

The Unitary Executive and Trump: How Lawyers Undermine the Constitutional Presidency

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ABSTRACT:

As president, Donald Trump has exhibited the same behaviors in his second term as he did in the business world: headstrong, impulsive, demanding, erratic, insistent on personal loyalty from those around him, impatient with procedural niceties, and contemptuous of the rule of law. Yet President Trump in office has not behaved as a lone wolf. Instead, his actions have been buttressed, fortified, and legitimized by those around him via two related recent constitutional theories: Originalism and the Unitary executive. This paper examines how the Unitary theory in particular was spun and legitimized by the conservative legal community, despite the fact that the Unitary theory largely contradicts the very Constitution it claims to extol. The Unitary theory's profound influence was built in a field of study—law—that has proven itself to be a breeding ground for wayward constitutional theorizing for reasons that this paper examines. Unitary adherents have been the largely unseen handmaidens of Trump's power expressions, even as the Unitary view corrodes constitutional governance.

On January 20, 2025, the first day of his second term, President Donald Trump signed an executive order directing that federal agencies stop issuing documents recognizing the American citizenship of the children born in the U.S. but whose “(1). . . mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary. . . .”¹

The order was immediately challenged as a facial contradiction of the Constitution's Fourteenth Amendment, which states plainly that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Trump's executive order also contradicted long settled court doctrine stretching back over a century as well as decades old federal law.

As a purely unilateral act, his executive order would (and should) have been dismissed at the outset as an obvious, egregious, and even frivolous contradiction of the Constitution's plain

¹ “Protecting the Meaning and Value of American Citizenship,” The White House, January 20, 2025, <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/>

wording and settled meaning. But it was not. The EO was immediately challenged in court, and even though lower court rulings held his order to be unlawful, the Supreme Court agreed to hear the case on appeal. On June 30, 2026, in a nearly 200 page 6-3 ruling,² the court majority struck down the EO. Despite the ruling, the fact that three justices sided with Trump's addled interpretation (and perhaps a fourth, Brett Kavanaugh, who voted with the majority but on statutory grounds) is itself remarkable. Moreover, the nation's highest court is not accustomed to spending its time on constitutional frivolities.

The reason this EO was treated as a debatable and even serious proposition was not because the president issued it, but because a body of legal writing had been promulgated that purported to offer a plausible, if "controversial" scholarly justification for the idea that many born within the U.S. were not, in fact, entitled to be considered citizens. As the *New York Times* intoned in a page one headline in 2026, this writing prompted a "Growing Split On Birthright."³

Yet any merit-based examination of this proposition found it to be, literally, without merit.⁴ The idea that citizenship "derives from parentage, not birth on U.S. soil alone"⁵ was treated as credible because an academic pedigree was built for it within the legal community in the pages of law journals and related legal publications⁶—what law professor Ilan Wurman

² *Trump v. Barbara*, 609 U.S. ____ (2026). The three dissenters were Thomas, Gorsuch, and Alito.

³ Ann E. Marimow, "Growing Split On Birthright," *New York Times*, March 31, 2026.

⁴ E.g. Joshua Zeitz, "Trump Is Wrong About Birthright Citizenship. History Proves It." *Politico Magazine*, June 29, 2025, <https://www.politico.com/news/magazine/2025/06/29/birthright-citizenship-14th-amendment-history-00431386>. One scathing article—one of many of all ideological stripes—dubbed it "The Nonsense Case Against Birthright Citizenship." Pema Levy and Isabela Dias, "The Nonsense Case Against Birthright Citizenship," *Mother Jones*, March 31, 2026, <https://www.motherjones.com/politics/2026/03/birthright-citizenship-ilan-wurman-history-amicus-brief/>. One critic opined about the research behind the restricted view of citizenship: "In any respectable academic field, we'd be talking about article retractions. It is simply that bad." Quoted in Levy and Dias, "The Nonsense Case Against Birthright Citizenship." Another called it "an open-and-shut case under almost any approach to constitutional and statutory interpretation." Stephen I. Vladeck, "Trump Will Lose the Birthright Citizenship Case. But in a Way, He's Already Won." *New York Times*, April 1, 2026, <https://www.nytimes.com/2026/04/01/opinion/birthright-citizenship-case-trump.html?smid=nytcore-ios-share>. Commenting on the research of law professor Ilan Wurman, a prime proponent of this restricted view of citizenship, constitutional originalist Keith Whittington of Yale Law School said that Wurman "mistakes what the legal history of that rule is. He misstates the logic and implications of the rule. He misstates the justification for the rule." Quoted in Levy and Dias, "The Nonsense Case Against Birthright Citizenship."

⁵ Levy and Dias, "The Nonsense Case Against Birthright Citizenship."

⁶ These articles include: John C. Eastman, "Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11," *University of Richmond Law Review* 42 (2008); William Ty Mayton, Birthright Citizenship and the Civic Minimum, *Georgetown Immigration Law Journal* 22 (2008); Patrick J. Charles, Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law, 51 *Washburn L.J.* 211 (2012); Richard Epstein, "The Case Against Birthright Citizenship," Civitas Institute, January 28, 2025, <https://www.civitasinstitute.org/research/the-case-against-birthright-citizenship>; Samuel Estreicher and Rudra Reddy, "Revisiting the Scope of Constitutional Birthright

defensively described as “an entire literature.”⁷ Notably, among the first such articles was one written by lawyer John Eastman who was then at Chapman University Law School. (Eastman was disbarred by California in 2026 for his role as “a key architect of Trump’s effort to pressure then-Vice President Mike Pence to singlehandedly block Joe Biden’s Electoral College victory [in the 2020 election].”⁸) An investigative reporter described the effort to narrow birthright citizenship as “how a small group of legal academics have tried to create a dubious counter-consensus around the citizenship clause to further Trump’s goals.”⁹

As the manufactured controversy over the meaning of birthright citizenship illustrates, the singular nature of legal training combined with the massive publishing hole of law journals has produced a unique breeding ground for wayward constitutional theorizing. The birthright citizenship dispute is only the most recent example of a constitutional theory that could not otherwise withstand scholarly scrutiny, but that has gained traction and the shroud of scholarly legitimacy within the pages of legal academic writing.

This takes us to the example of the Unitary theory of executive power, where the very same dynamic has unfolded.

This paper has two purposes. First, it explicates the pivotal role of law journal writing that, despite its prolific importance and pretensions, by and large does not follow the standards of scholarly review utilized in every other academic discipline. Such writing matters because the courts are defined and guided by legal doctrine, and law journals are a fountainhead for generating and explicating such doctrine and related theorizing. Closely linked is the unique nature of legal education, which extols advocacy and persuasion over the search for that which is true. Second, this paper examines the fundamentally flawed nature of the Unitary theory—a pretension-laden theory that was birthed and flowered almost entirely in articles written by lawyers and published in the pages of law reviews. It is this theory that has provided the shroud of legitimacy to many of President Trump’s most dubious actions and claims, and which have found sympathy in a number of recent Supreme Court rulings.

