 'years, *unless sooner removed by the President*.'"[127]

2. *Prior Academic Treatments*

Scholars have addressed the general set of questions raised by the relationship between the President, Congress, and the "Treasury."[128] Some scholars—echoing Henry Clay's discussion during the "Bank

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at 92 (citing Humphrey's Executor v. United States, 295 U.S. 602, 619, 632 (1935)); *see also id.* (citing the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Authority, the National Credit Union Administration, and the Securities and Exchange Commission as examples of agencies that "are considered independent whether or not for-cause removal protection is specified by statute").

123 A future article will pick up the narrative where this Article leaves it off.

124 *See PHH Corp.*, 881 F.3d at 177 n.4 (Kavanaugh, J., dissenting).

125 *Id.*

126 *Id.*

127 *Id.* (quoting Free Enter. Fund v. PCAOB, 561 U.S. 477, 500 n.6 (2010), which in turn quotes 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834) (emphasis added by Judge Kavanaugh)). As discussed *infra* Sections II.B.1–2, the *PHH* court's narrative contains a surprising omission—namely, one of the single most significant removals in the history of American governance, Andrew Jackson's decision to fire Secretary of the Treasury William Duane for failure to remove deposits from the Bank of the United States.

128 Along with the many articles, several book-length treatments of presidential power have been written. *See generally* J. DAVID ALVIS ET AL., THE CONTESTED REMOVAL POWER, 1789–2010 (2013) (describing the evolution of the removal power over time); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008) (tracing the history, President by President, of the development of executive power across different time periods); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING (2015) (discussing the Constitution's allocation of authority to the executive branch). For leading articles defending the proposition that the Constitution confers on the President the authority to control all government officials who implement the laws, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 (1992); David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19, 31–36; Geoffrey P. Miller,

Wars"[129]—have claimed that the Treasury Department was not an "executive department" because Congress did not label it as one in the title of the statute creating the Department of the Treasury, while affixing that label in the statutes creating the Departments of War and Foreign Affairs.[130]

Others, like Justice Brandeis,[131] have relied on the nature of the "Comptroller of the Treasury," an official created by the 1789 statute creating the Department of the Treasury.[132] For example, in his classic article *Tenure of Office and the Removal Power Under the Constitution*,[133] written in the immediate aftermath of *Myers*, Edward Corwin relied expressly on James Madison's remarks during the debate establishing the office of Comptroller of the Treasury, which (according to Corwin) showed that the President lacked the authority to remove some officers.[134] Still others have relied on two "boards of eminent officers" established to oversee the Mint and the Sinking Fund Commission, which (again, according to the scholars) demonstrated that modern-day notions of independence from the President were present during the early practice.[135]

Independent Agencies, 1986 SUP. CT. REV. 41, 58–60. Leading articles arguing to the contrary are discussed in the immediately following paragraphs.

129 *See infra* Section II.B.2.

130 *See, e.g.*, Casper, *supra* note 17, at 239–41 (noting that, under the statutes of 1789 establishing the three "great departments" of government, "[o]nly the departments of State and War were completely 'executive' in nature"); Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175, 183–84 (1993) (explaining that the President had "no directory control over the Comptroller General" and that "the Framers and the early congresses treated this independence as flowing from the nature of the Comptroller's duties"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 32–34 (1994); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 73–75 (1983) (explaining that the Comptroller was "clearly . . . expected to exercise independent judgment"). For a contrary view, see PRAKASH, *supra* note 128, at 200–02.

131 *See* Myers v. United States, 272 U.S. 52, 240, 250–51 (1926) (Brandeis, J., dissenting).

132 An Act to Establish the Treasury Department, ch. 12, § 4, 1 Stat. 65, 66 (1789) (amended 1809).

133 Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927).

134 *Id.* at 353, 366–67.

135 *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1301–02 (2006). In addition to the Mint and Sinking Fund Commission, Mashaw draws attention to two other statutes. First, Mashaw notes that Congress created a commission involving allocation of public lands in the territories that required the combined action of the Secretaries of Treasury, State, and War. *See id.* at 1302 & n.140 (citing An Act Regulating the Grants of Lands Appropriated for Military Services, and for the Society of United Brethren, for Propagating the Gospel Among the Heathen, ch. 46, § 2, 1 Stat. 490, 491 (1796)). Second, Mashaw notes that Congress created a board comprised of the Secretary of State, Secretary of War, and the Attorney General to authorize the issuance of patents. *See id.* at

Notwithstanding the extent and sophistication of the scholarship, however, Madison's remarks during the Comptroller of the Treasury debate remain misunderstood. Moreover, prior scholarship has yet to assess fully the treatment of the "Treasury" during Andrew Jackson's dismissal of the Treasury Secretary, William Duane, in the battle over the Second Bank of the United States. Equally notably, scholars have yet to address the nature of the office of the Comptroller of the Currency, created in 1863 and amended shortly thereafter. Nor have scholars connected the treatment of the "Treasury" with the treatment of the First and Second Banks themselves. Finally, scholars have yet to connect the treatment of the Treasury with the congressionally appointed "Treasurer" rejected at the Constitutional Convention.

This Article aims to fill these gaps and provide a richer and more systematic account of how political actors treated the Treasury and the Bank in the years leading up to the Civil War. The reason to concentrate on political actors is straightforward: no cases directly spoke to the President's removal authority under the Constitution until the 20th Century, leaving executive and legislative practice as the most relevant markers of the legal framework from this era. And even when the Supreme Court spoke in cases like *Myers*, *Humphrey's Executor*, and *Morrison*, it established an unclear and shifting legal framework that relied in part on the very historical precedents discussed in this Article. As the D.C. Circuit's recent decision in *PHH* demonstrates, historical analysis helps understand how the Court's removal cases fit together.[136] As a result, this Article addresses the following question: How did the Treasury Department and the Bank fit within Article II's framework for appointment and removal of federal officers?

II. The "Treasury" and the Removal Power

The rejection of a congressionally appointed "Treasurer" at the Constitutional Convention did not end debate over who would control financial policy at the federal level. At various subsequent points,

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1302 & n.141 (citing An Act to Promote the Progress of Useful Arts, ch. 7, § 1, 1 Stat. 109 (1790)). Neither of these statutes falls within the scope of this Article's discussion of the "treasury." But at any rate, neither of the boards contradicts this Article's thesis about presidential control over the executive branch, because the two boards were composed of officers (the Secretaries of Treasury, State, and War and the Attorney General) whom the President could remove. *See, e.g.*, *id.* at 1302 n.143 ("The Patent Office was not . . . independent in some of the senses we often associate with contemporary independent agencies, such as balanced bipartisan representation, fixed and staggered terms of office, and removal only for cause.").

136 *See* discussion *supra* Section I.B.1.

members of Congress and the President fought over presidential authority to control the Treasury Secretary. For the sake of simplicity, this Article breaks down these debates into four basic eras. As an initial matter, the First and Second Congresses created the first three departments of the executive branch (War, Foreign Affairs, and Treasury), the office of the Comptroller of the Treasury, and several additional financial entities, such as the Mint, the Sinking Fund Commission, and the First Bank of the United States. Second, Congress and the public engaged in an extensive debate about the President's control of the Treasury Secretary when Andrew Jackson ordered the removal of the federal government's deposits from the Second Bank of the United States and fired his Secretary of the Treasury, William Duane. Third, Congress established a Court of Claims. Fourth and finally, during the Civil War, Congress initially created a Comptroller of the Currency who could not be removed by the President without the advice and consent of the Senate. Following a constitutional debate, however, Congress significantly altered the Comptroller of the Currency's statutory removal protection.

On several occasions, a significant minority sought to establish some form of congressional control over the President's authority to remove a treasury officer. But on each such occasion, the prevailing view was that Congress could not interfere with the President's power to remove subordinates.

A. The First and Second Congress

1. The Removal Debate in the Creation of the Departments

During the creation of the Department of Foreign Affairs (which shortly thereafter became the State Department), Congress engaged in a constitutional debate over the President's authority to remove the department heads that has come to be known as the "Decision of 1789."[137]

This debate pitted James Madison and various congressmen who supported a plenary presidential authority to remove the heads of departments against a set of congressmen with varying views. Madison argued that "one of the most prominent features of the constitution" was "that there should be the highest possible degree of responsibility in all the executive officers thereof."[138] Accordingly, if the President could remove the heads of the executive departments, "we have in

137 *See* Prakash, *supra* note 80, at 1067–68.

138 1 ANNALS OF CONG. 615 (1789) (Joseph Gales ed., 1834).

him security for the good behavior of the officer," thereby making the officer "responsible to the great Executive power" and the President in turn "responsible to the public for the conduct of the person he has nominated and appointed to aid him in the administration of his department."[139] As one of the other participants in the debate, John Vining of Delaware, put it, "the best principle is, that he who is responsible for the conduct of the officer, ought to have the power of removing him."[140]

Opponents such as James Jackson of Georgia argued—in the form of a *reductio ad absurdum*—that this logic would give the President an "arbitrary authority" over the "Secretary of Finance."[141] Likewise, Elbridge Gerry of Massachusetts claimed that the logical consequence of Madison's argument was to give the President "unlimited control over the officers of the Treasury," which meant that Congress "may as well give him at once the appropriation of the revenue."[142]

Madison and other supporters of his position did not dispute that these were, in fact, the logical consequences of their legal position. To the contrary, they embraced them. Thomas Scott accused opponents of "raising [] a great number of frightful pictures," including "that the Treasurer must be the mere creature of the President, and conform to all his directions."[143] Scott further argued that "no money shall be taken out of the Treasury but by appropriations," which would "serve to soften down the harsh features which the terrible picture I have just now mentioned displayed."[144] Congress then enacted the bills creating the first three departments using the language that Madison and his allies had suggested.[145]

When Congress enacted the bill for the Department of the Treasury, it changed the formulation for the *name* of the bill. Earlier in the debate, Madison had introduced the bills to create the three departments using a resolution providing "[t]hat it is the opinion of this committee that there ought to be established the following Executive

139 *Id.* at 379.

140 *Id.* at 464–65.

141 *Id.* at 486–88.

142 *Id.* at 501–02.

143 *Id.* at 532.

144 *Id.* at 532–33 ("[O]ur money may be in the Treasury by millions, and, without special appropriation by the Legislature, neither the President, Treasurer, nor both together, can touch a farthing of it, unless they steal it. This being the case, I see [] little security to the Treasury in the independence of this officer . . . .").

145 *See* Prakash, *supra* note 80, at 1023 & n.7.

departments; to wit,—A Department of Foreign Affairs . . . A Treasury Department . . . A Department of War."[146] Following this resolution, the statutes creating the first two departments—Foreign Affairs and War—expressly designated them "executive departments." For example, the statute creating the Department of Foreign Affairs was entitled "An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs."[147] Congress used a similar formulation to name the bill creating the Department of War.[148] But when Congress enacted the Department of the Treasury, it dropped the introductory phrase and described the statute as simply "An Act to Establish the Treasury Department."[149]

Some have concluded that this change in formulation indicated that the members of the First Congress did not believe that the Treasury Department was an "executive department."[150] But the argument that the change in the bill's name carries such weight is weak for several independent reasons. First, under the Articles of Confederation, it is abundantly clear that Congress considered the Department of the Treasury to be an "executive department." To take just one example, in 1781, the Continental Congress reorganized the Treasury as part of a general reorganization of the "civil executive departments."[151] Thus, it is clear that classification of the Treasury Department as "executive" was by no means unusual in 1781. Second, as previously mentioned, the participants in the debate over the creation of the Department of Foreign Affairs were well aware of the statute's implications for the President's control over congressional appropriations and the treasury. Several representatives, like James Jackson of Geor-

146 1 ANNALS OF CONG. 396 (1789) (Joseph Gales ed., 1834).

147 An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789).

148 An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 6, 1 Stat. 49 (1789).

149 An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

150 Indeed, during the debates over the Bank War, this alteration in the statute creating the Department of the Treasury was Henry Clay's primary evidence that the President lacked the authority to control the Secretary of the Treasury. *See infra* note 368 and accompanying text. For scholars who have picked up on Clay's argument, see Casper, *supra* note 17, at 240–42; Lessig & Sunstein, *supra* note 130, at 27–30, 71–72; Mashaw, *supra* note 135, at 1285–86, 1288, 1340.

151 *See* 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 125–26 (Gaillard Hunt, ed., 1912) (listing the departments of "War" and "Marine" as the other two such departments subject to reorganization). The reason for the 1781 "total reorganization of the Treasury" is likely "[t]he utter confusion of the finances under the various [preexisting] arrangements." WILLARD E. HOTCHKISS, THE JUDICIAL WORK OF THE COMPTROLLER OF THE TREASURY AS COMPARED WITH SIMILAR FUNCTIONS IN THE GOVERNMENTS OF FRANCE AND GERMANY 13 n.2 (1911).

gia and Elbridge Gerry of Massachusetts, argued that Madison's position would give the President undue influence over the treasury.[152] Third, Congress included the officers of the Treasury under the heading of "Executive Officers of Government" when it enacted the Salary Act a mere nine days after the statute creating the Department of the Treasury.[153] Fourth, there is no contemporary evidence that anyone understood this change in the formulations to be significant, and indeed President Washington immediately directed and took charge of Alexander Hamilton's functions as Secretary of the Treasury.[154]

Fifth and finally, it is important to consider whether there could be another reason for Congress's decision to alter the verbal formulations in the naming of the bills creating the first departments. There is another, simple potential reason: simplicity itself. The act naming the Department of the Treasury used the formulation "An Act to Establish the Treasury Department" as opposed to the wordier formulation "An Act for Establishing an Executive Department, to be Denominated the Department of the Treasury."[155] The formulation used was less wordy than the earlier statutes. Shortly after the statute creating the Treasury Department, Congress created the Post Office using a statute with the less wordy formulation.[156] When Congress created the mint, it did so with a statute styled "An Act establishing a Mint."[157]

2. The Comptroller of the Treasury

After succeeding in persuading Congress to embrace a presidential removal authority during the debate over the establishment of the Department of Foreign Affairs, Madison suggested that a particular officer—the Comptroller of the Treasury—might receive a different treatment.[158] Madison claimed that the Comptroller's tenure ought to

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152 *See supra* notes 140–42 and accompanying text.

153 Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67; An Act to Establish the Treasury Department, ch. 12, § 4, 1 Stat. 65, 66 (1789) (amended 1809).

154 *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 ILL. L. REV. 701, 792–93.

155 An Act to Establish the Treasury Department, § 4, 1 Stat. at 66.

156 Act of Sept. 22, 1789, ch. 16, 1 Stat. 70. To be sure, some have argued that this sequence of events suggests that Congress believed that the Post Office, too, was not an "executive department." *See* Lessig & Sunstein, *supra* note 130, at 29–30.

157 Coinage Act of 1792, ch. 16, 1 Stat. 246.

158 1 ANNALS OF CONG. 611 (1789) (Joseph Gales ed., 1834) (observing that the bill did not make "any provision respecting the tenure by which the Comptroller is to hold his office" and contending that this "was a point worthy of consideration"); *id.* at 612 (suggesting that "there may be strong reasons why an officer [like the Comptroller] should not hold his office at the pleasure of the executive branch of the Government").

depend on the "nature of th[e] office," which he believed was "not purely of an Executive nature."[159] Instead, as he put it, the Comptroller's duties partook "of a Judiciary quality as well as Executive," though Madison indicated that "perhaps the latter obtains in the greatest degree."[160] Madison's comments during the Comptroller of the Treasury debate have received significant attention in both case law and scholarship, with some suggesting that they indicate that, even if the President had the authority to remove the Secretary of the Treasury, he lacked the authority to remove a particular officer (the Comptroller of the Treasury) within that Department.[161] For that reason, Madison's remarks are worthy of sustained analysis. As explained below, scholars have both misidentified the rationale for Madison's belief that the tenure rules might be different for the Comptroller of the Treasury, as well as Madison's proposed solution to the problem.

To understand Madison's comments, one must first appreciate the proposed structure of the Department of the Treasury. The 1789 statute establishing the Department of the Treasury assigned a series of functions to a series of officials. In addition to creating the office of the Secretary of the Treasury, the statute created a "Comptroller," "Auditor," "Treasurer," and "Register" of the Treasury.[162] It is readily apparent that the statute's organization of the Treasury, as well as many of these officers' duties, were borrowed from the structure of the federal financial system that predated the Constitution. In that system, too, the Continental Congress had established a comptroller, auditor, treasurer, and register, with many of the same duties that Congress ultimately conferred on the officers with the same name in the 1789 statute.[163]

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159 *Id.* at 611; *see id.* at 613 (arguing that the "nature" of the Comptroller of the Treasury "differed from the other[]" offices that the House had created and that a "modification might take place").

160 *Id.* at 611.

161 *See supra* notes 97–98, 102, 112–17, 131–34 and accompanying text.

162 *See* An Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789) (amended 1809). The statute also created an "Assistant to the Secretary of the Treasury," to be appointed by the Secretary, whose only statutory duty was to "have the charge and custody of the records, books, and papers" of the Secretary "whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office of Secretary." *Id.* § 7, 1 Stat. at 65, 67.

163 *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 49, at 948–50. The 1781 law, for example, established a Register who would "keep all the public accounts, both of receipts and expenditures, and every warrant on the treasurer or others shall be entered and countersigned by the register before it shall be paid." *Id.* at 950. The 1789 act contained similar language. *See* § 6, 1 Stat. at 67 (providing that the Register would "keep all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United

The relationship between the "auditor" and "comptroller" is relevant to understanding Madison's remarks. In 1778, the Continental Congress had specified that the "auditor" was to "receive all accounts brought against the United States for money lent, expended, or advanced; goods sold or purchased; services performed or work done, with the vouchers" and then to "refer them to one of the chambers of accounts."[164] After various bureaucratic steps had been taken,[165] the "parties concerned" would have the right to "appeal from the judgment of the commissioners [of the chamber of accounts]," at which point the auditor would "call before him the commissioners and the party, and hear them, and then make determination."[166] Under the 1778 law, "no appeal [would] lie" from this decision, "unless to Congress."[167] As for the Comptroller, the 1778 structure tasked him with, among other things, "keep[ing] the treasury books and seal," "fil[ing] all the accounts and vouchers on which the accounts in the said books are founded," and "direct[ing] the manner of stating and keeping the public accounts."[168]

In 1781, the Continental Congress reorganized the Treasury as part of a general reorganization of the "civil executive departments."[169] On February 7, 1781, the Congress authorized the "Superintendent of Finance"—an office akin to a "Secretary of the Treasury"—to "examine into the state of the public debt, the public expenditures, and the public revenue, to digest and report plans for improving and regulating the finances, and for establishing order and economy in the expenditure of the public money."[170] On the Superintendent's recommendation, the Continental Congress enacted a reorganization plan for regulating the treasury on September 11, 1781.[171]

States"; "receive from the Comptroller the accounts which shall have been finally adjusted, and . . . preserve such accounts with their vouchers and certificates"; and "record all warrants for the receipt or payment of monies at the Treasury, certify the same thereon, and . . . transmit to the Secretary of the Treasury").

