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Officers at Common Law

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Job Talk Paper

The Framers of the federal Constitution said almost nothing about how subordinate officers would be held accountable. This Article provides one overlooked explanation for this longstanding puzzle. The Constitution was enacted against a well-defined jurisprudence that has largely fallen from view: a law of officers. When using the term "Officer" and its framework of "Duties," the Constitution invoked a distinctive method of regulating state power, in which officers were personally responsible—and liable—for discharging duties defined by law. The Framers and Ratifiers of the Constitution expected that these common-law rules would fill the gap left by the document's silence.

This Article weaves together the strands of statutory and common law that constituted and regulated the early American officer. This system of legal organization, drawn from longstanding English and colonial practice, empowered officers to create a decentralized governing apparatus that blurred the line between public and private. Its regime of harsh personal liability and individual empowerment impeded efforts to construct a top-down hierarchy by empowering and encouraging officers to resist orders from their superiors. As Americans developed a bureaucratic state over the nineteenth- and twentieth centuries, judges and lawmakers replaced this officer-based paradigm of governance with a system of administrative law that was more conducive to the modern state.

The legal regime of early American officeholding is inconsistent with many originalist justifications of the "unitary executive theory," which assert that the Constitution relies on a combination of managerial control and presidential elections to discipline the state. Because the traditional law of officers centered officers' independent obligations to law *rather than to the executive hierarchy, it actively frustrated efforts to construct the command-and-control executive branch that unitarists believe the Constitution requires. The unitarists implicitly impose a theory of the state that developed as the early American law of officers was fading from view.*

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The Supreme Court has a theory of the American state. In a welter of recent opinions, it has said that the Constitution, in vesting the President with "[e]xecutive power" and imposing a duty that she "take [c]are" that the laws be faithfully executed,[1] requires a "'clear and effective chain of command' down from the President, on whom all people vote" to the officers who act on her behalf.[2] To protect the chain of electoral accountability, this "unitary executive" must (in this argument's strongest articulations) be able to appoint, remove, and instruct a range of subordinate officials.[3] Critics claim this theory undermines the independence of agencies and civil servants, a move that could threaten the rule of law and ironically hobble the Presidency.[4] Defenders say it instills the energy and democratic responsiveness demanded by the Founding Generation, disciplining both Congress and the federal bureaucracy.[5]

The text of the Constitution is oddly terse on the subject. It leaves a "hole . . . where administration might have been," communicating little about how the President is supposed to manage subordinates.[6] Scholars have struggled to explain its "mystifying" silence.[7] This ambiguity may have been a strategic dodge.[8] Alternatively, its delphic invocation of terms like "Department"[9] or "Executive Power"[10] may have been eighteenth-century terms of art, communicating more than they appear at first glance. It may even act by implication, granting

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[1] U.S. Const. art. II §§ 1, 3.
[2] United States v. Arthrex, Inc., 594 U.S. 1, 11 (2021) (quoting Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498 (2010)).
[3] *See* Stephen G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 593-99 (1994); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 443 (2018).
[4] *See* Nicholas Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV., at 68 (forthcoming 2025); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 179 (2021); Aaron L. Nielson, Christopher J. Walker, & Melissa F. Wasserman, *Saving Agency Adjudication*, 130 TEX. L. REV., at 26-36 (forthcoming 2025).
[5] MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 351 (2020); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59-70 (1995); Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441, 461 (2023).
[6] Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1269 (2006); *see also* Lawson, *supra* note 5, at 442-43.
[7] MCCONNELL, *supra* note 5, at 163 (discussing removal power); *see also* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1222 (2014).
[8] *Cf.* Roderick M. Hills, *Strategic Ambiguity and Article VII: Why the Framers Decided Not to Decide*, 1 J. AM. CONST. HIST. 379, 381-82 (2023); Caitlin Tully, *The Unenumerated Power*, 111 VA. L. REV., at 38-44 (forthcoming 2025).
[9] *See* Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. REG. 90, 99 (2021).
[10] *See* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023); Andrew Kent, *Executive Power, the Royal Prerogative, and the Founders' Presidency*, 2 J. AM. CONST. HIST. 403, 406 (2023).

sweeping authority to the President because it "refers to duties and powers of officers [but] nowhere grants any executive officer other than the President any duty or power."[11] Interpreting this silence is critical to determining what the Constitution requires.

One reason for their confusion is that scholars have largely lost sight of a Founding Era jurisprudence that would have answered many of these questions for the Framers—their law of officers. According to John Marshall, "offices" were a particular "medium" or "mode of executing an act."[12] This medium was adapted to a different kind of state than that imagined by today's Supreme Court, one which represented a non-unitarist vision of state power. For early American officers, the state was a kind of *personal charge*: officers were given legal powers and corresponding duties and were directly accountable to the law (rather than their superiors) for discharging them. Even when exercising discretionary duties, officers were expected to make their own decisions rather than deferring to superiors.[13]

The statutory and common-law rules of officeholding, drawn from British and colonial practice and continued throughout the nineteenth century, cut across the legal categories present-day lawyers use to organize the world. The law governing officers was a mélange of what we might today consider constitutional law, tort, agency, contract, statutory interpretation, and criminal law: officers were held personally liable for neglecting their duties or overstepping their legal authority;[14] officers employed deputies as their personal agents to help them, directly negotiating the terms under which the deputies would serve;[15] and both officers and lawmakers freely manipulated these rules to tailor bespoke command arrangements that fit their particular circumstances.

This legal regime reflected the decentralized structure of early American governance. Long before Ratification and for some time thereafter, lawmakers relied on "local notables" to mobilize their community and implement laws.[16] Lacking traditional tools of administrative management, the state relied on these officers and their familiarity with local social networks to

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[11] *See* Calabresi & Prakash, *supra* note 3, at 594.
[12] United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823).
[13] *See infra* Section I.C.2.b. For prominent originalists arguing that "discretionary executive power" is a particularly important area for Presidential control, see, e.g., Calabresi & Prakash, *supra* note 3, at 595; Lawson, *supra* note 5, at 460.
[14] *See infra* Section I.D.
[15] *See infra* Section I.C.2.
[16] *See infra* Section I.B.

organize the community and execute the law. This system was cheap and kept governance close to trusted local leaders, but it had flaws. Often with little legal experience, and at times minimally committed to the projects outlined in statutes, these local notables might wield power irresponsibly or inconsistently with the law. Jurists created and manipulated the law of officers to capitalize on its benefits and address its characteristic problems. Adapted as it was to this form of governance and not to the logic of modern bureaucracy, the law of officers frustrated early efforts to build a more hierarchically coordinated state.

The Supreme Court, along with many scholars, fails to appreciate this legal regime or its implications because it has a different vision of the state largely forged in a different century. For the Court, the state is a *bureaucracy*: a collection of officials folded into a specialized and rule-bound hierarchical command structure. Although some changes were already underway by the late-eighteenth century, the nineteenth century saw the rise of vast hierarchical organizations with legal duties spread across a range of interlocking departments.[17] The shifting character of governance undercut the operative logic of the law of officers, causing subtle and gradual changes that make the law notoriously difficult for contemporary scholars to parse.[18] The field of "administrative law" emerged at the turn of the twentieth century to discipline and deploy this new form of state power: officeholding became less personal as statutory regulation replaced common-law rules of agency or individually negotiated contracts.[19] Judges and lawmakers increasingly crafted exceptions from traditional contract and tort rules, abandoned statutory penalties, and collectivized liability.[20] In short, the state took on a new legal form as the officer receded from view.

Understanding the legal and institutional transformation of the American state provides two different kinds of evidence to suggest that the Constitution was not historically understood to entail unitarism. First and most directly, the Article provides evidence of early federal legal authorities who did not believe the Constitution conferred the kind of removal or instructive power that unitarist originalists typically claim it did.

[17] *See infra* Section II.A.
[18] *See infra* notes 379-383.
[19] *See infra* Section II.A.
[20] *See infra* Sections II.B.2-II.B.3.

More fundamentally, however, this Article challenges the idea that unitarism would have been an intuitive framework that was implicit in the Constitution. Unitarists typically justify their position as a natural inference from the Constitution's structure[21] or as entailed by "executive power," which they say was a term of art requiring such a command structure. Either one implicitly rests on the idea that early Americans would have intuitively expected a bureaucracy—otherwise it is hard to imagine that they communicated such a complicated set of rules with a cryptic phrase or two. By contrast, this Article shows how Americans expected a state that arose from the personal obligation of officers. Rather than an impersonal institutional tendril stretching back to Washington (first the person, eventually the place), the state was frequently a form of personal charge placed on officers, who were personally accountable for their actions. These officers were defined by their autonomy and duty to the law, which required them to defy unlawful commands and use their own judgment to discharge the powers delegated to them.[22] When the Constitution gave Congress the authority to create offices and govern via officers,[23] it therefore gave Congress the ability to create non-unitarist pockets of independent authority within the executive branch.

Admittedly, not all permutations of unitarism are strictly incompatible with the law of officeholding—a president could have the authority to remove officers who were nonetheless expected to scrutinize his conduct and exercise independent judgment. But contrary to the "plebiscitary presidentialism"[24] that the Supreme Court envisions, it was also established to vindicate the primacy of law, which frustrated efforts to implement the will of the President. As a testament to this system's incompatibility with unitarism, the Court has even started to disable law-of-officers liability rules in the name of restoring the unitary executive.[25]

This Article builds on scholarship that has investigated parts of the law of officers in isolation: what the term meant,[26] how officers were removed,[27] the oaths they swore,[28] the fees

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[21] *Cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204 (2020) (independent officer "clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control").
[22] *See infra* Section I.A.
[23] *See* U.S. Const. art. II, § 2; *infra* notes 337-339.
[24] Noah A. Rosenblum & Roderick M. Hills, *Presidential Administration After* Arthrex, 75 DUKE L. J., at 28-37 (forthcoming 2026).
[25] *Cf.* Trump v. United States, 603 U.S. 593, 608-609 (2024) (rooting immunity from liability in a unitarist reading of the Constitution).
[26] Mascott, *supra* note 3; *see also* James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and "Officers of the United States,"* 42 HARV. J. L. & PUB. POL'Y 871 (2019).

they took,[29] and the liability rules that regulated them.[30] Some have even suggested that there was something "distinctive" about the English law of officeholding and the American law inspired by it.[31] This Article builds out previously unexplored aspects of the doctrine, and more generally provides a shared paradigm and institutional context in which these discrete doctrines were developed.

Like many unitary executive theory articles before it, this Article does not devote much time to related debates about what theory of originalism should govern.[32] Broadly speaking, the wider one's aperture, the more this history matters—those who believe the "original intent" of the Framers controls will find something of value here.[33] Those who believe that we should read the Constitution in accordance with its "original public meaning" or the "original law" will have to engage even more with materials in this Article, as they would have formed the point of reference most familiar to people not privy to the private debates in Philadelphia.[34] For its part,

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[27] *See* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 28-39 (2021).
[28] Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2163-77 (2019)
[29] *See generally* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 2 (2013).
[30] *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 76 (2012); JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 9 (2017); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History* 93 NOTRE DAME L. REV. 1235, 1269-1304 (2018); Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 145-49 (2012); Jane Manners, *The Great New York Fire of 1835 and the Legal Architecture of Disaster*, *in* RETHINKING AMERICAN DISASTERS 81, 83 (Cynthia A. Kierner, Matthew Mulcahy, and Liz Skilton eds., 2023); James Pfander & Jacob Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1305-18 (2020); Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2154-56 (2023); E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 870-75 (2025); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE WESTERN RESERVE L. REV. 396 (1987). I also include in this set the scattered work on bond pledging. *See, e.g.* Sandra G. Mayson & Kellen R. Funk, *Bail at the Founding*, 137 HARV. L. REV. 1816, 1846 (2024); Kent et al., *supra* note 28, at 2167; Manners & Menand, *supra* note 27, at 39; Erik Matheson, *"Know All Men By These Presents": Bonds, Localism, and Politics in Early Republican Mississippi,* 33 J. EARLY REPUBLIC 727, 731-32 (2013).
[31] *See* Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 WM. & MARY L. REV. 1297, 1300 (2021); Rosenblum, *supra* note 30, at 2154.
[32] *See, e.g.*, MCCONNELL, *supra* note 5, at 13 ("the difference between these approaches has been exaggerated"); Bamzai & Prakash, *supra* note 10, at 1762 & n 32; Mascott, *supra* note 3, at 449-50.
[33] Especially Sections I.C, I.D.2, and I.E, *infra*.
[34] On methodologies, see generally Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807, 817 (2023).

the Supreme Court has been less-than-disciplined about identifying a theory of originalism.[35] Nevertheless, however one chooses to give it meaning, the underlying history matters.

There is one methodological move this Article makes that warrants special discussion. It draws heavily on state and local practice (which in turn drew on English common law) to describe how Americans would have understood their state. As early as 1894, the administrative law scholar Ernst Freund asserted that the federal government had always been unitary while state practice was not.[36] Although this Article draws on Freund the theorist, it breaks with Freund the historian. This Article documents how English, state, and federal authorities developed in conversation and employed similar strategies, documenting these connections in canonical sources of Constitutional interpretation—for instance, ratification debates, Federalist papers, or Supreme Court cases. But the canonical sources are often fragmentary and equivocal; moreover, they would have been inaccessible to and not representative of many members of the ratifying generation whose commitment gave legal meaning to the Constitution. So the Article goes into the materials that made those terse conversations possible.

Even for those laser-focused on the Framers, these connections matter. Many early American lawyers believed law "was as much found as made," and that different jurisdictions were trying to articulate "general legal principles" in conversation with one another.[37] This "cross-jurisdictional" understanding of early American law let courts "cite cases from a variety of international and domestic courts."[38] In other words, recovering the Founder's world requires discovering the often unstated legal rules they carried in their heads—the Founding was "a period with a mature and developed legal system of its own;" we must understand these legal debates "on their own terms."[39]

The Constitution has a theory of the American state, but it is unlike the state we know. More than sixty years ago, Leonard White remarked that "[a]t the time of the Revolution, the

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[35] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204 (2020) (referencing "historical practice" including "the First Congress," "constitutional structure," "the text of Article II," and "precedents"). For a critique of the Court's fidelity to scholarly accounts of originalism, see Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 404-406 (2023).
[36] Ernst Freund, *The Law of Administration in America*, 9 POL. SCI. Q. 403, 408, 420 (1894).
[37] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 88 (2024).
[38] *See* William Baude, Jud Campbell, & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1194 (2024).
[39] *Cf.* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 6 (2020).

common law contained a well-developed system of duties, rights, and liabilities of public officers," and yet we are still only beginning to grasp its complexity, let alone appreciate its significance.[40] By recovering the law of officers and the system of governance it structured, we can understand not only where the Supreme Court's unitarist jurisprudence has gone wrong, but just how difficult it would be to transpose the eighteenth-century law of officers onto the twenty-first century state. This Article does not solve that problem; rather, it establishes such a problem exists. Before we can tackle the myriad "translation" problems involved in the exegesis of the constitutional executive, we must first recognize that the document is speaking a different language.[41]

I. The Local Notables and the Law of Officers

In January of 1831 the highways of Brookline, Massachusetts were covered with snow.[42] During a "hard winter," such blockages could shut down roads for weeks, preventing farmers from getting to the market and threatening their livelihoods.[43] Breaking a path could occupy workers for days as they cleared snow or pounded it flat for sleds.[44] Unwilling to perform this labor themselves, the Brookline residents complained to their surveyor of highways, Alvan Loker, threatening to prosecute him for his negligence if he did not break the roads.[45] After all, under Massachusetts's highway statute, Loker was responsible for clearing snow, and he faced penalties should he "neglect his duty."[46] Although he legally had the power to compel road labor from local inhabitants,[47] Loker was either unwilling or unable to do so. So he cleared the snow himself.[48]

This Part sketches the world in which such a system made sense. Before America was governed by bureaucracies—and for some time thereafter in many communities—it was managed by local notables threatened with legal liability. These officers were not civil servants.

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[40] LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 424 (1961).
[41] *Cf.* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 (1993).
[42] Loker v. Inhabitants of Brookline, 30 Mass. (13 Pick.) 343, 344 (1832).
[43] Roger Neal Parks, The Roads of New England, 1790-1840, at 30 (unpublished Ph.D. dissertation, Michigan State University), ProQuest Dissertations and Theses No. 6614161.
[44] *See id*., at 244-47.
[45] Loker, 30 Mass. (13 Pick), at 344.
[46] Act Making Provision for the Repair and Amendment of Highways, ch. 81, 1786 Mass. Acts 247, 248-54.
[47] *See* 1787 Mass. Acts at 249.
[48] Loker, 30 Mass. (13 Pick.), at 344.

They shirked their duties and abused their powers. Lacking traditional bureaucratic controls, Americans leaned on formal law to manage officers. This system gave lawmakers and even the officers themselves tremendous control over officers' command structure. Officers could enlist deputies to help them as their personal agents,[49] negotiate indemnification agreements to reallocate liability or petition the legislature to reimburse them for damages.[50] Meanwhile, lawmakers could create special protections for officers when they wanted to encourage more vigorous execution,[51] construct bespoke command hierarchies by defining an officer's duties of obedience,[52] and modulate liability rules to balance competing priorities.[53] Rather than relying on unitarist hierarchy, the early American state relied on decentralized authority and the primacy of law.

The remainder of this Part will unpack the early American officer, how this sociolegal concept was inconsistent with unitarism, and how early Americans believed it would govern the Constitution. Legally, the officer was defined by his duty to law, which gave him the responsibility to resist unlawful commands.[54] Structurally, the officer was part of a system of governance that intentionally devolved control to subordinates distant from central jurisdictions.[55] As a matter of formal doctrine, it gave lawmakers authority to determine how much independence an officer would have from its superiors and what its relationship to its subordinates would look like.[56] To instill energy and responsiveness in these officers, early Americans employed a complicated system of damages, which also allowed lawmakers rather than superiors to determine how much centralized control there would be—officers had to scrutinize the orders they received on threat of personal liability, and lawmakers could decide whether they were indemnified or immunized.[57] Finally, although this Part routinely draws on examples of early federal practice throughout, the last Section shows how the Framers and Ratifiers expected this system of law and governance to govern their constitutional order.[58]

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[49] *See infra* Section I.D.3.
[50] *See infra* Section I.C.2.
[51] *See infra* Section I.C.3.
[52] *See infra* Section I.D.2.
[53] *See infra* Section I.C.1.
[54] *See infra* Section I.A.
[55] *See infra* Section I.B.
[56] *See infra* Section I.C.
[57] *See infra* Section I.D.
[58] *See infra* Section I.E.

A. Who Were "Officers" at Common Law?

"Officer" was an organizing unit of the early Anglo-American state. Judges spoke of its obligations, treatises devoted chapters to legal rules governing "officers,"[59] lawyers wrote manuals for officers,[60] and the Framers applied these rules as they structured the state.[61] Thomas Jefferson and John Adams recorded doctrines of officeholding in their pre-Revolutionary legal notes.[62] Alexander Hamilton employed the officer-deputy distinction as he compiled a list of federal civil officers in 1792.[63] During the Ratification debates, John Marshall and other defenders of the Constitution assured critics that the common law rules of officer liability would persist under the Constitution.[64] And the Constitution routinely spoke of officers, giving Congress the power to create them and outlining rules for their appointment.[65] By the end of the nineteenth century, treatise writers even spoke of the "law of officers" as they synthesized the jurisprudence of officeholding.[66]

According to English and American legal authorities in the Early Republic, public officers were defined as those charged with ongoing duties to the public.[67] This category encompassed a wide range of governmental posts, from the President of the United States to the local constable. As with any body of law, specific rules varied across time, jurisdiction, and office; but there were some consistencies.

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[59] *E.g.* 1 WILLIAM BLACKSTONE, COMMENTARIES, *327 ("subordinate magistrates"); 3 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 59 (Boston, Cummings, Hilliard & Co., 1823-29) ("Officers and Offices"); 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 362 (New York, O. Halsted, 1826) ("Of offices"); 2 JOHN LILLY, PRACTICAL REGISTER: OR, A GENERAL ABRIDGEMENT OF THE LAW 321 (London: E. & R. Nutt, 1735) ("Office and Officer"); 16 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 101 (Aldershot, Law Patentees, 1743) ("[Officers and] Offices").

[60] *See infra* note 239.

[61] *See infra* Section I.E.

[62] *[List of Pleadings, October-December 1758*, *in* THE EARLIEST DIARY OF JOHN ADAMS, JUNE 1753 – APRIL 1754, SEPTEMBER 1758 – JANUARY 1759 (L.H. Butterfield, Marc Friedlander, & Wendell D. Garrett, eds., 1966) ("Trespass on the Case vs. Sheriff for Default of Deputy"), available at Founders Online, https://founders.archives.gov/documents/Adams/02-01-02-0010-0007-0001; THOMAS JEFFERSON, JEFFERSON'S LEGAL COMMONPLACE BOOK 35, 190 (David Thomas Konig & Michael P. Zuckert eds., 2019).

[63] Mascott, *supra* note 3, at 520 (noting that Hamilton excluded deputies from his list of officers).

[64] *See infra* note 348.

[65] *See infra* note 339.

[66] *Cf.* FLOYD RUSSELL MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 488 (Chicago, Callaghan, 1890).

[67] *See* Riddle v. Bedford County, 7 Serg. & Rawle 386, 392 (Pa. 1821) (citing Leigh's Case, 15 Va. (1 Munf.) 468, 475 (1810) (argument of counsel) and King v. Burnell (1700), 90 Eng. Rep. 875, 875-76; Carth. 478 (argument of counsel)); 3 KENT, *supra* note 59, at 362. *See also* Mascott, *supra* note 3, at 485-94; Phillips et al., *supra* note 26, at 893.

An important one for this Article is that an officer's duty to the public meant that law (i.e. the will of the people) took precedence over the hierarchical command structure.[68] This structure explains the Constitution's Take Care clause—as an officer, the President was charged with protecting the law.[69] But the power to execute the law did not give the President the power to seize authority that the law conferred upon someone else.[70] When subordinate officers were charged with duties, they had their own obligations to the law. These obligations often created spaces of protected discretion that were to be executed independently of the control of superior officers.

In fact, the law had a name for subordinates who exercised delegated authority and were treated as extensions of their principals—they were deputies, not officers.[71] But even deputies had obligations not to violate the law that superseded their superiors' commands: neither common law nor the Constitution gave the President the power to shield subordinates from the consequences of his orders, a fact which officers and courts cited for the idea that the subordinates should independently assess the legality of their orders.[72] Formally, therefore, the constitutional power to create officers[73] entailed a power to create pockets of autonomous authority within the executive branch.

This non-unitary primacy of law reflected and was a response to an underlying system of governance that was highly decentralized. This decentralization was a result of the limited resources, communications, and transportation infrastructure of the state, which frustrated efforts to build a bureaucracy. But it also reflected many Americans' distrust of concentrations of distant power. Fearing tyranny and resenting foreign imposition, many Americans wanted to keep government close and consistent with local custom. The next Section sketches the system of governance that arose in response to these concerns.

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[68] Janet McLean has compellingly traced an officers' obligation to law over hierarchy to English common law. *See* Janet McLean, *Between Sovereign and Subject: The Constitutional Position of the Official*, 70 U. TOR. L. J. 167, 174-79 (2020); Janet McLean, *The Authority of the Administration*, *in* THE FOUNDATIONS AND FUTURE OF PUBLIC LAW: ESSAYS IN HONOR OF PAUL CRAIG 45, 56-61 (Elizabeth Fisher, Jeff King, & Alison Young eds., 2020).
[69] U.S. Const. Art. II § 3.
[70] *See infra* Section I.C.2.
[71] *See infra* Section I.C.3.
[72] *See infra* Section I.D.2.
[73] *See infra* note 339.

B. The Local Notables System

Understanding why the law of officers took the form it did requires appreciating the institutional reality those doctrines oversaw and the problems they were created to solve. In addition to explaining why the law of officers developed, this Section shows how presidential oversight via managerial tools would have been ill-suited to mobilize the manpower needed to govern the state or hold it accountable. In other words, the practical operation of the early American state was non-unitary because unitarism both would have exacerbated anxieties about distant, concentrated power and also would have failed to address the problems raised by the local notables system that structured the early American state.

1. Local Notables as a System of Governance

In the late-eighteenth century, Americans were generally cash poor and preferred government stay local.[74] Instead of salaries, officers frequently had the right to collect fees[75] or collateral perquisites of office,[76] spoils which officers might reallocate to hire help.[77] This compensation arrangement was consistent with a broader early American tendency to make specific beneficiaries pay for government services rather than fund them via a general levy.[78]

Partially to avoid raising taxes or empowering distant officials, and partially because of limited state capacity, early Americans employed what historians call a "republican" or "local notables" system of governance, in which those with stature and influence in the community were endowed with formal legal authority and charged with legal duties.[79] Their credibility legitimized distant lawmakers, and their social networks allowed them to enlist members of the community in the execution of their legal duties.