Citizenship,” *Journal of Law & Public Policy* 24 (Summer 2026), ssrn.com/abstract=5223361; Andrew T. Hyman, “Originalism, Illegal Immigration, and the Citizenship Clause,” *British Journal of American Legal Studies* 15 (Spring 2026); Kurt T. Lash, “Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment’s Citizenship Clause,” 101 *Notre Dame Law Review* (forthcoming 2026); Ilan Wurman, “Jurisdiction and Citizenship,” 49 *Harvard Journal of Law & Public Policy* (2026). In his dissent, Justice Thomas cited several of these sources.

⁷ Ilan Wurman, posting on X, January 23, 2025, https://x.com/ilan_wurman/status/1882506699963253196?s=20&utm_source=substack&utm_medium=email. Attention to this narrow redefinition of birthright citizenship exploded when an op-ed appeared in the New York Times: Randy E. Barnett and Ilan Wurman, “Trump Might Have a Case on Birthright Citizenship,” *New York Times*, February 15, 2025, <https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html>

⁸ Kyle Cheney, “John Eastman loses his law license in California over 2020 election scheme,” *Politico*, April 15, 2026, <https://www.politico.com/news/2026/04/15/john-eastman-law-license-california-00875083>

⁹ Matt Ford, “The Law Professors Aiding Trump’s War on Birthright Citizenship,” *The New Republic*, October 31, 2025, <https://newrepublic.com/article/202505/law-professors-bogus-birthright-citizenship>

LEGAL TRAINING AND THE ADVERSARY SYSTEM

I have long argued that fundamental traits accompanying legal training and law reviews combine to cultivate a breeding ground for wayward constitutional theorizing.¹⁰ In the case of the presidency, legal academic analysis has provided critical scholarly legitimacy for the Unitary theory of executive power, first formulated during the Reagan presidency, and that visibly appeared in the presidency of George W. Bush.¹¹ The Unitary theory has now achieved full flower in the Trump presidency.

Thinking Like a Lawyer

Legal training, including the adversarial process, advocacy, and client loyalty, are well suited to the American system of justice, in which opposing, one-sided arguments collide to produce something approximating a just outcome. By its nature, the adversary process often has the effect of giving the presentation of truth a lower priority, as winning the argument becomes the most important goal. But when these principles are applied to scholarly analysis of constitutional matters, the all-too-frequent result is selective analysis, overheated rhetoric, overstated conclusions, and distortion of facts and concepts. Such wayward theorizing too easily finds its way into print in the nation's more than 1000 law journals¹² where, unlike every other academic discipline, the professional publications are run by law students, not faculty or other trained professionals, and peer review is almost never used to determine publication worthiness. I am not the first to observe the traits described here.¹³ For example, Lee Epstein and Gary King noted in their study of legal writing in law reviews: "While a Ph.D. is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence against his or her theory, an attorney is taught to amass all the evidence for his or her hypothesis and distract attention from anything that might be seen as contradictory information."¹⁴ They further noted that "lawyers and judges, and hence law professors, specialize in persuasion. Lawyers need to persuade judges and juries to favor their clients, and the rules of persuasion in the adversary system are different from the rules of empirical inquiry."¹⁵

¹⁰ Robert J. Spitzer, "Saving the Constitution from Lawyers," in *Politics and Constitutionalism*, Robert J. Spitzer, ed. (Albany, NY: SUNY Press, 2000), 185-225. I first presented this as a paper at the American Political Science Association Annual Meeting in 1997. See also Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning* (New York: Cambridge University Press, 2008).

¹¹ John P. MacKenzie, *Absolute Power* (NY: The Century Foundation Press, 2008); Robert J. Spitzer, "Is the Constitutional Presidency Obsolete?" *The Presidency in the Twenty-First Century*, Charles W. Dunn, ed. (Lexington, KY: University Press of Kentucky, 2011).

¹² A 2016 survey by the Washington & Lee Law School concluded that there were 980 law journals and reviews (over 80 percent of which were student run), a number that has exceeded 1000 in the intervening ten years. Thomas W. Merrill, "The Digital Revolution and the Future of Law Reviews," *Marquette Law Review* 99(Summer 2016): 1101-10.

¹³ E.g. Lee Epstein and Gary King, "The rules of Inference," *University of Chicago Law Review* 69 (2002): 1-133. See also Kenneth Mayer, "The Return of the King? Presidential Power and the Law," *PRG Report* 26 (2004): 12-16.

¹⁴ Epstein and King, "The rules of Inference," 9.

¹⁵ Epstein and King, "The rules of Inference," 9, n. 23.

The purpose of legal education is, of course, to produce lawyers to participate in a career in law (some lawyers continue their education or directly enter the academic world to teach law). The job of the lawyer is to function successfully within the framework of the American legal system. And that system—indeed, the central feature of American justice—rests on the adversary system. The adversary system is predicated on the belief that the best way to determine the truth (or at least arrive at a relatively just outcome) in a legal dispute is for opposing sides to present their strongest possible arguments to an impartial and passive arbiter, whether a judge or jury. The adversary system in operation tends to serve “the objective of resolving disputes rather than searching for material truth.”¹⁶

Long experience with the adversary system has demonstrated “the natural tendency of advocates to win by any means available.”¹⁷ The nature of the adversary system means that a lawyer’s foremost obligation is to the lawyer’s particular position or client. Even though lawyers function as officers of the court, they “have no obligation to parties or interests other than their own clients.... Consequently, justice, or the right result, is not the responsibility of either lawyer.”¹⁸ In fact, although lawyers are ethically barred from lying, or knowingly allowing their clients to lie, lawyers may encourage a fact finder to reach a wrong conclusion by, for example, knowingly presenting perjured testimony, or cross-examining truthful witnesses in a manner that undercuts their credibility, if such an end promotes the goal of effectively defending the client. These tenets of the adversary process are not limited to the criminal and civil realms but also emerge, for example, during contract negotiations. As the leading legal theorist Lon Fuller noted, the lawyer’s job is “not to decide but to persuade. He is not expected to present the case in a colorless and detached manner, but in such a way that it will appear in that aspect most favorable to his client.”¹⁹ Marvin Frankel made this point expressly when he observed this about the consequences of legal education and its practice:

We become skeptical about, if not indifferent to, the notion of objective truth. Who can know the truth, after all? . . . We are not historians, commissioned to recapture events as they actually happened. Our job is to learn what witnesses will or may say, what evidence exists, who will or won’t discover the evidence, who will tell what “story,” how much must become known, what may not be discoverable, what “the record” will finally look like. . . . we learn a kind of modulated ignorance, stopping short of final answers, relying enthusiastically on the division of labor that separates lawyers from judging.²⁰

In no other academic field of inquiry, whether the natural sciences, the social sciences, or the humanities, is the value of truth seeking subordinated to the values that are the foundation of legal training: to marshal every persuasive skill to win an argument, to put the interests of the

¹⁶ Stephan Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* (St. Paul, MN: West, 2000), 3.