164 12 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 46, at 957.

165 The commissioner of the chamber of accounts would "examine the authenticity of the vouchers," determining "whether they support the charges" while "reduc[ing] such articles as are overcharged, and reject[ing] such as are improper." *Id.* After making an entry of the balances, the commissioner of the chamber of accounts would return the accounts and vouchers to the auditor. *See id.*

166 *Id.*

167 *Id.*

168 *Id.* at 958.

169 *See supra* note 151 and accompanying text.

170 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 150, at 126 (footnote omitted).

171 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 49, at 948.

The reorganization enhanced the Comptroller's core functions,[172] and kept the auditors' initial hearing of claims.[173] But the reorganization added significant oversight functions for the Comptroller over auditors. Specifically, after an audit, "any person" who thought "himself aggrieved by the judgment of the auditor" had "a privilege of appealing, within fourteen days, to the comptroller," who would "openly and publicly hear the parties, and his decision shall be conclusive."[174]

The 1789 statute creating the Department of the Treasury maintained a similar set of functions for the Comptroller.[175] The Comptroller was tasked with adjusting and preserving the public accounts, examining accounts settled by the Auditor, certifying balances to the Register, countersigning warrants drawn by the Secretary, and reporting to the Secretary the official forms of all papers to be issued for collecting the public revenue.[176] The statute also contemplated that the Comptroller of the Treasury would "provide for the regular and punctual payment of all monies which may be collected, and shall direct prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States."[177] Most notably, in a fashion similar to the 1781 law, the 1789 statute provided that the Auditor's duty was "to receive all public accounts, and after examination to certify the balance, and transmit the accounts with the vouchers and certificate to the Comptroller for his decision."[178] Any person "dissatisfied" with an audit could "within six months appeal to the Comptroller."[179]

Against this backdrop, Madison's proposal for the Comptroller of the Treasury makes sense. Madison maintained that the argument that "the Executive Magistrate had constitutionally a right to remove subordinate officers at pleasure" had "some force," because "these

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172 *Id.* at 949 (conferring on the Comptroller "general authority to inspect and superintend the settlement of public accounts, and all subordinate officers concerned therein" and the duty "to see that the public accounts are expeditiously and properly adjusted, and accurately and safely kept").

173 As under the 1778 law, auditors would "hear the party and the clerk" examining an account—with "the party, for himself, and the clerk, on behalf of the public, . . . heard before the auditor." *Id.* at 950. After the auditor had "determine[d] upon the objections," he would "transmit [the account] to the comptroller." *Id.* at 950.

174 *Id.* at 949.

175 *See* An Act to Establish the Treasury Department, ch. 12, § 3, 1 Stat. 65, 66 (1789) (amended 1809).

176 *Id.*

177 *Id.*

178 *Id.* § 5, 1 Stat. at 66.

179 *Id.* § 5, 1 Stat. at 66–67.

officers were merely to assist him in the performance of duties."[180] But Madison also noted that the Comptroller of the Treasury had the authority to resolve appeals from auditors.[181]

This latter "appeal" authority, which mirrored the Comptroller's functions before the Constitution was adopted, explains Madison's characterization of the Comptroller's "principal duty" as "deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens," which partook "strongly of the judicial character."[182] The Comptroller, in other words, had both "executive" functions that were appropriately considered to be those of a Treasury officer and "judicial" functions that look much like the Court of Federal Claims's functions today—in the sense that the Comptroller would hold a hearing "openly and publicly" on an "appeal" by "any person . . . aggrieved" by an auditor's judgment.[183] Thus, Madison noted, he wondered whether the President "can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States"—which involved examination that "partake[s] too much of the judicial capacity to be blended with the executive."[184]

That interpretation is bolstered by Madison's equivocation on the Comptroller's functional status. As Madison put it, one could consider the Comptroller "something in the light of an arbitrator between the public and individuals, and that he ought to hold his office by such tenure as will make him responsible to the public generally"—in other words, that the Comptroller had a judicial function.[185] Alternatively, one might believe that "some persons ought to be authorized" to represent "the [private] individual" with the Comptroller representing the federal government and the "usual liberty of referring to a third person, in case of disagreement"—in other words, that the Comptroller had an executive function.[186]

For this reason, Madison contended "that a modification by the Legislature may take place in such [offices] as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is pre-

180 1 ANNALS OF CONG. 638 (1789) (Joseph Gales ed., 1834).

181 *Id.* at 636.

182 *Id.*

183 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 49, at 949.

184 1 ANNALS OF CONG. 638 (1789) (Joseph Gales ed., 1834).

185 *Id.* at 636.

186 *Id.*

scribed."[187] But Madison did not elect to place the Comptroller in the judicial branch. Instead, he proposed that the Comptroller should hold office for a term of specified years "unless sooner removed by the President."[188] As a result, Madison contended, the Comptroller would be "dependent upon the President, because he can be removed by him; he will be dependent upon the Senate, because they must consent to his election for every term of years; and he will be dependent upon this House, through the means of impeachment."[189] By that mechanism, according to Madison, Congress would "effectually secure the dependence of this officer upon the Government."[190] As he put it, he urged a modification that would result in "limiting the tenure" of the Comptroller of the Treasury.[191]

The responses from other Representatives were scattershot. Representative William Smith argued that the Comptroller of the Treasury "ought to be independent of the Executive, in order that he might not be influenced by that branch of the Government in his deci-

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187 *Id.* The same principle was later at issue in the Supreme Court's opinion in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855). In that case, the Court observed that

> there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id. at 284. The point, in brief, was that Congress may choose to allow certain issues to be tried before executive branch officers in a manner that looks very much like the judicial resolution of a "case or controversy." *Id.* Alternatively, Congress may choose to allow those issues to be tried before courts vested with the "judicial power." *Id.* In his capacity as an adjudicator of appeals, the Comptroller of the Treasury wielded authority that Congress could have chosen to place in either category.

188 1 ANNALS OF CONG. 636 (1789) (Joseph Gales ed., 1834).

189 *Id.*

190 *Id.*; *see id.* at 638 (urging that the Comptroller of the Treasury be made "responsible to every part of the Government"). The downside of creating such "dependence" on the Government, Madison observed, was that some might question the Comptroller's "impartiality, with respect to the individual." *Id.* at 636. Such impartiality, according to Madison, could be secured "by giving any person, who conceived himself aggrieved, a right to petition the Supreme Court for redress." *Id.* That would allow the individual to "carry his claim before an independent tribunal." *Id.* Here, Madison appears to be proposing that a private party could petition the Supreme Court directly from the Comptroller of the Treasury's decision. The irony, of course, is that 12 years later, in *Marbury v. Madison*, the Court would hold that a direct review provision from an executive branch officer violated Article III of the Constitution. 5 U.S. (1 Cranch) 137, 176 (1803). And when Congress gave the Court direct review of the Court of Claims, which at the time was arguably not an Article III court, the Supreme Court applied *Marbury* to hold that the review provision was likewise unconstitutional. *See* Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864).

191 1 ANNALS OF CONG. 638 (1789) (Joseph Gales ed., 1834).

sions."[192] Representative Michael Stone contended that, as an "inferior officer," the Comptroller of the Treasury was not necessarily subject to the resolution on the removal power that had occurred for principal officers.[193] Nevertheless, he expressed his view that "all officers, except the judges, should hold their offices during pleasure."[194] And the Comptroller, in his view, was not a judge.[195] Representative Theodore Sedgwick initially appeared to misunderstand the proposal, suggesting that the Comptroller of the Treasury would "hold his office by the firm tenure of good behavior, inasmuch as he was to be reappointed at the expiration of the first term."[196] Madison quickly corrected Sedgwick on this point, noting that he was being "misapprehended" and that the Comptroller should merely "be reappointable at the expiration of the term—not re-appointed."[197] Upon Madison's further explanation, Sedgwick noted that the proposal "far from making [the Comptroller of the Treasury] independent, as a judge ought to be, [] subjected him to more subordination than any other officer."[198] At any rate, Sedgwick believed that the House had already "decided that all officers concerned in executive business should depend upon the will of the President for their continuance in office."[199] And the Comptroller performed "important executive duties," because he "is to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for delinquencies; he is to preserve the public accounts, to countersign warrants, and to report to the Secretary."[200] All told, Sedgwick contended, these duties meant the Comptroller "ought . . . to be dependent upon the President."[201] In a similar vein, Representative Egbert Benson argued that there should be "certainty in knowing what was

192 *Id.* at 637.

193 *Id.*

194 *Id.*

195 *See id.* In this case, Stone argued that it was "unnecessary" to "give, by an express clause in the bill, a right to the complainant to appeal from [the Comptroller's] decision," because he believed it was "the right of every man, upon the principles of common law" to bring such a suit and "therefore securing it by the statute would be a work of supererogation." *Id.*

196 *Id.* Stone appeared to be under the same misunderstanding. *See id.* (suggesting that Madison believed that the "office should be held during good behavior . . . for if it was intended to be held during a term of years, and then the office to be re-appointed, if he had not been convicted on impeachment, it would be tantamount to holding it during all the time he behaved well").

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.* at 637–38.

201 *Id.* at 638.

the tenure of offices," with "[t]he judges hold[ing] theirs during good behavior" and "all others, during pleasure."[202]

At any rate, Madison appears to have withdrawn the proposal.[203] The critical point is that Madison viewed the Comptroller of the Treasury as partaking of judicial functions because of the Comptroller's role in resolving appeals from auditors.[204] Equally important, Madison would not have solved the issue he identified by limiting the President's power to remove the Comptroller.[205]

3. The Mint, the Sinking Fund Commission, and the Bank

Through the course of 1790 and 1791, Alexander Hamilton, then the Secretary of the Treasury, submitted to Congress a series of reports to establish the basis for the nation's finances.[206] Three of the reports prompted the creation of three separate bodies: the Mint, the Sinking Fund Commission, and the First Bank of the United States.[207] None of these three entities appears to have been viewed at the time, or in the debates that followed, to have an administrative structure that departed from the "Decision of 1789."[208] But modern scholars have cited them as examples of early "independent" agencies that exercised the "executive power" of the federal government outside the scope of presidential control.[209] As explained below, however, the most plausible interpretation is that these three entities were consistent with the President's authority to remove "officers" who exercised the federal government's "executive power."[210]

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202 *Id.*

203 *Id.* at 639.

204 *Id.* at 636.

205 *Id.*

206 *See, e.g.*, James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 487–88 (1978).

207 *See* JONATHAN ELLIOT, THE FUNDING SYSTEM OF THE UNITED STATES AND OF GREAT BRITAIN, WITH SOME TABULAR FACTS OF OTHER NATIONS TOUCHING THE SAME SUBJECT 406 (1845).

208 *See supra* Section II.A.1.

209 *See* Mashaw, *supra* note 135, at 1291; Shane, *supra* note 27, at 354–60. For an in-depth, recent treatment of the structural questions posed by the Sinking Fund Commission, see Christine K. Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies* (Sept. 22, 2019) (unpublished manuscript), https://ssrn.com/abstract=3458182 [https://perma.cc/6C98-DYXJ].

210 The discussion of the three entities below occurs in a non-chronological order, addressing first the Mint, then the Sinking Fund Commission, and finally the Bank. This Section discusses them in this order for ease of exposition and to make thematic linkages between the constitutional analyses of each entity.

a. The Mint

On January 28, 1791, Hamilton submitted to Congress a report proposing the establishment of a mint.[211] The First Congress responded to Hamilton's report by resolving that "a mint shall be established under such regulations as shall be directed by law."[212] It was another year before the Second Congress enacted a statute "establishing a Mint, and regulating the Coins of the United States"—a statute that has come to be known as the Coinage Act of 1792.[213]

In terms of constitutional structure, the Coinage Act of 1792 raised a question relating to the role of the Chief Justice of the United States in assaying the coins produced by the mint. Specifically, the statute required a committee that included the Chief Justice to inspect "a certain number of pieces" of the coinage to ensure that they met the statutorily prescribed standards.[214] Inspection of coins to ensure their suitability for commercial use, however, was presumably an executive function (if a governmental function at all), rather than a judicial one. Although the Chief Justice had on occasion been assigned various executive functions by President Washington, there was little doubt that on each such occasion the President could direct the Chief Justice in the performance of his executive duties and could remove him from such performance if circumstances so warranted.[215] Needless to say, however, the President could not remove the Chief Justice from the performance of his judicial duties. In the case of the mint, Congress by statute conferred membership in the commission on the Chief Justice, thereby raising questions whether the President could direct the Chief Justice's performance of mint commission duties.[216]

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211 Alexander Hamilton, *On the Establishment of a Mint*, *in* 4 THE WORKS OF ALEXANDER HAMILTON 3 (Henry Cabot Lodge ed., 1904); *see also* H.R. JOURNAL, 1st Cong., 3d Sess. 366 (1791) (noting the House's acceptance of Hamilton's report and accompanying letter); *id.* at 194 (1790) (directing Hamilton to prepare report on the establishment of a mint). For an enlightening discussion of coinage during this time period, see A. BARTON HEPBURN, A HISTORY OF CURRENCY IN THE UNITED STATES 33–70 (1967).

212 Resolution III of Mar. 3, 1791, 1 Stat. 225.

213 Coinage Act of 1792, ch. 16, 1 Stat. 246. Notably, the Coinage Act of 1792 was styled as a statute "[e]stablishing a mint" rather than a statute establishing an "executive department, to be denominated the mint." But there was evidently no debate that the mint was not an executive department.

214 *Id.* § 18, 1 Stat. at 250.

215 Saikrishna Bangalore Prakash, *Double Duty Across the Magisterial Branches*, 44 J. SUP. CT. HIST. 26, 26–30 (2019) (collecting examples of Justices serving "double duty" and explaining that Chief Justice John Jay served as the "de facto Secretary of Foreign Affairs" and was sent by President Washington to negotiate the Treaty of Paris and Chief Justice John Marshall served as Secretary of State for two months while he was also Chief Justice).

216 *Id.* at 33; Coinage Act of 1792, ch. 16, 1 Stat. 246.

To understand why the Coinage Act of 1792 did not run afoul of the Decision of 1789, it helps to review the organizational framework that Hamilton proposed in his report on the establishment of a mint.[217] Most of the report addressed technical aspects about the coinage for the United States, but toward the end of the report Hamilton discussed the "organization of the mint," describing "the persons to be employed" and "the services which they are respectively to perform."[218] Hamilton recommended that Congress create a "Director of the Mint, to have the general superintendance of the business," along with a series of offices, such as an "Assay Master" or "Assayer," a "Master Coiner," a "Cashier," an "Auditor," and clerks, workmen, and a porter.[219]

In his report, Hamilton also proposed a "remedy for errors in the weight and alloy of the Coins" based on "the practice in England."[220] In English practice, according to Hamilton, "[a] certain number of pieces" of coin were set aside "in a strong Box called the pix," which would be "opened in the presence of the Lord Chancellor, the Officers of the Treasury and others; and portions [would be] selected from the pieces of each coinage, which are melted together, and the mass assayed by a jury of the Company of Goldsmiths."[221] Hamilton went on to explain that "[i]f the imperfection and deficiency both in fineness and weight" were within a certain standard, "the Master of the Mint is held excuseable; because it is supposed that no workman can reasonably be answerable for greater exactness."[222] "The expediency of some similar regulation," Hamilton concluded, "seems to be manifest."[223]

The Coinage Act of 1792 borrowed many of these elements. Like Hamilton's report, most of the statute specified the technical manner in which the government would mint coins that would "be a lawful tender in all payments whatsoever."[224] As for the mint's organization, the statute created a series of offices similar, though not identical, to those Hamilton had suggested.[225] Of relevance to the subject of presi-

217 Hamilton, *supra* note 211, at 57–58.

218 *Id.* at 57.

219 *Id.*

220 *Id.* at 58.

221 *Id.*

222 *Id.*

223 *Id.*

224 *See* Coinage Act of 1792, ch. 16, 1 Stat. 246, 250.

225 *Id.* § 1, 1 Stat. at 246 (creating the offices of Director, Assayer, Chief Coiner, Engraver, and Treasurer). Reflecting the Mint's organizational place within the executive branch, its Director was authorized to employ others, such as clerks and workmen, "subject to the approbation of

dential control over the mint, the statute created a mechanism for judging the quality of the coins. It required the Treasurer of the mint to set aside "a certain number of pieces" that "shall be assayed."[226] But because the United States lacked a "Company of Goldsmiths" that could assay the coinage, the statute provided that the coins would be

> assayed under the inspection of the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary for the department of State, and the Attorney General of the United States . . . or under the inspection of any three of them, in such manner as they or a majority of them shall direct.[227]

If the coins were inferior to the statutorily specified standard, the Coinage Act provided that "it shall be certified to the President of the United States, and the said officer or officers shall be deemed disqualified to hold their respective offices."[228]

The inspection mechanism for coins thus included four officers subject to the President's control (the Secretary of the Treasury, the Comptroller of the Treasury, the Secretary of State, and Attorney General) and one officer with life tenure (the Chief Justice).[229] Was this framework consistent with the Decision of 1789? Yes, for several reasons. For one thing, it seems doubtful that the members of this committee—by inspecting the assessment of the coins—exercised any significant sovereign powers of the federal government.[230] They played the role that Hamilton had ascribed, in English practice, to a "jury of the Company of Goldsmiths"—in other words, a set of private individuals.[231] Because no comparable guild existed in the United States, Congress naturally turned to a list of reasonably available pub-

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the President of the United States." *Id.* § 2. Similarly, the Director was authorized to regulate the "alloy . . . composed of silver and copper . . . with the approbation of the President." *Id.* § 12, 1 Stat. at 249.

226 *Id.* § 18, 1 Stat. at 250.

227 *Id.*

228 *Id.*

229 The inclusion of the Chief Justice appears to mirror the proposal from Hamilton's report, which was based on English practice that included the "Lord Chancellor" in the group that assayed the coinage. The Lord Chancellor was a judicial official. Hamilton, *supra* note 211, at 58.

230 To be sure, it was abundantly clear that judges could exercise executive power. Prakash, *supra* note 215, at 26.

231 Hamilton, *supra* note 211, at 58. The Company of Goldsmiths still exists and engages in a Trial of the Pyx in England. *Trial of the Pyx—Since 1282*, ROYAL MINT, https://www.royalmint.com/discover/uk-coins/history-of-the-trial-of-the-pyx/ [https://perma.cc/8V4A-SSFZ].

lic officials to perform the jury function.[232] Indeed, in later years, the committee became the United States Assay Commission, which included purely private individuals who would inspect the assaying of the coinage.