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[74] *See* BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 31 (2009); MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 40-42 (2003).
[75] *See generally* PARRILLO, *supra* note 29, at 1-2.
[76] *See* William E. Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship Between Structure and Style in American Administrative History*, 10 L. & SOC'Y REV. 187, 194-95 (1976).
[77] *See infra* notes 178-185.
[78] *See generally* ROBIN L. EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833-1872, at 14-19 (1991).
[79] *See* JONATHAN OBERT, THE SIX-SHOOTER STATE: PUBLIC AND PRIVATE VIOLENCE IN AMERICAN POLITICS 7 (2018), 7; BALOGH, *supra* note 74, at 34-35; MARTIN SHEFTER, POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE 63-64 (1994); Johann N. Neem, *Social Capital, Civic Labor, and State Capacity in the Early American Republic: Schools, Courts, and Law Enforcement*, 31 J. OF POL'Y HIST. 326, 327-29 (2019).

Officers drew manpower not from paid staff, but from calling their neighbors to assist as posses,[80] patrols,[81] militias,[82] road laborers,[83] juries,[84] and other local institutions. As James Wilson wrote, a sheriff "not only may, but must at his peril, employ the strength of the county," calling upon the *posse comitatus* to rally a force strong enough to command obedience to the law.[85] Gathering a posse could be difficult, even requiring sheriffs to ride several miles to gather forces from neighboring jurisdictions.[86] Although they theoretically wielded formal power to discipline those who refused to serve, officers without community support could nonetheless find themselves backed down by unruly crowds.[87] As Sheriff Charles Pinckney Sumner wrote about sheriffs' authority more generally, American sheriffs "rel[ied] for aid more on the authority derived from a good reputation, than upon . . . weapons."[88]

Government posts typically went to people with status, or at least connections to high-status patrons. Demographic studies of early American officeholding generally confirm that in the colonial and early Revolutionary eras, high-ranking local offices tended to be staffed by people with more property, more education, and those whose families had been in the country longer.[89] Lower-level officeholders might be from relatively more humble backgrounds, but they were

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[80] *See generally* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 16-20 (1972); Gautham Rao, *The Federal* Posse Comitatus *Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 L. & HIST. REV. 1, 10-11 (2008).

[81] *See generally* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001); Nicole Breault, *The Quotidian State: Nightly Watches and Police Practice in the Early Republic*, 44 J. EARLY REPUBLIC 229, 231-37 (2024); Douglas Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, 19 AM. J. LEGAL HIST. 173, 175 (1975).

[82] On the local governance functions of militias, see generally HARRY S. LAVER, CITIZENS MORE THAN SOLDIERS: THE KENTUCKY MILITIA AND SOCIETY IN THE EARLY REPUBLIC 48 (2007); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 58 (1988).

[83] *See generally* Aaron Hall, *Bad Roads: Building and Using a Carceral Landscape in the Plantation South*, 111 J. AM. HIST. 469, 480-81 (2024); Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845*, 26 L. & SOC'Y REV. 469, 472-74 (1992).

[84] *See generally*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83-93 (1998).

[85] James Wilson, *Lectures on Law, in* COLLECTED WORKS OF JAMES WILSON 427, 1016 (Kermit L. Hall & Mark David Hall, eds., Liberty Fund ed., 2007) (1789-91).

[86] *See, e.g.*, Coyles v. Hurtin, 10 Johns. 85, 85-87 (N.Y. Sup. Ct. 1813).

[87] *See, e.g.*, Greenberg, *supra* note 81, at 177; OBERT, *supra* note 79, at 8-9; 3 EDWARD AUGUSTUS KENDALL, TRAVELS THROUGH THE NORTHERN PARTS OF THE UNITED STATES 161-66 (New York, I. Riley, 1809).

[88] C.P. Sumner, *Art. I—Sheriff Sumner's Discourse*, AM. JURIST & L. MAG., July 1829, at 1, 10.

[89] *See* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 192 (2021); R. EUGENE HARPER, THE TRANSFORMATION OF WESTERN PENNSYLVANIA, 1770-1800, at 162-68 (1991); Nelson, *supra* note 76 at 191-201.

often at least local property owners.[90] Moreover, officers were often required to pledge bonds that made them beholden to the wealthy patrons who would agree to indemnify them if they could not afford to pay the liabilities they incurred.[91] At the federal level, early presidents, and particularly the Washington Administration, self-consciously enlisted local notables because they seemed trustworthy and could confer legitimacy on the young government.[92] In extreme cases, failure to appoint influential local leaders to their desired posts could spark protracted conflicts.[93]

Although they relied on local notables, unitarist hierarchies were not well suited to policing or even identifying them. In a 1785 letter to the Virgina House of Delegates, Governor Patrick Henry illustrated this point well. A 1784 militia statute had made the governor responsible for appointing militia officers throughout the state, but as Henry explained, he had "sufficient information" to make appointments in a couple counties only; the resulting appointment process caused "much embarrassment to the Executive" as Henry found officers "by such means as accident furnished."[94] Henry sent letters asking for help to the counties, many of which did not respond at all, forcing Henry to appoint based on "a partial knowledge of character in some counties, + a total Ignorance of them in others."[95] The result of this goat rodeo was that many "worthy" people were passed over, many "less fit for office" were commissioned, and many counties lacked any officers at all "for want of the recommendations of captains + subalterns."[96] The stakes of these decisions were high—later in his letter, he mentioned that some of the field officers in one county were "active partisans for separation" from the rest of the state and had to be dismissed.[97] But short of receiving reports of active secessionists, the reality of early American administration was that central officials lacked the information and communications

[90] *See* HADDEN, *supra* note 81, at 88-98; HARPER, *supra* note 89, at 169-70; Breault, *supra* note 81, at 237-38; Marvin L. Michael Kay & William S. Price, *"To Ride the Wood Mare": Road Building and Militia Service in Colonial North Carolina, 1740-1775*, 57 N.C. HIST. REV. 461, 373-76, 387 (1980); Alan D. Watson, *The Constable in North Carolina*, 68 N.C. HIST. REV. 1, 6-10 (1991); D. Alan Williams, *The Small Farmer in Eighteenth-Century Virginia Politics*, 43 AGRIC. HIST. 91, 97-98 (1969).
[91] *See infra* note 296.
[92] *See* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 8-9 (1905); FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789-1989, at 12 (1989); MASHAW, *supra* note 30, at 295; GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE ADMINISTRATIVE STATE 69-73 (2017); Nelson, *supra* note 76, at 201-203.
[93] *See, e.g.*, Roger V. Gould, *Patron-Client Ties, State Centralization, and the Whiskey Rebellion*, 102 AM. J. SOC. 400, 421-25 (1996).
[94] Letter from Patrick Henry, Governor of Virginia to Speaker of the House of Delegates, Oct. 17th, 1785, at 1, Accession No. 36912, State Government Records Collection, Library of Virginia, Richmond, Va.
[95] *Id.*, at 1.
[96] *Id*.
[97] *Id*., at 4.

technology to exercise meaningful oversight of officers. Rather, they relied on local social networks and the law of officers to deploy and manage state power.

2. Problems of Local Notables Governance

Although the local notables system solved some problems, it gave rise to some concerns. For instance, officers did not always enforce the law as understood by central elites. To be sure, many early Americans complained that the statutes themselves were numerous and difficult to parse.[98] But few notables had significant formal legal experience and the notables could be more focused on enforcing community norms than on strictly complying with the letter of the statute.[99] The lawyers who served as judges or drafted statutes derided this folk law as ignorance,[100] which it undoubtedly was in some cases.

Ignorance was not the only concern raised by early Americans about this system of governance. The local notables system risked granting tremendous authority to untrustworthy people. For Revolutionary Americans, being subject to "arbitrary" power without restraint was akin to tyranny.[101] The rule of law opposed the tyranny of arbitrary power, constraining the government and private citizens from violating a person's protected sphere of liberty.[102] Revolutionary Era Americans expressed concern that even minor official power could corrupt those who held it.[103] As Alexander Hamilton declared, "[w]herever a discretionary power is lodged in any set of men over the property of their neighbours, they will abuse it."[104] James Wilson noted that "[o]ppression under color of office" was associated with "[t]yrannical partiality."[105]

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[98] Citizens: Petition, Oct. 21, 1790, Accession Number 36121, Box 362, Folder 10, Legislative Petitions of the General Assembly, 1776-1865, Library of Virginia, Richmond, VA; JOHN DUER ET AL., REPORT FROM THE COMMISSIONERS APPOINTED TO REVISE THE STATUTE LAWS OF THE STATE OF NEW YORK 19 (Albany, Croswell, Barnum, & Van Benthuysen, 1826); THIRD REPORT OF THE COMMISSIONERS . . . RELATIVE TO A REVISED CODE OF PENNSYLVANIA, 3-4 (Harrisburg, H. Welsh, 1833).
[99] *See* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 12 (2009).
[100] *Id*.
[101] JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 56 (1988).
[102] *Id*., at 60-67. *See also* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 54 (1999); Mashaw, *supra* note 6, at 1344.
[103] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 147 (2d ed., 1996).
[104] Alexander Hamilton, *The Continentalist No. VI*, July 4, 1782, *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 99, 104 (Harold C. Syrett & Jacob E. Cooke, eds., 1962).
[105] Wilson, *supra* note 85, at 1160.

Early American courts echoed these concerns as they confronted officers maliciously abusing their authority. New York's Supreme Court decried a constable's "causeless[] and malicious[]" exercise of "powers incident to his situation of superior" to "oppress" a taxpayer.[106] More dramatically, Justice Charles Jones Colcock wrote for a unanimous South Carolina court that "nothing is so offensive to the law, as to violate the principles of justice and humanity, under the semblance of its authority."[107] Colcock worried that failing to punish a slave patroller who unjustly beat a slave would "place the slaves of this country at the mercy of every unprincipled and unfeeling man, who may be clothed with this brief authority."[108]

Local officials might also be more invested in their own local social standing than in enforcing centrally mandated directives. For instance, officers charged with tax collection had to discharge a duty that was locally unpopular and required them to anger locally powerful people.[109] This situation, as one observer noted, created "some temptation to ease off a little from the strictness of law."[110] Alexander Hamilton echoed this critique, writing to Gouverneur Morris that in New York, taxes were only collected if the collector was a "zealous man" living in a "zealous neighbourhood."[111] Hierarchical supervision could not solve this problem because collectors' elected supervisors did not want to impose unpopular taxes, and so never prosecuted the collectors for the "continual delinquencies" in their returns.[112]

More broadly, uncooperative officers—whether enforcing community norms, shirking duties, or advancing their own interests—could hobble governance. When a militia company lacked a cooperative captain, the entire company might fail to muster because there was no one responsible for ensuring that they did so.[113] After all, officers needed to tell everyone when they were required to perform their public duties:[114] two Virginia justices of the peace found

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[106] Rogers v. Brewster, 5 Johns. 125, 126-27 (N.Y. Sup. Ct. 1809).
[107] Hogg v. Keller, 11 S.C.L. (2 Nott & McC.) 113, 114 (1819).
[108] *Id.*, at 114.
[109] PARRILLO, *supra* note 29, at 25-27.
[110] *Observations on the General Impost*, INDEP. GAZETEER, June 30, 1789, at 2
[111] RAO, *supra* note 92, at 58 (quoting Letter from Alexander Hamilton to Gouverneur Morris, Aug. 13, 1782, *in* 3 Syrett & Cook, *supra* note 104, at 132, 136).
[112] Hamilton, *supra* note 111, at 136.
[113] *See* JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 57 (1985); Joseph Stewart et al., Petition of Isaac Morris's Company of Militia, Dec. 17, 1811, 4, *in* Legislative Petitions of the General Assembly, 1776-1865, Accession Number 36121, Box 255, Folder 50, Library of Virginia, Richmond, VA.
[114] *See, e.g.*, Act Establishing and Regulating the Militia, ch. 26, § 19, in 1 LAWS OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO 121, 131 (Cincinnati, Carpenter & Findlay, 1800);1 JOHN HAYWOOD & ROBERT L. COBBS, THE STATUTE LAWS OF TENNESSEE 325 (Knoxville, F.S. Heiskell, 1831) (slave patrol); THE LAWS

themselves unable to organize routine law enforcement when local captains simply refused their order.[115] By punishing officers, lawmakers could motivate the people with enough information and stature to keep the group in line; reflecting this logic, a Georgia justice of the peace manual admonished patrol commanders of their "particular duty" to see that the patrol law was "strictly executed," noting that an officer who failed to punish a "defaulting" company could be fined or fired by a court martial.[116] To keep communities from shirking their collective obligations by failing to appoint officers, statutes might impose the duties of the vacant office on other officers[117] or even let courts choose officers on behalf of the community.[118] So central was the officer to the early American state that the law could not allow them to go unfilled.

As subsequent Sections will demonstrate, early American legal authorities developed a system to manage these problems, but it was not unitarist hierarchy. It was a world of delegated responsibility requiring officers to stand fast against lawless orders from above; it was a world of personal liability that forced officers to bear the costs of their actions. Law's primacy held the decentralized regime together.

C. Agency and Delegation

This Section shows how early American lawmakers regularly entrusted both the highest and lowest officers with decisions in their personal capacity, not as members of a hierarchy. Although these delegations gave rise to the problem of possibly unchecked discretion, they were often the only way for governance to work. American legal authorities defended these delegations even over executive-branch efforts to command or remove their subordinates. These rules reflected the primacy of law and the centrality of officers in deploying state power.

OF THE STATE OF NEW-HAMPSHIRE 311-12 (Portsmouth, N.H.: John Melcher, 1797) (road work); 3 TRANSCRIPTIONS OF PUBLIC ARCHIVES IN FLORIDA: ORDINANCES AND MINUTES OF THE CITY OF ST. AUGUSTINE 18 (1941) (patrol).

[115] James McDowell & Thomas Shanks, Petition, Jan. 7, 1847, 1-2, Legislative Petitions of the General Assembly, 8 1776-1865, Accession Number 36121, Box 34, Folder 3, Library of Virginia, Richmond, VA.

[116] THE GEORGIA JUSTICE OF THE PEACE 121-22 (Augusta, Ga., George F. Randolph, 1804) [hereinafter GEORGIA JUSTICE].

[117] Act for . . . Appointment of Assessors . . ., § 2, *in* 1 LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 274, 276 (Boston, Thomas & Andrews and Manning & Loring, 1807) [hereinafter MASS. 1807]; Act for Regulating Towns . . ., § 2, *in* 1 MASS. 1807, *supra*, at 313, 313; Act to Alter and Amend an Act Respecting the High Roads and Bridges . . . , § 2, *in* JOHN FAUCHERAUD GRIMKÉ, THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 442, 444 (1790).

[118] Act for Enforcing . . ., § 3, *in* 1 MASS. 1807, *supra* note 117, at 265, 266; Act Relative to the Duties and Privileges of Towns, ch. 78, § 6, *in* 1 LAWS OF THE STATE OF NEW YORK 325, 327 (Albany, Charles R. & George Webster, 1802) [hereinafter N.Y. 1802]; Wildy v. Washburn, 16 Johns. 49, 50-51 (N.Y. 1819).

This Section then explores how early American legal authorities did vest the kind of hierarchical authority unitarists imagine—by creating deputies. Deputies had much less capacity to resist the orders of their principals, and were often regulated by familiar principles of master-servant or principal-agent law. Ironically the structure of the law of deputies reinforces the non-unitary nature of officers. As the personal agents of their officers—for whom the officers were personally liable—deputies were a testament to the extent to which officers themselves recruited state power and were responsible for their own subordinates. So great was early federal legal authorities' respect for the officer's control over his deputies that they embraced limits on presidential control and removal of an officer's deputies.

1. Limits on Direction and Removal

a) Ministerial Duties

Former Attorney General Charles Lee demonstrated how an officer's obligation to the law could give rise to independence in *Marbury v. Madison*, successfully explaining why a writ of mandamus could apply to the Secretary of State.[119] Where Congress charged the Secretary with ministerial duties, the Secretary acted as a "public ministerial officer" whose duties were "to the United States or its citizens," making him "an independent, and an accountable officer."[120] Because his recordkeeping duties, outlined in statute, were "of a public nature" and "enjoined upon him by law, he [was], in executing them, uncontrollable by the President."[121] As Justice Marshall wrote, "he is so far the officer of the law [and] is amenable to the laws for his conduct . . . ."[122] Jefferson's Attorney General Levi Lincoln implicitly conceded this point when he invoked his Fifth Amendment right against self-incrimination to avoid answering questions about what happened to the commissions: President Jefferson's orders offered him no protection against the laws they violated in denying Marbury his commission.[123]

By contrast, Lee argued, in its act establishing the Department of Foreign Affairs (the original name of the Department of State), Congress charged the Secretary with "duties as shall .

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[119] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 139 (argument of Charles Lee); *id.*, at 166.
[120] *Id.*, at 139 (argument of Charles Lee).
[121] *Id.*, at 141 (argument of Charles Lee).
[122] *Id.*, at 166.
[123] *Id.*, at 144 (1803) (argument of Levi Lincoln). *See also* Karen Orren & Christopher Walker, *Cold Case File: Indictable Acts and Officer Accountability in* Marbury v. Madison, 107 AM. POLI. SCI. REV. 241, 243 (2013); *infra* Section I.D.2.

. . be enjoined on, or intrusted to him by the President of the United States" and required him to "conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."[124] In this role, his "duty [was] to the President," making him the President's "agent, and accountable to him alone."[125] Marshall endorsed Lee's position, clarifying that the Secretary owed the President obedience because "[t]his office, as his duties were prescribed by that act, is to conform precisely to the will of the President."[126]

An officer's legal obligations took precedence over his role in a political hierarchy to the extent the two conflicted. The Supreme Court summarized this view succinctly in *Kendall v. United States*, when it said that "in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."[127] An officer could have obligations of obedience to his superior—as with the Secretary's foreign affairs responsibilities—but only insofar as they were defined by law. Ultimately his obligation was to the law.

b) Antihierarchical Exercises of Discretion

Some scholars contend that mandamus was special, and that these cases do not clarify whether Congress could confer independence over discretionary duties.[128] Although the logic of the cases suggest that it could, the cases themselves leave "many ambiguities."[129] This Section demonstrates that discretion was not always conferred to a command hierarchy. Like ministerial duties, the duty to exercise discretion was frequently personal; even presidential authority might give way to an officer's duty to exercise his discretion.

This legal doctrine helps make sense of a number of legal controversies in the early Republic. In 1792, for instance, Alexander Hamilton drew on the "Act constituting the Treasury Department"—not the Constitution—to argue that he had the ability to instruct customs officials

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[124] Marbury, 5 U.S. (1 Cranch) at 139-40 (argument of Charles Lee) (quoting Act for Establishing . . . the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 29 (1789))
[125] *Id.*, at 139 (argument of Charles Lee).
[126] *Id.*, at 166.
[127] Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838).
[128] *See, e.g.*, STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 421 (2008).
[129] Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 56-58, 61 (1994).

in how to interpret the customs law.[130] As in *Marbury*, the statutory scheme mattered. The Treasury statute gave the Secretary the authority to "superintend the collection of the revenue,"[131] and Hamilton declared that "the 'power to superintend must imply a right to judge and direct,'" a position that informs Supreme Court doctrine to this day.[132] But this position was an argument, not legal consensus. Hamilton had long wanted more central control over customs officials, and two years prior, had unsuccessfully petitioned Congress to create a group of customs supervisors to better oversee local officials.[133] His customs officials disagreed with his interpretation, citing their oaths and supererogatory duties to law as justification for defying his orders.[134] Just two days after his first note, Hamilton rescinded one of the substantive instructions and let "[e]ach officer . . . pursue that course which appears to him conformable to law, his own interest and safety, and to the good of the service" after receiving a contrary opinion from the Attorney General.[135]

Courts countenanced claims of subordinates who insisted discretionary power insulated them from the control of their superiors. In *Gilchrist v. Collector of Charleston*, a customs officer asserted that a statute calling for "his opinion" on whether to detain a ship let him override President Jefferson's command that he detain certain types of ships; Justice Johnson ultimately agreed with the collector, frustrating embargo enforcement and creating a national political controversy until the Republican Congress modified the relevant statute to give Jefferson authority to command the customs officers.[136] Johnson's vision about the relationship between executive power, law, and hierarchy was a common one. For instance, North Carolina's Supreme Court concluded that even though the Governor was the "supreme executive power," he could only "tacitly influence the subordinate officers," and could not "personally direct" them about how to exercise their "discretion."[137]

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[130] *See* Alexander Hamilton, Treasury Circular, July 20, 1792, in 3 THE WORKS OF ALEXANDER HAMILTON 558 (John C. Hamilton ed., 1850)
[131] Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).
[132] United States v. Arthrex, 594 U.S. 1, 18-19 (2021) (quoting Hamilton, *supra* note 130, at 557-559).
[133] RAO, *supra* note 92, at 93.
[134] Hamilton, *supra* note 130, at 559-61. *See also* RAO, *supra* note 92, at 83-86
[135] *See* Alexander Hamilton, Treasury Circular, July 22, 1792, *in* 3 HAMILTON, *supra* note 130, at 562-63.
[136] *See* Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 356-61 (C.C.S.C. 1808); Act in Addition . . ., ch. 66, § 11, 2 Stat. 499, 502 (1808) (calling for collectors' opinions); Act to Enforce . . ., ch. 5, § 2, 2 Stat. 506, 507 (1809) (resolving the crisis in favor of Jefferson); RAO, *supra* note 92, at 147-48.
[137] State v. English, 5 N.C. (1 Mur.) 435, 435 (1810).

Congress also understood this legal principle. When it overrode *Gilchrist*, it did not do so because of a principled belief that the President had the constitutional right to instruct his subordinates. The following year, it passed a statute permitting the President to reallocate intradepartment spending "on the application of the secretary of the proper department, and not otherwise."[138] Indeed, lawmakers regularly decided when a superior officer could instruct his subordinates and circumscribed his authority where they decided it was appropriate.[139] Even in the context of customs enforcement, presidential instruction remained a controversial issue as late as 1842, when Congress passed a statute making the Secretary's decision about difficult interpretative questions "binding upon all . . . collectors."[140]

Many executive officials similarly accepted legal barriers to hierarchical control. George Washington told one petitioner that he "ha[d] no power" to intercede in the Treasury Department's settlement of her claim "unless it be in cases of mal-pratice in the officer," reflecting common-law practice that Thomas Jefferson would later affirm.[141] Treasury Secretary Oliver Wolcott "disclaimed any control" over tax valuations made by subordinate commissioners.[142] Attorney General William Wirt noted that "[i]f the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law."[143] For Wirt, the difference between presidential control and official autonomy turned on the particular officers to whom statutes

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[138] Act Further to Amend . . ., ch. 28, § 1, 2 Stat. 535, 535 (1809).
[139] *See, e.g.*, Act to Raise a Sum of Money . . ., § 2 (1799), in 4 N.Y. 1887, *supra* note 275, at 446-47; Act Providing for the Better Organization of the Treasury Department, ch. 107, § 7, 3 Stat. 592, 596 (1820); Zachary S. Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491, 519-21 (2021).
[140] Act to Provide Revenue . . ., ch. 270, § 24, 5 Stat. 548, 566 (1842). *See generally* RAO, *supra* note 92, at 195.
[141] Letter from George Washington to Charlotte de la Saussaye Hazen, Aug. 31, 1795, *in* 34 THE WRITINGS OF GEORGE WASHINGTON 291, 291-92 (John C. Fitzpatrick ed., 1940); *see also* Letter from Tobias Lear to Samuel Carlton, Mar. 6, 1790, *in* 5 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134 n2 (Dorothy Twohig et al. eds., 1987) ("[intervening] is out of the line of my official duty"); Letter from Thomas Jefferson to Benjamin Latrobe, June 2, 1808, *reprinted in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/99-01-02-8090 ("I have no right to interfere"); Manners & Menand, *supra* note 30, at 29-45. Prakash appears to attribute Washington's refusal in the Lear letter to a general feeling of impropriety and Jefferson's similar statement as a legal error. *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 189-90 (2015). But here, Washington viewed his lack of legal authority as a separate issue, *see* Washington, *supra*, at 291 ("I have no power, nor would there be any propriety").
[142] Parrillo, *supra* note 279, at 1336.
[143] The President and Accounting Officers, 1 Op. Atty. Gen. 624, 625 (1823). See also MCCONNELL, *supra* note 5, at 349; Price, *supra* note 139, at 521-23.

assigned the decision and the type of presidential control statutes explicitly authorized.[144] Moreover, even where they conferred some supervisory authority, statutes might limit the extent of the President's control; thus, where a statute made the officers' decisions "subject to the *revision* and *final decision* of the President," Wirt concluded that the President "merely" had "appellate power," meaning he could not "put those officers aside, and take the whole subject at once into his own hands."[145] A few years later, Attorney General Roger Taney agreed that a district attorney "might refuse to obey the President's order" to abandon a prosecution, and that the President would not have the authority to directly overrule him, though he might be able to remove the district attorney.[146]

Even when limits on the President's removal authority posed significant risks, early American jurists recognized that the law might nonetheless limit presidential authority by vesting removal power in subordinate officers. As early as 1790, George Washington concluded that he could not intervene in disputed postmaster appointments, writing it was an "insuperable objection" to his meddling that the "Resolutions and Ordinances establishing the Post Office" let the postmaster general "appoint his own Deputies" and made him "accountable for their conduct."[147] By the 1820s, the post office was a behemoth, but leading legal authorities hewed to

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[144] 1 Op. Atty. Gen. at 628 (emphasis in original) (comparing Act for the Relief of Joseph Wheaton, 6 Stat. 232 (1819) and Act to Provide for . . . Daniel D. Tompkins . . ., 6 Stat. 280 (1823)).