¹⁷ Landsman, *Readings on Adversarial Justice*, 4-5.

¹⁸ Stephen Gillers, “The American Legal Profession,” *Fundamentals of American law*, Alan B. Morrison, ed. (New York: Oxford University Press, 1996), 166-67.

¹⁹ Lon L. Fuller, “The Adversary System,” *Talks on American Law*, Harold J. Berman, ed. (New York: Vintage Books, 1971), 35.

²⁰ Marvin Frankel, *Partisan Justice* (New York: Hill and Wang, 1980), 23-34.

client or employer above that of the truth, and to maintain confidentiality regardless of its consequences.

This does not mean that those trained in the law are incapable of producing sound scholarly analysis, any more than it means that scholars in other disciplines are somehow immunized from defective scholarship by virtue of their graduate school and disciplinary training. Without question, much superb scholarship is to be found in legal publications. Yet the difference in values, principles, and training between law and other disciplines is as stark as it is undeniable. As Epstein and King shrewdly noted, “An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.”²¹

THE LAW REVIEW BREEDING GROUND

The deleterious consequences of these principles of legal training applied to academic research and writing might well be mitigated were it not for the other chief characteristic of academic writing in the realm of law: an enormous publishing venue composed of more than 1000 law reviews, the content of which is controlled (with a relative handful of exceptions) by editorial boards consisting of law students. Though well-meaning, hardworking, intelligent, and diligent, law students, by definition, cannot possess, and cannot be expected to possess, the expertise necessary to judge the merit of manuscripts sent to them for publication based on subject-matter expertise.

Married to student control is the related fact that peer review is almost never relied on to make publication decisions. The absence of peer review, by itself, sets law journals apart from the academic publishing venues of literally every other academic discipline, from anthropology to zoology. The reality of student control does likewise. The reasons for student control of law reviews date to the nineteenth century and, ironically, the professionalization of legal education attached to the development of modern, university-affiliated law schools.²² A detailed discussion of this evolution is beyond the scope of this essay. Yet this critical trait is the paramount and unassailable characteristic that renders law review publications suspect. Yes, much superb scholarship has been and will continue to be published in the pages of law reviews. But the obvious problem is the absence of any expertise-based barrier to any and every conceivable kind of writing. And the sheer size of law’s publishing venue invites academic mischief to any prospective author with a modicum of determination.

The legal profession has long been aware of this problem and has been critical of its defects, referred to for decades as “law office history,”²³ and more recently, “history lite.”²⁴ These derisive terms describe the long-simmering dispute between historians and legal writers, based on historians’ claims that legal writers distort and cherry-pick history in the way that a lawyer in a courtroom only presents one side of a story, in hopes of persuading a jury to rule on behalf of the client. It’s good legal practice, but terrible history or social science. Defenders of

²¹ Epstein and King, “The Rules of Inference,” 9.

²² Spitzer, *Saving the Constitution from Lawyers*, Chap. 2.

²³ Alfred H. Kelly, “Clio and the Court,” *The Supreme Court Review*, Philip Kurland, ed. (Chicago: University of Chicago Press, 1965), 122.

²⁴ Martin S. Flaherty, “History ‘Lite’ in Modern American Constitutionalism,” *Columbia Law Review* 95(April 1995): 523-91.

law review publishing are sometimes quick to criticize peer review for its flaws and limitations, which it certainly has. Yet the remedy for peer review's flaws is more and better peer review, not the abandonment of peer review in favor of the judgments of students.

In other writing I examined three examples of wayward constitutional theorizing that are the product of this process: the scope of the president's veto power (the so-called inherent item veto), the president's commander-in-chief power, and the reinterpretation of the meaning of the Second Amendment's right to bear arms.²⁵ The recent effort to redefine birthright citizenship summarized at the beginning of this paper is yet another example, as is the Unitary theory of executive power. Both are examples of law office advocacy and brief writing, not scholarship. The purpose of this paper, however, is to examine the second.

THE UNITARY THEORY: WHERE DID IT COME FROM, AND WHY IS IT TREATED SERIOUSLY?

The traditional conservative view of presidential power, as it existed in most of the twentieth century, viewed strong, activist presidents with suspicion. As President William Howard Taft wrote early in the twentieth century, after his presidency, "The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise."²⁶ Later writings argued on behalf of a more restrained, and narrowly constitutional, interpretation of presidential powers.²⁷

But this Whiggish/conservative tradition emphasizing limited presidential power was swept aside by the presidency of Ronald Reagan. Partly as a response to what was viewed by some as an abrogation of presidential powers in the 1970s by a resurgent post-Watergate Congress, Reagan's election in 1980 brought into office a new conservatism that planted feet in two seemingly contradictory camps: constitutional Originalism and activist presidentialism. The chief architects of this new activist conservatism were lawyers working in the Reagan Justice Department and in a newly founded organization of conservative lawyers, the Federalist Society.²⁸ Together, these groups produced a new theory of presidential power, the Unitary theory, which argues that the framers envisioned and created expansive executive power.

The essence of the theory contains two key elements: that the president controls the entire executive branch, and that only the president may exercise that control. As then-federal judge Samuel Alito said in a speech before the Federalist Society in 2000, "The president has not just

²⁵ Spitzer, *Saving the Constitution from Lawyers*, Chaps. 3, 4, and 5, respectively.

²⁶ William Howard Taft, *The President and His Powers* (New York: Columbia University Press, 1916), 139–140.

²⁷ James Burnham, *Congress and the American Tradition* (Chicago: Regnery, 1959); Herman Finer, *The Presidency* (Chicago: University of Chicago Press, 1960); Willmoore Kendall, *The Conservative Affirmation* (New York: Harcourt Brace, 1963); Alfred DeGrazia, *Republic in Crisis* (New York: Federal Legal Publications, 1965). An important, contemporary statement of the traditional conservative view of the presidency is Gene Healy, *The Cult of the Presidency: America's Dangerous Devotion to Executive Power* (Washington, DC: Cato Institute, 2008).

²⁸ Spitzer, *Saving the Constitution from Lawyers*, 92–95; Steven M. Teles, *The Rise of the Conservative Legal Movement* (Princeton, NJ: Princeton University Press, 2008); Amanda Hollis-Brusky, *Ideas With Consequences* (NY: Oxford University Press, 2015).

some executive powers, but the executive power -- the whole thing.”²⁹ Beyond that, adherents have spun two versions: so-called “strong” versus “weak” Unitary views.³⁰ William G. Howell and Terry M. Moe define the strong view as asserting that “Congress has no right to interfere” with any element of the Executive branch, extending even to independent agencies and the civil service, even though both were created by acts of Congress. Further, “the courts, as a separate branch of government, have no right to encroach on or limit the president’s proper constitutional powers.”³¹ Oddly, Howell and Moe decline to define the “weak” view.