For another thing, the statute expressly provided that a bare majority of the committee ("or any three of them") could approve or disapprove the coins.[233] Through that majority mechanism, the statute gave presidentially appointed and removable officers effective control of the decisions of the committee and, thereby, the President effective control over the committee. These considerations likely explain why, at the time of the Coinage Act's passage in 1792, nobody appears to have raised a concern that the mint's organizational structure was inconsistent with the Decision of 1789.[234]

b. The Sinking Fund Commission

In January 1790, Hamilton submitted to Congress a report relating to the public credit, which called for the federal government to assume state debt at face value.[235] In the report, he proposed that the revenue from the post office be applied to the "purposes of a sinking fund."[236] From an administrative standpoint, the oddity in Hamilton's proposal was that he suggested that Congress vest the fund in "commissioners, to consist of the Vice-President of the United States or President of the Senate, the Speaker of the House of Representatives, the Chief Justice, Secretary of the Treasury and Attorney-General of the United States."[237] Hamilton suggested that "any three of them" be authorized to apply the funds "to the discharge of the existing public debt, either by purchases of stock in the market, or by payments on

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232 *See* Coinage Act of 1792 § 18.

233 *Id.*

234 The establishment of the mint does provide evidence of the flexibility that the Constitution conferred on Congress to structure agencies to arrive at credible—and in a sense, independent—decisions within the framework of the separation of powers. Congress conferred on the Chief Justice a small role to be a part of a committee to ensure that the coinage was not debased. By making the Chief Justice a part of the committee—albeit as a minority member—one could see how that the Chief Justice was in a position to sound the alarm to Congress if in fact presidentially appointed and removable officers within the mint sought to debase the currency. But the manner of independence fit within the general framework of the earlier decision on the removability of federal officers.

235 Alexander Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), *reprinted in* 1 ANNALS OF CONG. 2041 (1790) (Joseph Gales ed., 1834).

236 *Id.* For an explanation of this mechanism, see Donald F. Swanson & Andrew P. Trout, *Alexander Hamilton's Hidden Sinking Fund*, 49 WM. & MARY Q. 108 (1992).

237 *See* Hamilton, *supra* note 235, at 2071.

account of the principal."[238] Much like with the mint commission, Hamilton's proposal granted several officials not removable from their office by the President—notably the Speaker of the House and the Chief Justice—the authority to spend the Sinking Fund's money.[239]

After a significant debate devoted to the propriety of assuming state debt, Congress adopted Hamilton's proposal, albeit with an amendment to the Sinking Fund's administrative structure. When Congress enacted the statute, it substituted the Secretary of State for the Speaker of the House.[240] The substitution suggested that Congress was concerned about structural considerations; the Constitution, after all, barred members of Congress from serving in the executive branch.[241] But there was no comparable prohibition on judges serving in the executive branch, and Congress retained Hamilton's proposal to place the Chief Justice on the commission.[242] The statute also provided that the commission "or any three of them" would act "with the approbation of the President of the United States."[243]

Like the Mint commission, several theories can explain how the Sinking Fund Commission comports with the separation of powers. For one thing, it appears as though members of Congress did not view acting as a "commissioner" of the Sinking Fund to be a separate and distinct office. During an 1806 debate on dual officeholding, for example, Representative John Randolph explained that "the Commissioners of the Sinking Fund [we]re not, strictly speaking, officers," because they "discharge[d]" their "duties . . . *ex officio*, in virtue of their holding other high offices, and, as Commissioners, they receive[d] no salary."[244] The sinking fund statute, in other words, had not created new offices to which appointments were made, but rather conferred new duties on existing officers. Those new duties, moreover, were subject to presidential control. First, the commission was required to obtain the President's "approbation" for its actions.[245] Second, the requirement that a majority of the commission could act on the commission's behalf ("or any three of them") ensured that the President controlled

238 *Id.*

239 *Id.*; Hamilton, *supra* note 211, at 58.

240 *Compare* Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186, *with* Hamilton, *supra* note 235, at 2071.

241 U.S. CONST. art. I, § 6, cl. 2.

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

243 *Id.*

244 15 ANNALS OF CONG. 929 (1806).

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

the commission through its three members who were undeniably presidentially appointed and removable (the Secretaries of the Treasury and State and the Attorney General).[246] Finally, the Sinking Fund Commission may be an example of the unusual role that judges could play within the executive branch.[247]

c. The Bank

In December of 1790, Alexander Hamilton submitted to Congress a report proposing a national bank modeled on the then–existing Bank of England.[248] Hamilton's arguments in favor of his proposed structure for the bank rested on policy grounds. He argued that a bank would augment "the active or productive capital of a country," by prompting the circulation of notes on the basis of the bank's gold and silver reserves; that it would assist the government in obtaining aid "in sudden emergencies"; and that it would assist the government in collecting taxes.[249] According to Hamilton, the existing three banks in the United States—the Bank of North America, Bank of New York, and Bank of Massachusetts—could not, for various reasons, serve on a national scale.[250]

Although Hamilton did not use the familiar terminology, his report made an argument for "independence" of a sort for the national

246 *See id.*

247 *See* Prakash, *supra* note 215, at 33 (noting the Sinking Fund Commission as an example of an early law which "assigned executive duties to federal judges").

248 Alexander Hamilton, Report on a National Bank (Dec. 13, 1790), *in* 1 REPORTS OF THE SECRETARY OF THE TREASURY 54, 75–76 (1828); *see also* JOHN THOM HOLDSWORTH & DAVIS R. DEWEY, THE FIRST AND SECOND BANKS OF THE UNITED STATES, S. DOC. NO. 571, at 19–22 (1910) (discussing the Bank and its relationship to the Bank of England).

249 Hamilton, *supra* note 248, at 55–57. Hamilton also urged that a bank (and not the government) release paper money because "paper emissions, under a general authority . . . are of a nature so liable to abuse . . . that the wisdom of the government will be shown in never trusting itself with the use of so seducing and dangerous an expedient." *Id.* at 64–65. According to Hamilton, the government's release of paper currency provided "no standard to which an appeal can be made, as to the quantity which will only satisfy, or which will surcharge the circulation." *Id.* at 65.

250 As Hamilton observed, the Bank of North America was initially chartered by Congress on December 31, 1781. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 49, at 1187–90. Its directors, however, had since "accepted and acted under a new charter from the State of Pennsylvania" that limited the stock in the bank and placed it in an "ambiguous" situation. Hamilton, *supra* note 248, at 66. Intriguingly, Hamilton also argued that the Bank of North America was unfit because the directors were not rotated, and the principle of rotation of office "lessen[ed] the danger of combinations among the directors, to make the institution subservient to party views, or to the accommodation, preferably, of any particular set of men." *Id.* at 68. As Hamilton put it, the "continual administration of an institution of this kind, by the same persons, will never fail, with or without cause, from their conduct, to excite distrust and discontent." *Id.*

Bank through the form of corporate chartering.[251] Responding to those who argued that the "profits" of the bank ought to "redound to the immediate benefit of the State," Hamilton contended that "[t]o attach full confidence to an institution of this nature, it appears to be an essential ingredient in its structure, that it shall be under a *private* not a *public* Direction, under the guidance of *individual interest*, not of *public policy*."[252] Absent that approach, Hamilton contended, suspicion "would continually corrode the vitals of the credit of the Bank," notwithstanding the "real interest of the Government not to abuse it," because no "Government ever uniformly consulted its true interest."[253] The State, according to Hamilton, "ought not to desire any participation in the Direction of [the Bank], and therefore ought not to own the whole or a principal part of the Stock."[254] To put the matter bluntly, in Hamilton's view, a private chartered bank was necessary because the government could not be trusted to manage its finances appropriately.[255]

In Congress, James Madison led the opposition to the Bank by contending that Congress lacked the power to charter a corporation like the Bank under its enumerated powers, rather than focusing on any concerns related to presidential appointment and removal.[256] His

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251 *See* Hamilton, *supra* note 248, at 70–71; *see also* H.R. JOURNAL, 1st Cong., 2d Sess. 295 (1790) (directing the Secretary of the Treasury "to prepare and report to this House . . . such further provision as may, in his opinion, be necessary for establishing the public credit").

252 Hamilton, *supra* note 248, at 70–71.

253 *Id.* at 71. Hamilton claimed that "[t]he keen, steady, and, as it were, magnetic sense, of their own interest, as proprietors, in the Directors of a Bank, pointing invariably to its true pole, the prosperity of the institution, is the only security, that can always be relied upon, for a careful and prudent administration." *Id.*

254 *Id.* at 72.

255 At the same time that Hamilton contended that the Bank should be private, he also made allowances that the Bank would come to the assistance of the government in emergencies, because the institution "must depend for its renovation from time to time on the pleasure of the Government." *Id.* at 71. Thus, as Professor James Willard Hurst put it, the "national bank legislation" creating the First and Second Banks of the United States "delegate[ed] functions of public interest to organizations predominantly private," in line with Hamilton's view "that private control meant that the bank would give more careful attention to its public as well as to its private business and that its private organization would insulate it from the forces that pressed legislators to inflate the money stock." HURST, *supra* note 14, at 158–59; *see id.* at 153 (observing that "[t]he text of the federal Constitution and contemporary debate showed keen distrust of the capacity of legislators to withstand temptations to inflate an official currency," which prompted "[d]elegation of currency issue to private bankers"). As discussed below, those who believed control of the currency was a sovereign function later objected, on separation of powers grounds, that the bill chartering the Second Bank unconstitutionally delegated congressional power to a private entity. *See infra* Section II.B.1.

256 James Madison, *Speech in Congress Opposing the National Bank, Feb. 2, 1791*, *in* JAMES MADISON: WRITINGS 480, 482–83 (1999).

arguments were unsuccessful. Congress responded to Hamilton's report by enacting a bill to charter the First Bank of the United States.[257] Consistent with Hamilton's vision, Congress established that shareholder votes would elect all of the 25 directors of the Bank, who in turn would choose the Bank's President.[258] In light of the further limitation on the United States' authority to subscribe to no more than one-fifth of the Bank's stock, the law thus ensured the Bank's private, profit-driven status.[259] While the Treasury Department could supervise the Bank by demanding reports and inspecting records,[260] the statute provided no additional role for ongoing and direct federal control of the Bank's operations. Notwithstanding this lack of federal control, however, the statute gave the Bank certain important powers under federal law: It provided that the Bank's bills or notes would be "receivable in all payments to the United States,"[261] thereby rendering them a *de facto* circulating currency. And it barred Congress (by a "pledge[]" of "the faith of the United States") from establishing any other bank by law "during the continuance of the" Bank's charter.[262]

On Congress's passage of the bank bill, President Washington sought the advice of three members of his cabinet—Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton—before deciding whether to sign or to veto the bill.[263] None of the three lodged an objection to the bill based on the Appointments Clause or the President's inability to supervise officers of the bank.[264] The simplest and most likely explanation for their silence on this issue was that nobody thought that the Bank would be a part of the government at all or that its employees performed sufficiently sovereign functions to render them "Officers of the United States" to whom Article II's provisions were

257 Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

258 *Id.* §§ 4, 7, 1 Stat. at 192–93.

259 *See id.* §§ 9, 11, 1 Stat. at 196.

260 *Id.* § 7, art. XVI, 1 Stat. at 195.

261 *Id.* § 10, 1 Stat. at 196.

262 *Id.* § 12, 1 Stat at 196.

263 Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, *in* 3 THE WORKS OF ALEXANDER HAMILTON 180, 180 (Henry Cabot Lodge ed., 1904); Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *in* THE FEDERALIST 651–52 (Paul Leicester Ford ed., 1898); Edmund Randolph, *The Constitutionality of the Bank Bill* (Feb. 12, 1791), *in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 3 (1999).

264 *See* Hamilton, *supra* note 263, at 180 (observing that "the objections of the Secretary of State [Jefferson] and the Attorney-General [Randolph] are founded on a general denial of the authority of the United States to erect coprorations").

applicable. As Hamilton explained in his opinion, "[t]he by-laws of . . . a bank can operate only on its own members, can only concern the disposition of its own property, and must essentially resemble the rules of a private mercantile partnership."[265]

After the passage of two decades, Congress elected not to renew the charter of the First Bank of the United States upon its lapse in 1811.[266] But when the lack of a central fiscal institution caused financial difficulties during the War of 1812,[267] Congress chartered a Second Bank of the United States in 1816.[268]

From a separation-of-powers perspective, the plan for a Second Bank created an additional wrinkle. In the new charter, Congress altered the rules for the Bank's directorship, expressly authorizing the President to appoint five of the Bank's twenty-five directors with the Senate's advice and consent.[269] The proposal was the subject of some criticism, because, as Representative Samuel Smith of Maryland noted, certain members of the House "were hostile to the control of the Government in" the Bank.[270] Or as Representative John Sergeant of Pennsylvania—a Federalist and later a Vice Presidential running mate to Henry Clay on the National Republican ticket—asked: "Was this to be a commercial bank, or a Government bank" in light of "the Government's interference in the management of the bank by appointing directors and president"?[271]

The new provision prompted a debate in the House, only part of which is accessible today.[272] At the outset, Representative Joseph Hopkinson—a Federalist from Pennsylvania and the very same Hopkinson who would soon argue against the Bank's constitutionality in *McCulloch v. Maryland*[273]—argued that the new bill contained "new ingredients, many of which are known to be absolutely inadmissible in the judgment of many of the best friends of a National Bank."[274] Hop-

265 *Id.* at 195. An opinion written by Randolph shortly thereafter appears to reflect this view of the Bank as a private entity. *See* Commissioners of the Bank of the United States, 1 Op. Att'y Gen. 19, 19 (1791).

266 *See* MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY AND THE AMERICAN STATE, 1783–1867, at 121 (2014).

267 *See id.* at 122–23.

268 *See* Act of Apr. 10, 1816, ch. 44, § 1, 3 Stat. 266, 266.

269 *Id.* §§ 8, 11, 3 Stat. at 269–71.

270 29 ANNALS OF CONG. 1074 (1816) (statement of Rep. Smith).

271 *Id.* at 1081.

272 The reporter of the Annals of Congress noted that he "can only generalize the argument" that occurred on this topic. *Id.* at 1137.

273 17 U.S. (4 Wheat.) 316 (1819).

274 29 ANNALS OF CONG. 1096 (1816) (statement of Rep. Hopkinson). Hopkinson claimed

kinson conceded that Congress could lawfully establish a National Bank "as an instrument of finance" as a "necessary accommodation in collecting and disbursing revenue, receiving and paying debts, and facilitating loans."[275] But he claimed that a Bank that would be a "field for the exercise of patronage and appointment" was "a direct and dangerous violation of the Constitution."[276] A few days later, Representative Timothy Pitkin, a Federalist from Connecticut, moved to strike out the provision giving the President the authority to appoint five directors of the Bank.[277] In the debate that followed, several representatives spoke on Pitkin's motion.[278] Those who favored government control tended to argue that the Bank was "designed not merely to fulfil the ordinary purposes of banks of discount," but rather to "aspire[] to great national objects" such as "a restoration of the legitimate currency of the country" that the Constitution had "intended to . . . vest[] in the Congress of the United States, when to it was assigned the supervisorship of the Mint establishment."[279] Thus, in the words of Representative Thomas Telfair of Georgia, "[t]he interest of this bank should be made subservient to the interest of the public, of the people; and hence I wish for some control in its direction."[280] On the flip side, some like Representative William Gaston of North Carolina worried that the President would appoint directors "not for their capabilities

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that he "came to this Congress strongly impressed with the expediency of establishing a National Bank," but had changed his mind when Congress had failed to pursue a plan comparable to the First Bank of the United States, which he described as having been run with "integrity and honor." *Id.* at 1095–96.

275 *Id.* at 1099.

276 *Id.*

277 *See id.* at 1137; *id.* at 1209.

278 *Id.* at 1209–10 (noting that Pitkin's motion was supported by Representatives Ward of Massachusetts, Hopkinson, McKee, Huger, and Grosvenor, and opposed by Representatives Smith of Maryland, Calhoun, Tucker, and Robertson).

279 *See id.* at 1144 (statement of Rep. Telfair). A similar debate arose when Representative Smith of Maryland later sought to amend the same provision "to allow the choice of President of the Bank to be made from *any* of the Directors, and not to confine the selection of that officer to one of the Directors appointed by the President and Senate." *Id.* at 1151. Smith's motion received support from Representative Ross of Pennsylvania, who "condemned the policy of giving so much additional strength to the Executive arm" and contended that "Alexander Hamilton himself, in the zenith of his influence, would not have dared to propose such a grant of power to the President as the control and regulation of a great moneyed institution." *Id.* at 1152. The motion passed, *see id.*, even though some members of the House believed (as one Representative put it) the motion "would diminish too greatly the power which it was necessary the Government should have over the Bank," *id.* at 1151 (statement of Rep. Robertson) (arguing that the bill should create "not . . . merely a great money machine, but an institution of a national character").

280 *Id.* at 1146 (statement of Rep. Telfair).

for the banking trade, but for their political service, past, or to come."[281] Indeed, as Representative Pickering put it, Alexander Hamilton had argued "that banks could be beneficial only under the direction of private individuals, but never under that of Governments."[282]

Ultimately, Pitkin's motion failed.[283] Congress's statute chartering the Second Bank expressly authorized the President to appoint, with the advice and consent of the Senate, five of the Bank's 25 directors.[284]

B. Andrew Jackson and the Bank Wars

Congress's decision to charter the Second Bank raised two distinct legal questions. First, what was the nature of the institution (*i.e.*, the Second Bank) that Congress had created—was it an arm of the national government or a private corporation? Second, if (as the predominant view held) the Second Bank was understood to be a private institution, could the President control the Treasury Secretary's supervision of the Second Bank and the five directors appointed by the President with the advice and consent of the Senate? The first of these two questions—regarding the nature of the Bank—was addressed in a series of Supreme Court decisions preceding the presidency of Andrew Jackson.[285] The Bank was generally understood to be a private, rather than a public entity, with important legal ramifications for how Congress could control it.[286]

The second question was addressed during the "bank wars" between Congress, the Bank, and President Andrew Jackson. The titanic struggle between these entities is one of the most fascinating political battles in American history.[287] For present purposes, a brief outline of the politics helps to frame the legal discussion that will follow. After Jackson vetoed a bill to recharter the Second Bank in 1832, the Bank actively campaigned against Jackson during the presidential election.[288] Jackson prevailed in the election, at which point he decided to

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281 *Id.* at 1147 (statement of Rep. Gaston) (expressing concern about the "increase of patronage created by these appointments").

282 *Id.* at 1148 (statement of Rep. Pickering).

283 *See id.* at 1210 (recording a vote of 54 in favor and 91 opposed).

284 *See* Act of Apr. 10, 1816, ch. 44, § 8, 3 Stat. 266, 269.

285 *See* Briscoe v. Bank of Ky., 36 U.S. (11 Pet.) 257 (1837); Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907–08 (1824); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

286 *See infra* Section II.B.1.

287 For a classic exposition of the politics of this issue, see generally ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER (1967).