[145] Duties of Accounting Officers, 1 Op. A.G. 596, 597-98 (1823) (emphasis in original).

[146] Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 490 (1831). Gary Lawson has identified competing opinions from the 1820s and 30s that are admittedly difficult to reconcile, *see* Lawson, *supra* note 5, at 442-43. John MacPherson Berrien presumed that the President and Secretary of War could overrule a Treasury comptroller's opinion and noted that he presumed the Secretary of War acted "by the direction of the President." Decisions of Accounting Officers–To What Extent Final, 2 Op. Att'y Gen. 302, 303-304 (1829). But it is not clear why he made that presumption, and it may have arisen from the statute commanding the Secretary to "conduct the business of the said department . . . as the President . . . shall . . . instruct." Act to Establish . . ., ch. 7, § 1, 1 Stat. 49, 50 (1789). Indeed, Berrien's opinion seems motivated by the broader statutory framework: namely, he did not believe "Congress would have [subjected] . . .the head of the Department of War . . . to the control of a subordinate officer of the Treasury." 2 Op. Att'y Gen. at 303-304. Roger Taney appears to have adopted Berrien's position in one opinion before reversing himself almost immediately thereafter, though the opinions may well have turned on the statutes at issue. *Compare* Accounts and Accounting Officers, 2 Op. Att'y Gen. 463, 464 (1831) (Department of War) *with* Duties of Accounting Officers—Forfeitures, 2 Op. Att'y Gen. 480, 482 (1831) (Navy); Accounts and Accounting Officers, 2 Op Att'y Gen 507, 509-510 (1832) ("None of the acts of Congress . . . look to a revision of the accounts by the President"). By the 1840s and 1850s, opinions had begun to make the constitutional command-and-control argument unambiguously. *See* Claim of Surgeon Du Barry for Back Pay, 4 Op. Att'y Gen. 603, 608-10 (1847); Lawson, *supra* note 5, at 460.

[147] Letter from George Washington to Mary Katherine Goddard, Jan. 6, 1790, *reprinted in* 4 eds. THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 428 (Dorothy Twohig ed., 1993), available at Founders Online, https://founders.archives.gov/?q=Author%3A%22Goddard%2C%20Mary%20Katherine%22&s=1111311111&r=2. Prakash reads this letter as indicating Washington "was reluctant to intervene," *see* PRAKASH, *supra* note 141, at 189, but given Washington's language and the broader law of officers, I read it as countenancing a legal constraint.

Washington's position despite growing concerns about the office. Its "enormous patronage" led Joseph Story to wonder whether the Postmaster General's power "rival[ed] . . . that of the president himself," ultimately concluding that if the people's liberties were ever to be "prostrated, this establishment will furnish the most facile means" of doing so.[148] Yet, Story concluded that the Postmaster General had the "sole and exclusive authority to appoint, and remove all deputy post-masters;" solving this problem was "a question for statesmen, and not for jurists."[149] William Wirt similarly concluded that the President could not remove a postmaster if the Postmaster General disagreed with his preferred appointment.[150] In fact, the President could not even remove a corruptly appointed postmaster; rather, the President had to replace the Postmaster General and ask the new appointee to replace the postmaster.[151]

These positions make sense given the primacy of an officer's duty to the law. The law charged the Postmaster General with the authority to appoint deputies and assistants and the Postmaster had an obligation to use his judgment to fill those vacancies.[152] The President could take limited corrective action if the Postmaster General acted dishonestly (because the Postmaster General needed to be "punished for this violation of the law"), but not if the postmaster acted without "perfect correctness of judgment" (because the statute entrusted the decision to his judgment).[153]

2. The Law of Deputies

Officers could recruit assistance from deputies. The officer-deputy distinction was legally significant even as it could sometimes get muddy. For instance, in 1817, Congress passed a statute declaring that "deputy collectors of the customs . . . are hereby declared to be officers of the customs."[154] Under the prior statute, collectors had been authorized to "perform their . . . duties by deputy," but the deputy had not been an officer.[155] Judge Joseph Hopkinson explained that "[t]he deputy . . . [wa]s no longer a mere agent or substitute of the collector . . . but he [wa]s

[148] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 387-88 (Boston: Hilliard, Gray, and Co. 1833).
[149] *Id*., at 387-88.
[150] President and Accounting Officers, 1 Op. Att'y Gen. 624, 626 (1823).
[151] *Id*.
[152] *See* Act Regulating the Post-office Establishment, ch. 37 § 1, 2 Stat. 592, 593 (1810).
[153] *See* 1 Op. Att'y Gen. at 626.
[154] Act to Continue in Force . . ., ch. 109, § 7, 3 Stat. 396, 397 (1817).
[155] Act to Regulate . . ., ch. 22, § 22, 1 Stat. 627, 644 (1799).

a constituted, permanent officer of the customs, to be appointed with the approbation of the secretary of the treasury."[156] Understanding what was at stake for the 1817 Congress requires finer attention to the law and mechanics of deputies.

Officers often hired deputies to discharge their duties, and did not necessarily require specific statutory authorization to do so.[157] They were often presumed to have the right to fire them as well.[158] Formally, the deputies derived their powers from their principals. A young Thomas Jefferson wrote that "a deputy does things only as a servt and in right of his master,"[159] James Kent described the deputy as "the officer's shadow,"[160] and Charles P. Sumner remarked that sheriffs and their deputies derived their authority from different "source[s]."[161] Because the deputy acted on behalf of his principal, a court wrote in 1821, the acts of the deputy were considered "to be done directly and personally[] by the [principal] himself."[162]

In civil actions, this principle manifested itself in the legal doctrine that "the principal is liable for the acts of his deputy."[163] Early nineteenth century courts regularly held principals legally responsible for both the misfeasance and nonfeasance of their deputies,[164] though the deputies may have had personal legal obligations to indemnify their principals for the liability that they caused their principals to accrue.[165] Pennsylvania jurist William Tillghman explained the functionalist rationale of this rule as applied to sheriffs: "sheriff's deputies [were] frequently men of small property, and sometimes of bad character; and the responsibility ought to rest on the principal, who has the sole power of appointing and removing them."[166] But third parties

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[156] United States v. Barton, 24 F. Cas. 1025, 1027 (E.D. Pa. 1833).
[157] See Mascott, *supra* note 3, at 515-22; MASHAW, *supra* note 30, at 63; Bonds v. State, 8 Tenn. (1 Mart. & Yer.) 143, 145-46 (1827); A.E. GWYNNE, A PRACTICAL TREATISE ON THE LAW OF SHERIFF AND CORONER 40 (Cincinnati, H.W. Derby & Co., 1849) (noting that until 1818, Ohio sheriffs were not expressly authorized to appoint deputies but they nonetheless existed). *Cf.* CALHOUN, *supra* note 92, at 7.
[158] *See* JEFFERSON, *supra* note 62, at 190 (citing Lane v. Cotton (1701), 91 Eng. Rep. 1332, 1337; 1 Ld. Raym. 646, 655-56 (Holt, Ch. J., dissenting)); ISAAC GOODWIN, NEW ENGLAND SHERIFF 16-23 (Worcester, Mass., Door & Howland, 1830).
[159] JEFFERSON, *supra* note 62, at 312.
[160] 3 KENT, *supra* note 59, at 366.
[161] C.P. Sumner, *Mr. Sheriff Sumner's Statement*, LIBERATOR, Aug. 6, 1836, at 127.
[162] Campbell v. Phelps, 17 Mass. (17 Tyng) 244, 246 (1821); *see also* Moore's Adm'r v. Dawney, 13 Va. (3 Hen. & M.) 127, 132 (1808) (opinion of Tucker, J.).
[163] Samuel v. Commonwealth, 22 Ky. (6 T.B. Mon.) 173, 174 (1827). *Accord* JEFFERSON, *supra* note 62, at 190.
[164] *See, e.g.*, Marshall v. Hosmer, 4 Mass. (4 Tyng) 60, 63-64 (1808); McIntyre v. Trumbull, 7 Johns. 35, 36 (N.Y. Sup. Ct. 1810); Prewitt v. Neal, Minor 386, 386 (Ala. 1825); Moore v. Graves, 3 N.H. 408, 413 (1826).
[165] *See* Baldwin v. Bridges, 25 Ky. (2 J.J. Marsh) 7, 9 (1829); JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 314-16 (Bos., Charles C. Little & James Brown, 1839).
[166] Hazard v. Israel, 1 Binn. 240, 245 (Pa. 1808).

could only hold deputies liable for their actions, not their inactions.[167] The distinguished Vermont jurist Nathaniel Chipman justified this distinction by pointing out that the public duty remained on the officer—though the deputy was responsible for the wrongs he committed, the officer alone was responsible for discharging the duty placed upon him.[168]

Just as officers could not formally offload responsibility for their own duties onto their deputies, they could not delegate discretionary judicial authority at all. "The general rule," James Kent wrote in 1828, "is, judicial offices must be exercised in person," not delegated.[169] This rule still left considerable room to delegate, as ministerial responsibilities could be quite broad: for instance, early American legal authorities generally agreed that the sheriff's responsibilities were almost entirely ministerial.[170] But this rule-of-thumb could be overridden by statute, and statutes could commit nondelegable ministerial power to a specific officer.[171]

Nor could officers allow the chain of delegated authority to grow too long. Deputies could further delegate authority, but subject to more stringent limits. Drawing on the Roman law maxim "delegata potestas non potest delegari" (delegated power cannot be delegated), early American authorities settled on a further principle, namely that a deputy could not make an additional deputy.[172] One Albany-based publication expressed a characteristic skepticism of extended chains of delegation and the important role of legal oversight when it reported on how a "deputy custom-house officer . . . deputized a man as a *sub-sub-deputy*" who proceeded to terrorize a local resident; the article closed by noting that "[s]uits are already commenced

[167] Coltraine v. McCain, 14 N.C. (3 Dev.) 308, 309 (1832); Smith v. Joiner, 1 D. Chip. 62, 64 (Vt. 1797) (jury instruction by Chipman, C.J.); Armistead v. Marks, 1 Va. (1 Wash.) 325, 326 (1794); STORY, *supra* note 165, at 316-17.
[168] Smith, 1 D. Chip. at 64.
[169] 3 KENT, *supra* note 59, at 365. See also 2 BLACKSTONE, *supra* note 59, at 36; 2 DANE, *supra* note 59, at 349; GEORGIA JUSTICE, *supra* note 116, at 119; GOODWIN, *supra* note 158, at 16-23; PARKER, *supra* note 226, at 108; Glasgow's Lessee v. Smith, 1 Tenn. 144 (1 Overt.), 151-52 (1805). *But see* Bonds v. State, 8 Tenn. (1 Mart. & Yer.) 143, 146 (1827) (suggesting that a court might permit deputies for nonministerial functions, but that ministerial duties were particularly safe for a deputy); Reigart v. McGrath, 16 Serg. & Rawle 65, 67 (Pa. 1827) (reading the restriction narrowly).
[170] 3 DANE, *supra* note 59, at 61-62; Town of Meredith v. Ladd, 2 N.H. 517, 518 (1823); Glasgow's Lessee 1 Tenn. (1 Overt.) at 152; Shewel v. Fell, 4 Yeates 47, 53 (La. 1804); Dickinson v. Kingsbury, 2 Day 1, 3 (Conn. 1805) (argument of counsel); Tillotson v. Cheetham, 2 Johns. 63, 66 (N.Y. Sup. Ct. 1806) (argument of attorney general).
[171] 2 DANE, *supra* note 59, at 349.
[172] 3 KENT, *supra* note 59, at 365. *See also* James v. Cox, 9 N.J.L. 335, 335 (N.J. 1827); Montgomery v. Scanland, 10 Tenn. (2 Yer.) 337, 339-40 (1829); State v. Hudson, 2 Del. Cas. 28, 28 (Ct. Quarter Sess. of the Peace of De. 1797).

against" the culprits responsible.[173] However, many state courts permitted deputies to create sub-deputies, bailiffs, assistants, and other auxiliary officers to perform a subset of their responsibilities.[174]

This regime of vicarious liability reflected and reinforced the fact that officers were expected to supervise their deputies closely. South Carolina's constitutional court was shocked, for instance, when it discovered that a surveyor-general's office customarily presumed the predecessor's deputies would continue to act as deputies without being re-sworn.[175] "The surveyor general," it declared "is . . . expressly liable for the conduct of . . . his deput[ies], and therefore, he ought to know who are his deputies. He ought to have the choice and appointment of them . . . he ought to take bond and security from them; and to administer to them, respectively, the oath of office."[176] In practice, this type of close working relationship was sometimes more aspirational than realistic. Sheriff Sumner likened some sheriff's deputies to "governors of distant provinces, [who] feel but a small sense of dependence, or need of instruction."[177]

Officers even had the flexibility to adjust the compensation of their deputies. For example, federal surveyors general regularly contracted with each deputy separately for the first few decades of the nineteenth century.[178] And officers sometimes "farmed"[179] their offices to deputies. As a Congressman, for instance, James Madison helped pass a law authorizing the Postmaster General to "farm the transportation of the mail" to one of his constituents.[180] Because offices typically entitled their holders to fees and other perquisites, governments in colonial America and England sometimes let people pay for the right to hold office or serve as a deputy,

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[173] *Foreign News*, BALANCE & ST. J., May 2, 1809, at 3 (emphasis in original).
[174] Hunt v. Burrell, 5 Johns. 137, 137-38 (N.Y. Sup. Ct. 1809); Hudson, 2 Del. Cas. at 28; Salling v. McKinney, 28 Va. (1 Leigh) 42, 43 (1829); Dupuy v. Dickerson, 16 Ky. (Litt. Sel. Cas.) 163, 163 (1812); Woods v. Galbreath, 2 Yeates 306, 306 (Pa. 1798). *But see* James v. Cox, 9 N.J.L. 335, 335 (N.J. 1827).
[175] Kent v. Carwell, 3 S.C.L. (1 Brev.) 30, 30 (1801).
[176] *Id*., at 31-32. *See also* GOODWIN, *supra* note 158, at 16 (noting the sheriff had "sole appointment of his deputies and jailers, for whom he is answerable, and they may be removed at his pleasure"). One colonial Pennsylvania court even went so far as to remove an officer who failed to take security from his deputy, a testament to an officer's responsibility for designing a proper regulatory apparatus for his subordinates. *See* Kent et al., *supra* note 28, at 2171.
[177] Sumner, *supra* note 88, at 20.
[178] Duties of Surveyor in Illinois and Missouri, 1 Op. Att'y Gen. 661, 669 (1824).
[179] *See* Stow v. Converse, 3 Conn. 325, 327 (1820); *see also* Baldwin v. Bridges, 25 Ky. (2 J.J. Marsh) 7, 7 (1829); Town of Meredith v. Ladd, 2 N.H. 517, 519 (1823).
[180] Letter from William Grayson and James Madison to Governor of Virginia, Feb. 26, 1787, *in* 4 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 248, 248 (William P. Palmer ed., Richmond, R.U. Derr, 1884).

though the practice had become controversial by the Revolution.[181] In 1828, James Kent explained that American jurisdictions largely prohibited "the sale of any office," nor did they permit deputies to pay their officers for the position.[182]

But the practice did not vanish. The fact that principals remained liable for the conduct of their deputies helped justify the practice. As the Kentucky Court of Appeals noted: it was "necessary to the administration of justice[] that there . . . be deputies, [but] [t]hey [could] not be procured without compensation;" nor would it be fair to require the sheriff to divest himself completely of the profits, given that he "superintend[ed] the duties of it" and "was responsible for all acts done by his deputies."[183] The political high court of Connecticut permitted a sheriff to charge his deputy $300 per year as compensation "for the responsibility which he thereby took on himself," a practice which "ha[d] always [enjoyed the] . . . implied approbation" of the political branches.[184] Even states that banned farming drew what James Kent called "refined distinctions" between impermissible selling and permissible compensation arrangements.[185]

Officers had significant control over their deputies, who were understood as their personal agents. To understand the stakes of that responsibility, this Article next turns to an oft-forgotten system by which the law kept officers in line.

D. Liability

In the absence of an effective managerial hierarchy, Americans leaned on a complicated system of legal liability to supply energy and accountability to their officers. This Section builds out those liability rules to recover the ways they offered an alternative to unitarist managerialism. This Section further shows the various ways the liability rules frustrated efforts to construct a unitary executive. Subordinates faced punishing liability for following unlawful orders, encouraging them to defy their superiors; lawmakers (and even officers themselves) reallocated

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[181] See DOUGLAS W. ALLEN, THE INSTITUTIONAL REVOLUTION: MEASUREMENT AND THE ECONOMIC EMERGENCE OF THE MODERN WORLD 7 (2011); Kent et al., *supra* note 28, at 2171; James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the Court of Law Requirement*, 107 NW. L. REV. 1125, 1138-47 (2013). For early American defenders of the practice, see, e.g., Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 19-23 (1833) (Ruffin, C.J.); Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME LAW REVIEW 213, 283 (2024).
[182] 3 KENT, *supra* note 59, at 363; see also Baldwin v. Bridges, 25 Ky. (2 J.J. Marsh) at 8.
[183] Baldwin v. Bridges, 25 Ky. (2 J.J. Marsh) at 8.
[184] De Forest v. Brainerd, 2 Day 528, 530 (Conn. Sup. Ct. Err. 1807).
[185] 3 KENT, *supra* note 59, at 363. *See also* JEFFERSON, *supra* note 62, at 118.

liability, shaping officers' and deputies' incentives to obey; and lawmakers substantively rewrote liability rules to make them more- or less conducive to hierarchy. Properly understood, this web of liability rules presented an alternative paradigm where courts and lawmakers had a significant role in shaping officers' incentives to comply with superiors' orders.

1. Liability as Alternative to Administration

This institutional configuration left lawmakers with few tools to check the bad behavior of the local notables. As Alexis de Tocqueville explained somewhat hyperbolically in 1835, "administrative hierarchy exist[ed] nowhere:"[186] officers were generally difficult to remove and often elected, creating difficulties for superiors attempting to keep them in line.[187] The response "from one end of the Union to the other," Tocqueville noted, was a "system of fines" by which officers would be "forced to obey the law."[188] American officers faced pervasive legal liability both for abusing their authority (misfeasance) and for failing to discharge their duties (nonfeasance).

Officers faced personal liability for taking unauthorized actions—without a valid law to justify it, tax collection, for instance, was simply a trespass.[189] As one treatise writer explained, "all officers, from the President of the United States, downwards, ought to be submitted to and obeyed; but, if they should overstep the limits of their official authority . . . they would cease to be under the protection of their offices, and would be recognized merely as private citizens; and . . . would be liable to a civil or criminal prosecution, in the same manner as a private citizen."[190] Officers should not, *The Portsmouth Oracle* warned, "proceed to business . . . unless they first clothe themselves with authority to perform it."[191]

This regime could be strict, punishing good-faith officers because the laws they used to justify their actions were not passed according to proper procedure[192] or were subsequently ruled

[186] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA: HISTORICAL-CRITICAL EDITION 133-34 (Eduardo Nolla, ed., trans. James T. Schleifer, Liberty Fund, 2010) (1835).
[187] *Id*., at 121-22, 132-33.
[188] TOCQUEVILLE, *supra* note 186, at 133-34. *See also* BALOGH, *supra* note 74, at 32
[189] *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 18 (1972); Manners, *supra* note 30, at 83; Woolhandler, *supra* note 30, at 410.
[190] BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 317 (Boston, Marsh, Capen, & Lyon, 1832).
[191] A Citizen, *Advertisement*, PORTSMOUTH ORACLE, Aug. 21, 1819, at 3.
[192] *See, e.g.*, Bergen v. Clarkson, 6 N.J.L. 352, 363-64 (N.J. Sup. Ct. 1796).

unconstitutional.[193] These types of trespass actions were common responses to tax enforcement: the Massachusetts Supreme Judicial Court called such suits "among the most common actions in our courts," [194] and the Supreme Court of Kentucky called the principle of trespass for unlawful taxes "as firmly settled . . . as perhaps any other principle of the common law.[195] These actions could have serious consequences. Sheriff Charles P. Sumner postulated that "[t]he loss of an hour may outweigh the profits of years," likening a sheriff to an "agriculturist on the side of Vesuvius."[196]

Conceptually, this type of liability fit with the local notables idea that officers were personally charged with special powers and duties alongside their other responsibilities.[197] But it also had a more functional role in forcing ignorant officers to educate themselves. The Connecticut jurist Tapping Reeve wrote that "an officer is bound to know the law" and could therefore be held liable for a facially defective warrant.[198] As Chief Justice Parker of Massachusetts explained in an opinion, the surveyor of highways "acts at his peril," and would be liable for damages if he dug streets too deep or raised them too high.[199] Parker justified this approach in a different case where a tax assessor took too many oxen: "[s]trictness in these particulars is wholesome discipline—as it will, from motives of interest, produce care and caution in the selection of town officers and diligence in them when chosen."[200]

Civil actions also protected citizens from being at the discretion of unaccountable officers, vindicating the promise of the rule of law. Parker explained that punishment was necessary to protect citizens from "arbitrary extractions, limited by no rule but the will of assessors."[201] Riding circuit, Justice Story declared that granting "unlimited and arbitrary discretion" to naval officers over troop discipline would compromise the bedrock principle that America was a

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[193] *See, e.g.*, Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 870-71 (1824).
[194] Commonwealth v. Kennard, 25 Mass. (8 Pick.) 133, 140 (1829). Wilcox v. Sherwin, 1 D. Chip. 72, 78 (Vt. 1797) (Chipman, C.J.); Winslow v. Beal, 10 Va. (6 Call) 44, 46 (1806) (opinion of Carrington, J.), Bergen 6 N.J.L. at 352-54; 2 KENT, *supra* note 59, at 30.
[195] Sanders v. Vance, 23 Ky. (7 T.B. Mon.) 209, 213 (1828).
[196] Sumner, *supra* note 88, at 20.
[197] *See* Nelson, *supra* note 76, at 195.
[198] Grumon v. Raymond, 1 Conn. 40, 48 (1814); *see also* Hyde v. Melvin, 11 Johns. 521, 524 (N.Y. Sup. Ct. 1814).
[199]Callender v. Marsh, 18 Mass. (1 Pick.) 418, 435-36 (1823).
[200] Libby v. Burnham, 15 Mass. (15 Tyng) 144, 148 (1818).
[201] Libby, 15 Mass. (15 Tyng) at 148; *see also* Hylton v. United States, 3 U.S. (3 Dall.) 171, 179 (Paterson, J., concurring).