Advocates of the “weak” view seem mostly bent on constructing an apologia for the theory by sanding down its rough edges while trying to retain its essence. Yet whether “strong” or “weak” the irreducible core of this view is the bedrock principle that only the president (and the president alone) controls the entire executive branch, thereby rejecting the long history of congressional power to create, regulate, and insulate from direct presidential control elements of the bureaucracy through enactments including the creation of independent agencies and the civil service.³² The difficulty with this watered-down version is that, by definition, a bright line separates the Unitary view from the non-Unitarian conventional modern strong presidency, which jousts with Congress but does not pretend that Congress does not possess final legislative authority through the aforementioned long-held powers.

Some have argued that the Unitary theory is simply the logical extension of the modern strong presidency, noting the rising use of unilateral presidential powers such as executive orders and signing statements by all recent presidents,³³ at least since Reagan (and arguably including presidents before him). But this misses the fundamental break with the past exemplified by the Unitary view because unilateral presidential actions are not necessarily synonyms for the Unitary theory. The defining trait of the Unitary theory—rejection of the principle of shared or overlapping powers—is a bright line, even if activist presidents have acted in a unilateral fashion and pushed the office toward the Unitary line. The distinction between support for an active, vigorous modern presidency but that also rejects the Unitary theory is reflected, for example, in the prolific writings of political scientist Michael Genovese. As he concludes, “I find the unitary executive theory. . . to be a groundless view, not supported by evidence or logic.”³⁴

Death of the Whig Presidency

²⁹ Jess Bravin, “Judge Alito's View Of the Presidency: Expansive Powers,” January 5, 2006, <https://www.wsj.com/articles/SB113642811283938270>

³⁰ Jeffrey Crouch, Mark J. Rozell and Mitchel Sollenberger, *The Unitary Executive Theory* (Lawrence, KS: University Press of Kansas, 2020), 22-23.

³¹ William G. Howell and Terry M. Moe, *Trajectory of Power* (Princeton, NJ: Princeton University Press, 2025), 122. Defenders of the “weak” view include Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive* (New Haven, CT: Yale University Press, 2008).

³² Neal Devins and David E. Lewis, “The Independent Agency Myth,” *Cornell Law Review* 108(September 2023): 1305-74.

³³ For more on signing statements, see Robert J. Spitzer, “Liberals and the Presidency,” *Contending Approaches to the American Presidency* Michael A. Genovese, ed. (Washington, D.C.: CQ Press, 2012), 87-93.

³⁴ Michael A. Genovese, *The Modern Presidency* (NY: Columbia University Press, 2022), 64. See also Genovese, *A Presidential Nation* (Boulder, CO: Westview Press, 2013).

Presidential liberals now no longer had a monopoly over presidential activism. Yet liberals' philosophical differences with Unitary conservatives consisted of two parts. The first was a difference in public policy. Liberals supported liberal policies, whereas conservatives supported conservative policies. That was fair enough. The second difference was more significant. Liberal presidentialists and traditional conservatives generally recognized the historical consensus that presidential power as found in the Constitution was relatively limited (as was the vision of most founders), but the document's architecture, especially in Article II, was sufficiently vague that it allowed for the possibility of greater presidential power, a pattern that unfolded primarily in the twentieth century. Further, this rise of strong presidentialism was viewed by liberals as both necessary and good, coinciding as it did with the growth of the modern American republic.

Conservatives hewing to the Unitary theory argued that the founders in fact vested unitary executive powers in the Constitution, but that these powers had been somehow reduced, misunderstood, hemmed in, lost, or whittled away over the post-Founding decades, so that modern presidents staking out Unitary power claims were only reclaiming for their office its original constitutional powers—in short, that presidential power has declined, not increased, since the enactment of the Constitution in 1789, only to be rediscovered in the 1980s.³⁵ According to Theodore Olson (who also served as assistant attorney general in the Reagan administration and as solicitor general in the second Bush administration) the presidency had endured “two centuries of unrelenting encroachments by Congress,” during which time Congress has “adeptly and persistently eroded and disassembled executive power. . . .”³⁶

This activist conservative (as distinct from Whiggish conservatism) narrative suffered from four problems. First, this Unitary “originalist” interpretation of expansive presidential powers fit poorly with nearly all the evidence of what the founders understood, how they constructed presidential powers in 1787, and how those who ran the country in its early decades (some of whom had helped create the modern Constitution) actually behaved; in fact, constitutional Originalism leads to legislative dominance, not coequal branches, and certainly not to presidential preeminence (see later discussion).³⁷ Second, the notion that presidents had, on the whole, lost powers from the end of the eighteenth century to the present contradicted the bedrock understanding that the presidential institution has (in fits and starts) grown in powers significantly and dramatically in the last three centuries.³⁸ Third, the intellectual provenance of the Unitary theory as constitutional theory was inherently suspect, as its architects claimed to discover an entirely new theory that had been somehow missed in nearly 200 years of intense

³⁵ See for example Minority Report, *Report of the Congressional Committees Investigating the Iran-Contra Affair* (Washington, D.C.: GPO, 1987; Theodore B. Olson, “The Impetuous Vortex: Congressional Erosion of Presidential Authority,” in *The Fettered Presidency: Legal Constraints on the Executive Branch* ed. L. Gordon Crovitz and Jeremy Rabkin (Washington, D.C.: American Enterprise Institute, 1989), 231, 239; Terry Eastland, *Energy in the Executive* (New York: Free Press, 1992); Jane Mayer, “The Hidden Power,” *The New Yorker*, July 3, 2006, 44–55; Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive* (New Haven, CT: Yale University Press, 2008); John Yoo, *Crisis and Command* (New York: Kaplan Publishing, 2009).

³⁶ Olson, “The Impetuous Vortex,” 231.

³⁷ Garry Wills, *A Necessary Evil* (New York: Simon & Schuster, 1999), chap. 5.

³⁸ Robert J. Spitzer, *President and Congress* (New York: McGraw-Hill, 1993), chap. 2.

and prolific constitutional scrutiny.³⁹ Fourth, the intellectual foundation for the Unitary theory rested on a political motivation: to construct a conservative justification for presidential activism that maintained the fig leaf of fidelity to constitutional Originalism, the secular religion of the modern conservative movement.⁴⁰ In short, liberal presidentialists could have no quarrel with conservatives who now sought to use the powers of the presidency to advance conservative political and policy objectives, just as liberal presidents had done in the past and, presumably, would continue to do in the future. But critics of the Unitary view (both liberal and conservative) did and do quarrel with a tendentious counter-factual theory constructed solely to provide political cover for actions that have skirted, if not blown past, the outer edges of both the law and the Constitution, some of which have recently received the blessing and legal imprimatur of Unitary adherents now serving on the Supreme Court.⁴¹

Lawyers Invent a Unitary Theory Provenance

As noted, the Unitary theory's emergence traces to President Reagan's Justice Department's Office of Legal Counsel, under office heads Theodore Olson and Charles Cooper, along with Attorney General Edwin Meese, with coordinate support from the newly formed Federalist Society.⁴² General Meese first articulated this view publicly in 1985. Its efforts overlapped closely with the goals of the Federalist Society.