288 *Id.* at 89–108.

remove the federal government's deposits immediately from the Second Bank before the expiration of its charter in 1836.[289] When Jackson's Treasury Secretary William Duane refused to remove the deposits, Jackson fired him.[290] Jackson's firing of Duane prompted a set of arguments in Congress that Jackson lacked the authority to remove, and to control, the Treasury Secretary, because the Treasury Department was situated differently from the other departments for purposes of Article II.[291]

1. The Nature of the Bank

First things first: What was the Bank? Congress could have created a bank as part of the federal administration—the "Bank Department," so to speak—without incorporating a new entity. But Alexander Hamilton, in his *Report on a National Bank*, had opposed that framework in 1791, preferring a corporation to a separate department of the government.[292] The resulting administrative apparatus naturally gave rise to the question whether a bank chartered by the federal government was in fact a private entity—as its corporate form might suggest—or was instead an arm of the federal government because it undertook functions on the public's behalf. That question, in turn, had important administrative ramifications because "officers of the United States" must be appointed pursuant to the Appointments Clause.[293] If the Directors of the Bank were "officers," then the failure to appoint *all of* them using the Appointments Clause violated the Constitution.

The Court addressed this question in a series of cases about state banking corporations and two canonical cases about the Bank of the United States. Although the cases did not all point in exactly the same direction, the prevailing view was that the Bank of the United States was a private entity that performed non-sovereign functions for the benefit of the public.

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289 *See id.* at 109–53.

290 *See id.* at 123–24.

291 *See id.* at 137–53.

292 Hamilton, *supra* note 248, at 70–71; *see also* Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, *supra* note 263, at 195 (characterizing the First Bank's bylaws as "essentially resembl[ing] the rules of a private mercantile partnership").

293 U.S. CONST. art. II, § 2, cl. 2 (providing that principal "Officers of the United States" must be appointed by the President with the advice and consent of the Senate and that "inferior" officers may be appointed in that manner, or by the President alone, the "Head of a Department," or a "Court of Law").

One key precedent was the Supreme Court's 1824 decision in *Bank of the United States v. Planters' Bank of Georgia*.[294] The case involved a jurisdictional dispute, the details of which are only tangentially relevant to this Article.[295] In the course of its analysis, the Court was forced to confront the question whether the Planters' Bank of Georgia was distinct from the State of Georgia itself.[296] If the Planters' Bank had been deemed an arm of the State of Georgia—because, as the Court put it, the State was a "corporator" of the Bank—the lawsuit would have been understood as a suit against the State barred by the Eleventh Amendment.[297] But the Court held that a lawsuit against the Planters' Bank "is no more a suit against the State of Georgia, than against any other individual corporator."[298] "The Planters' Bank of Georgia," the Court reasoned, "is not the State of Georgia, although the State holds an interest in it."[299]

In reaching this conclusion, the Court in dicta observed that the federal Government had "held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank."[300] By incorporating the bank, the federal government "lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."[301] In a word, and at least for some constitutional purposes, the Bank of the United States was a private, not a public, entity.

In a similar vein, in *Briscoe v. Bank of the Commonwealth of Kentucky*,[302] the Court indicated that a state banking corporation with

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294 22 U.S. (9 Wheat.) 904 (1824).

295 *See, e.g.*, RICHARD H. FALLON JR., DANIEL MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 792–93, 846–47 (5th ed. 2003) [hereinafter HART & WECHSLER] (discussing *Planters' Bank's* treatment of federal question jurisdiction).

296 *See Planters' Bank*, 22 U.S. (9 Wheat.) at 906.

297 *Id.*

298 *Id.*

299 *Id.* at 907. Speaking more generally, the Court observed that "many States of this Union who have an interest in Banks, are not suable even in their own Courts; yet they never exempt the corporation from being sued." *Id.*

300 *Id.* at 908 ("The United States was not a party to suits brought by or against the Bank in the sense of the constitution. . . . Suits brought by or against [the Second Bank of the United States] are not understood to be brought by or against the United States.").

301 *Id.*

302 36 U.S. (11 Pet.) 257 (1837). On the significance of the case to the Court's jurisprudence, see Justice McLean's assertion in the *Briscoe* opinion that, of the issues that the Court had theretofore decided, "none have exceeded, if they have equalled, the importance of that which arises in this case." *Id.* at 311; *see also id.* at 328 (Story, J., dissenting) ("When this cause

directors "chosen by joint ballot of both houses of the general assembly"—and with stock designated exclusively the property of the commonwealth[303]—was not an arm of the government of Kentucky.[304]

The Court's reasoning in *Planters' Bank* and *Briscoe* could be understood as being in tension with *McCulloch v. Maryland*'s holding that the State of Maryland could not tax the Bank of the United States.[305] In *McCulloch*, the Court held unconstitutional "a tax on the operations of the bank," because it was "consequently, a tax on the operation of an instrument employed by the government of the Union

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was formerly argued before this Court, a majority of the judges, who then heard it, were decidedly of opinion that the act of Kentucky establishing this bank, was unconstitutional and void; as amounting to an authority to emit bills of credit, for and on behalf of the state, within the prohibition of the constitution of the United States.").

303 *Id.* at 314. When the Kentucky legislature incorporated the Bank in 1820, it declared that the Bank's capital stock shall be two million dollars from funds "paid into the [state] treasury" from various land sales. *See id.* at 265, 314–15. But, as the Court observed, "[t]here [wa]s no evidence of any part of the capital having been paid into the bank." *Id.* at 315.

304 *Id.* at 326. The Constitution, as discussed above, prohibited States from issuing "bills of credit." *Id.* at 258–59. A private party argued that notes issued by the Bank were "in all respects the same" as "bills of credit" issued by the state in violation of the Constitution. *Id.* at 266 (noting that the notes were made a tender). In *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830), the Court had defined "bills of credit" as "a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." *Id.* at 432; *see also Briscoe*, 36 U.S. (11 Pet.) at 313, 314 (defining a "bill of credit" as "a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money"). Part of the argument in *Briscoe* was whether "[t]he intervention of a corporation, by which the notes were issued, did not affect the character of the transaction," because those notes were "bills of credit" "[i]f they had been put into circulation by a state officer." 36 U.S. (11 Pet.) at 266 (argument of counsel); *see also id.* at 316 (noting that the case turned on whether "the Bank of the Commonwealth, in emitting the bills in question, acted as the agent of the state; and that, consequently, the bills were issued by the state"); THE FEDERALIST NO. 44 (James Madison) (describing bills of credit). The *Briscoe* Court acknowledged that "[i]n the early history of banks . . . their notes were generally denominated bills of credit," "[b]ut the inhibition of the constitution applies to bills of credit, in a more limited sense." 36 U.S. (11 Pet.) at 312. *Briscoe* also held that a "bill of credit" "must be issued by a state, on the faith of the state, and be designed to circulate as money." *Id.* at 318. In so holding, the Court distinguished between bills "issued by a state" and those issued by another entity, such as a corporation. *See id.* at 320 (reasoning that the Bank's notes were not issued by the state or on the faith of the state); *see also id.* at 321 (resting the holding in part on the fact that a separate "fund existed, independent of the state, [that] was sufficient to give some degree of credit to the paper of the bank"); *id.* at 328 (Thompson, J., concurring) (explaining that "[t]here is an ample fund provided for [the bank bills'] redemption; and they are issued by a corporation which can be sued, and payment enforced in the courts of justice, in the ordinary mode of recovering debts," but reasoning that if the bills were "bills of credit" then they were issued by the state because "[t]he state is the sole owner of the stock of the bank" and "has the sole and exclusive management and direction of all its concerns"). Indeed, one way the bank was clearly not the state is that it could be sued notwithstanding the Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1792), that a state could not be sued in federal court. *See* 36 U.S. (11 Pet.) at 257, 321.

305 17 U.S. (4 Wheat.) 316, 436–37 (1819).

to carry its powers into execution."[306] This train of logic appeared to draw no distinction between parts of the federal government and private entities chartered by the government. Likewise, Daniel Webster had noted during his argument that the "government of the United States has itself a great pecuniary interest in this corporation" and relied on the notion that the national government necessarily had the authority to "protect its own property by its own laws."[307] The argument appeared to equate the Bank's property with the United States' property. In response, Joseph Hopkinson, Maryland's counsel, argued that bank-stock was inherently taxable property,[308] and that "[s]o far as [the United States] hold stock [in the Bank], they have a property in the institution, and no further."[309] "Can an institution," Hopkinson asked, that was "purely private, and which disclaims any public character, be clothed with the power and rights of the government . . . ?"[310]

The Court amplified this point in *Osborn v. Bank of the United States*.[311] In the face of a challenge by the State of Ohio, the Court again confronted the question of whether a State could tax the

306 *Id.* at 436–37.

307 *Id.* at 328 ("The United States have, and must have, property locally existing in all the States; and may the States impose on this property, whether real or personal, such taxes as they please?").

308 *Id.* at 339.

309 *Id.* at 340 ("Strip [the Bank] of its name, and we find it to be a mere association of individuals, putting their money into a common stock, to be loaned for profit, and to divide the gains.").

310 *Id.* at 341. Echoing cases like *Planters' Bank* and *Briscoe*, Hopkinson contended that Maryland could tax the Bank because "the direction and management of the bank" was not "under the control of the United States," and the federal government was merely "represented in the board by the directors appointed by them, as the other stockholders are represented by the directors they elect." *Id.* at 340 (observing that "[a] director of the government has no more power or right than any other director" and that "the control the government may have over the conduct of the bank, by its patronage and deposits, [] is precisely the same it might have over any other bank, to which that patronage would be equally important"). As Hopkinson put it, the Bank was not "an institution belonging to the government, directed by it, or in which it has a permanent, indissoluble interest." *Id.* In addition, in arguing against the Bank's authority to establish branches in new states, Hopkinson contended that the power rested (if anywhere) with Congress and could not "be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens." *Id.* at 335–36; *see also id.* at 336 ("[I]f the powers derived from [the Necessary and Proper Clause] are assignable by the Congress to the directors of a bank; and by the directors of the bank to anybody else; we have really spent a great deal of labour and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled."). The Attorney General responded to this nondelegation argument by claiming that the right to establish branches had not been "delegated by Congress to the parent bank," but rather specified in the act of Congress with the "time and place of their establishment" left "to the directors, as a matter of detail." *Id.* at 359–60.

311 22 U.S. (9 Wheat.) 738 (1824).

Bank.[312] The Court reaffirmed *McCulloch* and held that States could not impose such a tax.[313] Arguing for Ohio, Charles Hammond quite sensibly conceded that "[i]f [the Bank] st[ood] upon the same foundation with the mint and the post office"—if it was, in other words, a government entity—"it is entitled to the exemption [from taxation] it claims," because "[t]he States cannot tax the offices, establishments, and operations, of the national government."[314] Hammond claimed, however, that banking was "in its nature, a private trade,"[315] and that the Bank's federal corporate charter did not change matters.[316] Hammond expressly noted the contradiction between viewing the Bank as a public institution and the status of the Bank's officers: he observed that "[a]ll the powers of the [federal] government must be carried into operation by individual agency, either through the medium of public officers, or contracts made with individuals."[317] If the Bank were a public institution, then Hammond claimed its "individual stockholders must be the officers."[318] But if that were so, then the stockholders held other "public offices, even in the national Legislature, from which, if they be public officers, they are excluded by the constitution in express terms."[319] Hammond, in other words, expressly argued the Bank was "private" based on structural separation-of-powers principles.[320]

In rejecting Hammond's argument, the Court observed that Ohio's position necessarily rested on the premise that the Bank had "been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object."[321] A "mere private corporation," the Court stated, "engaged in its own business, with

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312 *Id.* at 765–66.

313 *Id.* at 766.

314 *Id.* at 765–66 (argument of Mr. Hammond). By contrast, Henry Clay, who argued for the Bank, "declined" to address "the question of the right of the State of Ohio to tax the Bank, considering it as finally determined by" *McCulloch*. *Id.* at 795.

315 *Id.* at 766.

316 *See id.* at 768–70 ("The charter was granted to give facility to the individuals in the management of their private affairs; not that, in virtue of that charter, they might share in the civil government of the country.").

317 *Id.* at 771.

318 *Id.* at 774.

319 *Id.*

320 Hammond also observed that, "[i]f the Bank be a public institution" like the "mint and the post office, then its charter may be amended, altered, or even abolished, at [Congress's] direction." *Id.*; *see id.* at 774–75 ("All public offices are created purely for public purposes, and may, at any time, be modified in such manner as the public interest may require. Public corporations partake of the same character.").

321 *Id.* at 859.

its own views, would certainly be subject to the taxing power of the State, as any individual would be."[322] Moreover, the Court acknowledged that the "mere business of banking is, in its own nature, a private business."[323] And the Court noted that the Bank itself was "undoubtedly[] capable of transacting private as well as public business."[324] Despite all that, however, the Court concluded that the "Bank [was] not considered as a private corporation, whose principal object is individual trade and individual profit," but rather "as a public corporation, created for public and national purposes."[325]

The undeniable tension between *Planters' Bank* and *Briscoe*, on the one hand, and *McCulloch* and *Osborn*, on the other, lingered in the case law during the Bank's existence.[326] Prominent contemporaneous treatises addressed the broader question whether and when a "corporation" was a private or a public entity.[327] One of the first

322 *Id.*

323 *Id.* at 860.

324 *Id.* ("While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage.").

325 *Id.* (reasoning that the Bank "was not created for its own sake, or for private purposes"). Justice Johnson's dissent echoed this understanding in part. *Id.* at 872 (Johnson, J., dissenting) ("The Bank of the United States, is now identified with the administration of the national government."). As he put it, the Bank had been created "to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone." *Id.* at 873. But Johnson recognized the Bank's private nature more directly. He noted that a government officer acted "distinctly as the organ of government," but the Bank was "a mere agent or attorney, in some instances; in others . . . it is a private person, acting on its own account, not clothed with an official character at all." *Id.* at 902.

326 There is a way to harmonize the holdings in *Planters' Bank* and *McCulloch* on this point—namely, to hypothesize a provision in the bank charter or another congressional enactment expressly exempting the Bank from state taxation, thereby preempting contrary state provisions under the Supremacy Clause. That is, in fact, how the modern law of intergovernmental immunity would treat such issues. *See, e.g.*, Davis v. Michigan, 489 U.S. 803, 804 (1989). Charles Hammond, in his *Osborn* argument, made this very observation, but noted that Congress had failed to specify a tax exemption by statute. *See, e.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 782 (argument of Hammond, counsel for Ohio) ("The power of the national Legislature to confer this exemption, upon a corporation created by it, in express terms, is one thing. That it exists as an incident to the charter, without any express provision, is a very different proposition.").

327 *See, e.g.*, JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (1832); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1827). The distinction between "public" and "private" corporations is found in later treatments. *See, e.g.*, ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS § 3, at 8 (1897) ("We commonly distinguish two principal classes of corporations, public and private. The former includes the state and municipal and other corporations constituting territorial or administrative subdivisions of the state; the latter, all other bodies incorporated for common purposes of the members, for individual profit, and for eleemosynary objects.").

Some modern scholars have speculated that this distinction between "public" and "private" corporations was manufactured during the nineteenth century. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1095 (1980) (claiming that pre-19th century corpo-

American treatises on corporate law—Joseph Angell and Samuel Ames' *A Treatise on the Law of Private Corporations Aggregate*,[328] first published in 1832—distinguished between "public" and "private" corporations.[329] As Angell and Ames explained, a corporation was "generally called *public*, when it has for its object the government of a portion of the state; and although in such a case it involves some private interests, yet, as it is endowed with a portion of political power, the term *public* has been deemed appropriate."[330] Angell and Ames identified "[a]nother class of public corporations," which were "founded for public" purposes "though not for political or municipal purposes," and "the *whole* interest in which belongs to the government."[331] Thus, in Angell and Ames' view, a corporation was "public" if it possessed some sovereign or governing capacity or if the government owned the "*whole* interest" in the corporation.[332]

Other corporations, however, were properly categorized as "private." In applying that analysis specifically to the "bank of the United States," Angell and Ames observed that "if the stock belonged *exclu-*

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rate law treatises did not "even mention[] the concepts of public and private corporations") (citing, *inter alia*, STUART KYD, LAW OF CORPORATIONS (1793-1794)); *id.* at 1099 (arguing that it was only "early nineteenth century legal doctrine [that] divided the corporation into two different entities, one assimilated to the role of an individual in society and the other assimilated to the role of the state"). Although this Article cannot fully address this difficult topic, it is readily apparent that some distinction between "public" and "private" is necessary for the proper functioning and analysis of the Appointments Clause and other separation of powers principles. The Appointments Clause, for example, specifies appointment mechanisms for "officers of the United States." U.S. CONST. art. II, § 2, cl. 2. By its nature, the Clause presupposes that some "officers" (which could be denominated "public") must be appointed pursuant to the specified mechanisms; other individuals who might serve a public function (denominated "private") need not be. The critical question is where to draw the line. And the critical point is that nineteenth century treatises placed banking institutions, including the Bank of the United States, on the "private" side of the line unless wholly owned by the government. But even if one were to reject the categorization of the Bank of the United States' functions as "private"—which was a legal position quite close to Andrew Jackson's—then one would be forced to confront the question whether the Bank impermissibly wielded the federal government's sovereign authority. As explained below, that was Jackson's key objection to the Bank.

328 ANGELL & AMES, *supra* note 327.

329 *Id.* at 8, 21.

330 *Id.* at 8.

331 *Id.*

332 *See id.* at 21 ("[I]f the whole interest does not belong to the government, or if the corporation is not created for the administration of political, or municipal power, the corporation is private."). In making this point, Angell and Ames observed that "[i]n the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the public benefit." *Id.* But creation "for the public benefit" did not make a corporation *public* in the relevant sense. According to the treatise, despite the government's intention to serve some public benefit in creating a corporation, such a corporation remained private unless "the whole interest" belonged to the government or the corporation administered "political" or "municipal" power. *Id.*

sively to the government, [the Bank] would be a public corporation; but inasmuch as there are other owners of the stock, it is a *private* corporation."[333]

Angell and Ames' treatment mirrored the analysis of Chancellor James Kent. In his *Commentaries on American Law*,[334] Kent argued that "[p]ublic corporations, are such as exist for public political purposes only, such as counties, cities, towns and villages."[335] "They are founded by the government, for public purposes," Kent reasoned, "and the whole interest in them belongs to the public."[336] Thus, according to Kent, "[a] bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation."[337] In contrast, "a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature."[338]

To decide whether a corporation was appropriately classified as "public" or "private," the test set forth by Angell and Ames and Kent required a court to determine whether a corporation conducted "sovereign" functions or whether it was wholly owned by the government.[339] As to the former inquiry, the line between "sovereign" and "private" functions could be challenging and slippery. Both Angell and Ames and Kent placed banks squarely on the side of entities performing non–sovereign functions and, hence, "private" corporations unless wholly owned by the government. As for other such private

333 *Id.* at 8. In reaching this conclusion, Angell and Ames relied on *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which held that the state of New Hampshire could not abrogate the charter for Dartmouth College under the Contracts Clause of the United States Constitution, because the charter was a contract with a private corporation (the college) rather than an act creating an arm of the government. *See id.* at 628-30; U.S. CONST. art. I, § 10, cl. 1 (prohibiting States from enacting laws "impairing the Obligation of Contracts"). In a concurrence in *Dartmouth College*, Justice Story observed that "a bank created by the government for its own uses, whose stock is exclusively owned by the government, is" a "public corporation," whereas "a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature." 17 U.S. (4 Wheat.) at 669 (Story, J., concurring). Likewise, Angell and Ames' treatise relied on *Planters' Bank* for a similar proposition about banking corporations generally. *See* ANGELL & AMES, *supra* note 327, at 21–22 ("A *bank*, for instance, may be created by the government for its own uses; but if the stock is owned by private persons, it is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature."); *see also id.* at 22 n.1 (citing state cases for this proposition).