"government of laws."[202] James Kent agreed, writing that "[t]he law watch[ed] the exercise of discretionary power with a jealous eye," and would punish ship captains for meting out "excessive or unjustifiable" punishments upon their subordinates.[203]

This lack of accountability created opportunities for corruption, which further justified strict liability. When a New Jersey debtor escaped the county jail, for instance, the sheriff protested that he should not be liable for permitting the escape; after all, he "had made regular protest" as to its inadequacy and the county had not fixed it.[204] Nevertheless, the court found the sheriff strictly liable for an escape—even if it had been effected by a mob which the sheriff could not suppress with his *posse*. The alternative would leave a creditor constantly monitoring the sheriff for colluding with the debtor, "which it would be impossible to thwart . . . ."[205] Ultimately, the sheriff took "the office and enjoy[ed] its benefits, he must submit to the inconveniences."[206]

Courts and legislatures registered their concerns about official abuse by creating new causes of action and imposing heavy punitive damages when officers abused their authority or acted with bad faith. Several courts refused to immunize otherwise justified conduct or created new causes of action to reach misconduct when an officer acted maliciously: although the law might authorize an act, it "did not authorize it for individual oppression."[207] Other jurists similarly noted that they might scrutinize justices of the peace more closely or inflict more severe punishments on officers when they suspected improper or tyrannical motives.[208]

Conversely, courts and legislatures might reduce the punishment for misconduct committed in good faith, though they seldom immunized such conduct.[209] For instance, an officer's good faith might insulate him from punitive damages or help him get indemnified by the legislature.[210]

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[202] U.S. v. Bevans, 24 F. Cas. 1138, 1139 (D. Mass. 1816).
[203] 3 KENT, *supra* note 59, at 141.
[204] Patten v. Halsted, 1 N.J.L. (Coxe) 277, 282 (1795).
[205] *Id*., at 280 (recounting trial court jury charge).
[206] *Id*., *aff'd* 1 N.J.L. at 283.
[207] Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 365 (C.C. S.C. 1808). *See also* Rogers v. Brewster, 5 Johns. 125 (N.Y. Sup. Ct. 1809); Kennedy v. Terrill, 3 Ky. (1 Hard.) 490, 492 (1808); Alexander Mechanick, *The Interpretive Foundations of Arbitrary or Capricious Review*, 111 KY. L.J. 477, 488-91 (2022).
[208] *See* Briggs v. Wardwell, 10 Mass. 356 (10 Tyng), 357 (1813); OLIVER, *supra* note 190, at 318; 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 51-52 (Winchester: The Republican, 1836); 1 BLACKSTONE, *supra* note 59, at *342.
[209] *But see infra* notes 322-324.
[210] 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, 1870, 1906-1907, 1924-25 (2010).

In some jurisdictions, sheriffs could mitigate damages by convening ad hoc, ex parte juries to make preliminary determinations about contested property.[211]

In addition to being compelled to act via writs of mandamus,[212]officers could also be punished for their nonfeasance.[213] The duties and penalties were often defined by statute. They could be relatively straightforward, like a constable's duty to assemble jurors for service or return a warrant.[214] Or an overseer of highways could be punished for failing to post and maintain proper signage.[215] A fence viewer might be fined for not attending to a request to view a fence.[216] And a militia officer had to "march for the support of the civil authority" and suppress an insurrection.[217] But the duties could also be relatively amorphous, like a Delaware statute fining a state Commissioner of Tax if he "neglect[ed] to act," which was likely part of a compulsory officeholding arrangement.[218] Some were more explicit about trying to force officers to exercise control over their fellow community members, like a New York statute fining the surveyor of highways for failing to "warn and set to work" those with road labor obligations.[219] Eighteenth-century colonial and legal practice bore out the idea that officials could be and were punished for neglecting their duties.[220] Early American officials faced punishment for failing to

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[211] *E.g.* Pearson v. Fisher, 4 N.C. (Car. L. Rep.) 72, 75-76 (1814).
[212] See MASHAW, *supra* note 30, at 3, 66-72.
[213] *See* Beck, *supra* note 30, at 1269-1304; Manners & Menand, *supra* note 27, at 38-45.
[214] Act Regulating. . . Grand Jurors, § 1, in 1 MASS. 1807, *supra* note 117, at 184, 185; Act Describing . . . Coroners, § 2, *in* 1 MASS. 1807, *supra* note 117, at 150, 150-51; Act Relating unto the Office and Duty of a Coroner, § 3, *in* GRIMKÉ, *supra* note 117, at 8, 9.
[215] *E.g.*, 1 HAYWOOD & COBBS, *supra* note 114, at 287; State v. Nicholson, 6 N.C. (2 Mur.) 135 (1812) (prosecuted by indictment).
[216] Act for the Better Securing . . ., § 8, in 1 MASS. 1807, *supra* note 117, at 283, 286.
[217] Act for . . . Tumults and Insurrections in the Commonwealth, § 3, in 1 MASS. 1807, *supra* note 117, at 366, 367.
[218] Act for the Valuation . . ., ch. 98, § 3, *in* LAWS OF THE STATE OF DELAWARE 1247, 1248 (New-Castle, Samuel & John Adams, 1797) (hereinafter DEL. 1797). *See also* Act Obliging . . ., ch. 205, § 6, *in* 1 DEL. 1797, *supra*, at 476, 479 (fining constables for "neglect in said office"); Act for Establishing . . ., ch. 36, § 12, *in* 2 DEL. 1797, *supra*, at 1134, 1142 (fining a militiaman for failing "to perform his exercise with the care and attention requisite therin"); Wilson, *supra* note 85, at 1160 ("negligence in publick offices, if gross, will expose the negligent officers to a fine").
[219] Act for the Better Laying Out . . ., ch. 52, 1784 N.Y. Laws 690, 695.
[220] 2 WILLIAM HAWKINS & THOMAS LEECH, TREATISE OF THE PLEAS OF THE CROWN 210-11 (Dublin, Eliz. Lynch, 1788); William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664-1776*, 38 HOFSTRA L. REV. 69, 133-34 (2009); Watson, *supra* note 90, at 15.

maintain infrastructure,[221] permitting detainees to escape,[222] failing to perform inspections or assess taxes,[223] and failing to regulate local elections properly.[224]

These "statute penalties"[225] were enforced in many ways. They could be "private actions" reserved for the public or parties aggrieved; they could be "popular" or "qui tam" actions brought by anyone suing on behalf of the public, himself, or both.[226] Such statutes often reserved a "moiety" of the fine for those who prosecuted the offenses.[227] But even statues without penalties could give rise to an action— as Nathan Dane explained, "when a statute . . . commands a matter of public convenience, as repairing a highway &c., every disobedience to such statute is indictable, because it is an offence against the public . . . [namely] to neglect to do what a statute commands to be done."[228] At eighteenth-century English common law and early American practice, "contempt of the statute" was a misdemeanor, even if the statute did not declare a penalty or mode of proceeding.[229]

Individuals who were particularly harmed by an officer's dereliction of duties had special remedies. Parties who faced an "immediate danger" from someone who engaged in misfeasance

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[221] State v. Com'rs of Levy Court, 2 Del. Cas. 85 (De. Ct. Common Pleas 1797); State v. Fayetteville Com'rs, 6 N.C. (2 Mur.) 371, 371-72 (1818) (roads); State v. Justices of Lenoir County, 11 N.C. (4 Hawks) 194 (1825) (prison).
[222] State v. Manley, 1 Tenn. (1 Overt.) 428, 428 (1809).
[223] Com. v. Genther, 17 Serg. & Rawle 135, 138 (Pa. 1827); Mix v. Whitlock, 1 Tyl. 30, 33 (Vt. 1801) (argument of counsel).
[224] People v. Denton, 2 Johns. Cas. 275, 277 (N.Y. Sup. Ct. 1801). *But see infra* notes 423-424.
[225] 5 DANE, *supra* note 59, at 252.
[226] Some sources distinguished between the two based on the fact that a qui tam action was in the name of the king and might have divided the bounty between the king and the informant. *See, e.g.*, 3 BLACKSTONE, *supra* note 59, at *160; GILES JACOB, A NEW LAW DICTIONARY [738] (London, W. Strahan & W. Woodfall, 1782); JAMES PARKER, THE CONDUCTOR GENERALIS 204-205 (Phila., Robert Campbell, 1792). Others did not. *See, e.g.*, 2 JOHN BOUVIER, A LAW DICTIONARY 274 (Phila., T. & J.W. Johnson, 1839). The distinctions are immaterial for this Article.
[227] For some examples of enforcement actions against government officials with moieties reserved for the officials or private litigants, see, e.g., Caswell v. Allen, 10 Johns. 118, 118 (1813); Rowe v. State, 2 S.C.L. 565, 565 (1804). For a small sample of statutes, see, e.g., Act Making Provision for the Repair and Amendment of Highways, ch. 81, 1786 Mass. Acts 247, 254 (fining surveyor of highways for neglect of duty); Act More Efficiently to Compel the Supervisors of Towns . . . ., ch. 43, 1807 N.Y. Laws 61, 61 (fining town supervisors for failing to appropriate money when directed by the legislature); Act Relative to the Duties and Privileges of Towns, ch. 78, § 9, *in* 1 N.Y. 1802, *supra* note 118, at 325, 330; Act for Licensing Hawkers . . ., § 8, *in* GRIMKÉ, *supra* note 117, at 152, 154 (constables, church wardens, etc. who fail to enforce the act regulating hawking); Act for Regulating Towns . . ., § 2, *in* 1 MASS. 1807, *supra* note 117, at 313, 314 (constables for neglect of duty); Act to Prevent the Delay of Justice . . . ., § 4, *in* GRIMKÉ, *supra* note 117, at 162, 163; 1 HAYWOOD & COBBS, *supra* note 114, at 287, 325 (road maintenance and slave patrol).
[228] 7 DANE, *supra* note 59, at 253.
[229] *See* Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371, 378 (N.Y. Chancery Ct. 1817) (Kent, Ch.); Com. v Inhabitants of Springfield, 7 Mass. (7 Tyng) 9, 14 (1810); 5 DANE, *supra* note 59, at 246; 4 BLACKSTONE, *supra* note 59, at *122-23; 1 HAWKINS & LEECH, *supra* note 220, at 92; Lewis Hochheimer, *The Offense of Disobeying Statutes*, 38 CENT. L.J. 510, 510 (1894).

or nonfeasance as outlined by statute could sometimes seek additional qui tam remedies not available to the general public.[230] Parties could also bring a special action on the case against the officer who neglected "to perform a service" that was "[e]ntrusted [him] by common law[] or by statute."[231] This remedy reflected the "customer service" orientation of early American governance.[232] Indeed, Ohio's supreme court remarked that officers were, in some cases, "the agents . . . not only of the *law*, but in some respects of *individuals* for whom they act."[233] Litigants sued constables for failing to collect debts,[234] sheriffs or jailers for permitting captives to escape,[235] and even jailers for failing to provide sufficient food or accommodations for prisoners.[236] But caveat emptor. When a Massachusetts creditor demanded a sheriff seize disputed property, the Massachusetts Chief Justice Theophilus Parsons explained, the sheriff could sue the creditor if he turned out to be mistaken.[237]

The eighteenth and nineteenth centuries saw the rise of an expansive array of reference manuals for those without legal training, suggesting there was an appetite for and at least passing familiarity with basic liability rules.[238] Although many of these manuals described themselves as manuals for justices of the peace, by the early nineteenth century, several in the Northeast and

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[230] *See* PARKER, *supra* note 226, at 205.
[231] 3 DANE, *supra* note 59, at 33. *See also* Work v. Hoofnagle, 1 Yeates 506, 508 (Pa. 1795); Pearl v. Rawdin, 5 Day 244, 244, 246 (Conn. 1812) (suing law enforcement officer for suffering an escape); Morgan v. Fencher, 1 Blackf. 10, 10 (Ind. 1818) (unsuccessfully suing constable for selling plaintiff a horse which did not belong to the debtor whose property was being sold); Maxwell v. McIlvoy, 5 Ky. (2 Bibb) 211, 211 (1810) (suing deputy postmaster for lost mail); McMillan v. Eastman, 4 Mass. (4 Tyng) 378, 382 (1808); Evans v. Foster, 1 N.H. 374, 374 (1819); Rhodes v. Gregory, 3 N.C. (2 Hayw.) 351, 351 (Sup. Ct. L. & Equity N.C. 1805) (bringing the admittedly confusingly named "action of debt upon the case" against a sheriff for letting a slave escape); Bolan v. Williamson, 2 S.C.L. (2 Bay) 551, 551 (1804) (suing postmaster and deputy postmaster for lost letter); Hubbard v. Dewey, 2 Aik. 312, 312 (Vt. 1827) (suing constable for failing to record execution); Ralston v. Strong, 1 D. Chip. 287, 287 (Vt. 1814) (suing sheriff for not executing writ of attachment); GEORGIA JUSTICE, *supra* note 116, at 153.
[232] *See* PARRILLO, *supra* note 29, at 125. *See also* Chad R. Holmes, *The Sheriff's Sword: Property, Democracy, and Public Order in Early Republican Massachusetts*, 44 J. EARLY REPUB. 262, 266-67 (2024).
[233] Barret v. Reed, 2 Ohio 409, 411 (1826). Some nineteenth-century jurists reserved this vision only for officers who received fees rather than salaries. *E.g.*, Young v. Com'rs of Roads, 11 S.C.L. (2 Nott & McC.) 537, 538 (1820). *But see,* People v. Corporation of Albany, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834).
[234] *See, e.g.*, Hale v. Dennie, 21 Mass. (4 Pick.) 501, 501 (1827); 2 ZEPHINIAH SWIFT A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 111-12 (Windham, John Byrne, 1795); PARKER, *supra* note 226, at 406.
[235] *See, e.g.*, Carrington v. Parsons, 4 Day 45 (Conn. 1809); Ellis v. Gee, 5 N.C. (1 Mur.) 445 (1810); 2 SWIFT, *supra* note 234, at 112.
[236] *See, e.g.*, Dabney v. Taliaferro, 25 Va. (4 Rand.) 256, 261 (1826).
[237] Marshall v. Hosmer, 4 Mass. (4 Tyng) 60, 63 n (1808); Stoyel v. Cady, 4 Day 222, 226 (Conn. 1810) (opinion of Swift, J.).
[238] *See generally* Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J. SOUTHERN LEGAL HIST. 315, 323-28 (2018); John A. Conley, *Doing it By the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 263-64 (1985).

Ohio described themselves as "town officer" or "township officer" manuals.[239] And even outside of these states, justice of the peace manuals were also often written explicitly to instruct local officers affiliated with the courts, namely sheriffs, constables, or coroners.[240] Many of these volumes, like Samuel Freeman's *Town Officer* were widely advertised and ran many editions.[241] Sometimes, newspapers published entire sections of manuals verbatim.[242] Some jurisdictions would even keep copies of these volumes around so that local officials could reference them.[243]

The threat of liability was a selling point for this explosion of law literature. An anonymous writer for the *Salem Gazette* correctly explained in 1834 that a surveyor of the highway who made a road without authority "commits a trespass, and is liable in his own property to any damages that he may do," before ultimately concluding "[l]et *officers* therefore be cautious."[244] Another advertisement in the *Portsmouth Oracle* admonished town officers that it was "highly necessary" that they should "know their duty, and when to perform it," as they were "liable for misconduct and neglect of duty" once they took the oath of office.[245] Advertisers even explicitly used liability rules to sell books—one advertisement for Isaac Goodwin's *The New England Sheriff*, for instance, explained that an "officer in the discharge of his duty, proceeds at his peril; if he [discharges his duty] incorrectly, he suffers for his ignorance or neglect."[246]

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[239] *See, e.g.*, JOHN BACON, THE TOWN OFFICER'S GUIDE (Havermill, Mass 1825); SAMUEL FREEMAN, THE TOWN OFFICER . . . . (Portland, Mass., Benjamin Titcomb, 1791); WILLIAM MERCHANT RICHARDSON, THE NEW-HAMPSHIRE TOWN OFFICER (Concord, N.H., J.B. Moore, 1829); JOHN TAPPEN, THE COUNTY AND TOWN OFFICER (Kingston, N.Y.: J. Tappan, 1816); A. VAN VLEET, THE OHIO JUSTICE AND TOWNSHIP OFFICERS' ASSISTANT (Lebanon, OH: A. Van Fleet, 1821); SAMUEL WHITING, THE CONNECTICUT TOWN-OFFICER (Danbury, CT: N.L. Skinner, 1814).

[240] JOHN BRADFORD, THE GENERAL INSTRUCTOR: OR THE OFFICE, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, AND CONSTABLES IN THE STATE OF KENTUCKY (Lexington, Ky., John Bradford, 1800); JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE, SHERIFF, CORONER, CONSTABLE . . . . (Trenton, N.J., James Oram, 1805); JOHN HAYWOOD, THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, AND OF SHERIFFS, CORONERS, CONSTABLES, &C ACCORDING TO THE LAWS OF THE STATE OF NORTH CAROLINA (Halifax, N.C., Abraham Hodge, 1800).

[241] *Town Officer*, SALEM GAZETTE, Apr. 30, 1802, 4; *Town Officer*, INDEP. CHRONICLE (Boston, MA), Mar. 30, 1812, at 4; *County and Town Officer*, ULSTER PLEBEIAN (Kingston, N.Y.), May 30, 1818, at 3 (claiming that the *County and Town Officer* had sold more than 500 volumes); *Advertisement*, SUPPORTER AND SCIOTO GAZETTE (Chillicothe, Ohio), Sep. 5, 1821, at 1; *For Sale*, CAROLINA SENTINEL (New Bern, N.C.), Oct. 25, 1823, at 1; Berry, *supra* note 238, at 328; Loren A. Wenzel, Stanley D. Tonge, & Peter L. McMickle, *An Analysis of* The Town Officer *(1791-1815): The Earliest American Treatise of Municipal Accounting?* 19 ACCOUNTING HISTORIANS J. 57, 60 (1992).

[242] *Non Resident Taxes*, NEW-HAMPSHIRE GAZETTE, Apr. 13, 1830, at 3.

[243] An Inhabitant, *Town Affairs—No. 3*, SALEM GAZETTE, Sep. 19, 1834, at 2.

[244] An Inhabitant, *Town Affairs*, SALEM GAZETTE, June 24, 1834, at 2 (italics in original). *See also Legal. Town Meetings*, ME. FARMER & J. OF USEFUL ARTS, Apr. 27, 1839, at 98, 98.

[245] A Citizen, *supra* note 191, at 3.

[246] *Duties of Civil Officers*, NAT'L AEGIS, Dec. 1, 1830, at 3.

2. Antihierachical Penalties for Misfeasance

These rules disciplined the entire command hierarchy. All subordinates—deputies and officers alike—were responsible for ensuring that their conduct conformed to the law, even when their superiors instructed them otherwise. "[T]he principles of the common law, as old as the law itself," explained Nathaniel Chipman, dictated that a collector could not hide behind a justice of the peace's legally invalid warrant.[247] Because the law would not sanction an unlawful act, "all who act[ed] in the business [were] volunteers in the injury" inflicted by an invalid tax and could be liable.[248] Chipman justified his position in functionalist terms as well, noting that immunizing the collector would deny compensation to the injured party and "indemnify collectors of towns, in distressing the inhabitants with the collections of pretended taxes."[249] As Chief Justice Kinsey of the Supreme Court of Judicature of New Jersey explained in a different case, the officer must "look for indemnity to those under those whose usurped authority he has acted."[250] Similarly, the U.S. Supreme Court held a naval officer liable for implementing unlawful orders because "the instructions cannot . . . legalize an act . . . ."[251]

Conversely, an officer might face penalties for failing to obey the orders of his superior, but only where the superior was acting within his legal authority.[252] Subordinates facing orders they felt were unlawful therefore had to make a call, as one Pennsylvania constable did when he refused to execute a warrant unsupported by sworn oath; the Pennsylvania Supreme Court rewarded him by vacating his conviction for failing to execute the warrant.[253] In another case, Bushrod Washington went so far as to fine and imprison a Pennsylvania militia captain for obeying an order from his commander, the governor: "had the defendants refused obedience, and been prosecuted before a military or state court, they ought to have been acquitted, upon the

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[247] Wilcox v. Sherwin, 1 D. Chip. 72, 84 (Vt. 1797) (Chipman, C.J., dissenting).
[248] *Id*., at 84-85.
[249] *Id*., at 84-85. Admittedly, Chipman lost on this point to his two colleagues. *See id.*, at 81-82 (opinion of Hall, J.). But their position was "frequently overruled" by subsequent Vermont courts and was not consistent with other jurisdictions. *See* Blood v. Sayre, 17 Vt. 609, 613 (1843); Wise v. Withers, 7 U.S. (3 Cranch.) 331, 337 (1806) (Marshall, C.J.); Bergen v. Clarkson, 6 N.J.L. 352, 366 (1796); Hyde v. Melvin, 11 Johns. 521, 523 (N.Y. Sup. Ct. 1814); Orval Edwin Jones, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 OKLA. L. REV. 285, 286-89 (1984).
[250] Bergen, 6 N.J.L. at 366.
[251] Little v. Barreme, 6 U.S. (2 Cranch.) 170, 179 (1804). *See also* Jones, *supra* note 249, at 290-91 (collecting more cases).
[252] *See* PARKER, *supra* note 226, at 100.
[253] *See* Conner v. Commonwealth, 3 Binn. 38, 44 (Pa. 1810).

ground that the orders themselves were unlawful."[254] Ironically, the orders in question were to resist a federal marshal enforcing a district court judgement that Pennsylvania claimed was invalid.[255]

Judges had some leeway to make mistakes. Nineteenth-century jurists, consistent with centuries-old English precedent, largely agreed that it would be unfair to hold a judge or officer carrying out judicial duties liable for a "mere error of judgment," though they often explicitly excluded malicious action from that protection.[256] For justices of the peace, this protection represented a pragmatic weakening of the typical rules of officer liability in the interests of administrative necessity. As a South Carolina court condescendingly put it, local justices of the peace were so "ignorant . . . yet so indispensable" that the court was loathe to punish good-faith errors.[257] By contrast, Thomas Jefferson wrote in his commonplace book, a constable committing someone for a breach of the peace could be challenged if there was no such breach.[258]

This privilege was subject to some qualifications. For instance, courts would not protect a judge acting beyond his jurisdiction, a distinction which could sometimes turn on the underlying merits of the case.[259] And to exercise protected discretion, inferior courts like justices of the peace had to make decisions that were, in one court's words, "sound and legal . . . not . . . arbitrary."[260] Indeed, courts "commonly permitted" tort suits against judges over their bail determinations at the Founding.[261] Furthermore, the protection only applied to "judicial acts" and

[254] United States v. Bright, 24 F. Cas. 1232, 1238 (C.C.D. Pa. 1809).
[255] *See id*. at 1234.
[256] Little v. Moore, 4 N.J.L. 74, 75 (N.J. 1818); Respublica v. Meylin, 3 Yeates 1, 3 (Pa. 1800); Reid v. Hood, 11 S.C.L. (2 Nott & McC.) 168, 170 (1819) ("unless *wilfully wrong* or *negligent*, or at least convicted of such *ignorance* as shows a *depravity* in undertaking to give an opinion"); 3 DANE, *supra* note 59, at 60; 2 SWIFT, *supra* note 234, at 115; J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 897-901.
[257] Reid, 11 S.C.L. (2 Nott & McC.) at 171-72; *see also* 1 BLACKSTONE, *supra* note 59, at *342.
[258] JEFFERSON, *supra* note 62, at 111 (citing Groenvelt v. Burwell (1701), 91 Eng. Rep. 343, 344; 1 Salk. 396, 396-97)
[259] Percival v. Jones, 2 Johns. Cas. 49, 51 (N.Y. Sup. Ct. 1800); OLIVER, *supra* note 190, at 318; Block, *supra* note 256, at 892-93.
[260] Broussard v. Trahan, 4 Mart. (o.s.) 489, 503 (La. 1816). *See also* Respublica v. Hannum, 1 Yeates 71, 74 (Pa. 1791); Block, *supra* note 256, at 897-901; Mechanick, *supra* note 207, at 488.
[261] Alexandra Nick & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CAL. L. REV. 1763, 1770 (2023).

not "ministerial acts" performed by judges, which could be the basis for liability or a writ of mandamus.[262]

This judicial privilege carried with it what one scholar calls an "obedient officer's privilege."[263] Under this doctrine, a court order would protect the implementing, ministerial officer where—and only where—the court had subject-matter jurisdiction.[264] As New York's Supreme Court explained in 1816, "the subordinate officer [was still] bound to see that he act[ed] within the scope of the legal powers of those who command[ed] him."[265] This arrangement required obedient officers to remain vigilant, since the question of whether a court had jurisdiction could turn on the merits of the order. Spencer Roane, for instance, sustained an action against constables who implemented an overbroad warrant because "the officer is not bound to obey him who is not a judge [and] . . . [n]o man is a judge for the purpose of granting a general warrant."[266] A Kentucky court found that a justice of the peace could not justify its actions under a law the Court decided was unconstitutional.[267] And the United States Supreme Court found that a court martial could not protect a fine collector when it told him that a plaintiff was not covered by an exception—because the court martial decided the issue incorrectly.[268]

Statutes could also carve out a "zone of discretion" within which officers received protection from liability.[269] One way legislatures conferred authority was to pass statutes requiring an actor to take an action that he felt appropriate "in his opinion." Such statutes delegated authority to a wide range of state, local, and federal actors, including juries,[270] turnpike corporations,[271] town trustees,[272] schools,[273] courts,[274] inspectors,[275] commissioners,[276] boards,[277] and even the