Coterminously, articles referencing the Unitary executive began to appear in law journals in the mid-1980s,⁴³ but the first full-blown and sustained explication and defense of the idea was published in 1992.⁴⁴ Thereafter, a lengthy series of articles appeared debating the merits of the unitary theory.⁴⁵ Capping the Unitary argument was a series of four law review articles,

³⁹ Spitzer, *Saving the Constitution from Lawyers*, 92–98; Spitzer, “The Post-Bush Presidency and the Constitutional Order.” Paper presented at the annual meeting of the American Political Science Association, Toronto, Canada, September 3–6, 2009.

⁴⁰ Robert J. Spitzer, “Saving the Presidency From Lawyers,” *Presidential Studies Quarterly* 38 (June 2008): 329–346; Louis Fisher, “The Unitary Executive and Inherent Executive Power,” *Journal of Constitutional Law* 12 (February 2010): 569–591; Ryan J. Barilleaux and Christopher S. Kelley, eds., *The Unitary Executive and the Modern Presidency* (College Station: Texas A&M University Press, 2010).

⁴¹ Most notably see *Trump v. U.S.*, 603 U.S. ____ (2024) and *Trump v. Slaughter*, 609 U.S. ____ (2026). Both Justices John Roberts and Samuel Alito worked in the Reagan Justice Department and helped advance the Unitary theory.

⁴² See Teles, *The Rise of the Conservative Legal Movement*, Chap. 5.

⁴³ Peter L. Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch,” *Columbia Law Review* 84(April 1984): 599–602; Geoffrey P. Miller, “Independent Agencies,” *Supreme Court Review* (1986): 41–97; Harold J. Krent, “Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government,” *Northwestern University Law Review* 85(Fall 1990): 62–112.

⁴⁴ Steven G. Calabresi and Kevin H. Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary,” *Harvard Law Review* 105(April 1992): 1153–1216. Calabresi is a co-founder of the Federalist Society and also worked as a lawyer in the Reagan administration.

⁴⁵ Articles defending the unitary view include, Gary Lawson, “Changing Images of the State: The Rise and Rise of the Administrative State,” *Harvard Law Review* 107 (April 1994): 1231–54; Steven G. Calabresi and Saikrishna B. Prakash, “The President’s Power to Execute the

amounting to nearly 500 published pages, all authored by Steven Calabresi, Christopher S. Yoo, and other associates, that provide a chronological account of what they claim shows the infusion of the Unitary executive throughout American history under the modern Constitution.⁴⁶ The sweep and ambition of this unitary view writing is concisely encapsulated by legal writer Gary Lawson, whose breathtaking argument in his article on the subject is that, as per the Unitary theory, “The post-New Deal administrative state is unconstitutional. . . .”⁴⁷ As Nicholas Jacobs and Sidney Milkis wrote, this law journal writing “bestowed academic credibility on the unitary executive doctrine. . . .”⁴⁸

The law journal writing explicating and defending the Unitary executive theory found in law reviews labors under at least three shortcomings⁴⁹ endemic to the law journal writing examined here. First, it cherry-picks its evidence, often misrepresents the historical record, and ignores pertinent literature in other disciplines. Second, it attempts to manufacture a constitutional pedigree for a purely contemporary political construct to then upend existing law. As lawyers Lawrence Lessig and Cass Sunstein wrote, “the view that the framers constitutionalized anything like this [Unitary] vision of the executive is just plain myth. It is a creation of the twentieth century, not the eighteenth.”⁵⁰ Third, it is a paradigmatic example of the lawyerly advocacy scholarship just described – which is to say, it is not scholarship at all.

Laws,” *Yale Law Journal* 104(December 1994): 541-665. Critics of the unitary view include: Lawrence Lessig and Cass R. Sunstein, “The President and the Administration,” *Columbia Law Review* 94(January 1994): 1-120; Abner S. Greene, “Checks and Balances in an Era of Presidential Lawmaking,” *University of Chicago Law Review* 61(Winter 1994): 123-96; Martin S. Flaherty, “The Most Dangerous Branch,” *Yale Law Journal* 105 (May 1996): 1725-1839; Neil Kinkopf, “Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors,” *Rutgers Law Review* 50(Winter 1998): 331-96.

⁴⁶ Steven G. Calabresi and Christopher S. Yoo, “The Removal Power: The Unitary Executive During the First Half-Century,” *Case Western Reserve Law Review* 47(Summer 1997): 1451-1561; Steven G. Calabresi and Christopher S. Yoo, “The Unitary Executive During the Second Half-Century,” *Harvard Journal of Law and Public Policy* 26(Summer 2003): 667-801; Christopher S. Yoo, Steven G. Calabresi, and Lawrence D. Nee, “The Unitary Executive During the Third Half-Century,” *Notre Dame Law Review* 80(November 2004): 1-109; Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, “The Unitary Executive in the Modern Era, 1945-2004,” *Iowa Law Review* 90(January 2005): 601-731.

⁴⁷ Lawson, “Changing Images of the State,” 1231.

⁴⁸ Nicholas F. Jacobs and Sidney M. Milkis, *Subverting the Republic* (Lawrence, KS: University Press of Kansas, 2025), 117.

⁴⁹ Particularly effective critiques of the unitary view are found in Lawrence Lessig and Cass Sunstein, “The President and the Administration,” *Columbia Law Review* 94(January 1994); Kelley and Barilleaux, “The Past, Present, and Future of the Unitary Executive”; Louis Fisher, “Unitary Executive: Ideology Versus the Constitution,” *The Unitary Executive and the Modern Presidency*, Ryan J. Barilleaux and Christopher S. Kelley, eds. (College Station, TX: Texas A&M University Press, 2010), 17-40; MacKenzie, *Absolute Power*; Crouch, Rozell, and Sollenberger, *The Unitary Executive Theory*.

⁵⁰ Lessig and Sunstein, “The President and the Administration,” 2.

Perhaps the best example of this latter criticism is the fact that the Unitary theory turns the related principles of separation of powers and checks and balances on their head. Any power identified as belonging to the president or the executive branch is, by Unitary theory definition, beyond the reach of the other two branches and is defined solely by the executive,⁵¹ despite the fact that the essence of the three-branch relationship is one of overlapping and interconnected powers (which does not deny that each branch does retain exclusive control over some aspects of their respective branches). Indeed, central to the Unitary view is rejection of “the idea that powers were shared. The president,” per the Unitary view, had and has “the right to direct everything that occurred in the executive branch.” Laws restricting the president’s authority over the executive branch are considered “unconstitutional encroachments on presidential power.”⁵²

Some who have analyzed the Unitary theory’s provenance note that “unitarians tend to differ about what exactly the theory entails.”⁵³ As noted above, some apologists of the Unitary view have argued for a “weaker” definition of unitarianism, even saying, as one legal analyst proposed, that “the president has no authority to ignore laws enacted by Congress.”⁵⁴ That view is not consistent with the bedrock basis of the Unitary theory. As Jeffrey Crouch and associates conclude, claims like these are “based on a narrow or even revisionist understanding of the unitary executive theory.”⁵⁵