334 2 KENT, *supra* note 327.

335 *Id.* at 222.

336 *Id.*

337 *Id.*

338 *Id.*

339 ANGELL & AMES, *supra* note 327, at 8.

corporations, Angell and Ames provided a partial list, including "insurance, canal, bridge, turnpike companies, &c." and "eleemosynary corporations," such as hospitals and colleges.[340] All of that suggested that the legislature was not at liberty to simply affix the "private" label to a federal government entity and thereby opt out of constitutional limits. Even if the federal government elected to call the Department of State a "private" corporation by statute, in other words, the Department would still accomplish "sovereign" functions, necessitating its categorization as "public" and triggering related constitutional ramifications.

To modern eyes, the Bank of the United States' currency-making functions might seem quintessentially sovereign.[341] But that modern sensibility was by no means the orthodoxy at the time of the First and Second Banks' establishment in the early 19th Century. In recommending to Congress the creation of a national bank under private management, Alexander Hamilton's 1790 report identified as a virtue a private bank's ability to avoid the temptation to avoid unpopular taxes by excessively printing money.[342] And as Angell and Ames' and Kent's treatises reflect, that was the dominant wisdom of the day.[343]

The resolution of that classification question ("public" or "private"?) carried significant legal ramifications. If the Court characterized the Bank of the United States as "public," then it would lead to a spate of follow-on questions, such as whether the nonfederal bank officials were "Officers of the United States" and, hence, needed to be

340 *Id.* at 22 (italics omitted); *see also id.* ("[F]or a *hospital*, founded by a *private* benefaction, is, in point of law, a private corporation, though dedicated by its charter to public charity."); *cf.* HURST, *supra* note 14, at 152 ("Delegating jobs of public concern to private associations was not unique to banking and money; the same years saw such delegation as the principal means of providing for public transportation, insurance, education, libraries, water supply, hospitals, and institutions to care for dependent persons.").

341 *See, e.g.*, Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 131 (1994) (stating that "the Bank arguably would have been a government entity" and its directors arguably "officers" because "[a] vigorous reading the Bank's authority might lead one to conclude that its directors", *id.* at 131, wielded "significant authority pursuant to the laws of the United States" under *Buckley v. Valeo*, 424 U.S. 1, 126 (1975)); Shane, *supra* note 27, at 355 (expressing "no doubt" that "the Bank wielded government power").

342 *See* Hamilton, *supra* note 248, at 65 ("The Stamping of paper is an operation so much easier than the laying of taxes, that a government, in the practice of paper emissions, would rarely fail, in any such emergency, to indulge itself too far in the employment of that resource, to avoid as much as possible one less auspicious to present popularity.").

343 *See* ANGELL & AMES, *supra* note 327, at 21–22; 2 KENT, *supra* note 327, at 222.

appointed and overseen by the President.[344] By characterizing banking corporations as "private," however, the Court opened up a separate can of worms. State charters created banks, and those charters looked, felt, and indeed acted much like contracts.[345] But if bank charters were true contracts, then arguably alterations to such charters violated the Contracts Clause of the Constitution.[346] That issue arose when Congress sought, during the Civil War, to regulate state banks incorporated pursuant to state charters.[347]

Indeed, this aspect of the Second Bank appears to have formed the backdrop against which Congress enacted the charter in 1816. During the debate on the proposed statute, Representative Sergeant noted that the charter of the Bank was not "an ordinary act of legislation which Congress might at their pleasure repeal," for it would "continue in force for twenty years" and "there would be no power within that period to repeal it."[348] The statute, Sergeant contended, would "create a vast machine of incalculable force, the direction of whose momentum was to be placed in the hands of they knew not whom."[349]

Sergeant's 1816 argument thus perfectly crystallized the options that participants in the congressional debate understood to be available to Congress when it chose to establish institutions that lacked an inherently sovereign function. Either Congress could create a new arm of the government, with officers who performed executive functions and, hence, served solely at the pleasure of the President. Or Congress could create a private corporation, with officers that might not serve at the pleasure of the President. In the latter circumstance, because of the corporation's private nature, Congress may not have had the unfettered discretion to change the terms of the corporation's charter during the charter's life.

That point is critical because the key Jacksonian objection to the Bank was premised, in an important respect, on *precisely* this fault

344 U.S. CONST. art. II, § 2, cl. 2; *see also* Mascott, *supra* note 10, at 531; Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1883 (2015).

345 *See* CONG. GLOBE, 37th Cong., 3d Sess. 823 (1863) (statements of Sens. Sherman and Fessenden).

346 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 330, 351–52 (1819) (argument of Maryland's attorney, Joseph Hopkinson, contending that Maryland's tax did not violate the Contracts Clause, even though the charter was a "contract between the government and the stockholders," in part because the State was not bound by the federal government's contractual agreements and because all contracts "are presumed to have in view the probability or possibility that they will be taxed").

347 *See generally infra* Section II.D.1.

348 29 ANNALS OF CONG. 1075 (1816) (statement of Rep. Sergeant).

349 *Id.*

line. Jackson's 1832 message accompanying his veto of the recharter of the Second Bank of the United States made this point with the utmost clarity.[350] In his veto message, Jackson characterized the Bank as a private entity, albeit one "established as an agent of the executive branch of the Government."[351] In the message, Jackson also conceded that "a bank of the United States is in many respects convenient for the Government and useful to the people."[352] But Jackson objected to the kind of bank created on several grounds—principally that a rechartering of the bank conferred "monopoly" and "exclusive" privileges to its *private* subscribers by inflating the value of their stock "at the expense of the public."[353] Instead—much like the mint that Congress established to coin money—Jackson believed that the authority to regulate the currency "was conferred to be exercised by [Congress], and not to be transferred to a corporation."[354] "If the bank be established" to regulate the currency, Jackson contended, "with a charter unalterable without [Congress's] consent, Congress have parted with their power for a term of years, during which the Constitution is a dead letter."[355]

To put the matter differently, the thrust of Jackson's veto message sounded, not in federalism, but in the separation of powers—and was premised on the notion that Congress could not delegate a monopoly over currency-making to a private entity.[356] If Congress made such a

350 *See* Veto Message from President Jackson Regarding the Bank of the United States (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson, ed., 1897) [hereinafter Veto Message]. The veto was prompted by the attempted rechartering of the Second Bank in 1832. As the expiration of the twenty-year charter for the Second Bank approached, Congressional Whigs enacted a law to extend the charter by four years. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861, at 58 (2005).

351 Veto Message, *supra* note 350, at 1151–52.

352 *Id.* at 1139.

353 *Id.* at 1140.

354 *Id.* at 1149.

355 *Id.*

356 Professor Hurst has understood Jackson's position in a similar fashion. *See* HURST, *supra* note 14, at 150 (contending that Jackson denied "that Congress had authority to delegate creation of currency to a private corporation—a matter . . . less of the federal balance than of the separation of powers within the central government itself"). So too has Professor Schwartz. *See* David Schwartz, *Defying* McCulloch*? Jackson's Bank Veto Reconsidered*, 72 Ark. L. Rev. 129, 152 (2019) ("[I]n a kind of antecedent to the twentieth-century nondelegation doctrine, Jackson argued that it was unconstitutional for Congress to delegate to a private corporation the power to decide where to locate branches or to regulate currency which *might* be impliedly granted to Congress . . . by the Coinage Clause."). In an interesting nod to 20th century economic theory, Jackson also suggested that the government auction off the right to run a national bank as a monopoly, rather than simply recharter the subscribers to the current bank. As Jackson put it,

delegation, it could not be revoked for the term of the charter. As Jackson put it, "[i]t is neither necessary nor proper to transfer [Congress's] legislative power to such a bank."[357]

2. *Presidential Control over the Treasury Secretary and the Bank*

After his reelection in 1832, Jackson sought to remove the federal government's deposits from the Second Bank before the lapse of the Bank's charter.[358] He directed his Secretary of the Treasury, William Duane, to remove the government's deposits and, when Duane refused, he removed Duane himself.[359] Jackson then replaced Duane with Roger Taney, who would soon become Chief Justice of the Supreme Court, and Taney removed the government's deposits.[360] Jackson's actions prompted a censure by the Senate, during which many of the arguments about the nature of the "Treasury" were aired.[361] A number of Jackson's critics assailed his removal of Duane from office. Senator Daniel Webster, for example, acknowledged the Decision of 1789 had established that "the power of removal does exist in the President," but he contended that the power had been "abused in this case."[362] Senator George McDuffie of South Carolina, to take another example, expressed alarm at the "meretricious combination between the banking power and the power of the executive."[363]

> If we must have such a corporation, why should not the Government sell out the whole stock and thus secure to the people the full market value of the privileges granted? Why should not Congress create and sell twenty-eight millions of stock, incorporating the purchasers with all the powers and privileges secured in this act and putting the premium upon the sales into the Treasury? . . . [S]ome of our citizens not now stockholders petitioned that the door of competition might be opened, and offered to take a charter on terms much more favorable to the Government and country. . . . If our Government must sell monopolies, it would seem to be its duty to take nothing less than their full value.

Veto Message, *supra* note 350, at 1140.

357 *Id.* at 1149. Thus, I disagree with the claim that "Jackson did not doubt that the Bank was established to be an agency of government," but nevertheless "did not object to the Bank on any separation of powers ground." Shane, *supra* note 27, at 359. Quite the contrary, Jackson claimed the Second Bank was a private entity to which Congress had unlawfully delegated its legislative power. *See supra* note 356.

358 REMINI, *supra* note 287, at 109–53.

359 *Id.* at 122–24.

360 *Id.* at 125.

361 *Id.* at 137–53.

362 Daniel Webster, Mr. Webster's Speech on the President's Protest: Delivered in the Senate of the United States, May 7, 1834, *reprinted in* 7 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 103, 105 (1903).

363 George McDuffie, Speech of December 19, 1933, *reprinted in* 45 NILES' WKLY. REG., Jan. 4, 1834, at 319, 321.

The leading statement was made by Senator Henry Clay in a famous speech on the "removal of the deposits."[364] Clay argued that, under the 1789 statute creating the Department of the Treasury, "[t]he Secretary of the Treasury is . . . constituted the agent of Congress."[365] Parts of Clay's speech were highly rhetorical. He condemned, for example, the "union of the purse and the sword, in the hand of one man, which constitutes the best definition of tyranny which our language can give."[366] Such a tyrannical union would result, according to Clay, if the President controlled both the military and the treasury. Other parts, however, were more legally technical. Relying on the differences in the phrasing of the statutes creating the first departments (specifically, the missing word "executive" in the statute establishing the Treasury),[367] Clay claimed that:

> The treasury department is placed by law on a different footing from all the other departments, which are, in the acts creating them, denominated executive, and placed under the direction of the president. The treasury department, on the contrary, is organized on totally different principles. Except the appointment of the officers, with the co-operation of the Senate, and the power which is exercised of removing them, the president has neither by the Constitution nor the law creating the department, any thing to do with it.[368]

Clay also claimed that, unlike the more nebulous duties assigned to the Secretaries of War and Foreign Affairs, those of the Treasury were specific and definite.[369] And Clay claimed that the "whole scheme of the [treasury] department [wa]s one of checks, each officer acting as a

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364 *See* Henry Clay, On the Removal of the Deposits (Dec. 26, 1833), *reprinted in* 5 THE WORKS OF HENRY CLAY 575 (Calvin Colton ed., 1897). For an explanation of Clay's role in the early- to mid-nineteenth century Congress, see David P. Currie, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 250 (2001) (describing Clay as "famous for his long and dogged battle for a legislative program of aggressive measures to strengthen the national economy," which had as its "principal elements . . . the Bank, internal improvements, and the protective tariff").

365 Clay, *supra* note 364, at 584.

366 *Id.* at 588.

367 *See supra* Section II.A.1.

368 Clay, *supra* note 364, at 598.

369 *See id.* at 589 (reasoning that "Congress has prescribed and has defined [the Secretary of the Treasury's] duties" by requiring him "to report to Congress annually; and to either House whenever he should be called upon," thereby rendering him "the sentinel of Congress"). At times, Clay's speech appeared to address the same basic question through a different doctrinal lens—the question whether Congress could constitutionally delegate legislative authority to the Secretary. *See id.* at 602 (observing that the Secretary's duties were "altogether financial and administrative" because "[h]e has no legislative powers; and Congress has delegated and could delegate none to him").

control upon his associates."[370] Thus, in Clay's views, the treasury department "was expressly created not to be an executive department."[371]

On being censured, Jackson directed a protest to the Senate.[372] He claimed that "[t]he Treasury Department in the discussions of 1789 was considered on the same footing as the other Executive Departments, and in the act establishing it, the precise words were incorporated, indicative of the sense of Congress that the President derives his power to remove the Secretary, from the constitution."[373] As he put it, the Secretary of the Treasury was

> appointed by the President, and being considered as constitutionally removable by him, it appears never to have occurred to anyone in the Congress of 1789, or since until very recently, that he was other than an executive officer, the mere instrument of the Chief Magistrate in the execution of the laws, subject, like all other heads of Departments, to his supervision and control.[374]

Other Jacksonians made the same set of arguments. Representative James K. Polk, the Chairman of the Ways and Means Committee and a future President of the United States, gave a significant speech before Congress on this issue.[375] Polk contended that Jackson's critics "suppose[d] that the secretary of the treasury is responsible to congress, and not to the president for the manner in which he discharges the duties of his office."[376] Polk argued that the Secretary of the Treasury was "not only not independent of the president of the United States—but, if congress were to pass a law to make him so, they would exceed their power, and the law would be void and of no effect."[377] Polk observed that, "[a]lthough there is no express clause in the constitution authorising [the Secretary of the Treasury's] removal from office at the pleasure of the president, [] the power to remove him flows from the nature of the constitution."[378]

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370 *Id.* at 598.

371 *Id.* at 602.

372 Andrew Jackson, Message of Protest to the Senate, *in* 10 REG. DEB. 1317 (1834).

373 *Id.* at 1326.

374 *Id.*

375 James K. Polk, Speech of January 3, 1834, *reprinted in* NILES' WKLY. REG., Jan. 4, 1834, at 313.

376 *Id.* at 314.

377 *Id.* (claiming that "[t]he secretary is not only not independent of the executive, but it is not in the power of congress to make him so"). In this regard, Polk found it important that the Secretary of the Treasury was appointed "[n]ot by congress," but by the President. *Id.*

378 *Id.* ("The judges of the courts of the United States hold their offices, indeed, during

Polk disputed that "the treasury department has been differently organized from the other executive departments."[379] In forming this opinion, Polk researched "the opinions and conduct of those who framed our constitution," relying on Madison, Vining, and Scott's statements from 1789.[380] It is notable that he was aware that others had argued that "the legislature, jealous of uniting the money power with other executive powers, wisely and purposely withheld it from the president."[381] As Polk put it, the claim that Congress purposely withheld such power was incorrect because Congress lacked the power "to appoint the secretary of the treasury, nor any power to remove him from office, if his conduct shall not please them; nor would they possess any such power, even if they could pass a law conferring it upon themselves."[382]

Another participant in the debate, Samuel Tilden—an eminent lawyer and later a presidential contender—also contended that there was no difference between the Treasury and the other Departments.[383] Tilden observed that "[t]he right of the President to remove the Secretary of the Treasury is not questioned; it is expressly recognized by the Act establishing the Treasury department."[384] From the right of removal, he derived "the supervisory right of the President" over the Treasury Secretary, because "the right of supervision and direction is of necessity included in and coextensive with that of removal."[385] Tilden also argued that "[i]t was the intention of the framers of the Treasury department to make it an executive department, and, like the other departments, subject to the supervision of the President."[386]

On March 11, 1834, Jackson renominated four of the Bank's presidentially appointed directors.[387] In his message to the Senate, Jackson contended that the presidentially appointed directors were not

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good behavior, or for life; but I deny that any other officer of the government holds his office by a similar tenure.").

379 *Id.*

380 *Id.* at 315–16.

381 *Id.* at 315.

382 *Id.* at 314.

383 Samuel J. Tilden, *Is the Treasury an Executive Department?*, *reprinted in* 1 THE WRITINGS AND SPEECHES OF SAMUEL J. TILDEN 28 (John Bigelow ed., 1885).

384 *Id.* at 31.

385 *Id.* (emphasis omitted); *see also id.* ("[T]hese rights are inseparable is almost too clear for argument" because "[h]ow can the right of removal be justly exercised without that of supervision and direction?").

386 *Id.* at 32 (emphasis omitted).

387 President Jackson's Message to the Senate Regarding the Renomination of the Directors of the Bank of the United States, *in* 10 REG. DEB. app. at 311 (1834).

"ordinary directors of a bank appointed by the stockholders and charged with the care of their pecuniary interests in the corporation," but rather were "public officers."[388] That conclusion, Jackson argued, was supported by the directors' "mode of [] appointment and their tenure of office."[389] The directors were "appointed like other officers of the Government and by the same authority" and were "liable to be removed from office at any time by the President when in his judgment the public interest shall require it."[390] Thus, these directors were "officers of the United States, and not the mere representatives of a stockholder."[391]

The upshot of this legal arrangement, in a nutshell, was that the presidentially appointed directors of the Bank were "officers of the United States" who served in a private institution—namely, the Bank.

The entire episode drew the attention of James Madison. Though eighty-three at the time,[392] Madison had evidently followed the machinations regarding Jackson's firing of Duane, as well as the invocation of the Decision of 1789.[393] In a letter to his friend John Patton, Madison argued that:

> Should the controversy on removals from office end in the establishment of a share in the power, as claimed for the Senate, it would materially vary the relations among the component parts of the Government, and disturb the operation of the checks and balances as now understood to exist. If the right of the Senate be, or be made, a constitutional one, it will enable that branch of the Government to force on the Executive department a continuance in office even of the Cabinet officers, notwithstanding a change from a personal and political harmony with the President, to a state of open hostility towards him. If the right of the Senate be made to depend on the Legislature, it would still be *grantable* to that extent; and even with the exception of the heads of departments and a few other officers, the augmentation of the Senatorial patronage, and the new relation between the Senate directly and the Legislature indirectly, with the Chief Magis-

388 *Id.* at 311.