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[262] Block, *supra* note 256, at 887; Briggs v. Wardwell, 10 Mass. (10 Tyng) 356, 357 (1813); Com. v. Justices of Fairfax Cnty. Ct., 4 Va. (2 Va. Cas.) 9, 12-13 (1815); 1 KENT, *supra* note 59, at 24-25; 2 SWIFT, *supra* note 234, at 115.
[263] Engdahl, *supra* note 189, at 45. *See also* L. A. Sheridan, *Protection of Justices*, 14 MOD. L. REV. 267, 271 (1951).
[264] *See, e.g.*, Johnson v. Dole, 4 N.H. 478, 480 (1828); Wells v. Jackson, 17 Va. (3 Munf.) 458, 478 (1811) (opinion of Roane, J.); 2 SWIFT, *supra* note 234, at 112; PARKER, *supra* note 226, at 100.
[265] Suydam v. Keys, 13 Johns. 444, 446 (N.Y. Sup. Ct. 1816).
[266]Wells, 17 Va. (3 Munf.), at 478-79 (opinion of Roane, J.); *see also* Grumon v. Raymond, 1 Conn. 40, 46 (1814) (Reeve, Ch. J.); Campbell v. Sherman, 35 Wis. 103, 110 (1874).
[267]*See* Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70, 76 (1820).
[268] Wise v. Withers, 7 U.S. (3 Cranch.) 331, 337 (1806).
[269] James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 157-58 (2021); *see also* 2 SWIFT, *supra* note 234, at 116.
[270] *E.g.*, Act to Authorize . . ., no. 152, § 5, 1834 Ala. Laws 143, 143.
[271] *E.g.*, Act Authorizing . . ., no. 243, § 2, 1849 Pa. Laws 309, 310.
[272] *E.g.*, Act to Authorize . . ., ch. 610, § 10, 1831 Ky. Laws 35, 38.
[273] *E.g.*, Act for Establishing an Academy . . ., ch. 44, 1794 Mass. Acts 88, 89

President of the United States.[278] Legislatures regularly employed these strategies to confer what some called a "discretionary power" on the actor whose opinion was called for.[279] The New York Supreme Court took such delegations to confer immunity from liability. When a law "made the duty of a public agent . . . to do a thing, if in his opinion certain requisites are complied with, he c[ould] never be liable for omitting to act" unless he misbehaved.[280] The United States Supreme Court agreed, noting that the "[t]he law place[d] a confidence in the opinion of the officer, and he [was] bound to act according to his opinion."[281] But as with judicial privilege, it is important not to overread the protection offered by such statutes because a court could require an officer to demonstrate the "facts which brought [a plaintiff] within the act in question."[282]

3. Indemnification

Although officers were responsible for their duties and misfeasance in the first instance, they seldom bore liability alone. Officers were nodes of responsibility, focal points of accountability who used indemnification agreements to more efficiently "suboptimize" liability rules in the shadow of the law by reallocating liability across the community.[283]

Federal, state, and local government bodies sometimes indemnified officers, effectively shifting those liabilities onto the collective.[284] Legislatures could pass private bills reimbursing

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[274] *See, e.g.*, Act to Amend . . ., ch. 15, § 2, in 3 LAWS OF THE TERRITORY OF THE UNITED STATES, NORTHWEST OF THE RIVER OHIO 119, 119 (Chillicothe, Ohio, N. Willis, 1802).
[275] *See, e.g,* Act Making Provision (1800), ch 17, *in* 4 LAWS OF THE STATE OF NEW YORK 460 (Albany, Weed, Parsons, & Co., 1887) (hereinafter N.Y. 1887).
[276] *See, e.g.*, Act for Offering Compensation . . ., ch. 187, § 5, 1798-99 Pa. Acts 400, 403; Act for Appointing . . ., ch. 592, § 8, 1795-96 N.J. Acts 74, 77.
[277] *See, e.g.*, Act to Provide for a General System of Internal Improvement, ch. 2, § 12, 1835 Ind. Laws 6, 12.
[278] *See, e.g.*, Act to Authorize . . . Embargoes, ch. 41, § 1, 1 Stat. 372, 372 (1794); Act Authorizing the President of the United States to Raise a Provisional Army, ch. 47, § 1, 1 Stat. 558, 558 (1798); Act Supplementary . . ., ch. 64, § 1, 1 Stat. 575, 575 (1798).
[279] See, e.g., Act to Amend . . ., ch. 119, § 1, 1830-31 N.C. Laws 108, 108; Act Supplementary . . ., § 2, *in* ACTS PASSED AT THE SEVENTH SESSION OF THE GENERAL ASSEMBLY OF THE TERRITORY OF ARKANSAS 42, 42 (Little Rock: Charles P. Bertrand, 1832); Act to Alter . . ., ch. 41, § 1, 1798-99 Mass. Acts & Resolves 384, 384. *See also* Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 270 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Direct Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1451 (2021).
[280] Seaman v. Patten, 2 Cai. R. 312, 316 (N.Y. Sup. Ct. 1805).
[281] See Crowell v. McFadon, 12 U.S. (8 Cranch) 94, 98 (1814).
[282] *See* Jarman v. Patterson, 23 Ky. (7 T.B. Mon.) 644, 651 (1828); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115, 122-24 (2022).
[283] *Cf.* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 106 (1983).
[284] Pfander & Hunt, *supra* note 210, at 1924; Manners, *supra* note 30, at 83. *Cf.* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1482-91 (2019) (describing how the Treasury Department remitted civil

officers.[285] Counties and towns might allocate money as well, either voluntarily or because they were bound by statute.[286] Admittedly, this compensation was unreliable and could take years,[287] and many claims were denied.[288] Nevertheless, it softened the burden on officers while providing compensation for those harmed by their misfeasance or nonfeasance; it also permitted legislatures to decide what unlawful conduct was nonetheless politically justified (for instance in cases of emergency or necessity) and influence officers' behavior by crafting reimbursement rules.[289]

Private parties also helped pick up the tab. Officers were often required to pledge bonds to ensure they would perform their duty and be responsible for the damages they wrought.[290] In the words of Ohio's Supreme Court, these bonds were particularly important for officers who regularly received "large sums of money."[291] As the Pennsylvania Law Revision Commissioners explained, tax collector bonds gave the county "some other security than the personal responsibility of the individual," and allowed disputes to be settled in an "expeditious and easy manner" because courts did not need to encumber property with liens while litigation was pending.[292]

These bonds often had to be backed by sureties, who were established or prominent members of the community.[293] The important thing was that the sureties had sufficient property to cover

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forfeitures); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1568-70 (2018).

[285] See, e.g., Act to Indemnify Samuel Riggs, Sheriff of Davis County . . . , ch. 18, § 1, 1846 Iowa Acts 33, 33-34; Act to Indemnify James Talbert . . ., no. 66, 1828-29 La. Acts 120; Act to Indemnify Brigadier-General Andrew Pickens . . . From Vexatious Suits . . ., 1784 S.C. Acts 27, 28.

[286] See, e.g., Act to Authorize . . ., no. 41, § 2, 1839-40 Wisc. Laws 49, 49; Bancroft v. Lynnfield, 35 Mass. (18 Pick.) 566, 568 (1836); RECORDS OF THE TOWN OF NEWARK, NEW JERSEY, FROM ITS SETTLEMENT IN 1666, TO ITS INCORPORATION AS A CITY IN 1836, at 213, 239 (Newark, New Jersey Historical Society, 1864); *Editor's Closet*, NORTHERN WHIG, Mar. 29, 1814, at 3.

[287] Manners, *supra* note 30, at 83.

[288] *See generally* Pfander & Hunt, *supra* note 210, at 1889-1917.

[289] *See id.*, at 1868-69; James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 780 (2019).

[290] *See, e.g.*, Act to Increase the Penalty in Bonds Hereafter to be Given by Constables, ch. 10, § 1, 1824 Tenn. Pub. Acts 16, 17; Act Obliging . . ., ch. 19, pmbl., § 4; *in* 1 DEL. 1797, *supra* note 218, at 60, 60-61; Act for . . . Small Debts, ch. 250, § 19, *in* 2 DEL. 1797, *supra* note 218, at 1041, 1048-49; Act for . . . the Poor, ch. 218, § 11, *in* 2 DEL. 1797, *supra* note 218, at 988, 993; 1 HAYWOOD & COBBS, *supra* note 114, at 48 (law passed in 1824) (constable); 1 TUCKER, *supra* note 208, at 45. *See generally* RAO, *supra* note 92, at 67; Funk & Mayson, *supra* note 30, at 1846-48; Kent et al., *supra* note 28, at 2166-68; Manners & Menand, *supra* note 27, at 39-40.

[291] Barret v. Reed, 2 Ohio 409, 411 (1826).

[292] FOURTH REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE CIVIL CODE OF PENNSYLVANIA 102-103 (Harrisburg, H. Welsh, 1834).

[293] *See* Matheson, *supra* note 30, at 731-32.

expected liabilities—in Massachusetts, justices of the peace were expected to adjudicate the "sufficiency of the security given" by the sheriff,[294] and a Pennsylvania statute only required a surety from a constable if he lacked freehold property.[295] As a practical matter, bond requirements created patronage relationships between officers and the local notables who could afford to back them (though sureties could come from a range of backgrounds).[296] Officers in turn could demand bonds from their deputies guaranteeing the faithful execution of their duties.[297] Courts frequently encouraged this practice—a Kentucky court said that deputies had a "moral" and "legal" obligation to indemnify their principals;[298] a Massachusetts court said that if a sheriff declined to take such a bond from his deputy, "it [was] his own negligence."[299]

Indemnification agreements could also align incentives by forcing those demanding government services to internalize the risks they created. For instance, Massachusetts sheriffs who attached contested property were responsible for maintaining the property while the action was pending. These obligations could be onerous—in one case, a sheriff was held liable for failing to produce several cattle who had been entrusted to his care five years prior.[300] These sort of open-ended commitments made sheriffs reluctant to enforce creditors' writs. To avoid this risk, officers could leave the goods in the hands of the debtor provided they obtained "an accountable receipt from some friend of the debtor."[301] They could also demand indemnification from the creditor.[302] Over the course of the nineteenth century, a number of state legislatures codified a sheriff's right to demand indemnification from creditors in cases of contested property,

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[294] GOODWIN, *supra* note 158, at 14.
[295] *See* Act to Amend . . ., ch. 132, § 29, 1809-10 Pa. Laws 208, 222.
[296] See Gould, *supra* note 93, at 416-20; Matheson, *supra* note 30, at 727-31.
[297] Fitch v. Jones, 1 Root 248, 248 (Conn. Super. Ct. 1791); Lewis v. Crockett, 6 Ky. (3 Bibb) 196, 196 (1813) ("to keep said C clear, free, and indemnified"); Amos v. Johnson, 3 H. & McH. 216, 216 (Md. 1794) ("well and faithfully execute"); Hughes v. Smith, 5 Johns. 168, 168 (N.Y. Sup. Ct. 1809); Banner v. McMurray, 12 N.C. (1 Dev.) 218, 129 (1827) ("faithful conduct"); Postmaster-General v. Early, 25 U.S. (12 Wheat.) 136, 151 (1827) ("faithful execution" bond from Georgia); Meredith v. Johns, 11 Va. (1 Hen. & M.) 585, 585 (1807) ("due execution"); 1 JOSEPH BACKUS, A DIGEST OF LAWS RELATING TO THE OFFICES AND DUTIES OF SHERIFF, CORONER AND CONSTABLE 463-64 (New York, Joseph Backus, 1812).
[298] Baldwin v. Bridges, 25 Ky. (2 J.J. Marsh) 7, 9 (1829)
[299] Esty v. Chandler, 7 Mass. (7 Tyng) 464, 466 (1811).
[300] Sumner, *supra* note 88, at 12.
[301] GOODWIN, *supra* note 158, at 42.
[302] *See* Bond v. Ward, 7 Mass. (7 Tyng) 123, 126 (1810); Marshall v. Hosmer, 4 Mass. (4 Tyng) 60, 63 (1808). *See also* Clark v. Skinner, 20 Johns. 465, 468 (N.Y. Sup. Ct. 1823).

sometimes overruling traditional common-law rules that forced sheriffs to bear the risk themselves.[303]

These types of indemnification agreements helped dull the sting of personal liability, and judges kept them in mind when enforcing seemingly harsh liability rules. For instance, Chief Justice Parker cited the fact that an officer could demand indemnification from a creditor as a reason to believe the "hardship" imposed by liability was "imaginary."[304] However, courts were mindful that indemnification could create perverse incentives, and might not enforce indemnification agreements that encouraged officers to breach their duties.[305] For instance, some courts would invalidate bonds "for ease and favor," whereby debtors gave sheriffs unauthorized bonds to avoid going to prison.[306]

In some cases, bonds even extended an officer's oversight authority. A South Carolina militia colonel, for instance, required the fine collector to pledge a bond for the faithful performance of his fine-collection duties even though the colonel had no formal right to the money; the court praised the "laudable vigilance" with which the colonel executed his role as "the organ of the law to compel the performance of this service."[307] In another case, the trustees of a school district used a bond to oversee a school commissioner's use of public funds, authority they otherwise would have lacked.[308] Conversely, an officer could indemnify his underlings to enhance his control. For instance, when a New York commissioner of highways ordered an inhabitant to destroy a gate across the road, the charge balked, thinking (correctly) that the gate belonged to a turnpike company; in response, the commissioner told the inhabitant that "he would indemnify them" to induce the worker to break the gate.[309]

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[303] *See* Cole v. Fenwick, 21 Va. (Gilmer) 134, 138 (1820) (opinion of Roane, J.); Act to Reduce . . . (1819), ch. 134, § 25, *in* 1 REVISED CODE OF THE LAW OF VIRGINIA 533-34 (Richmond: Thomas Ritchie, 1819); Davis v. Commonwealth, 54 Va. (13 Gratt.) 139, 143 (1856). *See also* MECHEM, *supra* note 66, at 488.
[304] Com. v. Kennard, 25 Mass. (8 Pick) 133, 136 (1829); Campbell v. Sherman, 35 Wis. 103, 110 (1874).
[305] See, e.g. Ayer v. Hutchins, 4 Mass. (4 Tyng) 370, 373 (1808); Wheeler v. Bailey, 13 Johns. 366, 366 (N.Y. Sup. Ct. 1816); Denson v. Sledge, 13 N.C. (2 Dev.) 136, 147 (1829) (opinion of Henderson, C.J.); Reid v. Hood, 11 S.C.L. (2 Nott & McC.) 168, 171-72 (1819) (expressing skepticism about a bond but ultimately enforcing it); Stevens v. Webb, 2 Vt. 344, 347 (Vt. 1829). For a case of an indemnification agreement that was questioned on these grounds, see Nelson v. Milford, 24 Mass. (7 Pick.) 18, 26 (1828).
[306] *See* GOODWIN, *supra* note 158, at 76-77; Denson, 13 N.C. (2 Dev.) at 148 (opinion of Henderson, C.J.); Given v. Driggs, 1 Cai. R. 450, 459 (N.Y. Sup. Ct. 1803) (Kent, J.).
[307] Cross v. Gabeau, 17 S.C.L. (1 Bail.) 211, 214 (1829).
[308] *See* Todd v. Cowell, 14 Ill. 71, 72-73 (1852).
[309] Coventry v. Barton, 17 Johns. 142, 142 (N.Y. Sup. Ct. 1819); *see also* NORTHERN WHIG *supra* note 286, at 3.

4. Defending Against Liability

This punishing liability regime could significantly hamper officers' ability to implement the law, particularly those engaged in unsympathetic actions like tax collection. One colonial South Carolina statute decried the "contentious suits which have been, and daily are . . . prosecuted against justices of the peace, bailiffs, constables, serjeants in the militia, and other officers . . . by evil disposed, contentious persons to their . . . discouragement in doing of their offices."[310] English authorities could and did pass statutes targeting such vexatious litigation. Indeed, in his 1735 abridgement, the English lawyer John Lilly observed that "Publick Ministers of Justice are favoured in Law" because of the procedural advantages given to them by a seventeenth-century English statute.[311]

Some statutes protected officers from being hailed into far-flung jurisdictions by requiring plaintiffs to bring suit in the county where the alleged trespass occurred.[312] Others let them plead the general issue (i.e., argue that they did not engage in the alleged conduct) in addition to the special issue (i.e., that their conduct was justified by the law) rather than having to choose between pleadings as most litigants did.[313] Statutes could also shift burdens of proof and presumptions, requiring wronged parties to prove that the contested property belonged to them.[314] Yet another set of statutory provisions—which one justice of the peace manual called the constable's "indemnity"—forced plaintiffs to pay officers double costs if their suit was not meritorious;[315] this arrangement, a litigant observed, served to "punish the adverse party," thereby deterring suits, and also to "indemnify [officers] against extraordinary losses and expenses."[316] The First Congress applied several of these strategies to customs officers.[317]

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[310] Act for Ease . . . (1733), no. 556, pmbl., *in* 3 THOMAS COOPER, THE STATUTES AT LARGE OF SOUTH CAROLINA 366 (Columbia, S.C., A. S. Johnston, 1838).
[311] *See* 2 LILLY, *supra* note 59, at 323 (citing Act for Ease in Pleading, Agaynst Troublesom and Contencious Suits, 21 Jac. I c. 12).
[312] *See, e.g.*, Act for the More Easy Pleading in Certain Suits, ch. 47, 1801 N.Y. Laws 72, 72.
[313] *See* 2 LILLY, *supra* note 59, at 323; 1801 N.Y. Laws at 72**.** *See generally* Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J. L. & PUB. POL'Y 105, 113-15 (2023).
[314] *E.g.* Seeley v. Birdsall, 15 Johns. 267, 269 (N.Y. Sup. Ct. 1818); Daniel J. Hulsebosch, *The American Revolution (II): The Origin and Nature of Colonial Grievances*, *in* BRITISH NORTH AMERICA IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 289, 308 (Stephen Foster ed. 2013).
[315] PARKER, *supra* note 226, at 100. *See also* Act for Ease . . . (1733), § 1 *in* 3 COOPER, *supra* note 310, at 366; 1801 N.Y. Laws at 72; WHITE, *supra* note 40, at 432.
[316] McFarland v. Crary, 8 Cow. 253, 254-55 (N.Y. Sup. Ct. 1828).
[317] Act to Regulate the collection of Duties . . ., ch. 5, § 27, 1 Stat. 29, 43-44 (1789).

It would be a mistake to take from these defenses—as some commentators do—that something like contemporary qualified immunity existed in 1871,[318] much less 1787.[319] In his celebrated *Entick v. Carrington* opinion, Lord Camden declared some of these statutes as ones that "chang[ed] the common law for the benefit of the parties concerned,"[320] drawing on an opinion by Edward Coke interpreting the statutes to be in derogation of the common law.[321]

In some contexts, courts or statutes might immunize some reasonable mistakes, particularly in combat situations and actions subject to judicial oversight.[322] An officer acting pursuant to a warrant might be free from liability for a mistake, though he still had to police the validity of his warrant.[323] Additionally, early-nineteenth-century judges might permit naval officers to seize disputed vessels and bring them to prize courts if they had probable cause for doing so, although there was no such protection available for "municipal seizures" like those enforcing revenue laws, for instance.[324]

Such protections were the exception rather than the rule, as evidenced by the narrowness with which they were articulated. The next Section shows how important these liability rules, and the implicit vision of officeholding more generally, were to the drafting and ratification of the Constitution. Americans' attachment to officer suits even helped inspire portions of the Bill of Rights.

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[318] *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1864-65 (2018).
[319] *See* Oldham, *supra* note 312, at 127 ("Those immunities were part of the common law").
[320] Entick v. Carrington (1765), 19 Howell's State Trials 1029, 1062 (C.P.). To his credit, Oldham notes as much. *See* Oldham, *supra* note 312, at 121.
[321] *See* Christian Burset & T.T. Arvind, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L. REV. 265, 321 (2022).
[322] Nielson and Walker give the example that plaintiffs in malicious prosecution actions had to prove their tortfeasors (officers or otherwise) lacked probable cause, meaning that citizens and officers were protected by implication if they caused legal proceedings leading to an arrest. *See* Nielson & Walker, *supra* note 318, at 1866. This Article does not include this provision because it was not distinctive to officers, nor did it cover the kinds of actions described in this Article. For instance, as late as 1928, the law governing arrests differed from that governing malicious prosecutions. *See* Oliver P. Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction*, 77 U. PA. L. REV. & AM. L. REG. 155, 170-76 (1928)
[323] *See infra* notes 262-267; Act to Regulate . . ., § 27, 1 Stat. at 43.
[324] Apollon, 22 U.S. 362, 372-73 (1824). *See generally* Andrew Kent, *Federal Courts, Practice & Procedure: Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755, 1772-77 (2021). A reasonable mistake of law could nonetheless sustain a certificate of probable cause, United States v. Riddle, 9 U.S. 311, 313 (1809), which was consistent with how courts treated mistakes of law in the case of warrants, *see infra* notes 256-262, though unlike warrants, the certificates were issued post-hoc. *See* Act to Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 89, 1 Stat. 627, 696 (1799).

E. The Constitutional Law of Officers

The Constitution did not explicitly encode some of these specific common-law rules because the Framers were more concerned about corruption than regulating subordinate officers. George Mason claimed that patronage appointments had let the crown extend its corruption over "every town and village in the kingdom" during the previous century.[325] Several Framers less colorfully expressed concern that an unscrupulous executive could use the appointment power to bribe legislators.[326] A few supporters of a strong executive even welcomed the support that could be cultivated by patronage.[327] Conversely, they worried that if Congress controlled appointments, it could create offices to pay Congressmen and their friends.[328] The final Constitution reflected at least some of these concerns, banning electors from holding offices,[329] prohibiting legislators from holding non-legislative offices,[330] and preventing American officers from holding foreign offices without Congressional approval.[331] The Appointments Clause also reflected this concern about corruption, splitting control of appointments for principal officers between the President and the Senate, and giving Congress power to vest inferior officer appointments in other bodies.[332] Focused as they were on high officers, the Framers did not significantly discuss inferior officers, save for a few instances where they discussed a range of tentative Constitutional structures.[333]

The law of officers would have filled that constitutional lacuna. During the Constitutional Convention, Eldridge Gerry decried the "chimerical" idea that the President would be responsible for the behavior of his appointees, noting that "[t]he President can not know all characters, and can therefore always plead ignorance."[334] Indeed, Virginia had recently discovered how difficult it could be for a chief executive to gather on-the-ground information

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[325] 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION 380-81 (Max Farrand, ed., 1911) [hereinafter FARRAND].
[326] *See, e.g.*, *id*., at 73 (Randolph), 103 (Franklin); *see also* David M. Driesen*, Appointment and Removal*, 74 ADMIN. L. REV. 421, 453-54 (2022); Bamzai & Prakash, *supra* note 10, at 1831; 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES at app. 342 (Phila., William Young Birch & Abraham Small, 1803).
[327] *See, e.g.*, 1 FARRAND, *supra* note 325, at 302, 376 (Hamilton), 513 (Morris).
[328] *See id.*, at 376-80, 386-392; 2 *id.* at 287, 522, 524, 530.
[329] U.S. Const. Art. II, § 1, cl. 3.
[330] U.S. Const. Art. I, § 6, cl. 2.
[331] U.S. Const. Art. I, § 9, cl. 8.
[332] *See* U.S. Const. Art. II, § 2, cl. 2; Driesen, *supra* note 326, at 460-61.
[333] *See* Mascott, *supra* note 3, at 498.
[334] 2 FARRAND, *supra* note 325, at 539.

about its officers.[335] As lawyers and government officials, many of the Framers would have encountered the law of officers in regular practice,[336] and would have expected it to help. Indeed, the language of the Constitution reflects the idea that duty would be a central organizing principle for officeholding. The Opinions Clause envisioned that principal officers would be charged with "[d]uties" by statute and would be expected to know them.[337] The Take Care Clause explicitly charged the President with the duty to vindicate the law.[338] And although they did not root it in a specific textual provision of the Constitution, the Framers understood that the power to create offices would lie with Congress, a decision whose imprint can be seen in the Necessary and Proper Clause and the Appointments Clause.[339]

Those who lived far from the seat of government more explicitly advocated for law-of-officers remedies. Delegates at North Carolina's Ratification Convention, for instance, thought impeachment could not be the sole remedy for abuses committed by inferior officers, as it would require victims to travel and bring witnesses hundreds of miles to the seat of government to challenge politically connected insiders.[340] Thus, Archibald Maclaine asserted that the citizens "would have redress in the ordinary courts of common law."[341] Many, though not all, North Carolinians shared Maclaine's belief that common law actions would be available against at least some officers.[342] So too did newspapers in other states. The *Connecticut Courant* reassured concerned citizens that "[e]very department and officer of the federal government will be subject to the regulation and control of the laws."[343] And when he imagined how Americans would resist a tyrannical government under the new Constitutional order, one Antifederalist writer expected

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[335] *See supra* notes 94-96.
[336] *See supra* notes 62-63.
[337] *See* U.S. Const. Art. II, § 2, cl. 1.
[338] *See* U.S. Const. Art II, § 3.
[339] MCCONNELL, *supra* note 5, at 153-55; E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 177-185 (2018).
[340] *Convention Debates, 25 July 1788*, *in* 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION at 262, 267-69 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 2009) [hereinafter DHRC], https://rotunda.upress.virginia.edu/founders/RNCN-02-30-02-0005-0007-0002; Jennifer Mascott, The Ratifiers' Theory of Officer Accountability 26 (George Mason Univ. Legal Studies Research Paper Series No. 22-11, 2022), at 28. *But see Convention Debates*, *supra*, at 271 (minimizing the concern about the political connections of federal officers).
[341] *Convention Debates*, *supra* note 340, at 270.
[342] Mascott, *supra* note 340, at 27-29.
[343] *A Citizen of New Haven Connecticut Courant, 7 January*, *reprinted in* 3 DHRC, *supra* note 340, at 524, 527, https://rotunda.upress.virginia.edu/founders/RNCN-02-03-02-0004-0010-0036. *See also Middlesex Gazette, 22 October*, *reprinted in* 3 DHRC, *supra* note 340, at 394, 395, https://rotunda.upress.virginia.edu/founders/RNCN-02-03-02-0004-0008-0004.

they would "indict the High Officers" and bring "[a]ctions of tre[s]pass" against those who wronged them.[344]

Delegates in Virginia and Maryland expressed concern that the federal court system might tax common-law remedies by forcing plaintiffs to travel long distances to defend their trespass actions.[345] Maryland judge Alexander Contee Hanson pointed to the familiar framework for misfeasance, noting that an officer unable to justify his unlawful actions would face a common-law action in state court.[346] The claim that individuals would not be able to sue in state court, according to Hanson, was a "ridiculous bugbear, fit only to alarm minds."[347] Concerns about protecting the officer suit even helped inspire the Seventh Amendment, which protected Americans' rights to sue their government officials in front of what John Marshall had called "a tribunal in his neighborhood"[348] when he assured Ratifiers that officer trespass suits would be possible under the new regime.[349]

Whatever disagreement there may have been during the Ratification process, the statutory structure created by the First Congress and the common-law cases enforced by state and federal judges vindicated Hanson. The First Congress, for instance, drafted statutes reflecting the traditional law of officers.[350] And judges in the years following ratification readily applied these traditional rules to the officers brought into their courts.[351]

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[344] *From the Dependent Chronicle*, AM. HERALD (Boston, MA), Jan. 7, 1788, at 2. *See also For the Centinel*, MASS. CENTINEL, Jan. 26, 1788, at 3 (anticipating these remedies); MASHAW, *supra* note 30, at 67; Amar, *supra* note 30, at 776-77; James E. Pfander & Rex Alley, *Federal Tort Liability After* Egbert v. Boule*: A Textual Case for Restoring the Officer Suit at Common Law*, 138 HARV. L. REV. at 12-13 (forthcoming, 2025).