The fundamental flaw of the Unitary view is readily revealed by an even casual examination of the Founders’ thinking. One need go no further than James Madison, who wrote in Federalist Paper 51 that “Ambition must be made to counteract ambition.” In order to effectuate the American governing system, “. . . the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other. . . .”⁵⁶ As Madison wrote in Federalist 47, the branches of government have “a partial agency in” one another’s activities.⁵⁷ Richard Neustadt aptly and famously summarized the three branch relationship by noting that the branches are separate and have different responsibilities, but their powers are shared or blended, yielding a system of “separated institutions *sharing* powers.”⁵⁸ This bedrock idea is anathema to the Unitary theory, however, as it “dismisses the idea of ‘separate institutions sharing power’ as ‘mushy thinking.’”⁵⁹ As Louis Fisher concludes, “the model of the Unitary

⁵¹ Frederick A.O. Schwarz Jr. And Aziz Huq, *Unchecked and Unbalanced* (New York: The New Press, 2008), 156-57.

⁵² Richard J. Ellis, *The Development of the American Presidency* (NY: Routledge, 2012), 336. See also Savage, *Takeover*, 48.

⁵³ Graham G. Dodds, *The Unitary Presidency* (NY: Routledge, 2020), 4.

⁵⁴ Quoted in Crouch, Rozell, and Sollenberger, *The Unitary Executive Theory*, 11. For more on this “weak” view see 22-23.

⁵⁵ Crouch, Rozell, and Sollenberger, *The Unitary Executive Theory*, 11.

⁵⁶ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), 322.

⁵⁷ Hamilton, Madison, and Jay, *The Federalist Papers*, 302.

⁵⁸ Richard E. Neustadt, *Presidential Power and the Modern Presidents* (NY: Free Press, 1990), 29. Emphasis in original.

⁵⁹ Stephen Skowronek, John A. Dearborn, and Desmond King, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive* (NY: Oxford University Press, 2021), 33.

Executive was never adopted or intended [by the Framers], nor does it have any wholesale application today either in theory or practice.”⁶⁰

The Merit-less Unitary Theory Is Not Originalist

A fundamental asymmetry underlies the separation of powers: that the legislative branch was designed to be the first, most important, and most powerful branch among the three. If this comes as a revelation to twenty-first century Americans (and Unitary advocates), it was not to those of the eighteenth century where, as John Locke noted, “In all cases whilst the government subsists, the legislative power is the supreme power. . .the legislative must needs be the supreme, and all other powers in any members or parts of the society [are] derived from and subordinate to it.”⁶¹ The American three-branch federal system was emphatically not one of three co-equal branches, but was to be legislative-centered.⁶² James Madison’s dictum on this was clear enough when he proclaimed that “In republican government, the legislative authority necessarily predominates.”⁶³ What the political scientist (and advocate of strong presidentialism) Clinton Rossiter referred to decades ago as the “fact of legislative primacy”⁶⁴ arises from the constitutional document itself, where “Congress is granted a breathtaking array of powers. . .the bulk of governmental authority as the Founders understood it.”⁶⁵ This principle applies to foreign as well as domestic powers.⁶⁶ Yet legislative dominance rests not only with the lengthy laundry list of powers granted to it in Article I, but in its power relationship with the other two branches of government.

The legislature’s power to make laws is, first, government’s most important function. “Without prior legislation,” historian Garry Wills notes, “there is nothing to be executed or adjudicated. The other two functions [executive and judicial] necessarily serve the first.”⁶⁷ Beyond this, congressional pre-eminence is reflected in the trump cards that institution is granted in the Constitution. Congress can remove from office members of the other two branches through impeachment; neither the executive nor the judicial has any reciprocal removal power over members of Congress. Congress establishes and provides pay for the members of the other branches; determines the structures of the other two branches, encompassing the cabinet departments and other agencies of the Executive branch, as well as all “inferior Courts as the Congress may from time to time ordain and establish” below the Supreme Court, and the number

⁶⁰ Fisher, “The ‘Unitary Executive,’” 17. Crouch, Rozell, and Sollenberger agree: *The Unitary Executive Theory*, 12.

⁶¹ John Locke, *Of Civil Government* (Chicago: Regnery, 1955), 125. See James P. Pfiffner’s superb discussion of Locke and other theorists in *Power Play: The Bush Presidency and the Constitution* (Washington, D.C.: Brookings Institution Press, 2008), ch. 1.

⁶² Garry Wills, *A Necessary Evil* (New York: Simon & Schuster, 1999), Chap. 5. See also Spitzer, *President and Congress*, 13-16.

⁶³ Hamilton, Madison, and Jay, *The Federalist Papers*, 322.

⁶⁴ Clinton Rossiter, *1787: The Grand Convention* (New York: New American Library, 1966), 55.

⁶⁵ Roger Davidson, “‘Invitation to Struggle’: An Overview of Legislative-Executive Relations,” *Annals of the American Academy of Political and Social Science*, 499 (September 1988): 11.

⁶⁶ Harold Hongju Koh, *The National Security Constitution* (New Haven, CT: Yale University Press, 1990), 75-76; Louis Fisher, *Presidential War Power* 3rd ed. (Lawrence, KS: University Press of Kansas, 2013).

⁶⁷ Wills, *A Necessary Evil*, 85.

of judges that serve on all federal courts, including the nation's highest court. As the Constitution says in Article I, section 8, Congress not only has an express grant of power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing powers," but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Congress also has final say in the veto process, as well as in the approval of treaties and executive appointments by the Senate. Congress amends the Constitution with approval of the states, a process in which the president has no legal role. In the checks-and-balances system, each branch could indeed claim checks on the others, but those of Congress were final trumps. As Wills concludes: "No matter what the sequence of action. . . Congress always gets the last say (if it wants it)."⁶⁸

None of this is to suggest, however, that Congress's Constitution-based pre-eminence was untrammelled – far from it. Aside from the checks of the other two branches, Congress was checked by its division into two houses, making it the only branch of the three divided against itself; the extensive list of powers granted Congress in Article I, section 8, was immediately followed by a specific list of limitations described in Article I, section 9; and the First Amendment of the Bill of Rights, completed two years after the Constitutional Convention, begins with "Congress shall make no law. . ." followed by the specific prohibition that Congress is not to infringe on individual liberties enumerated in the First Amendment. Beyond this, considerable evidence supports the related proposition that the framers, and especially James Madison, cultivated and favored a closer relationship between the executive and judiciary as a counterbalance to the aforementioned legislative supremacy. As Madison said at the Constitutional Convention: "There was an analogy between the Executive & Judiciary departments in several respects. The latter executed the laws in certain cases as the former did in others. The former expounded & applied them for certain purposes, as the latter did for others."⁶⁹ A further evidence of Madison's predilections was seen in his vigorous, if unsuccessful, advocacy for creation of a council of revision – a body consisting of the president and the members of the Supreme Court that would come together to collectively exercise the veto power (such a power was exercised by the governor and state judges in New York until 1821).⁷⁰ While the proposal was not accepted, it reflected the idea that these two branches had an affinity, founded both in similar functions and in the need to effectively counterbalance the legislative branch, not shared by either with Congress.⁷¹

Further evidence of legislative dominance arising from the Constitution was the functional relationship between the branches in the nation's ensuing century. Those founders who participated in governance operated and behaved in a manner consistent with legislative

⁶⁸ Wills, *A Necessary Evil*, 86.