389 *Id.*

390 *Id.*

391 *Id.*

392 *See, e.g.*, James Madison Papers, 1723 to 1859, *1817–1836*, LIBR. CONGRESS, https://www.loc.gov/collections/james-madison-papers/articles-and-essays/james-madison-timeline-1751-to-1836/1817-to-1836/ [https://perma.cc/RTE3-YGVR].

393 Letter from James Madison to John M. Patton (Mar. 24, 1834), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 342, 342–43 (J.B. Lippincot ed., 1865).

> trate, would be felt deeply in the general administration of the Government. The innovation, however modified, would more than double the danger of throwing the Executive machinery out of gear, and thus arresting the march of the Government altogether.[394]

The letter, perhaps, reflected nothing more than Madison's views—and his views as an older nonparticipant in public affairs at that. But those views are revealing given the context in which they arose, as well as the arguable ambiguity as to Madison's own views engendered by his proposal with respect to the Comptroller of the Treasury during the 1789 debate. Madison's letter strongly suggested that he did not believe that the Department of the Treasury lay outside the scope of the President's control of the executive branch. Nor did he think that his prior position on the Comptroller of the Treasury bore on this question. To the contrary, Madison evidently found the position he had expressed during the Decision of 1789 to be applicable in the context of Jackson's removal of the Secretary of the Treasury.[395]

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394 *Id.* In another letter to his friend Edward Coles, Madison made similar arguments:

> The claim, on *constitutional* ground, to a share in the removal as well as appointment of officers, is in direct opposition to the uniform practice of the Government from its commencement. It is clear that the innovation would not only vary, essentially, the existing balance of power, but expose the Executive, occasionally, to a total inaction, and at all times to delays fatal to the due execution of the laws.
>
> Another innovation brought forward in the Senate, claims for the Legislature a discretionary regulation of the tenure of offices. This, also, would vary the relation of the departments to each other, and leave a wide field for legislative abuses. The power of removal, like that of appointment, ought to be *fixed* by the Constitution, and both, like the right of suffrage and apportionment of Representatives, to be not dependent on the legislative will . . . . But apart from the distracting and dilatory operation of a veto in the Senate on the removal from office, it is pretty certain that the large States would not invest with that additional prerogative a body constructed like the Senate, and endowed, as it already is, with a share in all the departments of power, Legislative, Executive, and Judiciary. It is well known that the large States, in both the Federal and State Conventions, regarded the aggregate powers of the Senate as the most objectionable feature in the Constitution.

Letter from James Madison to Edward Coles (Aug. 29, 1834), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 393, at 366, 368–69; *see also id.* at 355 (discussing the Andrew Jackson removal debate) ("[C]laims are made by the Senate in opposition to the principles and practice of every Administration, my own included, and varying materially, in some instances, the relations between the great departments of the Government.").

395 Letter from James Madison to John M. Patton (Mar. 24, 1834), *supra* note 393, at 342–43.

C. *The Creation of the Court of Claims*

The creation of the Court of Claims during the Presidency of Franklin Pierce also reveals the perspectives of legal actors on the role of the President in overseeing financial officers.[396] Congress debated the institutional arrangement for a new "Court of Claims" that would replace the preexisting regime, in which a claimant's sole recourse against the United States was to petition Congress for passage of a private act seeking disbursement of funds.[397] Given the central role of appropriations in the payment of claims, one would assume that, if any allowance were to be made with respect to the question of presidential removal, it would be in this context. But although members of Congress disagreed over whether the new body should be a "commission" or a "court,"[398] they tended to agree that, if Congress established a commission, its members would be subject to removal by the President—and if a court, its members would receive "good behavior" protection.[399]

The debate began on December 18, 1854, when Senator Richard Brodhead, a Democrat from Pennsylvania, reported a bill from the Committee on Claims "to establish a board of commissioners for the examination and adjustment of private claims."[400] The draft of the bill provided that the commissioners "shall hold their office until the time appointed for the expiration of this act, unless sooner removed by the President."[401] Brodhead described the bill as one to "remedy an evil which has been a crying one for the last twenty or twenty-five years."[402] He described a Congress in which "[t]wo days of every

396 *See* UNITED STATES COURT OF FEDERAL CLAIMS: THE PEOPLES' COURT, https://www.uscfc.uscourts.gov/sites/default/files/USCFC%20Court%20History%20Brochure_1_0.pdf [https://perma.cc/8CCF-BSX7].

397 *See* HART & WECHSLER, *supra* note 295, at 102–03; *see also* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1888–917 (2010).

398 CONG. GLOBE, 33d Cong., 2d Sess. 72 (1854) ("He prefers a tribunal to be called a court; I prefer a tribunal of three gentlemen, to be called a board of commissioners.").

399 *Id.* at 70–114.

400 *Id.* at 70. Sixteen years earlier, in 1838, the House of Representatives had enacted a resolution instructing the Committee on Claims to consider that "private business far exceeded what could reasonably be attended to." *Id.* Representative Whittlesey, the chairman of the Committee on Claims, submitted a report and corresponding bill. *Id.* In 1848, Senator Rockwell of Connecticut made a similar report urging the establishment of a board of claims. *Id.* Responding to Brodhead's opening remarks, Senator Robert Hunter of Virginia claimed that his earlier bill on the subject had proposed "that all the decisions of the tribunal constituted by it should be referred to Congress," with no recourse in the "district courts." *Id.* at 71.

401 *Id.* at 72.

402 *Id.* at 70.

week—one third of the time, to say nothing of the time spent by committees—is set apart for the consideration of private bills and reports, and yet not much more than half are acted upon" with "[t]hose who have honest claims [] postponed for years."[403] "The pressure of business of a private character," Brodhead continued, "prevent[ed] [Congress] from considering great questions in a way becoming statesmen representing this great people, and this extended empire."[404]

In his speech, Brodhead identified three ways that the government could create a claims mechanism: first, by "enlarg[ing] the powers of the accounting officers"; second, by "enlarg[ing] the powers of the judiciary"; and third, by "establish[ing] a board similar to the one proposed in the bill."[405] He rejected the "idea of allowing accounting officers to exercise a discretionary power" and "to dispense with rules of law and of evidence" as "abandoned" because "[e]xecutive officers should be governed by law."[406] Such officers, according to Brodhead, "exercise their functions in private" and "now have as much as they can properly attend to, and to enlarge their powers would be a dangerous experiment."[407]

The debate thus revolved around whether Congress should establish a Commission, or a Court, of Claims.[408] Brodhead initially embraced a commission.[409] He rejected permitting judges to adjudicate claims as "dangerous and inexpedient," because he doubted that Congress has "the power under the Constitution to waive sovereignty and to authorize the Government to be sued either in 'law or equity.'"[410]

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403 *Id.*; *see also id.* at 108 (stating that, as the Chairman of the Committee on Claims of the Senate, he had "not time to investigate the vast variety of cases which come before that committee, and yet properly discharge my other duties").

404 *Id*. at 70.

405 *Id.*

406 *Id.*

407 *Id.*

408 *See id.*; *id*. at 72.

409 *See id.* at 70.

410 *Id.* Brodhead reasoned that at least some "applications" that were at that time "addressed to [Congress's] discretion [] could not well be considered or adjudged by a judicial tribunal according to the rules known to the courts of 'law and equity.'" *Id.* And he believed that it would be "difficult . . . to establish the rules by which the court should be governed in the great variety of applications for equitable relief[,]" thereby "introduc[ing] a dangerous element into our judiciary system." *Id.* It was not until the creation of general federal question jurisdiction and the creation of the equitable cause of action against the government in cases such as *Ex parte Young*, 209 U.S. 123 (1908), that Brodhead's concern was abandoned. In a later passage from the same discussion, Brodhead claimed that, in order to create such a court, Congress

> would have to reform the whole judiciary system, in a great measure, to carry it out; you would have to define the jurisdiction; you would have to classify the cases; and how would you refer to a court, governed by rules of law or equity, questions which

Brodhead's bill, instead, proposed "the appointment of three commissioners . . . to hold these offices for four years, to whom all petitions to Congress, asking relief on account of any claim against the United States, shall be referred."[411] The commission was to "be in the nature of a judicial tribunal,"[412] with the President entitled to select the commissioners, by and with the advice and consent of the Senate.[413] Brodhead claimed that a party seeking relief could "present his petition to Congress, and file it with the Secretary of the Senate or Clerk of the House, whether Congress is in session or not, and it will thus, after being registered, go at once before the board[,]" with the board required "to report to Congress" at regular intervals.[414] Each member of the board, according to Brodhead, would "represent[] the Government" and would be "in some measure an examining magistrate," making a further requirement that the Government be represented before the board unnecessary.[415]

In contrast with Brodhead, Robert Hunter of Virginia announced that "the best tribunal for the examination of such claims would be a court constituted here, before whom these claims should be publicly presented."[416] He claimed that he would "vastly prefer, on account of the tenure, that, instead of commissioners appointed for four or five years, and removable at the pleasure of the President, we should have two judges sitting here, who should hold their office as judges do under the Constitution of the United States."[417] Hunter also conceded

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> address themselves alone to our discretion, to our sense of liberality and justice—if you please, abstract justice, which is administered in courts of law or equity?

Id. at 74. Senator Brown of Mississippi, in a later part of the debate over the bill, argued that the Constitution's requirement that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law[,]" required the Congress to "exercise sound judgment in making appropriations under the Constitution." *Id.* at 107 (citing U.S. CONST. art. I, § 9, cl. 7). Because of that requirement, according to Brown, there was no need for a court to create reports, which could just as easily be done by committee. *See id.* For a discussion of the appropriations issues in the creation of the Court of Claims, see HART & WECHSLER, *supra* note 295, at 102–03.

411 CONG. GLOBE, 33d Cong., 2d Sess. 71 (1854).

412 *Id.*

413 *Id.*

414 *Id.* at 71.

415 *Id.* As Brodhead put it in a later part of the same discussion, the "Government is to be represented by these three commissioners," who "are to be examining magistrates for" Congress. *Id.* at 72; *see also id.* at 71 (observing that he had "not made the decision of the board final in any case").

416 *Id.*

417 *Id.* Hunter argued that, if "the system did not work well," the judges would not "be fastened on us," but rather Congress could "abolish the court" and "of course the office would go with it." *Id.* But Hunter agreed with Brodhead that "[w]hen the court had examined and

that "[i]f we cannot get a court for that purpose, I shall vote for commissioners such as the Senator proposes."[418] Senator John Clayton of Delaware echoed this argument, saying that he did "not wish" that the commissioners should be viewed as "agents of the Government," but rather as "impartial arbiters and judges between the United States and the individual claimant, feeling themselves as much bound to look to the interest of the claimant as to the interest of the Government."[419] "These commissioners," Clayton argued, "ought to be independent."[420] Clayton noted that he did "not care for the name, whether you term them commissioners or judges," but he wished "them to be independent."[421] Clayton said that he "trust[ed] the words, 'unless sooner removed by the President,' will be stricken from the bill," because he did "not wish these commissioners to sit in this high tribunal, liable, at any moment, to be dismissed by the President or anybody else."[422] Senator John Pettit of Indiana concurred "that nothing short of referring the whole matter to the judicial tribunals of the country" would resolve the question of private claims.[423] Pettit claimed that the commission structure would "creat[e] labor, and mak[e] 'confusion worse confounded;' or, at least, it will be no more than doing what a clerk of a committee might do—write out a report."[424] Senator Dawson noted that his "opinion" was that a "bench of judges" would be the best way to accomplish the task, whereas "[o]thers, and I think a majority, say a board of commissioners."[425]

Finally, Senator James Jones from Tennessee claimed that there was no "principle" in the bill "that proceeds upon the supposition that [the commission] is to be a branch of the judiciary of this Government."[426] Rather, Jones conceived of the commission as a "mere committee"—presumably of the legislative branch?—"to examine the claim, and report it back to Congress."[427] In his view, a court was "bet-

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pronounced its opinion for or against, then that should be, not final and conclusive as against the United States, but should be reported to Congress for their action." *Id.* According to him, "it would be too great a power to give to any court to allow them to make decisions which would draw money directly out of the Treasury." *Id.*

418 *Id.*

419 *Id.* at 72.

420 *Id.*

421 *Id.*

422 *Id.*

423 *Id.*

424 *Id.* at 73.

425 *Id.* at 74.

426 *Id.*

427 *Id.*

ter,"[428] and there was "one safe mode" of conducting the task, which was "to establish a court of claims—an independent judiciary."[429] "Let the cases go there," Jones argued, and "let them be decided, and then let there be an appeal to the Supreme Court of the United States."[430]

Brodhead responded to arguments that the "commissioners should not be removable" by noting that such a change "would make them less responsible."[431] He then continued:

> If we confer upon the President the right to appoint, we impliedly confer the right to remove. That is my answer to his proposition. If we do not give the power to the President to remove—a power which I think we cannot withhold—it may be said that we wish to have a political board formed. I do not wish that, for one.[432]

In response, Clayton observed that:

> in regard to the propriety of the power of removal, that the power of removal by the President, under a decision of the provision of 1789, is a power to remove officers other than judicial; and, therefore, there is no difficulty, such as my friend supposes, in making them independent of the Executive.[433]

When the Senate gathered to discuss the issue on December 21, Senator Brodhead had changed the proposal "to establish a *court* for the investigation of claims against the United States."[434] The new bill established "a court of claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, to hold their offices during good behavior."[435]

The debate on that day confirms that Senators grasped the distinction between these two bodies. Senator Lewis Cass of Michigan noted the "question" whether "this tribunal should be a board or a court" and expressed a preference for a "court" while admitting that

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428 *Id.*

429 *Id.*

430 *Id.*

431 *Id.*

432 *Id.*

433 *Id.*

434 *Id.* at 105 (emphasis added).

435 *Id.* The bill also made provision for a "solicitor for the United States, to represent the Government before the court," who would be "appointed by the President, by and with the advice and consent of the Senate." *Id.*

he was "perfectly prepared to take [a board]" if he could not "get a court."[436]

Senator Brodhead observed that the new bill was "the same bill" that was previously introduced "with one important exception—the exception relating to the tenure of office—and a change of name."[437] The bill, Brodhead observed, authorized "the appointment of three gentlemen who are to hold their offices for life, or, technically speaking, during good behavior," thereby creating "independen[ce], in some measure, of all Executive influence."[438] As a result, Brodhead claimed, the court would "be a judicial tribunal in its character."[439]

In response to the change, a faction of Senators led by John Weller of California sought to change the nature of the tribunal back to a commission.[440] Weller offered an amendment "to strike out the word 'court' where it occurs in the bill, and to insert 'board of commissioners.'"[441] Weller observed that "[u]nder the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior."[442] Weller argued that the "only power which is given to us on that subject is by the first section of the third article of the Constitution of the United States, which provides that 'the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.'"[443] And Weller claimed that "under the provisions of the Constitution, it would be perfectly competent for the law-making power of this Government to limit the period for which the commissioners should hold their offices."[444] Weller

436 *Id.* at 106.

437 *Id.* (statement of Sen. Brodhead).

438 *Id.* Brodhead claimed that the tenure provisions would not be problematic, in part because the "court may be repealed or abolished at any time." *Id.*

439 *Id.* at 107.

440 *Id.*

441 *Id.* (statement of Sen. Weller).

442 *Id.*

443 *Id.*

444 *Id.* (statement of Sen. Weller). Weller argued that "[i]t may well be doubted whether this bill creates a 'court' within the meaning of" Article III of the Constitution, but he offered the amendment "to avoid all controversies which might arise on this subject." *Id.* Weller then stated his "opposition to the appointment of these judges during life," *id.*, referring to the practice then ascendant in the states:

> I think that, in the improvements which have been made by the different States in the Union in the organization of their judicial tribunals, they have all found that it was expedient to appoint or elect their judges for a limited term of years. There are, it is true, some States in the Union which still adhere to the old doctrine of appointing judges during good behavior, but nearly all the State constitutions which have been adopted within the last generation have contained a provision fixing a limited tenure to those offices. Whilst the most valuable improvements have been

argued that he was "utterly opposed to life officers in the judiciary, or any other department of the Government" and was "for a reform in this particular wherever the power of the Federal Government extends."[445]

This suggestion was quickly met by Virginia's Senator Hunter, who argued that "in regard to the tenure of office, that it will be easy to show that we have to choose between two alternatives"—

> either we have to appoint the members of this court during good behavior, in order to make them independent, or else, if we appoint them for a term of years, they will be depend[e]nt on the appointing power, who might remove them three times a day if the Senate could act on the new appointments so often.[446]

"These are the two alternatives between which we have to choose," Hunter argued, "and not between the practice of the General Government here and the practice of the States."[447] In the federal Government, Hunter claimed, "if we attempt to give them a term of years, they will not be independent, even during that term, but will be liable to be removed at any time the President may choose."[448]

Thus, Hunter continued:

> In the establishment of the Federal courts, the Constitution provided that the judges should hold during good behavior. That system has operated well as a judicial system. It has given us admirable courts, and I believe, for one, that those courts have been all the better, because the judges were independent . . . Here, if the judges did not hold during good behavior, they would be liable to removal every day . . . .[449]

Senator Thomas Pratt of Maryland expressed a different concern. He argued that the proposed bill conferred "judicial power upon the tribunal to be appointed," and as a result, it did not matter "whether

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> made in the arts and sciences, changes, calculated to advance the public interests and secure the rights of the people, have been made in our judicial system. I am not so wedded to the system adopted by our ancestors as to believe it perfect, and that no improvements can be made upon it; nor do I regard the changes recently adopted by the States, in regards to the judicial system, dangerous innovations. They are, on the contrary, wholesome reforms.

Id.

445 *Id.* (statement of Sen. Weller).

446 *Id.* at 108.

447 *Id.*

448 *Id.*; *see also id.* ("The danger, the fear is that they will be removed upon every change of party and upon each new Administration.").

449 *Id.*

you call them judges or commissioners," because where "[i]t is a judicial power conferred upon this tribunal, [] under the Constitution you have no authority to appoint a judge, or a person to discharge a judicial duty, except during good behavior."[450] "[I]f I am right," Pratt observed, "we have no power to gratify the views of [Senator Weller], by changing the tenure of the office."[451]

In reply, Senator Weller appeared to concede that the tenure could not be changed:

> The amendment which I have proposed contemplates the appointment of these judges or commissioners for a period of years. It is true, sir, in the course of my argument, I intimated that, if it could possibly be done, I would have the judges and all the officers of the Government elected by the people.[452]

Ultimately, Congress elected to set up a Court of Claims, rather than a commission.[453] But the key point, for this Article, is that senators debating the proposal referenced the nature of presidential control over commission members before choosing a different course.

D. Civil War Banking Reforms and the Comptroller of the Currency

During the Civil War, Congress sought to place the nation's finances on a new footing.[454] As part of that effort, Congress enacted the National Bank Acts of 1863 and 1864.[455] Rather than create a new "Bank of the United States," the two Acts imposed regulations on

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450 *Id.* at 110 (statement of Sen. Pratt).