[345] 3 FARRAND, *supra* note 325, at 222 (statement of Luther Martin); Debates, in 4 DHRC, *supra* note 340, at 1412, 1429 (statement of George Mason), https://rotunda.upress.virginia.edu/founders/RNCN-02-10-02-0002-0009-0001; *Samuel Chase: Objections to the Constitution, 24-25 April 1788*, *in* 12 DHRC, *supra* note 340, at 631, 638, https://rotunda.upress.virginia.edu/founders/RNCN-02-12-02-0003-0007-0002. *See also* Mashaw, *supra* note 6, at 1322-23 (quoting an article raising this objection).

[346] *Aristedes Maryland Journal, 4 March 1788*, *reprinted in* 11 DHRC, *supra* note 340, at 351, 354-55, https://rotunda.upress.virginia.edu/founders/RNCN-02-11-02-0003-0086.

[347] *Id*., at 355.

[348] *Debates*, *supra* note 345, at 1432.

[349] *See* Amar, *supra* note 30, at 775-79; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 708 (1973).

[350] *See* Mashaw, *supra* note 6, at 1316-18 (statute penalties); Mascott, *supra* note 3, at 507-509 (officer-deputy relationship); Shugerman, *supra* note 181, at 283-85 (sureties).

[351] *See, e.g.*, MASHAW, *supra* note 30, at 71-72; Lewis v. Crockett, 6 Ky. (3 Bibb) 196, 196-97 (1813) (federal marshal); McMillan v. Eastman, 4 Mass. (4 Tyng) 378 (1808) (federal tax collector); Henderson v. Brown, 1 Cai. R. 92, 96 (opinion of Thompson, J.) (federal tax collector).

The federal departments were creatures of statute. In an unpublished draft of his famous Law Lectures, James Wilson started a section on "subordinate officers" by noting that the Department of State was "established, and her Duties and Powers are assigned by Acts of Congress."[352] When they set to drafting statutes creating the new departments, Congress gave the President considerable control over some of his subordinates, particularly the heads of Departments. Throughout the Constitutional Convention and Ratification debates, a number of advocates of a strong federal government had pressed for Secretaries who would function essentially as deputies of the President,[353] and lawmakers statutorily adjusted the level of presidential control on a department-by-department basis to give the President greater or lesser control as they felt appropriate.[354] Between his statutory powers, political clout, and the Opinions Clause of the Constitution, Washington could wield considerable influence over the Secretaries,[355] and "rare[ly]," other officers.[356] But even Washington recognized where the law circumscribed his control.[357]

II. The Law of Officers Meets the Administrative State

Writing in 1886, the Victorian jurist V.A. Dicey decried the French concept of "administrative law," which he felt was antithetical to English liberty. A core principle of administrative law was that government officials were subject to a special body of rules when they harmed private citizens, placing them on different footing than they would be if a private citizen had inflicted the same harm.[358] To compound the problem, administrative law's focus on "separation of powers"[359] meant that courts withdrew from overseeing officers; rather, "quasi-judicial" administrative courts, not judges, handled discipline.[360] Instead of asking "whether the complainant has been injured," for instance by "a policeman," the question before such tribunals would be whether the policeman "acted in discharge of his duties and in *bona fide* obedience to

[352] James Wilson, Notebook No. 30, at 9 (1790-91) (with Free Library of Philadelphia).
[353] PRAKASH, *supra* note 141, at 185.
[354] Lessig & Sunstein, *supra* note 129, at 27-30.
[355] *See* WHITE, *supra* note 40, at 26-30.
[356] *See id.*, at 31.
[357] *See, e.g.*, *supra* note 141, 147.
[358] A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 183-85 (London, Macmillan, 1885).
[359] *Id*., at 185-87.
[360] *See id*., at 189.

the commands of his superiors."[361] Such a system, whatever its benefits, was inconsistent with English (and American) commitment to the rule of law: "[o]fficials, like everybody else, are accountable for their conduct to a Court of Law, and . . . a jury."[362]

The administrative lawyers saw things differently. As Frank Goodnow wrote in his trailblazing 1893 book on the subject, there was "hardly any room" for tort and contract law in administrative law.[363] The following year, Ernst Freund observed that at the state level, Americans believed that "every officer [was] responsible to the law, and that for the enforcement of the law the courts [were] sufficient."[364] But for Freund, criminal and civil actions were "too cumbrous and weighty" for many circumstances; he preferred executive-branch removal power.[365] Indeed, he complained, there was "no unity in the executive department," and that "the officer [had] no one to look to for instruction and guidance except the letter of the statute."[366] Because officers were responsible to "the law" they were not "bound to the chief executive by their tenure; for they [did] not necessarily hold by his appointment or subject to his power of removal. Nor [did] they owe him obedience or any regard whatever;" indeed, "their duties [were] not derived from him nor liable to his control."[367] Moreover, state-level government was staffed by non-professional officeholders. And in general, Freund concluded, "non-professional tenure of office and administrative independence on the one side, and hierarchical organization and professional office-holding on the other, go hand in hand."[368]

Five decades later, the prominent administrative lawyer Walter Gellhorn and his co-author C. Newton Schenck described individual officer liability as "a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons, so-

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[361] *Id*., at 197.
[362] *Id*., at 201. *See also id*., at 213.
[363] FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 11 (New York, Knickerbocker Press, 1893).
[364] Ernst Freund, *The Law of Administration in America*, 9 POL. SCI. Q. 403, 416 (1894). Following Frank Goodnow, Freund believed the federal executive enjoyed unfettered removal power. *Id*, at 408 (citing GOODNOW, *supra* note 363, at 53-66).
[365] Freund, *supra* note 364, at 416.
[366] *Id*., at 409-10.
[367] *Id*., at 409.
[368] *Id*., at 420. Admittedly, Freund thought the federal government was an exception such that hierarchical organization and non-professional personnel operated together. *Id*. And indeed the rest of this Section documents that by 1894 the transition was well under way at the federal level and in some jurisdictions like New York. But Freund's recognition that the law of officers frustrated hierarchy and tended to run with non-professional personnel is important, particularly given this Article's evidence showing how these dynamics played out at both the state- and federal level in the early republic. *See generally supra* Part I.

called Public Officers, who were in no way responsible to ministers or elected legislatures or councils."[369] It was "utterly unsuited to the twentieth-century state, in which the Public Officer has been superseded by armies of anonymous and obscure civil servants acting directly under the order of their superiors, who are ultimately responsible to an elected body."[370] They concluded that "[t]ransplanting the principles of private tort law into the field of official relationships has not sufficed to protect" people, arguing instead for a new jurisprudence of public responsibility for private injuries.[371] This Part recounts how Dicey lost to Goodnow, Freund, Gellhorn, and Schenck.

Even as Dicey was writing in the late nineteenth century, the transformation in the state and its law was underway in the United States. For decades, American jurists in the mold of Joseph Story had crafted special exceptions to traditional private law rules of contract, liability, and agency for state officials. Moreover, by the late-nineteenth century, officers were increasingly replaced by the new category of government "employees." As Thomas Cooley explained, two of the key characteristics distinguishing an officer from a mere employee were the officer's "independence" and his "liability to be called to account . . . for misfeasance or non-feasance."[372] Transformations in state structure and legal doctrine were starting to make officers less and less common relative to employees. Although legal scholars in the 1920s and 30s observed that officer liability was still present,[373] they typically agreed that it was on its way out. Mandamus, injunction, and declaratory relief were replacing damages actions as ways of testing legal authority,[374] statutes and case law frequently limited the personal liability of officers,[375] and governments increasingly assumed liability on their behalf.[376] But these transformations would take decades to unfold.[377]

It is difficult to place precise dates on gestalt changes. Doctrines were nuanced and the institutions they oversaw constantly changed in ways that arguably raised novel legal questions

[369] Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 725 (1947) (quoting W. A. Robinson, *Report of the Committee on Ministers' Powers*, 3 POL. Q. 346, 357-58 (1932)).
[370] Gellhorn & Schenck, *supra* note 369, at 725 (quoting Robinson, *supra* note 369, at 357-58).
[371] Gellhorn & Schenck, *supra* note 369, at 725, 736-41.
[372] Throop v. Langdon, 40 Mich. 673, 682 (1879) (Cooley, J.).
[373] Field, *supra* note 322, at 186.
[374] JOHN M. PFIFFNER, PUBLIC ADMINISTRATION 439 (1936); Leon Thomas David, *The Tort Liability of Public Officers: Part I*, 12 S. CAL. L. REV. 127, 129 (1939); Field, *supra* note 322, at 165.
[375] David, *supra* note 374, at 128-29; Field, *supra* note 322, at 167, 177.
[376] PFIFFNER, *supra* note 374, at 439, 441; David, *supra* note 374, at 129.
[377] *See* Engdahl, *supra* note 189, at 52; Kian, *supra* note 30, at 153-58.

not covered by existing law. Laws also changed unevenly across different jurisdictions. Aspects of the old legal order persisted long after the moral and institutional logics that created them faded from view.[378] These difficulties help explain why scholars of officer liability have struggled to explain what happened to the old model. Jerry Mashaw describes the law of officer liability as "confused and conflicted" by the Jacksonian Era.[379] Ann Woolhandler believes immunity regimes began to develop in 1840.[380] Andrew Kent says "[t]he modern system . . . began in 1857" for customs officers.[381] David Engdahl insists that the "gradual change" began with the Civil War.[382] And Sina Kian puts the transformation between 1880 and 1920.[383]

This Part does not place a hard date on when the law of officers disappeared. Rather, it documents some of the ways administrative bodies emerged (albeit unevenly) over the course of the nineteenth and early twentieth centuries, and notes how the vision of officeholding changed to accommodate them. Some judges played an outsized role: James Kent, for instance, routinely found officer immunity where colleagues found liability,[384] and Joseph Story was a pioneer in limiting liability. Some jurisdictions too. New York, which Tocqueville called "the most advanced" state in terms of "administrative centralization" often articulated new doctrines first.[385] But even where they were adapting, these visions were inconsistent and ever-changing, containing bits of the old alongside pieces of the new.

In a direct sense, this Part does not contradict originalist unitarists, as most of the action happens well after Ratification. However, watching Americans gradually coalesce around a more unitary executive well after 1789 should raise questions about how far unitarism extended or how compelling it was at the Founding. If, as this Part argues, Americans came to the legal vision of the state that underpins unitarism gradually over the nineteenth- and twentieth centuries, unitarist originalists should wonder whether they are imposing an anachronistic vision of the state backwards and imagining consensus where there was conflict.

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[378] *Cf.* Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building in the Fullness of Time*, *in* POLITICAL ORDER: NOMOS XXXVIII, at 111, 112 (Ian Shapiro & Russell Hardin, eds., 1996).
[379] *See* Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861,* 117 YALE L.J. 1568, 1683 (2008).
[380] Woolhandler, *supra* note 30 at 422
[381] Kent, *supra* note 324, at 1768.
[382] Engdahl, *supra* note 189, at 21.
[383] Kian, *supra* note 30, at 153.
[384] Bartlett v. Crozier, 17 Johns. 439, 451 (N.Y. Ct. Corr. Errors 1820); Henderson v. Brown, 1 Cai. R. 92, 102 (N.Y. Sup. Ct. 1803) (opinion of Kent, J.); Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810).
[385] TOCQUEVILLE, *supra* note 186, at 134-35.

A. The Problem of Hierarchical Administration

The nineteenth century saw profound changes in the structure of the American state. Although a hierarchical state apparatus was already nascent in the eighteenth century, its scope, professionalization, and organization by the late-nineteenth century represented "a change in kind" from what came before.[386] State and local governments started tackling new problems in the first few decades of the nineteenth century.[387] Meanwhile, cities spent more money and began offering new services like policing, firefighting, and public health.[388] As they performed these new services, they became "more complex, aggressive, and highly bureaucratized."[389] Even in tiny towns like Oyster Bay, New York the "necessities of a larger population and increased town business" transformed the direct "democracy of the Town Meeting" into "representative government of the Town Board."[390]

By the middle of the century, states started to develop "novel methods" of managing personnel, expanding the ability of superior officials to fire subordinates for their inefficiency.[391] As Bruce Wyman wrote, such "arbitrary" removal authority was "characteristic" and "indispensable in centralized administration."[392] Furthermore, formal rules of personnel management drove out some of the more flexible law-of-deputies methods: for instance, an 1884 treatise writer observed that "more modern rulings" took a harder line against office farming,[393] and a 1939 article noted that the rise of the civil service in the late nineteenth and early twentieth centuries "greatly restrict[ed]" an officer's personal control over his subordinates.[394] Writing at the end of the nineteenth century, Frank Goodnow referred to a new "class of officers whose development has taken place during this century," like the "the American supervisor and county

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[386] WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 222-24 (2022).
[387] *See* LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861, at viii (1954).
[388] ERIC H. MONKKONEN, AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES & TOWNS, 1780-1980S, at 93-108 (1988); JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT, 1650-1825, at 102-10 (1975); Randall G. Holcombe & Donald J. Lacombe, *The Growth of Local Government in the United States from 1820 to 1870*, 61 J. ECON. HIST. 184, 188 (2001).
[389] MONKKONEN, *supra* note 388, at 89.
[390] 8 JOHN COX, OYSTER BAY TOWN RECORDS 334 (1940).
[391] *See* Manners & Menand, *supra* note 27, at 45-52. For such a pivotal transformation in the character of American governance, the revolution in removal remains criminally understudied. The topic awaits its champion.
[392] BRUCE WYMAN, THE PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 178 (1903).
[393] *See* WILLIAM LAW MURFREE, A TREATISE ON THE LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS 49 (St. Louis, Mo., F.H. Thomas, 1884).
[394] *See* David, *supra* note 374, at 128.

commissioner," who were neither fully legislative, executive, or judicial; he termed them "administrative officers."[395]

The federal government developed new capacities as well. In the first few decades of the young Republic, lawmakers expanded the federal government's power to deliver mail, collect taxes, deploy ships, survey public land, and authorize patents, among other functions.[396] It also employed more people, rising from roughly 137 civilian, nonjudicial appointees in 1789 to 2,678 in 1802, 25,713 by 1851, and more than 200,000 by the beginning of the twentieth century.[397] To manage this sprawling number of people, Congress authorized "extensive general rulemaking authority" and created new systems of "administrative adjudication and administrative appeal."[398] Later in the nineteenth century, it passed a flurry of statutes delegating to the President sweeping new power to manage the mushrooming administrative state.[399]

This new administrative reality changed the considerations that had underpinned the law of officers: when asked to prevent Pennsylvania's Treasury Secretary from delegating allegedly judicial duties to a clerk, Chief Justice Gibbs refused to use this "supposed theoretic principle" to "impair the title of the state to millions."[400] These new administrative structures both reflected and entrenched an ascendant set of values that embraced a hierarchically organized government as more democratically responsive and efficacious. Andrew Jackson, for instance, asserted the "novel theory" that "the heads of departments became responsible to the people only because they [are] subordinate to the President."[401] Similarly, James Kent and Joseph Story channeled a Federalist vision of centralized governance, arguing that a "unitary executive" (rather than a

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[395] 2 GOODNOW, *supra* note 363, at 167; *see also* Lessig & Sunstein, *supra* note 129, at 43-47.
[396] *See* MASHAW, *supra* note 30, at 34-35, 82.
[397] *See* Peter J. Kastor, *Washington's Workforce*, *in* WASHINGTON'S GOVERNMENT: CHARTING THE ORIGINS OF THE FEDERAL ADMINISTRATION 57, 71 (Max M. Edling & Peter J. Kastor eds. 2021); JAMES STERLING YOUNG, THE WASHINGTON COMMUNITY, 1800-1828, at 29 (1966) (I included the numbers in the "Nonuniformed" category of the "Fighting establishment," "Revenue-producing functions," "Foreign relations," "Social control and law enforcement" minus district judges, "Citizen benefits and nonrevenue services" and "Miscellaneous"); SUSAN B. CARTER ET AL., HISTORICAL STATISTICS OF THE UNITED STATES: MILLENNIAL EDITION tbl. Ea894-903 (2006). Readers should take the 137 number with a grain of salt, as it excludes some number of appointees. *See* Kastor, *supra* at 71.
[398] MASHAW, *supra* note 30, at 83.
[399] *See* Andrea Scoseria Katz, *A Regime of Statutes: Building a Modern President in Gilded Age America*, 2 J. AM. CONST. HIST. 737, 757-59 (2024).
[400] Commonwealth v. Aurand, 1 Rawle 282, 289 (Pa. 1829).
[401] WHITE, *supra* note 387, at 23. Jackson did not invent the idea that a single chief executive might be more effective or accountable than a multi-headed body. *See, e.g.*, 1 TUCKER, *supra* note 326, at app. 317-19; MCCONNELL, *supra* note 5, at 33-34. But his argument that his election conferred a special democratic legitimacy on his subordinate officers is distinct.

multi-headed executive branch) brought additional democratic accountability and energy to administration.[402] This is not to say the concerns about "monarchical and arbitrary" authority fully dissipated at the first signs of bureaucracy: even as he praised a unitary executive, Story noted the importance of official independence.[403] But times were changing. By the early twentieth century, Progressive intellectuals would combine new tools of hierarchical control and an ideal of political accountability into a potent argument for centralized, presidential administration.[404]

As the state structure changed, the character of those working for the state changed as well. Early in the nineteenth century, the rise of the political party broke the hold of local notables. Parties were less interested in recruiting local notables to staff public administration than they were in drawing middle-class professionals who could deliver votes and manage organizations.[405] Later in the century, reformers would create the civil service, which replaced the party system's patronage appointees with meritocratically appointed technocrats tasked with implementing the popular will.[406] Culturally and institutionally, the officer dwindled from public view.

B. Decline of the Law of Officers

1. Quasi-Judicial Officers

Writing in the early-twentieth century, Bruce Wyman stated that the law's ability to authorize officers to exercise discretion free from the threat of liability was "at the foundation of administrative law."[407] Sweeping away what Wyman called "external law" gave the state an autonomous field to act; when paired with what Wyman called the "internal law" (the law structuring how officers within the agency would relate to one another), it created a "scope for the internal law within the external law."[408] This was the American instantiation of the administrative law Dicey had inveighed against.

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[402] *See* 1 KENT, *supra* note 59, at 254-55; 3 STORY, *supra* note 148, at 280-285, 293.
[403] *See* 3 STORY, *supra* note 148, at 391-92.
[404] *See generally* Andrew Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2232-37 (2023); SHEFTER, *supra* note 79, at 77-81.
[405] *See generally* SHEFTER, *supra* note 79, at 66-71.
[406] *See generally*, *id*., at 72-78
[407] WYMAN, *supra* note 392, at 4.
[408] *Id*., at 8.

We can see this hierarchy-enhancing two-step play out with the doctrine of quasi-judicial immunity. Over the nineteenth century, traditional protections for judicial duties[409] expanded in several respects: they likely extended to more offices, became more absolute, and provided more protection for the ministerial officers implementing superiors' decisions. These moves let courts and lawmakers carve out a wider space for administrative action and use the external law to enforce obedience to the internal law. As judges articulated these protections, they increasingly de-emphasized the law-of-officers's traditional focus on combatting ignorance, malice, or torpor and increasingly emphasized the importance of hierarchy as way of instilling energy in governance and vindicating democratic decisions.

This two-step turned individual officer decisions into the product of a semi-autonomous bureaucracy subject to a different set of legal rules than those governing private actors. One group of prominent lawyers and scholars declared that "'[a]dministrative law' is a convenient term to indicate that branch of modern law relating to the executive department of government when acting in a quasi legislative or quasi judicial capacity."[410] Quoting an 1895 Supreme Court case, Bruce Wyman emphasized the connection between quasi-judicial officers and the new world of administrative law when he remarked that an evidentiary determination was "only quasi judicial. It [was] as much an administrative as a judicial act. It [was] only one step in the procedure by which" the "executive department" made a final decision.[411] On its own, quasi-judicial immunity could have granted officers the roving autonomy of a previous era,[412] but when paired with hierarchical internal-law obligations, quasi-judicial immunity created the preconditions for an autonomous administrative state.

a) Protection for Ignorance

By the early-nineteenth century, courts protected non-judge officials engaged in "judicial" duties.[413] Drawing on recent English precedent, New York similarly protected non-judicial officials who were "called to exercise their deliberative judgments . . . [provided] their motives

[409] *See supra* notes 256-257.
[410] ERNST FREUND ET AL., THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 5 (1923). *See also* FRANK GOODNOW, POLITICS AND ADMINISTRATION 80 n1 (1900) (citing liability cases).
[411] WYMAN, *supra* note 392, at 217-18 (quoting Orchard v. Alexander, 157 U.S. 372, 379 (1895)).
[412] *See supra* Section I.C.1.
[413] *See supra* note 256.

[were] pure," and a number of other states followed suit.[414] But this approach was somewhat haphazard and courts regularly used the judicial-ministerial dichotomy to decide whether an official's action received protection.[415] In an 1828 case, the Kentucky Court of Appeals decided that since the trustees of a town were "not judicial officers" they "must be considered as ministerial officers . . . [and] act at their peril" when enforcing a statute that gave them some discretion.[416] There was no intermediate option between a judge and someone who acted at their peril.