⁶⁹ Max Farrand, ed., *The Records of the Federal Convention*, 4 vols. (New Haven, CT: Yale University Press, 1966), II, 34.

⁷⁰ Robert J. Spitzer, *The Presidential Veto* (Albany, NY: SUNY Press, 1988), 9-14. The council of revision proposal was offered up for a vote no less than four times at the convention, and was narrowly defeated each time.

⁷¹ Robert Scigliano argues precisely that the judiciary and executive "were intended by the framers of the Constitution to act, for certain purposes, as an informal and limited alliance against Congress, and that they have in fact done so." This was done, he argues, "to counterbalance the power of Congress. . . ." *The Supreme Court and the Presidency* (New York: The Free Press, 1971), vii.

supremacy.⁷² By the middle of the nineteenth century, the imperatives of the American “patronage state,” so delineated by political scientist Theodore J. Lowi, further favored “congressional dominance,” such that Lowi dubbed this period as one typified by near-parliamentary governance.⁷³ Writing in 1884, Woodrow Wilson identified “Congress as the central and predominant power of the system,” adding “unquestionably, the predominant and controlling force, the centre and source of all motive and of all regulative power, is Congress.”⁷⁴

Yet it is not only true, but a truism, of the three-branch relationship that it has been dynamic, not static, in American political development. To be sure, the modern three-branch relationship would appear to little resemble anything like a legislative-dominant system (and one might certainly argue that such a development was not only necessary, but desirable), but that is a consequence of over two hundred years of institutional evolution. No further evidence need be marshaled than to cite the reality of contemporary executive branch dominance in national governance. The proposition that presidential power has significantly increased in the last two centuries, yielding a “modern strong presidency” in the twentieth century is one of the most well established and widely accepted tenets of the institutional presidency and American governance.⁷⁵ Many contemporary analysts argue that presidents of recent decades have found as well that the demands and expectations placed on the office outstrip its powers, placing modern presidents in an often untenable political situation, but this assertion does not contradict the truism of the long-term rise of presidential powers, and the relative eclipse of Congress. Among his many writings, Louis Fisher provides careful case analysis of how this shift has taken place in such key areas as war powers and spending.⁷⁶

Many factors account for the legislative-executive reversal of fortunes, beginning, but not ending with, the limiting specificity of Congress’s Article I powers as compared with the delimiting vagueness of presidential Article II powers and precedent-setting actions of activist

⁷² Spitzer, *President and Congress*, ch. 2; Wills, *A Necessary Evil*, 87-90; Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Lawrence, KS: University Press of Kansas, 2007), ch. 1. Among the Constitution’s founders, Alexander Hamilton stands out as one who sought to stake out an aggressive view of executive power as President George Washington’s Secretary of the Treasury and de facto chief of staff. Yet Hamilton’s efforts stand out precisely because they were anomalous.

⁷³ Theodore J. Lowi, *The Personal President* (Ithaca, NY: Cornell University Press, 1985), 35.

⁷⁴ Woodrow Wilson, *Congressional Government* (New York: Meridian Books, 1956; first pub. 1885), 23, 31.

⁷⁵ A small sampling of such writing includes, Edward S. Corwin, *The President: Office and Powers* (New York: NYU Press, 1957); Clinton Rossiter, *The American Presidency* (New York: New American Library, 1960); Lowi, *The Personal President*; Neustadt, *Presidential Power*; Stephen Skowronek, *The Politics Presidents Make* (Cambridge, MA: Harvard University Press, 1993); Spitzer, *President and Congress*; Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997); Michael A. Genovese, *The Power of the American Presidency* (New York: Oxford University Press, 2001). A useful synthesis of competing arguments about presidential power is found in Raymond Tatalovich and Thomas S. Engeman, *The Presidency and Political Science* (Baltimore, MD: The Johns Hopkins University Press, 2003).

⁷⁶ Louis Fisher, *Congressional Abdication on War and Spending* (College Station, TX: Texas A&M University Press, 2000).

presidents. In any case, the realities of constitutional checks and balances lend credence to Thomas Jefferson's prescient prediction, penned in a letter to James Madison in 1789: "The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period."⁷⁷

This returns us to the Unitary executive and the Trump presidency.

FROM THE LEGAL ACADEMY TO TRUMP

One may readily argue that the ruminations of lawyers expounding on executive powers in law journals, examined earlier, are of little or no policy or political importance, and are certainly of no interest to President Trump, who has repeatedly stated in unequivocal if sophomoric terms his view of the president's constitutional powers. For example, he famously stated in his first term, "I have an Article II, where I have the right to do whatever I want as president."⁷⁸ In 2020, Trump said, "When somebody's president of the United States, the authority is total, and that's the way it's got to be. It's total. It's total, and the governors know that."⁷⁹ In 2025, Trump said in an interview about his second term as compared with his first, "I run the country and the world."⁸⁰ In 2026 he told an interviewer that there are "no limits" to his power.⁸¹ But as Stephen Skowronek has argued, "Trump embraced the unitary theory like a businessman whose tax adviser has just alerted him to an advantageous loophole in the code. . . ."⁸² After all, if the Unitary theory had never existed, Trump's beliefs in his own untrammelled power would surely be the same. Nevertheless, the theory's existence dignifies and enshrouds his juvenile power claims.

During his first term, Trump often found himself bounded by advisors and others who cautioned against overly aggressive unilateral power forays. In his second term, however, he prioritized appointing officials whose chief qualification was personal fealty to Trump. Gone were the guardrails of his first term. In other words, "President Trump surrounded himself with ardent unitarians and turned their theory into a touchstone of his administration."⁸³ Since assuming office the second time in January 2025, Trump has undertaken a staggering array of

⁷⁷ *Jefferson's Letters*, arranged by Willson Whitman (Eau Claire, WI: E.M. Hale & Co., 1950), 108.

⁷⁸ Michael Brice-Saddler, "While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want,'" *Washington Post*, July 23, 2019, <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/>

⁷⁹ Editorial: A Poor Choice of Words," *Augusta Chronicle*, April 15, 2020, <https://www.augustachronicle.com/story/opinion/editorials/2020/04/15/editorial-poor-choice-of-words/1348624007/>

⁸⁰ Ashley Parker and Michael Scherer, "I Run the Country and the World," *Atlantic*, April 28, 2025, <https://www.theatlantic.com/magazine/archive/2025/06/trump-second-term-comeback/682573/>

⁸¹ Dave Lawler, "Exclusive: Trump tells The Axios Show there are 'no limits' to his power after Iran war," *Axios*, June 18, 2026, <https://www.axios.com/2026/06/18/trump-iran-war-power-no-limits>

⁸² Skowronek, Dearborn, and King, *Phantoms of a Beleaguered Republic*, 25.