451 *Id.*; *see also id.* (remarking that the proposed bill "confers upon this tribunal, call it what you please, the judicial power of determining the claim of any individual citizen against the Government of the United States").

452 *Id.* (statement of Sen. Weller).

453 An Act to Establish a Court for the Investigation of Claims Against the United States, ch. 122, 10 Stat. 612 (1855).

454 The entire debate over the National Bank Acts of 1863 and 1864 unsurprisingly occurred against the backdrop of the other events previously described in this Article. *See, e.g.*, CONG. GLOBE, 37th Cong., 3d Sess. 880 (1863) (statement of Sen. Garrett Davis) ("When the deposits were removed by General Jackson, and his all-pervading popularity with the people of the United States brought them to support that movement, and our system of currency was broken up, the States then fell back upon the State banks . . . ."); *id.* at 871 (statement of Sen. Collamer) ("[W]e once had, or twice had, a United States Bank. The history of the last one is within the recollection of most of those who hear me.").

455 National Bank Act of 1864, ch. 106, 13 Stat. 99; National Bank Act of 1863, ch. 58, 12 Stat. 665; *see also Lincoln and the Founding of the National Banking System*, OFF. COMPTROLLER CURRENCY, https://www.occ.gov/about/who-we-are/history/founding-occ-national-bank-system/lincoln-and-the-founding-of-the-national-banking-system.html [https://perma.cc/NZG8-59BP].

already existing state banks.[456] The two Acts are vitally important to understanding the development of the American economy during the 19th Century. But they are also important to understanding the development of the President's control of the executive branch. That is because Chief Justice Taft mentioned them in *Myers*,[457] as did the D.C. Circuit in *PHH*.[458] Notwithstanding this importance, however, the debates surrounding the acts remain unexplored.

As explained further below—and consistent with the Supreme Court's use of precedent in *Myers* and the D.C. Circuit's similar use in *PHH*—the Act of 1863 did indeed contain a restriction on the President's authority to remove a new official, the Comptroller of the Currency.[459] That restriction fixed the term of the Comptroller of the Currency at "five years unless sooner removed by the President, by and with the advice and consent of the Senate."[460] But after a debate over the provision's constitutionality, Congress took out the removal restriction the very next year in the Act of 1864.[461]

1. National Bank Act of 1863

The proponents of the National Bank Act of 1863 were critics of the preexisting system, often termed the "independent treasury," that took hold following Jackson's successful war against the Second Bank of the United States. Representative Elbridge Gerry Spaulding described that system as having "unnecessarily isolated the Government from all the capitalists and the accumulated capital of the country,"[462] and advocated a system modeled on the banks of his home state, New York.[463] According to Spaulding, it was "now most apparent that the

456 *See* 13 Stat. at 112–13; 12 Stat. at 681–82.

457 272 U.S. 52, 165 (1926).

458 881 F.3d 75, 91, 104 (D.C. Cir. 2018).

459 *See* § 1, 12 Stat. at 665–66.

460 *Id.*

461 *See* § 1, 13 Stat. at 100.

462 CONG. GLOBE, 37th Cong., 3d Sess. 1115 (1863).

463 *Id.* at 1114 (statement of Rep. Spaulding) ("The bill in all its essential features is like the free banking law of the State of New York, which was been in successful operation in that State since 1838."). Spaulding hoped that the legal tender notes issued by the Treasury would "constitute a national currency uniform in value, in all parts of the United States, and bearing no interest," thereby creating in a way an "advantageous loan to the Government by the people who receive and circulate this kind of currency." *Id.* ("These legal tender notes are based solely on the faith of the Government and all the taxable property under the jurisdiction of the United States. If Congress performs its duty by imposing taxes on this property, and the Executive enforces the collection thereof, all these notes will be ultimately redeemed and retired from circulation."). Critics argued that the law did not mimic the law of New York because "the currency issued by the new associations . . . shall only be redeemed at the place of issue," thereby

policy advocated by Alexander Hamilton, of a strong central Government, was the true policy."[464] But the bill's proponents claimed that its provisions were voluntary, rather than "imperative upon the banks in any way," because of concerns that Congress could not "change" bank charters, and because it exceeded congressional "power to remove any difficulties that may arise in the States in regard to these corporations."[465]

The 1863 Act created a new and powerful officer to regulate the state banks that entered the federal scheme. The statute "established in the Treasury Department a separate bureau . . . charged with the execution" of laws "that may be passed by Congress respecting the issue and regulation of a national currency secured by United States bonds."[466] The "chief officer" of the bureau was designated the "comptroller of the currency."[467] The Act specified that the Comptroller of the Currency served "under the general direction of the Secretary of the Treasury."[468] It further specified that the Comptroller of the Currency would be "appointed by the President, on the nomination of the Secretary of the Treasury, by and with the advice and consent of the Senate" and that he would "hold his office for the term of

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rendering the currency "practically irredeemable and inconvertible." *Id.* at 1141 (statement of Rep. Baker).

464 *Id.* at 1115 (statement of Rep. Spaulding); *see id.* (describing the federal government as "vacillating and weakened by conflicting views and opinions as to the constitutionality and policy of a national bank"). Spaulding was candid in his view that the law was intended to be permanent, rather than a temporary war-time measure. *See id.* ("It seems that the present is a propitious time to enact this great measure as a permanent system, and that the duty of the Government in providing a national currency shall no longer be neglected.").

465 *Id.* at 823 (statement of Sen. Fessenden). Senator Ira Harris of New York, for example, desired that:

> [O]ur banks and banking associations might be permitted, without surrendering their character as State banks and State banking associations, maintaining the organization as State institutions, to take out circulation, under the provisions of this act, by depositing with the Treasurer of the United States the securities which this act contemplates, receive that circulation, use that circulation instead of a State currency, and subject themselves to the liabilities which banking associations organized under this act incur. I believe it can be done . . . . [B]ut I do not suppose that a single banking institution in the State of New York would ever be induced to surrender its charter, to surrender the privileges that it derives under the State law, and come in under this act, and become an association organized under the provisions of this act.

Id. (statement of Sen. Harris).

466 National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665 (repealed 1864).

467 *Id.*

468 *Id.*

five years unless sooner removed by the President, by and with the advice and consent of the Senate."[469]

Two aspects of the congressional debate over the Bank Act of 1863's passage bear on modern debates about the President's removal power.[470] First, a comment by Senator Garrett Davis—a Unionist from Kentucky, who had earlier been a Whig and later was a Democrat—spoke directly to the provision restricting the removal of the Comptroller of the Currency.[471] Davis claimed that it was "an old anti-Jackson principle"—which had been articulated during "the great national dispute in relation to the removal of the deposits from the United States Bank"—that "the power of the purse and the power of the sword should never be united in the same hands."[472] Davis argued that, under the National Bank Act, this principle was "repudiated . . .

469 *Id.* at 665–66.

470 To be sure, it was a different constitutional concern that appears to have drawn the most attention as the bill was being debated—one related to the nature of corporations. Senator John Sherman, one of the bill's primary sponsors, expressed a "very grave and serious" concern about "whether a bank organized by a State can, as a corporation, accept the provisions of this act." CONG. GLOBE, 37th Cong., 3d Sess. 823 (1863) (statement of Sen. Sherman). As Sherman explained, "[a] corporation is a mere creature of law, having no power to do any act unless it is authorized to do it by the act of incorporation," which raised the question whether a state banking corporation could "enter into the arrangement with the United States contemplated by this bill without the assent of the State which organized it." *Id.* Sherman viewed this as "a very grave question, and a question upon which I have doubts myself." *Id.* ("Perhaps it will be necessary in the States to get the assent of the State to the altering, changing, or modifying of the State charter. That is a question which is left open in this section to the banks and to the State governments."). Likewise, Senator William Pitt Fessenden of Maine argued that whether corporations "can avail themselves of this act under their charters is for them to ascertain," because "[t]he question whether they can come in under this act without the assent of the States is for them to settle." *Id.* (statement of Sen. Fessenden). As these statements indicate, the critical question concerned the nature of corporate charters generally. Having created the corporations by contract, it was questionable under then–current law whether the government could alter the terms of the contract without the bank's consent. And if *a* government could make the change, it was even more questionable whether the *federal* government could change the terms of *state* charters. Senator James Grimes of Iowa, for example, asked whether a bank chartered under New York law—which required certain business actions under certain circumstances that might be inconsistent with federal law—would violate "the charter under which they act in the State of New York, and will they not be subject to the State laws, and thus virtually destroy their corporations?" *Id.* (statement of Sen. Grimes). The bill's supporters, like Senator Fessenden, had a single response: The bill's provisions were "entirely of choice" for the banks, because the federal government could "not undertake to interfere with" or "control" state charters "in any possible way." *Id.* (statement of Sen. Fessenden); *see also id.* at 824 (statement of Sen. Harris) (claiming that the bank "remains a State corporation, and is still subject to the provisions of the State laws" and that it "cannot go on under the organization provided by this act, because it would have to report to the Treasury Department here, and report to the bank superintendent at Albany, and could be wound up by either one").

471 *Id.* at 879 (statement of Sen. Davis).

472 *Id.*

and the two powers . . . united."[473] Although Davis conceded that the provision requiring the Senate's concurrence in the Comptroller's removal meant that the statute created "a semblance of some check upon the executive branch of the Government over the Comptroller," he maintained that "most" of his fellow Senators disagreed with the "necessity of this concurrence of the Senate in removing officers."[474] Instead, according to Davis, they believed that presidential removal was "the practice of the Government" and had "been the practice since the first session of Congress."[475] Presaging the titanic dispute between Andrew Johnson and the Senate that would occur five years later,[476] Davis predicted that, if the President "has that power, this provision and restriction will both be disregarded," which meant that the "Comptroller of the Currency will hold his office at the will and pleasure of the President."[477]

Second, others echoed Davis's concern that the National Bank Act vested the Secretary of the Treasury (and the Comptroller of the Currency) with "most extraordinary political power—a power great and wide-spread," along with "vast discretionary power as to trade and commerce."[478] Representative Stephen Baker, a Republican from New York, stressed "the magnitude of the trust and extent of power which this act contrives to place" in the Comptroller of the Currency.[479] Without lodging a constitutional objection, Baker appeared to equate the power the Act conferred on the Comptroller with power lodged in the Secretary, thereby suggesting that the latter controlled the former.[480] In a similar vein, Senator Jacob Collamer, a Republican from Vermont, observed that the objections to the Bank of the United States had been premised on the claim that it would be a "dangerous political engine in the hands of whatever political party existed at the time."[481] The same problem, according to Collamer, arose with the National Bank Act. "If the old United States Bank furnished well-grounded apprehensions of its dangerous political tendency as a politi-

473 *Id.*

474 *Id.*

475 *Id.* To be sure, Davis himself disagreed with this practice. *See id.* ("I contend that the President has not the power to remove from office according to the Constitution without the concurrence of the Senate.").

476 *See infra* Section II.E.

477 CONG. GLOBE, 37th Cong., 3d Sess. 879 (1863).

478 *Id.* at 1142 (statement of Rep. Baker).

479 *Id.*

480 *Id.* ("With a Comptroller or Secretary unworthy of the trust the slender reed on which this system is based would break and involve all in one common ruin.").

481 *Id.* at 871 (statement of Sen. Collamer).

cal agency," Collamer contended, imagine what could be done by the Secretary of the Treasury, who had "three thousand banks subject to inspection."[482] Like Baker, Collamer appeared to take for granted that the Secretary would oversee the Comptroller of the Currency.[483]

Senator Davis's argument (and, to a lesser degree, Senator Collamer's and Representative Baker's concern) indicated that some number of congressmen objected to statutory provisions limiting the President's removal authority. As discussed below, Congress would revisit this issue the very next year—and, based at least in part on constitutional concerns, eliminate the removal restriction that was the subject of Davis's objection.

2. National Bank Act of 1864

When Congress met the next year, it replaced the entire 1863 Act with a new bill, the National Bank Act of 1864.[484] Representative Samuel Hooper, the bill's principal sponsor, began his defense of the bill by describing his intent as seeking "to correct what the experience and observation of the past year have shown to be imperfect, and to render the law so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters."[485] Before joining Congress as a Republican from Massachusetts, Hooper had been a businessman in the overseas hide trade and had found time to write two monographs on currency policy and theory.[486] As Hooper put it, he "frankly confess[ed] that [he] look[ed] upon the system of State banks as having outlived its usefulness" and as "unequal to the exigencies of the present time" and the demands of the Civil War.[487]

At the start of the debate in the House of Representatives, Representative James Brooks, a Democrat from New York, objected, ar-

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482 *Id.*

483 *See id.* at 876 (statement of Sen. Collamer) (contending that "if a Secretary of the Treasury was disposed to use the powers conferred by this bill, they would be exceedingly dangerous").

484 In the Senate, Sherman explained that the 1864 Act made seven principal changes to the 1863 Act. CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864).

485 *Id.* at 1256 (statement of Rep. Hooper).

486 *See* SAMUEL HOOPER, AN EXAMINATION OF THE THEORY AND THE EFFECT OF LAWS REGULATING THE AMOUNT OF SPECIE IN BANKS 3–4 (1860); SAMUEL HOOPER, CURRENCY OR MONEY: ITS NATURE AND USES AND THE EFFECTS OF THE CIRCULATION OF BANK-NOTES FOR CURRENCY 2–6 (1855); *see also HOOPER, Samuel*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/People/Listing/H/HOOPER,-Samuel-(H000765)/ [https://perma.cc/BU3L-QLHN].

487 CONG. GLOBE, 38th Cong., 1st Sess. 1256 (1864) (statement of Rep. Hooper).

guing that Congress ought to return to "the old policy and the policy of the Constitution, and let the President and not the Secretary [of the Treasury] have the control of the Treasury."[488] According to Brooks, the prior Congress had "reverse[d] the whole financial policy of the Government from 1787, by taking from the President of the United States the control of the public Treasury and giving it to the Secretary of the Treasury."[489] But the President should not, Brooks argued, "be deprived of his constitutional power and of the power given him by precedent."[490] Referring to an amendment proposed by Representative James Brown of Wisconsin that would permit the President to appoint the Comptroller without the Secretary of the Treasury's recommendation,[491] Brooks contended that "[t]he President alone is the responsible officer; we have no control over the Secretary of the Treasury, nor have the people any such control."[492]

In the Senate, the restriction on the President's authority to remove the Comptroller of the Currency was discussed at length, where an objection on constitutional grounds ultimately led to a substantial revision of the statute. Specifically, an amendment introduced and embraced by the Committee on Finance proposed to strike the provision limiting the President's authority to remove the Comptroller of the Currency only "by and with the advice and consent of the Senate."[493] After Senator Grimes of Iowa asked why the change had been proposed,[494] the Senate engaged in a spirited debate over the amendment.

The rationale for the new amendment was set forth by Senator Fessenden. Fessenden observed that the 1863 Bank Act, in restricting the President's removal authority, had "establish[ed] a new rule."[495]

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488 *Id.* (statement of Rep. Brooks).

489 *Id.* (arguing that Congress should continue the "wise policy pursued by George Washington and his Secretary, Alexander Hamilton, through the whole history of the United States" rather than take from the President "his legitimate control over the public money").

490 *Id.*

491 *Id.* at 1255 (statement of Rep. Brown) (proposing to strike out the words "on the recommendation of the Secretary of the Treasury," because the "Constitution provides for the mode in which appointments shall be made," and Congress has "no right to select other parties on whose recommendation appointments are to be made"); *see id.* at 1256 (citing the Appointments Clause). Representative Brown's amendment passed. *See id.*

492 *Id.*

493 *Id.* at 1865.

494 *Id.* Grimes asked "why the committee propose[d] to make th[e] change" and remarked that "this clause was put in the bill of last year upon great consideration, in order to prevent this officer from being a mere political officer, as he doubtless will be, if he is to be turned out without any consultation with the Senate." *Id.*

495 *Id.*

According to Fessenden, Congress included the proviso in the 1863 Act "because it was thought advisable that [the Comptroller] should be in a very particular degree independent of political changes and political considerations."[496] "There seemed," Fessenden continued, "to be a necessity for a degree of permanency and a degree of independence in this officer that did not apply to others."[497] But further reflection, Fessenden argued, had raised doubts about the statute's constitutionality.[498] As Fessenden put it, "[i]t is questionable whether the President has not the power of appointing this officer and removing him, even if this provision should remain in the bill."[499] In reaching that conclusion, Fessenden claimed that the notion that Congress "ha[d] a right to fix such limitations upon [an office] with reference to the power of removal as it sees fit" was "a doctrine that has never been acceded to heretofore."[500]

Fessenden's argument was echoed, and amplified, by Senator Jacob Howard, a Republican from Michigan.[501] Howard claimed that it was "well-settled law that under the Constitution of the United States the President has the absolute power of appointment and the equally absolute power of removal" from office.[502] The Senate, according to Howard, had "nothing to do with" removal, and could "only leave the responsibility of removal to the President himself."[503]

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496 *Id.* (statement of Sen. Fessenden).

497 *Id.*

498 *See id.*

499 *Id.* For this claim, Fessenden relied on prior practice, contending that "[i]t has always been held in all other cases that the power of removal was a necessary consequence of the power of appointment." *Id.*

500 *Id.* In addition to this argument—which sounded in constitutional law—Fessenden added a prudential argument. He noted that limiting the President's authority to remove the Comptroller of the Currency may cause difficulties if the Comptroller were "unfaithful" during a congressional recess. *Id.* Under those circumstances, Fessenden pointed out, the Comptroller would "wield an immense power in the country over all these banks" and could "produce the most disastrous effects upon the currency of the country by his own motion"—unless the President could remove him. *Id.* For that reason, it would "be difficult to say that the President should not have the power to remove him if he was found to be exercising the power of his office in that way." *Id.* Indeed, when it came to this prudential argument, Fessenden appeared conflicted. *See id.* ("For myself, while I see the force of the argument that the officer ought to be in a great degree independent, I also see the force of the argument that the power of suspending him should exist in the President, because otherwise, during a recess of Congress, the great interests of the community might be left at the mercy of the Comptroller of the Currency.").

501 *HOWARD, Jacob Merritt*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=H000839 [https://perma.cc/5R9W-P36L].