Over the course of the nineteenth century, courts developed the category of "quasi-judicial" duties.[417] A "quasi-judicial officer" was generally one whose "powers [we]re discretionary, to be exerted or withheld according to his own judgment," though the fact that an officer was making complicated decisions did not necessarily make his duties discretionary.[418] Like a judge, a quasi-judicial officer would neither be punished for mere errors or nonfeasance.[419]

It is hard to say for sure, but a qualitative assessment of intra- and inter-jurisdictional dynamics suggests judges increasingly accepted the practice. For instance, in 1810, when John Marshall encountered a law requiring a slave owner to prove "to the satisfaction of the naval officer" that his captive had lived in a different state for the past three years, Marshall was astonished that "this quasi judge" would "be made the sole judge of the right of one individual to liberty, and of another to property."[420] But by 1849, the Court had changed its tune, finding that a

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[414] Jenkins v. Waldron, 11 Johns. 114, 121 (N.Y. Sup. Ct. 1814) (citing Harman v. Tappenden (1801), 102 Eng. Rep. 214; 1 East 555; and Drewe v. Coulton (1787), 102 Eng. Rep. 217; 1 East 562 (note to *Harman*)). *See also* Swift v. Chamberlain, 3 Conn. 537, 543 (1821); Bridge v. Oakey, 12 Rob. (LA) 638, 638 (La. 1846); Weckerly v. Geyer, 11 Serg. & Rawle 35, 39-40 (Pa. 1824); Reid v. Hood, 11 S.C.L. (2 Nott & McC.) 168, 169 (Const. Ct. App. S.C. 1819) (not limiting its opinion to "judicial officers . . . alone." *But see* Lincoln v. Hapgood, 11 Mass. (11 Tyng) 350, 355 (1814).

[415] *See, e.g.,* Phelps v. Sill, 1 Day 315, 322 (Conn. 1804) (argument of counsel); McConnell v. Kenton, 1 Ky. (1 Hughes) 257, 288 (1799); Tillotson v. Cheetham, 2 Johns. 63, 70-71 (N.Y. Sup. Ct. 1806), *rev'd* 5 Johns. 430 (N.Y. Ct. Corr. Err. 1809); Com. v. Sheriff & Keeper of Jail of Northumberland Cnty., 4 Serg. & Rawle 275, 277 (Pa. 1818); Armstrong v. Campbell, 4 S.C.L. (2 Brev.) 259, 260 (Const. Ct. App. 1808); United States v. Lawrence, 3 U.S. 42, 47 (1795); *Ex parte* Pool, 4 Va. (2 Va. Cas.) 276, 276-79 (1821); 3 DANE, *supra* note 59, at 60; 2 KENT, *supra* note 59, at 24-25; Baude, *supra* note 282, at 117-18.

[416] Jarman v. Patterson, 23 Ky. (7 T.B. Mon.) 644, 649 (1828).

[417] *See generally*, Baude, *supra* note 282, at 116-18; Woolhandler, *supra* note 30, at 429.

[418] THOMAS GASKELL SHEARMAN & AMASA ANGELL REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 186 (New York, Baker, Voorhis & Co., 1869). On discretion not necessarily making duties quasi-judicial, see MONTGOMERY HUNT THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS 511-13 (New York, J.Y. Johnson, 1892).

[419] SHEARMAN & REDFIELD, *supra* note 418, at 186 & n.1.

[420] Scott v. Negro Ben, 10 U.S. (6 Cranch.) 1, 6-7 (1810).

naval officer "never should be[] made answerable for any injury" when imprisoning one of his crew because he was "in many respects, quasi judicial."[421]

Across jurisdictions, quasi-judicial immunity appears to have expanded over the century; as one West Virginia court remarked at the end of the nineteenth century, "*quasi* judicial duties seem to be largely on the increase."[422] Confronting the question of whether election inspectors could be held liable for wrongly but non-maliciously denying someone the vote, Pennsylvania's high court noted conflicting English authority and split state-level caselaw in 1824;[423] but by 1890, only Massachusetts and Ohio had adopted this strict liability rule for election inspectors.[424] Similarly, although jailers were traditionally held liable for escapes in the early nineteenth century, some late-nineteenth century authorities concluded that penitentiary wardens—who typically exercised more expansive delegated authority and oversaw more bureaucratic organizations—were protected as quasi-judicial officers.[425] Moreover, many of these quasi-judicial officers presided over new kinds of institutions: they were the "supervisor[s] and . . . commissioners" that Goodnow identified as innovations of the nineteenth century.[426]

In some cases, lawmakers even explicitly designed quasi-judicial arrangements that consolidated hierarchical review in the administrative state rather than the courts. For instance, starting in 1857 and proceeding over the next few decades, Congress gradually replaced the system of damage actions against tax collectors with an internal administrative appeals procedure.[427] And during the Civil War, Congress and some states passed "indemnity acts," protecting soldiers and other government officials from liability for following presidential

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[421] Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849).
[422] State v. South Penn Oil Co., 42 W. Va. 80, 87 (1896).
[423] *See* Weckerly v. Geyer, 11 Serg. & Rawle 35, 40 (Pa. 1824).
[424] MECHEM, *supra* note 66, at 459.
[425] *Compare supra* notes 235-236; Randolph v. Donaldson, 13 U.S. (9 Cranch.) 76, 86 (1815) *with* MECHEM, *supra* note 66, at 424 (citing Schoettegen v. Wilson, 48 Mo. 253, 257-58 (1871)). On the transformation of prisons see, e.g., REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941, at 54-55 (2008); ASHLEY T. RUBIN, THE DEVIANT PRISON: PHILADELPHIA'S EASTERN STATE PENITENTIARY AND THE ORIGINS OF AMERICA'S MODERN PENAL SYSTEM, 1829-1913, at 66-71 (2021).
[426] *Supra* note 395. *See, e.g.*, Colusa County v. De Jarnett, 55 Cal. 373, 375 (1880); Peck v. People, 153 Ill. 454, 457-58 (1894); Brimmer v. Boston, 102 Mass. 19, 22 (1869); Bellinger v. Gray, 51 N.Y. 610, 618 (1873); Hannon v. Grizzard, 99 N.C. 161, 163-64 (1888); Hawkins v. Kercheval, 78 Tenn. 535, 540 (1882).
[427] *See* Kent, *supra* note 324, at 1768.

orders.[428] Such actions gave executive officers discretionary authority to shield themselves and those carrying out their orders from personal liability from damages actions.

b) Protection for Malice

In 1810, the notably ambitious[429] New York Supreme Court shielded the Chancellor from a false imprisonment action involving a disputed habeas corpus petition; James Kent justified this privilege by the need to protect the "independence" of courts from the "degradation of private prosecution.[430] Not everyone was convinced. Dissenting State Senator DeWitt Clinton referred to the doctrine as a "Telamonian shield of judicial irresponsibility" that protected "tyrannical" judges from accountability.[431] Nevertheless, over the next few decades, a few courts cited Kent's opinion as they gradually expanded judicial immunity—for instance, shielding even judges who acted maliciously.[432] In 1872, the United States Supreme Court joined the trend, holding that judges could avoid liability for actions taken in "excess of their jurisdiction," even when acting "maliciously and corruptly," rules that one authority noted swept "further" than the traditional approach.[433] Some courts pushed this privilege further, protecting malicious inferior courts[434] and eventually even quasi-judicial officers.[435]

For much of the nineteenth century, quasi-judicial officers had not received protection if their decisions were motivated by malice.[436] That trend began to change by at least 1846 when the New York Supreme Court went out of its way to state that officials performing judicial duties

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[428] Engdahl, *supra* note 189, at 49-51.
[429] *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS 49-56 (2012); Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 713-18 (2018).
[430] Yates v. Lansing, 5 Johns. 282, 298 (N.Y. 1810), *aff'd* 9 Johns. 395 (N.Y. Ct. Corr. Err. 1811).
[431] Yates, 9 Johns. at 436-37 (Senator Clinton, dissenting).
[432] *See, e.g.*, Pratt v. Gardner, 56 Mass. (2 Cush.) 63, 70 (1848) (Shaw, C.J.); Mangold v. Thorpe, 33 N.J.L. 134, 136-37 (1868) (explicitly overturning the contrary rule articulated in Neighbour v. Trimmer, 16 N.J.L. 58, 60 (1837)); Wilson v. Mayor of New York, 1 Denio 595, 599 (N.Y. Sup. Ct. 1845).
[433] MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS 127 (Chicago, Callaghan, 1892).
[434] NEWELL, *supra* note 433, at 134 n2. This change was particularly significant because courts were often skeptical of inferior tribunals. *See infra* note 450.
[435] *See* THROOP, *supra* note 418, at 674.
[436] *See supra* notes 207-208; JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 367 (Chicago, T.H. Flood, 1889); Anderson v. Baker 23 Md. 531, 626 (1865); Reed v. Conway, 20 Mo. 22, 44-53 (1854); Waldron v. Berry, 51 N.H. 136, 140-42 (1871) (surveying jurisdictions). *But see id.*, at 140-42 (noting some jurisdictions that had explicitly abandoned the traditional rule or seemed likely to do so by 1871).

were not liable for malicious actions.[437] By 1868, at least one treatise explicitly endorsed this new rule by drawing almost exclusively on English and New York case law; Thomas Cooley then used it in 1880 to justify a rule that the President, governors, and judicial officers were exempt from liability for official utterances.[438] In 1890, one treatise writer concluded that rather than the traditional rule, "the better and the safer rule" would be to grant quasi-judicial officers the same malice protection as judges, and listed a number of cases that did so, signaling the increasing acceptance of the practice.[439] Another treatise writer affirmed this sentiment in 1892, deciding there was no "practical benefit" in distinguishing "political, executive, or administrative officers . . . from the judicial and ministerial classes," and that it was "almost impossible to conceive a case" where a private action would lie against a president or governor.[440]

In *Spalding v. Vilas* (1896), the Supreme Court cited Kent's 1810 opinion and adopted this increasingly influential though hardly consensus position, using case law on judicial immunity to protect the heads of executive departments.[441] In dicta, it suggested that executive department heads would generally not be liable for authorized actions taken with malicious motives, as litigation might "seriously cripple . . . effective administration."[442] Subsequent readers took *Spalding* even further—Bruce Wyman cited it among other cases for the proposition that the government could not be held liable for "the unavoidable imperfections of a machinery

[437] *See* Weaver v. Devendorf, 3 Denio 117, 120 (N.Y. Sup. Ct. 1846); Waldron 51 N.H. at 140-42 (surveying state practice).
[438] *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 214 & n 2 (Chicago, Callaghan & Co., 1880) (citing JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL 285 (New York, Baker, Voorhis, & Co., 1868)). Townshend also cited the Iowa case *Rector v. Smith*, but that case adopted the Massachusetts rule that if an officer acted from malice, discretion would "furnish no excuse." 11 Iowa 302, 308 (1860) (quoting Bradley v. Heath, 29 Mass. 163, 165 (1831)).
[439] MECHEM, *supra* note 66, at 425-27.
[440] THROOP, *supra* note 418, at 673.
[441] 161 U.S. 483, 493-98 (1896). I break with Scott Keller, who concludes that this absolute immunity was established "around 1871," and so was a historical justification for the contemporary doctrine of qualified immunity. *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1363-66 (2021). Like Townshend and Cooley, *Spalding* articulated a new rule, drawing exclusively on New York and English case law, along with its 1871 decision expanding judicial immunity. *See* 161 U.S. at 493-99. New York's rule immunizing the malicious conduct of quasi-judicial officers was at best rising but contested by 1871, and contemporaries rightfully believed the Supreme Court had embraced the traditional rule. *See* Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 131 (1849); Waldron v. Berry, 51 N.H. 136, 142 (1871).
[442] *See id*., at 499. For narrower readings of *Spalding*, see Engdahl, *supra* note 189, at 51-52; PFANDER, *supra* note 30, at 11-13.

so complicated as this system of administration."[443] Such problems, he noted, should not be "enforced by the courts, but . . . redressed at the ballot."[444]

c) Protection for Hierarchy

As quasi-judicial immunity expanded, courts settled on a more capacious articulation of the obedient officer's privilege. Under the more restrictive approach that some nineteenth century courts embraced, obedient officers were punished for executing orders that turned out to be invalid, for instance if a higher court voided the law under which the order was issued.[445] Even as it enforced this doctrine, one court recognized that the threat of this liability might compromise the "full and fearless discharge of [an officer's] duties," but expressed greater concern at the thought that "one man" could act "under the mere color . . . of legal process . . . without any responsibility."[446]

Over time, more courts coalesced around an approach that reduced the burden on implementing officers. In *Savacool v. Boughton* (1830), the New York Supreme Court navigated "considerable contrariety of authority" to establish that officers only needed to see whether there was any defect in subject-matter jurisdiction apparent from the face of the warrant.[447] Under this regime, officers did not need to concern themselves with the substantive merits of the case. This privilege still left room for officers to be held liable for technical defects in warrants or their execution,[448] but it nonetheless shielded officers from responsibility and emphasized the overriding importance of their obedience. Over the next few decades, the rule articulated in *Savacool* would become "settled,"[449] though some courts would remain more skeptical of courts of "limited jurisdiction."[450]

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[443] WYMAN, *supra* note 392, at 40.
[444] *Id.*
[445] *See, e.g.*, *supra* notes 266-267; Fisher v. McGirr, 67 Mass. (1 Gray) 1, 45 (1854).
[446] Fisher, 67 Mass. (1 Gray) at 45.
[447] Savacool v. Boughton, 5 Wend. 170, 172-80 (N.Y. Sup. Ct. 1830). *See also* Jones v. Hughes, 5 Serg. & Rawle, 299, 303 (Pa. 1819); Watson v. Watson, 9 Conn. 140, 146 (1832).
[448] *See, e.g.*, Sprague v. Birchard, 1 Wis. 457, 469-70 (1853); NEWELL, *supra* note 433, at 170-71.
[449]Meadow v. Wise, 41 Ark. 285, 290 (1883); *See also* Wilson v. Sawyer, 37 Ala. 631, 632 (1861); Norcross v. Nunan, 61 Cal. 640, 643 (1882); Camp v. Moseley, 2 Fla. 171, 195 (1848); Barnes v. Barber, 6 Ill. (1 Gilm.) 401, 406 (1844); Sprague, 1 Wis., at 469; NEWELL, *supra* note 433, at 168-69; THROOP, *supra* note 418, at 718-20.
[450]*See, e.g.*, Bowler v. Eldridge, 18 Conn. 1, 13 (1846); Sanders v. Rains, 10 Mo. 770, 772-73 (1847); Greenvault v. Farmers' & Mechanics' Bank, 2 Doug. 498, 502-504 (Mich. 1847); NEWELL, *supra* note 433, at 134, 143-47. *But see* Mangold v. Thorpe, 33 N.J.L. 134, 135 (1868); COOLEY, *supra* note 438, at 419-20.

Technically, a late-nineteenth-century treatise noted, the *Savacool* rule only protected officers executing "process issued by a court."[451] Indeed, earlier authorities had been skeptical of authority derived from a "source not judicial."[452] Nevertheless, the "modern" rule was to apply *Savacool* to "process, in the liberal sense," including any "order[] issued by" a quasi-judicial officer.[453] In 1871, for instance, the Supreme Court decided that "[w]hatever may have been the conflict at one time," it was "well settled" that officers executing the orders of an "officer or tribunal" with subject-matter jurisdiction—there, a tax assessor—would be shielded from liability for errors not clear on the face of the process.[454]

This was the type of rule that had concerned Dicey: one where officers had to ask not if their conduct was legal, but if it was commanded. As Frank Goodnow explained, rules immunizing "high officers" alone did little to wrest control of the administrative state from the courts. After all, the high officers interacted with individuals "through the medium of their subordinates."[455] By contrast, the new regime permitted those high officers to extend their autonomy to the legions of subordinates who implemented their vision. *Savacool* and its progeny thus constituted an important "limitation" on judicial control of the administrative state.[456]

2. From Deputies to Public Subordinates

Although the nineteenth century did not see the complete demise of the deputy,[457] the traditional law of deputies started to evolve as the increasing scale of the state and restrictions on officer-led contracting made the traditional law of deputies seem increasingly impractical and unfair. Decades before the rise of the specialized business corporation centered the law of agency and placed pressure on its foundational assumptions,[458] the emergence of a vast and complicated state drove judges and lawmakers to create new rules governing deputies.

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[451] THROOP, *supra* note 418, at 717.
[452] Jarman v. Patterson, 23 Ky. (7 T.B. Mon.) 644, 650 (1828). *Accord* Guptail v. Teft, 16 Ill. 365, 369 (1855); GWYNNE, *supra* note 157, at 574.
[453] THROOP, *supra* note 418, at 717-18.
[454] Erskine v. Hohnbach, 81 U.S. (14 Wall.) 613, 616-17 (1871); Conner v. Long, 104 U.S. 228, 239 (1881).
[455] 2 GOODNOW, *supra* note 363, at 166.
[456] *Id*.
[457] *See* COOLEY, *supra* note 438, at 132; NEWELL, *supra* note 433, at 189-90.
[458] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 39, 44 (1992).

As one of America's earliest federal administrative agencies, the postal service was at the leading edge of the paradigm shift.[459] It grew rapidly in the first few decades of the republic: the number of post offices increased more than 26-fold between 1789 and 1809, and the compensation paid to post officers increased 13-fold between 1790 and 1809.[460] By 1816, its 3,341 officials accounted for almost 70% of all federal employees, making it significantly vaster than the arrangements to which deputy law was traditionally applied.[461] At the same time, postal service was poorly compensated and part-time work; local postmasters routinely held second jobs and delegated the routine operation of the post office to a clerk.[462] Litigation could make the postmaster's life even more difficult—when the deputy postmaster of Boston was "harassed by an unjust prosecution," Congress's Claims Committee concluded "the Government cannot be . . . bound in such cases to afford pecuniary relief."[463]

As the post office grew, the character of deputy postmasters changed as well. Legally, Congress started charging deputies with explicit statutory duties in 1792.[464] Institutionally, the increasing number of postal employees and post offices changed the responsibilities of the deputy. State courts in the early 1800s increasingly suggested that the postmaster might not be liable for the misfeasance and nonfeasance of his subordinates because he nominally oversaw an impractically large number of people.[465] At the same time, they also suggested that the deputies might be officers in their own right, since they increasingly ran the day-to-day of a given post office.[466] As the scale, professionalism, and reputation of the post office progressed in fits and starts over the succeeding decades,[467] the new doctrine began to crystalize.

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[459] *See generally*, RICHARD JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 3-4 (1995).
[460] GIDEON GRANGER, VIEW OF THE POST OFFICE ESTABLISHMENT FROM 1789 TO 1809, COMMUNICATED TO THE HOUSE OF REPRESENTATIVES (Apr. 30, 1810), *reprinted in* AMERICAN STATE PAPERS: POST OFFICE DEPARTMENT 43, 43 (Walter Lowrie & Walter S. Franklin, eds. 1834).
[461] JOHN, *supra* note 459, at 3.
[462] *Id.*, at 122, 130-32.
[463] INDEMNITY TO A POSTMASTER FOR HIS EXPENSES IN DEFENDING A VEXATIOUS PROSECUTION, COMMUNICATED TO THE HOUSE OF REPRESENTATIVES (Feb. 12, 1803), *reprinted in* AMERICAN STATE PAPERS: CLAIMS 285, 285 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter, CLAIMS]. *But see* INDEMNITY FOR THE EXPENSES OF DEFENDING A SUIT, COMMUNICATED TO THE HOUSE OF REPRESENTATIVES, (Jan. 11, 1802), *reprinted in* CLAIMS, *supra*, at 250, 250 (indemnifying for the cost of litigating a claim).
[464] Mascott, *supra* note 3, at 521.
[465] *See* Bolan v. Williamson, 2 S.C.L. (2 Bay) 551, 554 (Const. Ct. App. 1804); Maxwell v. McIlvoy, 5 Ky. (2 Bibb) 211, 212-13 (1810); Franklin v. Low, 1 Johns. 396, 402 (N.Y. Sup. Ct. 1806).
[466] *See* Bolan, 2 S.C.L. (2 Bay) at 554; Maxwell, 5 Ky. (2 Bibb.) at 212-13.
[467] See generally, JOHN, *supra* note 459, at 125-37 (on the professionalization of the Post Office).

In *Dunlop v. Munroe* (1812), the United States Supreme Court suggested that a deputy postmaster would only be liable for negligent hiring or supervision of his assistants, rather than vicariously for any action they took.[468] This ruling, contemporaries noted, abandoned deputy law's traditional vicarious liability rule.[469] In *Schroyer v. Lynch* (1839), the Supreme Court of Pennsylvania advanced the doctrine even further, noting that the assistants to the deputy must also be officers, as the deputies had no "authority or control whatever" over them.[470] The issue here was not just scale, though the "impractical[ity]" of supervising the assistance motivated the doctrine.[471] It also turned on the fact that unlike a traditional officer, the deputy postmaster could not choose his assistants, who were subject to the approval of the postmaster general.[472] James Kent and Joseph Story quickly endorsed *Schroyer*'s holding, and helped spread it to other jurisdictions.[473]

This doctrinal change soon spread to other institutions. Early America's naval command structure similarly granted broad autonomy to formal subordinates—a ship typically operated as an "independent unit," perhaps folded into a squadron that could be scattered over many miles.[474] This loose connection between superior and subordinate helps explain why in 1817 the Supreme Court extended the commander of a two-ship squadron the same protection it had to the postmaster.[475] Like deputy postmasters, squadron commanders lacked the ability to choose their subordinates and could not "contract" with the vessel commander, the terms of whose appointment were defined by law.[476] Thus, each ship commander had a "partial independence"

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[468] Dunlop v. Munroe, 11 U.S. (7 Cranch) 242, 269 (1812).
[469] *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 302 n * (Cambridge, Hilliard and Brown, 1832); 2 KENT, *supra* note 59, at 474-75; Patons v. Lee, 18 F. Cas. 1296, 1298 (C.C.D. D.C. 1826).
[470] See Schroyer v. Lynch, 8 Watts 453, 454, 456 (Pa. 1839).
[471] *Id*., at 457.
[472] *See id.*, at 456.
[473] JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS *302 (Cambridge: Hilliard and Brown, 2d ed. 1840); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *610-11 (New York, E.B. Clayton, 4th ed. 1840). *See, e.g.*, Central R. & B. Co. v. Lampley, 76 Ala. 357, 365 (Ala. 1884); Keenan v. Southworth, 110 Mass. 474, 474-75 (1872); Foster v. M.A. Metts & Co. 55 Miss. 77, 81 (1877); Hutchins v. Brackett, 22 N.H. 252, 255 (1850); Wiggins v. Hathaway, 6 Barb. 632, 635-36 (N.Y. Gen. Term 1849); Sawyer v. Corse, 58 Va. (17 Gratt.) 230, 240 (1867).
[474] *See* LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829, at 269-70 (1951); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, YALE J. L. & HUMANITIES 1, 26 n 102 (2007).
[475] The Eleanor, 15 U.S. (2 Wheat.) 345, 356-57 (1817).
[476] *Id*., at 356.

that meant squadron commanders could only be liable for the "positive or permissive orders" they issued.[477]

Even federal marshals might be exempt from traditional rules of officer liability where the law hemmed in their control. In 1815, the Supreme Court found that a federal marshal would not be liable when federal prisoners escaped from state jails. Story explained that unlike the normal relationship between sheriff and jailer, the "keeper of the state jail is [not] . . . the deputy of the marshal," because the marshal could not appoint, remove, or direct the state jail keeper; rather, the keeper was "responsible for his own acts."[478]

The increasingly sprawling administrative state also created internal discipline problems. By at least the 1810s, state courts faced cases in which officials did not pay money they collected on behalf of the government, and a superior delayed in suing the collector for unpaid taxes. Although few opinions applied the doctrine of laches (which barred suits by parties who tarried too long) to these actions on liability bonds, New York did in a prominent case, and a Pennsylvania case suggested that the doctrine might apply.[479]

In a series of cases starting with *United States v. Kirkpatrick* in 1824, however, the United States Supreme Court found that government officials' negligence in bringing suit did not prevent the state from suing on collectors' bonds.[480] The new exception to laches was "founded . . . upon a great public policy," namely that the government was so sprawling that "the utmost vigilance would not save the public from the most serious losses."[481] The decision was controversial. In 1834, the prominent Mississippi lawyer Robert J. Walker castigated *Kirkpatrick* for destroying "all individual rights, as a burnt offering upon the altar of state necessity."[482] Instead, he cited to an 1832 Louisiana case defending the traditional laches rule as "principle of a free constitutional government," namely that "society in its collective capacity [should be] bound

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[477] *Id.*, at 356-57.
[478] Randolph v. Donaldson, 13 U.S. (9 Cranch) 76, 86 (1815). *But see* Patten v. Halsted, 1 N.J.L. (Coxe) 277, 283 (1795) (upholding an alternate rule for local sheriffs "[u]ntil our own legislature change the common law in this particular").
[479] *See, e.g.*, People v. Jansen, 7 Johns. Rep. 332 (N.Y. Sup. Ct. 1811); Commonwealth v. Wolbert, 6 Binn. 292, 294 (Pa. 1814). *But see* Hunt v. United States, 12 F. Cas. 948, 949 (C.C. Mass. 1812) (Story, J.) (expressing skepticism about *Jansen*).
[480] *See* United States v. Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735-36 (1824); United States v. Vanzandt, 24 U.S. (11 Wheat.) 184, 189-90 (1826); United States v. Nicholl, 25 U.S. (12 Wheat.) 505, 509 (1827); Dox v. Postmaster-General, 26 U.S. (1 Pet.) 318, 326 (1828).
[481] Kirkpatrick, 22 U.S. (9 Wheat.) at 735-36.
[482] *See* Kerr v. Baker, 1 Miss. (1 Walk.) 140, 143 (1823).

by those laws which it enacts for" individuals.[483] Nevertheless, Story largely won out, and New York even went so far as to overrule its own conflicting case on the basis of the Supreme Court decisions.[484]

In his 1839 *Schroyer* concurrence, Chief Justice Gibson anticipated a broader transformation, proclaiming that "public functionaries are not answerable for the acts of their subordinates. . . ."[485] Joseph Story agreed in a newly added passage of his 1844 edition of *Commentaries on the Law of Agency*, stating that it was "now firmly established . . . that public officers and agents are not responsible for the misfeasances . . . or for the nonfeasances . . . of the . . . other persons, properly employed by and under them, in the discharge of their official duties."[486] By 1867, the Supreme Court of Virginia would explain that the doctrine had been "long recognized."[487]

Even the sheriff's deputy—the quintessential deputy—changed over the nineteenth century. "At common law," Connecticut's Supreme Court of Errors declared in 1862, "the deputy sheriff . . . was but the agent of the sheriff . . . but under our system deputy sheriffs are officers as distinctly recognized by law as the sheriffs themselves."[488] Indeed, as the treatise itself asserted, "the statutes of most states" recognized deputy sheriffs as "independent public officers."[489]

3. Corporate Responsibility

The rise of the corporation and supervisory boards over the course of the nineteenth century created opportunities for new ways of organizing public power that transformed the character of officeholding. This change became apparent in 1839, when Alpheus Spear brought an action on the case against Charles A. Cummings, the public schoolmaster in Quincy,

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[483] *Id.* at 143 (quoting Andrus v. Treasurer of State, 4 La. 403, 413 (1832) (opinion of Porter, J.)).
[484] *See, e.g.*, Hawkins v. Mims, 36 Ark. 145, 149 (1880) ("the [older] principle . . . has been almost universally repudiated by the courts"); People v. Russell, 4 Wend. 570, 575 (N.Y. Sup. Ct. 1830); Commonwealth by Keel v. Preston, 21 Ky. (5 T.B. Mon.) 585, 587 (1827); Parks v. State, 7 Mo. 194, 195-96 (1841); State Bank v. Locke, 15 N.C. (4 Dev.) 529, 548 (1834).
[485] Schroyer, 8 Watts at 458 (Gibson, C.J., concurring).
[486] *Compare* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 404 (Boston: Little & Brown, 2d ed. 1844) *with* STORY, *supra* note 165, at 327-33.
[487] Sawyer v. Corse, 58 Va. (17 Gratt.) 230, 240 (1867). For other cases adopting this proposition of law *see, e.g.*, Conwell v. Voorhees, 13 Ohio 523, 542-43 (1844) (citing Story on Agency for a slightly different proposition); Memphis v. Lasser, 28 Tenn. (9 Hum.) 757, 760 (1849); MECHEM, *supra* note 66, at 451, 528; THROOP, *supra* note 418, at 554-55.
[488] Dayton v. Lynes, 30 Conn. 351, 356 (1862). *See also* GWYNNE, *supra* note 157, at 38-39.
[489] MECHEM, *supra* note 66, at 16-17.