⁸³ Skowronek, Dearborn, and King, *Phantoms of a Beleaguered Republic*, 25.

actions, the likes of which the country has never witnessed by or under any presidential administration. It would consume this entire essay, or many essays, to catalog and assess them, as they reach nearly every element and component of American national governance.⁸⁴

We thus return to the question of whether Trump administration actions would have been any different if the Unitary theory had never existed, given Trump's penchant to simply do whatever he wishes to do as president. In this paper I argue that the answer is yes, because constitutional theories drive constitutional interpretation, which in turn are the guiding stars of judges and lawyers. Without question, at least five of the nine current Supreme Court justices are unitarians: Justices John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and likely Amy Coney Barrett.⁸⁵ This view found full voice in the 2024 Supreme Court case of *Trump v. U.S.*,⁸⁶ and in the 2025 "shadow docket" cases of *Trump v. Wilcox*⁸⁷ and *Trump v. Boyle*.⁸⁸ A verdict comparable in scope and reach to that of the 2024 *Trump* case is the 2026 *Trump v. Slaughter* ruling.

No lawyer could feasibly march into court to defend Trump's controversial actions in these or other cases simply by citing his "I have the right to do whatever I want as president" mantra. Even among judges who thoroughly embrace the Unitary view, justification and adjudication require more, especially given that, as of June 2026, over 860 legal challenges to Trump administration issuances and actions have been filed in court.⁸⁹ While the Unitary theory encompasses the disavowal of the authority of courts to define or hem in executive power,⁹⁰ and indeed some Trump administration officials have openly defied judicial directives, by and large the administration has, to date, mostly found ways to at least give the appearance of compliance with rulings it dislikes. Yet it is difficult to overstate the extent to which the Unitary view has already wreaked havoc within the executive branch. For example, it has opened the gates for

⁸⁴ Exhaustive lists of those actions through the end of 2025 are found at Stephen Rohde, "The Unitary Presidency: Trump's Second Term, the Supreme Court, and the Consolidation of Power," Los Angeles County Bar Association, November 27, 2025, <https://lacba.org/?pg=LosAngelesLawyerMagazine&pubAction=viewIssue&pubIssueID=62305&pubIssueItemID=408457>; "The Abuse of Presidential Power and Breach of Public Trust," New York City Bar, December 12, 2025, <https://www.nycbar.org/reports/the-abuse-of-presidential-power-and-breach-of-public-trust/>

⁸⁵ Erwin Chemerinsky, "Morrison v. Olson and the triumph of the unitary executive theory," *SCOTUSblog*, December 3, 2025, <https://www.scotusblog.com/2025/12/morrison-v-olson-and-the-triumph-of-the-unitary-executive-theory/>

⁸⁶ 603 U.S. ____ (2024). This case was decided 6-3 with all six conservative justices voting for Trump's side.

⁸⁷ 605 U.S. ____ (2025).

⁸⁸ 606 U.S. ____ (2025).

⁸⁹ "Litigation Tracker: Legal Challenges to Trump Administration Actions," Just Security, visited April 2026, <https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/>

⁹⁰ Lawyers for the George W. Bush administration argued that the courts may not adjudicate in areas the president deems within his executive power, particularly in the realm of foreign affairs, in such cases as *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Trump administration officials to directly politicize fundamental scientific and medical research in ways that will be indisputably disastrous for scientific research.⁹¹

As long as people and institutions seek remedies for rights or wrongs in the interpretation of law through the courts, constitutional theories are and will be both crucial and vital. As one Unitary critic wrote, “Should six unelected, life-tenured justices wipe out over a century of precedent structuring vast sectors of the economy—without bothering to explain where and how they derive the authority to engineer such an epochal upheaval? Unsurprisingly, no takers spoke up to endorse this approach.”⁹²

CONCLUSION

The Unitary theory and theorists have been the largely unseen handmaidens of Trump’s power expressions. The Unitary wellspring has provided the grand theorizing to justify Trump administration actions. That theory has also provided the grounding for the current Unitary-friendly majority on the current Supreme Court. Without question, the court majority is “committed to a unitary executive.”⁹³ For this, we can only thank legal briefs masquerading as scholarship published in the pages of law journals. And to the limited extent that “inside baseball” debates among elites about the relative merits of the Unitary theory enter the larger public debate about charges of presidential abuses of power, that debate is easily translated as a reductionist competition between dueling theories that each have their adherents and merits.

Theorizing is an appropriate, important, and necessary component of any academic or intellectual discipline, and law is no exception. But what sets law apart from every other discipline is that the combination of advocacy-based training, along with a publishing venue run mostly by students without benefit of peer review, has produced a breeding ground for wayward constitutional theorizing—wayward meaning that it is too often counter-factual, one-sided, and ahistorical at a time when the court is increasingly turning to historical precedent and analogs to judge the constitutionality of contemporary actions and decisions.⁹⁴ Inevitably, some of these theories have made their way to significant legal proceedings, from the Second Amendment to the Unitary theory.

⁹¹ Mark Histed, “An Ascendant Constitutional Theory Is a Threat to American Science,” *The Atlantic*, June 17, 2026, <https://www.theatlantic.com/ideas/2026/06/unitary-executive-scientific-research/687565/>

⁹² Simon Lazarus, “The Right-Wing Justices Know Their Favorite Legal Theory Is Bunk,” *The New Republic*, January 2, 2026, <https://newrepublic.com/article/204737/supreme-court-unitary-executive-theory>

⁹³ Peter M. Shane, “This Is the Presidency John Roberts Has Built,” *The Atlantic*, July 21, 2025, <https://www.theatlantic.com/ideas/archive/2025/07/supreme-court-roberts-trump-dictator/683576/>

⁹⁴ The exemplar of this trend is the Supreme Court’s 2022 Second Amendment ruling in *NYSRPA v. Bruen*, which expressly ruled that the constitutionality of modern gun laws should be determined by the presence or absence of historical analogs.

The late New York senator and political scientist Daniel Patrick Moynihan famously remarked that “Everyone is entitled to his own opinion, but not to his own facts.”⁹⁵ Law journals have proven to be an engine for alternate fact production that, in turn, too often drive law and public policy. The Unitary theory has enabled President Trump to step over a bright line between the modern activist strong presidency and the Unitary executive. No presidency in history has reaped greater benefit from the invention of the Unitary theory than the Donald Trump administration.

⁹⁵ “An American Original,” *Vanity Fair*, October 6, 2010, <https://www.vanityfair.com/news/2010/11/moynihan-letters-201011?srsId=AfmBOopFic2pO3dSP9bKZjs-28xesWRG42QORi75hFA7tbhaquG-G2Gp>