502 CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864) (statement of Sen. Howard).

503 *Id.*

In response to Fessenden's argument, Senator Charles Buckalew, a Democrat from Pennsylvania, proposed language that the Senate first rejected, but that ultimately made its way into the final act—and that remains in the National Bank Act to this day.[504] Buckalew suggested that the Senate authorize the President to remove the Comptroller of the Currency "upon reasons to be reported by him to the Senate."[505] He was supported in this effort by Senator Samuel Clarke Pomeroy, a Republican from Kansas, who argued that the "effect" of Buckalew's proposal "would be that if the Senate did not approve of the reasons given by the President, they could refuse to confirm the successor."[506] Fessenden, however, objected. He argued that Buckalew's proposal "would only make confusion" because the President's "reasons" would be "conclusive whether the Senate likes them or not."[507] The proposal, according to Fessenden, would "leave[] the power of removal just exactly where it would [otherwise] be," even if the President's reasons were not "satisfactory to the Senate."[508]

Based on these arguments, when the Senate first voted on April 26, 1864, it adopted Fessenden's amendment (removing the restriction on the President's authority) but rejected Buckalew's amendment to the amendment (requiring the President to report "reasons" for a removal).[509] A few days later, however, Buckalew renewed his amendment that the President could remove the Comptroller "upon reasons to be communicated by him to the Senate."[510] Buckalew argued that his amendment would "not invade the prerogatives of the President in making the removal"[511]—a point with which Senator Fessenden appeared to agree, because he claimed that "nothing [would] be accomplished" by Buckalew's amendment and the amendment "forms no sort of restraint on the President."[512] As Fessenden put it, under Buck-

504 *See* National Bank Act of 1864, ch. 106, 13 Stat. 99; National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66.

505 CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864).

506 *Id.*

507 *Id.*

508 *Id.* (statement of Sen. Fessenden). Again, Senator Howard joined Fessenden, raising questions about the remedial and practical fallout of the President's actions. *See id.* (statement of Sen. Howard) ("Suppose . . . the President should see fit to remove this officer without giving to Congress any reasons whatever, what would be the result in law? Would he or would he not be actually removed? Would he remain in office because the President had not given reasons for his order of removal, or what would be his condition?").

509 *See id.*

510 *See id.* at 2121 (statement of Sen. Buckalew).

511 *Id.*

512 *Id.* at 2122 (statement of Sen. Fessenden).

alew's amendment, upon removal, the Comptroller of the Currency would be "out of office, and whether the reasons are good, bad, or indifferent, does not change the fact."[513] Fessenden reiterated that the purpose of the preexisting statute had been to limit the President's authority to remove the Comptroller "of his own motion," but the Senate's Committee on Finance "thought that . . . would be changing the rule that exists with reference to all other officers."[514] Buckalew responded that his amendment did "not check the power of the President," but rather "limit[ed] his discretion" by ensuring that he would "not exercise this power unless he has good reasons for it."[515] His argument that the amendment was "a very prudent and proper check, especially as this officer is to control these large moneyed interests" was echoed by several others.[516] Fessenden dropped his objection and, without a recorded vote, the Senate concurred in Buckalew's language requiring the President to "communicate[]" "reasons . . . to the Senate" if he removed the Comptroller.[517] Later that month, without recorded debate, the House agreed with the Senate by voting 58 to 41 to excise the language requiring the Senate's concurrence in the Comptroller's removal and to add Buckalew's language requiring the President to communicate reasons for removing the Comptroller.[518]

E. Coda: The Tenure of Office Act and the Impeachment of Andrew Johnson

The debate over the National Bank Act of 1864 occurred at a perilous moment in the nation's history. For proponents, federal regulation of banking was nothing short of an existential necessity for the survival of the Union. A comparable (and seemingly existential crisis) occurred three short years later, following the assassination of Abra-

513 *Id.* ("He may remove him just as he could before, and give his reasons to the Senate when it meets. Those reasons may be entirely inconclusive, of no sort of consequence, but the removal will stand and the matter will remain just as it was before. I do not see the propriety of requiring him to give reasons in a particular case when we effect nothing by it, and we impose no restraint whatever upon the President by doing it.").

514 *Id.* Fessenden conceded that it might be "very desirable to have [the Comptroller] as permanent as possible," yet argued that the President ought to have the ability to remove the officer "in the recess of the Senate . . . because the officer might be a bad one, and when the Senate was not in session it might be necessary to remove him immediately." *Id.*

515 *Id.* (statement of Sen. Buckalew).

516 *Id.*; *see also id.* (statement of Sen. Sherman) (claiming that Buckalew's amendment "might be some restraint"); *id.* (statement of Sen. Johnson) ("I think it is some restraint upon the President.").

517 *See id.*; *see also id.* (statement of Sen. Fessenden) ("I shall not object to the amendment . . . but it strikes me it is mere form, and amounts to nothing.").

518 *See id.* at 2448.

ham Lincoln in 1865.[519] Lincoln's successor, Vice President Andrew Johnson, had been selected to promote sectional diversity on the presidential ticket.[520] When he took office as President, crisis loomed, because Johnson did not share the views of "Radical" Republicans in Congress on the question of how the former Confederate states should be treated.[521] In response to concerns that Johnson might change the composition of the Lincoln Administration in a manner that would favor Southern interests, Congress enacted the Tenure of Office Act.[522] The statute limited the authority of the President to remove officers without the advice and consent of the Senate—in short, it was a generalized version of the 1863 statute that Congress had enacted to protect the Comptroller of the Currency.[523] Johnson vetoed the statute, but both Houses of Congress overrode the veto.[524]

On February 21, 1868, Johnson sent a message to the Senate announcing that he had removed Edwin M. Stanton, a staunch Radical Republican, as secretary of war.[525] His actions precipitated impeachment proceedings in the House and a trial in the Senate, which ended one vote short of the necessary two-thirds majority for conviction.[526]

A major question before the Senate was the constitutionality of the Tenure of Office Act.[527] If the Act unconstitutionally intruded on presidential authority, Johnson could not fairly be convicted of violating it. By contrast, if the Act was constitutional, Johnson might have violated it, which according to some would have formed the necessary predicate for removal from office.[528]

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519 *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 143 (1992).

520 *See Andrew Johnson*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/us-presidents/andrew-johnson [https://perma.cc/W8BV-J49P].

521 *See* REHNQUIST, *supra* note 519, at 143.

522 *See* Act of Mar. 2, 1867, ch. 154, 14 Stat. 430 (repealed 1887).

523 *See id*; National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66 (repealed 1864).

524 *See Why Was Andrew Johnson Impeached*, NAT'L PARK SERV., https://www.nps.gov/articles/why-was-andrew-johnson-impeached.htm [https://perma.cc/U7VF-8DLD].

525 *See The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm [https://perma.cc/J9FG-PC7L].

526 *See Why Was Andrew Johnson Impeached*, *supra* note 524.

527 *See id.*

528 To be clear, there was a strong argument that Johnson had not violated the text of the statute, which appeared not to apply to holdovers from the Lincoln Administration. Important Senators, like John Sherman of Ohio, contended that the Tenure of Office Act did not cover Johnson's removal of Stanton. *See* 3 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 10–11 (1868) (hereinafter TRIAL OF ANDREW JOHNSON) (statement of Sen. John Sherman). Notwithstanding his view on the text of

Of importance to this Article, the Comptroller of the Currency precedent formed the critical precedent for those who argued in favor of the Tenure of Office Act's constitutionality on grounds of past practice.[529] As Senator Charles Sumner of Massachusetts put it, "[t]he tenure-of-office act was heralded in 1863 by a statute making the Comptroller of the Currency removable 'by and with the advice and consent of the Senate,' thus, in this individual case, asserting for the Senate a check on the President."[530]

Senator John Sherman's argument is illustrative. Sherman claimed that "[v]arious legislative limitations have been put upon the power and mode of removal."[531] As an example, he noted that "[t]he Comptroller of the Currency holds his office for five years, and can only be removed by the President upon reasons to be communicated to the Senate."[532] Senator Timothy Howe of Wisconsin likewise noted that "in 1863, Congress passed an act to provide a national currency," the first section of which "was in palpable conflict with" a presidential power to remove subordinates.[533] Yet, Howe contended, "both houses agreed to it, and President Lincoln approved the act."[534] Howe went on to acknowledge that the 1864 act had removed the requirement that the President obtain "the advice and consent of the Senate" before removing the Comptroller, but deemed the statute's requirement that the President convey reasons to the Senate to be an example of congressional assertion of "the same control over the power of removal."[535]

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the statute, Sherman (as noted in the text) provided a sustained defense on the statute's constitutionality. *Id.* at 10–12. Although Sherman believed that Johnson had not violated the Tenure of Office Act in removing Stanton, he also believed that Johnson had unconstitutionally appointed a successor to Stanton in violation of the Vacancies Acts—a matter of considerable interest, but one that is outside the scope of this Article. *Id.* at 13–14.

529 *See supra* Section II.D.

530 TRIAL OF ANDREW JOHNSON, *supra* note 528, at 268.

531 *Id.* at 6.

532 *Id.* Sherman also pointed to longstanding court-martial practices for the proposition that "[a]rmy and navy officers have long been placed beyond the unlimited power of the President," and he noted that "[p]ostmasters and others have a fixed term of office." *Id.* Neither of these arguments supported Sherman's position, however, as squarely as the Comptroller of the Currency statute of 1863, which had been amended by the 1864 act. Based on these precedents, Sherman concluded that "[t]he legislative construction given by the first Congress has been gradually changed." *Id.*

533 *Id.* at 61.

534 *Id.*

535 *Id.* Howe did not reference the constitutional debate that accompanied the 1864 shift, but rather charged the claims of the Tenure of Office Act's unconstitutionality to "partizan zeal" as opposed to "real conviction." *Id.*

In a similar vein, Senator George Edmunds of Vermont argued that the 1863 act creating the Comptroller of the Currency "was passed by votes irrespective of party . . . without any objection, from any source, to this feature of it."[536] Charitably, Edmunds's claim may have been accurate, if one understands it to mean that constitutional objections to the 1863 provision were not raised until Congress considered the 1864 act. Nevertheless, from the 1863 statute, Edmunds drew the conclusion that "[t]he law and practice of the government was thus changed" and "restored to the letter and true spirit of the Constitution, with the concurrence of all parties, full five years before this case arose."[537] And Senator Willis Patterson of New Hampshire claimed that the 1863 act established that "[s]ubsequent Congresses ha[d] claimed and exercised . . . the power to regulate the tenure of office, both civil and military."[538] Patterson recognized that an 1863 statute was, at the time of the Johnson impeachment trial, a "late act[ ]," but he claimed that there was "no decision of the Supreme Court or settled precedent of legislation which can bar the right of Congress to regulate by law both appointments to and removals from office."[539]

It is notable, however, that some members of the Senate stuck to the position they articulated during the 1864 debate. Senator Fessenden of Maine, for example, said that "[t]he whole question of removals from office came under the consideration of the first Congress," which established a construction that "was understood and avowed at the time to be a legislative construction of the Constitution, by which the power of removal from office was recognized as exclusively vested in the President."[540] Fessenden contended that "although the correctness of the legislative construction then established has more than once been questioned by eminent statesmen since that early period, yet it has been uniformly recognized in practice; so long and so uniformly as to give it the force of constitutional authority."[541]

When the vote was ultimately called, Fessenden was the first of the Republicans to vote against conviction, thus providing the critical vote against removing Johnson from office.[542] Having gone on record

536 *Id.* at 86.

537 *Id.*

538 *Id.* at 312.

539 *Id.*

540 *Id.* at 17.

541 *Id.* at 18.

542 Fessenden had earlier voted against the Tenure of Office Act, but later voted to overrule Johnson's veto of it, because (as he explained at Johnson's impeachment trial) he "was not

in 1864 to eliminate the restriction on the President's authority to remove the Comptroller of the Currency on constitutional grounds, one might surmise that Fessenden felt bound to afford Johnson some leeway in reaching the same conclusion about the Tenure of Office Act. In this fashion, the Comptroller debates of 1863 and 1864 not only provided precedents for those arguing in favor of the Tenure of Office Act's constitutionality, but also the critical vote and precedent for rejecting the articles of impeachment altogether.

III. Modern Reverberations Revisited

In this Part, this Article returns to the two main themes of the preceding inquiry into the development of the United States' financial system. First, was the "Treasury" understood to be different in some way when it came to the President's authority to control or to direct its officers? And second, what was the status of banking corporations and corporations more generally in the separation of powers?

A. Was Treasury Different?

The preceding history allows us to assess the claim of the D.C. Circuit in *PHH Corporation*,[543] that the Treasury Department "has long been thought to be well served by a degree of independence," due to the "distinctive danger of political interference with financial affairs."[544] At least with respect to the period leading up to the Civil War, the prevailing view was that the Treasury Department was no different from any other government executive function and, hence, no more or less deserving of "independence."[545] To be sure, a significant minority held a view throughout this period that supported the constitutionality of restrictions on the President's removal authority.[546] Some even supported a position that sought to treat "Treasury" differently from other departments.[547] But when it came to the President's removal authority—and hence, the tenure of office of the Treasury Secretary—that view was repeatedly rejected.[548]

During the national financial crises precipitated by the Civil War, however, the creation of the office of the Comptroller of the Currency

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then, and am not now, convinced of its unconstitutionality, although I did doubt its expediency." *Id.* at 19.

543 PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 75 (D.C. Cir. 2018).

544 *Id.* at 91.

545 *See supra* Section II.B–C.

546 *See supra* Part II.

547 *See supra* Section II.B.2.

548 *See supra* Section II.A.2–II.B.

provided a toehold for those who believed treasury could be treated differently. A few short years later, during the Tenure of Office Act debates, the toehold was generalized as a precedent for the restriction of the President's removal authority altogether.

B. Private and Public Institutions

The preceding history also allows us to assess the First and Second Banks' position in the separation of powers. The Bank of the United States stands as good evidence that the delegation of certain functions by the federal government to nominally private—though heavily regulated—entities does not necessarily violate the separation of powers.[549] Those entities are not staffed by "Officers of the United States" and, hence, are not necessarily subject to the limitations imposed by the Appointments Clause and the Vesting Clause of Article II.[550]

The Bank—and government corporations generally—thus establish one means by which Congress can achieve "independence" of a sort from the President. Rather than limiting the President's authority to remove "Officers of the United States" within the executive branch, Congress may simply delegate functions to entities that are technically outside of the executive branch altogether. The question then naturally arises whether there are any limitations to this power.

One possible limitation—which the Supreme Court addressed in *Lebron v. National Railroad Passenger Corp.*[551]—is that, at some point, a nominally private entity may be deemed public.[552] As the Court stated in *Lebron* when determining the Amtrak Corporation's constitutional status, "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."[553] "If Amtrak is, by its very nature, what the Constitution regards as the Government," the Court held, "congressional pronouncement that it is not" is of no relevance.[554] In reaching that con-

549 *See* Mascott, *supra* note 10, at 531 (speculating that "Congress saw the bank as a public-private nongovernmental entity"); Metzger, *supra* note 344, at 1883 (characterizing the Bank of the United States as a "nongovernmental actor[]").

550 U.S. CONST. ART. II, § 1, cl. 1; *id.* § 2, cl. 2; *cf.* Shane, *supra* note 27, at 357 (arguing that the Framers did not intend to limit "the delegation of significant government authorities even to purely government institutions").

551 513 U.S. 374 (1995).

552 *See id.* at 378, 391–92.

553 *Id.* at 392.

554 *Id.*

clusion, the Court addressed *Planters' Bank of Georgia*—the very case in which the Court had, in 1824, said in *dicta* that the United States was not a party to suits involving the Bank of the United States.[555] The *Lebron* Court explained that it was not contradicting its statements in *Planters' Bank* by holding that:

> [A] corporation [namely, the Bank] is an agency of the Government, for purposes of the constitutional obligations of Government rather than the 'privileges of the government,' when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.[556]

Lebron thus appears to require an assessment of two factors: Whether the corporation was created "for the furtherance of governmental objectives," as opposed to proprietary objectives, and whether the government "controls the operation of the corporation through its appointees."[557]

A similar analysis was set forth by the Supreme Court recently in *Department of Transportation v. Association of American Railroads*.[558] In that case, the Court reiterated that "*Lebron* teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status."[559]

The Bank of the United States controversy highlights the challenges of making these distinctions. The prevailing view, as suggested by the *Planters' Bank of Georgia* case, was that the Bank was a private entity, not a governmental one, notwithstanding some degree of control by the federal government over its operations.[560] Congress presumably could not have delegated to the Bank a sovereign function, but Congress did delegate the functions of maintaining a national currency to the Bank. The example of the Bank thus demonstrates how, over time, the notion of currency maintenance became associated with sovereignty, rather than private banking—a process illustrated by Andrew Jackson's arguments that Congress had impermissibly delegated a sovereign function to a private entity. The example of the Bank also

555 22 U.S. (9 Wheat.) 904, 908 (1824).

556 *Lebron*, 513 U.S. at 399.

557 *Id.*

558 135 S. Ct. 1225 (2015).

559 *Id.* at 1233.

560 *See Planters' Bank*, 22 U.S. (9 Wheat.) at 907–08.

shows that, in the creation of private entities, past practice and constitutional principle necessarily require a distinction between sovereign functions, which cannot be delegated to private actors, and proprietary functions, which may.[561]

CONCLUSION

This Article has addressed the development of the United States' financial system from the Constitution's adoption to the Civil War. The United States Treasury Department, as well as the Bank of the United States, were significant administrative bodies in the early Republic. Yet their relationship with the Constitution's separation of authority among the three branches is understudied. This Article has examined whether the President had the authority to remove or to direct officers within the Treasury Department and the Bank. The bottom-line conclusion is that, over time, the view that the Treasury was no different from other departments repeatedly prevailed over the view that the Treasury was different. At the same time, courts and legislators repeatedly understood the Bank to be different because it was a private entity.

In the years following the period of this study, these lessons became even more important. Indeed, they formed the grounds for the debate over the structure of the Federal Reserve System, which was created in the early Twentieth Century to replace the framework that emerged after the Civil War.[562] They also formed the grounds for the creation of the Comptroller General,[563] as well as the array of independent agencies with financial regulatory authority such as the Federal Trade Commission and the Interstate Commerce Commission.[564]

More broadly, the period studied in this Article raises the question of the role of "nonjudicial precedents" in the interpretation of the Constitution. The Court did not decide any cases directly addressing the President's removal power until the Twentieth Century. When it did so, its two principal opinions—*Myers* and *Humphrey's Executor*—

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561 On which side of the line Amtrak's functions fall could have posed a difficult question, except that Amtrak is given the authority to promulgate regulations of private entities. *See Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. Had Amtrak not possessed that quality, its functions may well have been closer to the non-sovereign functions of the Bank of the United States.

562 *See generally* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016).

563 *See generally* HARVEY C. MANSFIELD, THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION (1939).

564 *See generally* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941).

pointed in different directions on the scope of that power. On the one hand, some may argue that nonjudicial precedents—such as legislative and executive constructions of the Constitution—may well be a shaky source for constitutional interpretation, given the difficulty of untangling the principled and situational grounds on which members of Congress may have articulated constitutional views. On the other hand, the Court has looked to such sources in construing the Constitution in the past,[565] and the practice itself may help resolve some of the ambiguities and tension in the case law. At any rate, whatever one's views about the present-day implications of Nineteenth Century practice, the nature of the Department of the Treasury and the Bank—two vital institutions of American nation-building—deserve study.

565 *See generally* NLRB v. Noel Canning, 573 U.S. 513 (2014) (using sources from the political branches to construe the Recess Appointments Clause).