Massachusetts, for refusing to instruct Spear's servant and three children.[490] Spear argued that that since Cummings took on the "office" of public schoolteacher, it became his "duty . . . to teach all the children."[491] The jury agreed, awarding Spear $38, but judge overruled the jury, and Spear appealed.[492]

To Lemuel Shaw, this was unlike any action that had "ever been brought."[493] In 1817, the legislature had "change[d the] . . . character" of school districts by granting them an independent corporate status.[494] In 1826, it charged a school committee with the "superintendence of all the public schools in said town."[495] In light of this new command structure, Shaw concluded that "the master of a school is not an independent public officer . . . like a sheriff," breaking with prior precedent.[496] Rather, Cummings was "employed and paid by the town; and to them only is he responsible on his contract."[497] The "school committee" was the entity with "will and judgment" over admissions.[498] Allowing Spear to sue Cummings would "lead to vexatious and ruinous litigation," disrupting the hierarchy by "compel[ling] the master, on peril of an action for damages" to contradict its decisions.[499]

Six years later, the legislature made the town liable in such cases, using a strategy of corporate liability it had employed for tax collectors two decades earlier.[500] With this act, Shaw wrote in 1851, the legislature recognized the town "in its corporate capacity" to be the body "responsible" to the student, whereas "the masters[,] teachers," and now even "the general and prudential committees" were simply "agents of the town."[501]

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[490] Spear v. Cummings, 40 Mass. (23 Pick.) 224, 224 (1839). For which party is which, see Spear v. Cummings, Oct. 1839, at 385 *in* 11 NORFOLK COUNTY SUPREME JUDICIAL COURT RECORDS, 1837-1839, *available at* FamilySearch, Massachusetts. Supreme Judicial Court (Norfolk County), Court Records, 1764-1859, Vol. 10-12, 1834-1842, https://www.familysearch.org/ark:/61903/3:1:3Q9M-C39T-PQQB-Q?i=395&cat=275420 (image 396).
[491] Spear, 11 NORFOLK COUNTY SUPREME JUDICIAL COURT RECORDS, *supra* note 490, at 386 (image 396).
[492] *Id.* at 386 (image 397).
[493] Spear v. Cummings, 40 Mass. 224, 225 (1839).
[494] Waldron v. Lee, 22 Mass. 323, 334 (1827).
[495] Act Further . . . (1826), ch. 170, §§ 1-5, 1825-28 Mass. Acts 299-302. *See generally* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. L. REV. 945, 973-78 (2017).
[496] Spear v. Cummings, 40 Mass. 224, 225 (1839). On teachers as officers, see Avery v. Inhabitants of Tyringham, 3 Mass. (3 Tyng) 160, 179 (1807); FREEMAN, *supra* note 239, at 100.
[497] Spear, 40 Mass. at 225.
[498] *Id*.
[499] *Id*., at 227.
[500] *See* Act Concerning Public Schools (1845), ch. 214, 1843-45 Mass. Acts 545, 545; Act in Addition . . ., ch. 138, § 5, 1822-25 Mass. Acts 393, 394.
[501] Sherman v. Charlestown, 62 Mass. (8 Cush.) 160, 162 (1851).

Spear shows in microcosm a transformation that was taking place across the nation. Over the nineteenth century, Americans collectivized liability, and, in the process, transformed their officers into employees. Several important jurisprudential changes preceded this transformation at the local level. One was that early-nineteenth-century courts and legislatures increasingly chartered more local governments and recognized them as "municipal corporations," giving them the legal capacity to absorb liability on behalf of public agents.[502] Another was that courts abandoned an older theory of corporate liability whereby corporations were not liable for the misconduct of their agents.[503] The result of these changes was that now-corporate local governments could assume responsibility for the actions of their employees.[504]

This indemnification changed the character of public employment. Where governmental employees were "not affected personally by the result of the action," a treatise opined in 1869, they were "not, properly speaking, public officers."[505] Indeed, courts drew a distinction between "public officers" (for whom the municipality was not liable) and "agents" or "employees" of the municipal corporation" (for whom it was),[506] reflecting the fact that public officers were "independent of the corporation as to the tenure of their office and the manner of discharging their duties."[507]

Although the federal government did not use municipal corporations, it chartered federal corporations which could be held liable in a corporate capacity.[508] It also passed statutes in the late-nineteenth and early-twentieth centuries authorizing suits against the United States for specific subject areas (including contract claims, patent infringement, maritime torts, and

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[502] *See* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 186-87 (1983); Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 421-22 (1985). On the increasing number, see Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351, 1364 (2023).

[503] *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 649-50 (1989); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1599-1600 (1988) (describing an "associational" theory of the corporation that bears a family resemblance to this view); Bd. of Chosen Freeholders v. Strader, 18 N.J.L. 108, 117 (1840); Smoot v. Mayor of Wetumpka, 24 Ala. 112, 121 (1854); *Corporations*, AM. JURIST & L. MAG., Oct. 1830, at 298, 302.

[504] *See, e.g.*, Manners, *supra* note 30 at 85-86; Allen v. City of Decatur, 23 Ill. 272, 274 (1860); Thayer v. Boston, 36 Mass. (19 Pick.) 511, 515-16 (1837); Meares v. Com'rs of Wilmington, 31 N.C. (9 Ired.) 73, 78-79 (1848).

[505] SHEARMAN & REDFIELD, *supra* note 418, at 210.

[506] Barney v. City of Lowell, 98 Mass. 570, 571 (1868); NEWELL, *supra* note 433, at 220-21; David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2223-27 (2005).

[507] JOHN F. DILLON, TREATISE ON THE LAWS OF MUNICIPAL CORPORATIONS 730 (Chicago. James Cockcroft & Co., 1872).

[508] *See* Gellhorn & Schenck, *supra* note 369, at 723; Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 389 (1939).

dredging-induced damage to oyster beds), before assuming liability more generally with the Federal Tort Claims Act in 1946.[509] These strategies similarly unwound the logic of officeholding.

III. The Law of Officers and the Unitary Executive

In its most general formulation, unitary executive theory posits that the President must have the indefeasible power to appoint,[510] remove,[511] or instruct[512] her subordinates. Although unitarists differ on specific issues, all implicitly endorse a particular view of a hierarchically organized state. The Supreme Court illustrated this vision in *United States v. Arthrex*, describing how "thousands of officers wield executive power . . . [t]hat . . . acquires its legitimacy and accountability to the public through a 'clear and effective chain of command' down from the President, on whom all people vote."[513] The unitarist President implicitly—or sometimes explicitly—sits at the apex of a Weberian bureaucracy that carries out her commands.[514]

The law of officers contemplated a different type of state. Officers mobilized their social networks to constitute and regulate state power. They were expected to take personal, legal responsibility for their own conduct as well as that of their staff.[515] Those who study the way federal governance worked on the ground have described subordinate officials' "broad discretionary power"[516] and referred to federal authority as "negotiated" between principals and subordinates.[517] The legal rules regulating these officers reflected this decentralized authority.

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[509] *See* Gellhorn & Schenck, *supra* note 369, at 723-24.
[510] *See* Lucia v. SEC, 585 U.S. 237, 253-54 (2018) (Thomas, J., concurring); Bamzai & Prakash, *supra* note 10, at 1765 (listing "appointments" as facets of "executive power"); Mascott, *supra* note 3, at 559. Technically, these arguments could be interpretations of the Appointments Clause and not the Vesting Clause. But the same vision of an electorally accountable chain of command via presidential elections animates both.
[511] *See* Collins v. Yellen, 594 U.S. 220, 278 (2021); Bamzai & Prakash, *supra* note 10, at 1761-62.
[512] *See* United States v. Arthrex, 594 U.S. 1, 15-17 (2021); Lawson, *supra* note 5, at 447; Calabresi & Prakash, *supra* note 3, at 595. This Article uses "instruction" to refer to the set of cases where Presidents approve, nullify, or even affirmatively make decisions entrusted to their subordinates, although lawyers might treat these issues differently. *See generally* Christine Kexel Chabot, *The President's Approval Power*, 92 FORDHAM L. REV. 373, 375 (2023); Kathryn E. Kovacs, *The Supersecretary in Chief*, 94 UNIV. S. CAL. L. REV. POSTSCRIPT 61, 62-71 (2020).
[513] United States v. Arthrex, Inc., 594 U.S. 1, 11 (2021) (quoting Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498 (2010)).
[514] *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *How to Think About the Removal Power*, 110 VA. L. REV. ONLINE 159, 160 (2024); MCCONNELL, *supra* note 5, at 168-69; Mascott, *supra* note 3, at 559.
[515] *Cf.* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1302-1303 (2020).
[516] Parrillo, *supra* note 279, at 1391.
[517] RAO, *supra* note 92, at 13. *See also* Grace E. Mallon, *Negotiated Federalism: Intergovernmental Relations on the Maritime Frontier, 1789-1815*, 81 WM. & MARY Q. 687, 689-90 (2024).

Legal accountability provided more precise solutions than the blunderbuss of presidential elections, reaching misconduct that electoral discipline might miss.[518] Indeed, unitarist political accountability carried its own risks, potentially turning the "chain of accountability" into an iron fetter. In his explanation of "How Nations are Enslaved," one Revolutionary American blamed a system of "posts" and "subordinate officers" for forming a patronage "chain . . . [by which] an hundred thousand are fastened to the tyrant."[519] Founding Era Americans recognized the risks of giving the President unfettered control over officers and designed a balanced constitutional and common-law system to protect against these risks.[520]

The legal rules governing this state privileged legality over unitarism's "chain of dependence"[521] because officers had a duty to uphold the law that was independent of their normal command hierarchy.[522] Not only was the President himself an officer with duties commanding him to recognize the primacy of law,[523] but his subordinate officers also had obligations to law that outweighed duties to the President.[524] This vision of the law explains how the Founding generation could both say that the President had the ultimate duty to see the laws faithfully executed and also pass laws limiting Presidential control of subordinates.[525] Where the law required a subordinate's discretion, the President was required to supervise, but not to superimpose his own judgement.[526]

The law-of-officers legalism empowered legislatures to interfere with the "chain of dependence." To be clear, the rule of law was not the same as the rule of the legislature—as Alexander Hamilton noted, "[i]t is one thing to be subordinate to the laws, and another to be dependent on the legislative body."[527] But it did elevate the lawmaking process, of which the legislature was a crucial part. Lawmakers created the obligations that required officers to defy

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[518] *See supra* notes 334-351.
[519] *How Nations are Enslaved*, NORWICH PACKET, Feb. 12, 1776, at 4; *see also* Wilson, *supra* note 85, at 732.
[520] *See supra* Section I.E.
[521] Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020) (quoting 1 ANNALS OF CONG. 499 (Madison)).
[522] *See also* Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 176-84 (2022); Driesen, *supra* note 326, at 430, 453-55; Mortenson, *supra* note 515, at 1334-45.
[523] *See* U.S. Const. Art. II, § 3, cl. 2; Kent et al., *supra* note 28, at 2182-84.
[524] *See supra* Section I.C.
[525] For sources asserting the inconsistency, see, e.g., Calabresi & Prakash, *supra* note 3, at 617-20.
[526] *Cf.* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1880-81 (2015).
[527] THE FEDERALIST NO. 71 (Hamilton), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed71.asp. *See also* Mortenson, *supra* note 515, at 1303

their superiors' orders.[528] More subtly, the primacy of law gave legislatures enormous authority to regulate the conduct of executive officers. They could prescribe penalties, allocate duties, define inter-officer command authority, set indemnification procedures, and create immunities or procedural protections, thereby manipulating officers' incentives to comply with or resist the orders of their superiors.[529]

Even some unitarists accept legal limits on Presidential control. Michael McConnell concedes that "the executive is *ultimately* but not *immediately* unitary," and that the President must act through agents who may "refuse[] to carry out illegal or improper orders," making it difficult "for a President to get his way."[530] And Gary Lawson says that the President may only instruct where his subordinates are called to make "exercises of lawful discretion," recognizing that Congress may create ministerial duties exempt from Presidential commands: after all, "[t]he law is the law."[531] Lawson's position appears to derive from a reading of the 1838 case *Kendall v. United States* (though he does not believe such early understandings are dispositive);[532] but *Kendall* did not say that discretionary duties must be subject to presidential control, only that ministerial duties were "emphatically" cases where the legislature conferred independence.[533] This Article provides both the broader legal framework that explains *Kendall* and concrete evidence that early Americans thought ministerial duties were not unique.[534] Early American jurists even created special nondelegation rules for discretionary duties because they were so concerned that some duties be exercised by specific officers.[535]

Admittedly, the Constitution was part of the gradual consolidation of state power over the long-nineteenth century, and it was designed in part to provide greater centralized control than its predecessor.[536] The "structuralist" unitarists who argue that the architecture of the Constitution implicitly gives the President powers might claim that the Constitution broke with hidebound

[528] *See supra* Sections I.C-I.D.
[529] *See* Pfander, *supra* note 27, at 774; Pfander & Hunt, *supra* note 210, at 1866-68; *supra* Sections I.D.3-I.D.4.
[530] MCCONNELL, *supra* note 5, at 342.
[531] Lawson, *supra* note 5, at 460.
[532] *See* Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 n65 (1994).
[533] 37 U.S. (12 Pet.) 524, 610 (1838).
[534] *See supra* Sections I.C.1-I.C.2.
[535] *See supra* note 169.
[536] *See* EDLING, *supra* note 74, at 3-4; *supra* Section II.A.

precedent and anticipated a different kind of state.[537] But the language of the Constitution as well as the Ratification debates and subsequent practice suggest that early Americans expected the Constitution would be interpreted and applied consistently with this pre-existing law of officers, even where doing so frustrated presidential control. The Constitution may have enabled the federal government to expand over time, but it did not immediately call forth twentieth-century administration.[538]

This Article also poses some challenges for the "lexical argument"[539] in favor of unitarism—namely, the idea that the text of the Constitution explicitly conferred a recognized set of command-and-control powers on the President when it vested her with "the executive power." Early Americans understood hierarchical governance differently than we do today, and these non-unitary presumptions colored how they read, interpreted, and applied the law.[540] Admittedly, a few Founding Era authorities referred to cabinet secretaries as deputies or assistants of the President, suggesting that they wanted the President to wield considerable power over his cabinet, though not necessarily subcabinet officers.[541] But many of these statements are ambiguous as to the source and scope of the power. Some referred to hypothetical executives,[542] or were plausibly predictions about how future statutes would structure departments—indeed, the ultimate design of some early departments reflects this vision.[543] But the text of the Constitution anticipated a world of officers and duties,[544] which gave lawmakers tremendous flexibility to "organize[]" the "system for [laws'] execution" by passing laws that structured the nature of supervisory authority.[545]

Some constitutional theorists have built out some of the ways that the text of the Constitution might admit a non-unitary executive, which find some grounding in this Article's

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[537] *Cf.*, MCCONNELL, *supra* note 5, at 164 (identifying the structural argument rooted in the Take Care Clause); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496 (2010) (deriving the structural argument from the Vesting Clause); Myers v. United States, 272 U.S. 52, 122 (1926) (deriving the structural argument from a combination of constitutional provisions).
[538] *See supra* Part II.
[539] *Cf.* MCCONNELL, *supra* note 5, at 164.
[540] *See supra* Part I.
[541] *See* THE FEDERALIST NO. 72 (Alexander Hamilton), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed72.asp; PRAKASH, *supra* note 141, at 185-86.
[542] *See, e.g.*, NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 153-55 (1793); 2 FARRAND, *supra* note 325, at 54 (statement of Gouverneur Morris, defending a proposed Constitution that was not adopted).
[543] *See supra* note 140.
[544] *See supra* notes 337-339.
[545] United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.).

history. For instance, the Necessary and Proper clause gives Congress "implementation power,"[546] which would be the textual basis for Congress's ability to create offices—a "mode of executing an act"[547]—to craft their command structure by defining their duties and powers, and to modify the common law of officers within which officers were embedded.[548] If, as some scholars argue, the executive power is "the power to execute the law," then Article II's vesting clause gives the President the power "to bring that [implementing] law . . . into effect in the real world."[549] The Take Care Clause and the oath clauses evoke the customary primacy of an officer's duty to the law, rather than a hierarchy.[550] Even granting the unitarists that the Constitution enacted some kind of hierarchy, one might read the Take Care clause and the welter of other Article II provisions to imply that the President had a "*right and duty* to supervise law execution" without defining "the *scope* of such supervision," which would leave room for the customary detailed tinkering performed by early American lawmakers.[551] Additionally, one might consider the common law of officers as well as the detailed early statutes structuring officers' duties as akin to today's "bureaucratic minutiae" that lawmakers design to ensure the "day-to-day implementation of the laws."[552] Such readings of the Constitution are more consistent with the variegated array of early American officers than the unitarists' procrustean fixation on a specific vision of appointment, removal, and instruction.

The early debates and practice do not provide dispositive evidence to the contrary. Undoubtedly, some early Americans asserted that the Constitution conferred some kind of removal authority upon the President.[553] But others disagreed or even opportunistically changed their position.[554] It is impossible to address every case adequately in a single article, but this fragmentary evidence often does not clarify the source or scope of that power—whether the President's removal power derived from the Constitution (as opposed to statute or common law),

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[546] John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 64 (2014).
[547] United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.).
[548] *Cf.* Metzger, *supra* note 526, at 1875 (noting that the Necessary and Proper Clause "grant Congress broad power to construct [an] administrative apparatus).
[549] Mortenson, *supra* note 515, at 1275.
[550] *See* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83-87 (2009).
[551] *Cf.* Metzger, *supra* note 526, at 1880; Price, *supra* note 139, at 566-68.
[552] *See* Metzger, *supra* note 526, at 1881-86.
[553] Bamzai & Prakash, *supra* note 10, at 1777-82.
[554] Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 410-14; Jed H. Shugerman, *The Indecisions of 1789: Inconsistent Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 757 (2023).

whether it was indefeasible, whether it required at-pleasure or only for-cause removal, or whether it extended to deputies or inferior officers.[555] Joseph Story, for instance, thought that most offices were presumptively held at pleasure unless the law specified a different term.[556] With regard to instruction, early Presidents sometimes felt they could give commands to subordinate officers, particularly in cases of alleged corruption or misfeasance, where an officer would be acting without legal authority.[557] But as with removal, the scope and source of instruction power is unclear. We cannot assume such actions "implicitly relied on constitutional authority"[558] when not accompanied by an alternative explanation, as they may just as easily have relied on common-law-of-officers presumptions or statutory text.[559] Indeed, the same early presidents who ostensibly wielded unitary power also recognized constraints on that power.[560]

Jennifer Mascott's careful inquiry into the original meaning of the term "officer" shows how this early American law of governance can have non-unitarist consequences for lexical originalists. Examining an impressive array of eighteenth-century sources, she concludes that an officer was "any individual who had ongoing responsibility for a governmental duty."[561] In her account, which has proven influential among several Supreme Court justices,[562] applying the eighteenth-century definition of officer to interpret the Appointments Clause would transform "thousands" of independent civil servants into political appointees to create the unitarist "chain of accountability."[563] But when she examines the laws passed by the First Congress, she notes that deputies were not always considered officers even when they seemed to have statutory obligations, particularly when "the primary officers . . . could be held personally liable for their deputies' misdeeds."[564]

This Article explains this peculiarity by showing the established common-law logic that tacitly underpinned the First Congress's decisions, and which teases out the non-unitarist implications of Mascott's argument. The officer's duty carried with it an independent, personal

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[555] *See* CALABRESI & YOO, *supra* note 128, at 3-4; Bamzai & Prakash, *supra* note 10, at 1789, 1830 n536.
[556]3 STORY, *supra* note 148, at 388.
[557] *See supra* notes 355-357.
[558] PRAKASH, *supra* note 141, at 188. *See also* CALABRESI & YOO, *supra* note 128, at 420.
[559] *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (proposing a similar approach).
[560] *See supra* notes 141-147.
[561] Mascott, *supra* note 3, at 450.
[562] *See, e.g.*, Lucia v. SEC, 585 U.S. 237, 253 (2018) (Thomas, J., concurring).
[563] Mascott, *supra* note 3, at 454.
[564] *Id*., at 517.

responsibility to the *law*. To the extent Mascott and the Supreme Court justices who follow her definition would expand the set of employees who must be appointed, they must also recognize that these officers are not deputies and cannot necessarily be instructed or removed at will by their superiors. Alternatively, the fact that so many government employees lack the independence or personal responsibility of officers might suggest that they are not officers after all, despite some superficial similarities.[565]

IV. Conclusion

It is conventional wisdom among historians that the early American state seems premodern compared to the Weberian benchmarks of "[u]nification, centralization, rationalization, organization, administration, and bureaucratization," so much so that they have advanced "alternative model[s] of state development" to explain it.[566] Unsurprisingly, the Founding generation conceived of their non-Weberian government in non-Weberian terms: they had different ideas about what it meant to wield governmental authority, which risks and goals were important, and ultimately how to regulate public agents. This Article begins to recover the legal vocabulary and tools that regulated eighteenth- and nineteenth-century governance. It shows how they gradually transformed to manage the subtly shifting structure of public power. In so doing, it argues that historians and jurists alike should be careful about projecting contemporary ideas about the state backwards as they interpret the law of the past. The state and the law that regulates it do not exist outside of time. We cannot understand what that law meant without understanding how it worked.

[565] *See* Hills, *supra* note 8, at 392-94.
[566] *See* William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 761 (2008).