

# THE PUZZLE OF HAMILTON'S *FEDERALIST* NO. 77

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## I. A STATEMENT OF THE PROBLEM

The Founders, the authors of the Constitution of 1787, much like you and me, were flesh-and-blood human beings. As a result, we expect to find errors and exaggeration in their written works.<sup>1</sup> There is nothing new about that insight. But one alleged error has always struck me as somewhat different from the others. I am speaking of Hamilton's 1788 publication, *Federalist* No. 77. There he wrote:

It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. *The consent of that body would be necessary to displace as well as to appoint.* A change of the chief magistrate therefore would not occasion so violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change, in favour of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt, and bring some degree of dis-

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1. See, e.g., Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003) (collecting errors and oddities in *The Federalist*); see also MICHAEL I. MEYERSON, *LIBERTY'S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD* 158 (2008); Richard Albert, *The Constitutional Imbalance*, 37 N.M. L. REV. 1, 6 n.34 (2007); Dan T. Coenen, *A Rhetoric for Ratification: The Argument of The Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 507 n.218, 541–42 (2006); Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 831 (2007).

credit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which from the greater permanency of its own composition, will in all probability be less subject to inconstancy, than any other member of the government.<sup>2</sup>

This is the enigmatic great white whale among Founding-era documents. Apart from investigating Hamilton's meaning as an intrinsically interesting historical matter, or as an avenue to glean more of the worldview of the Framers (or, at least, of Hamilton), *Federalist* No. 77 is also key to understanding our contemporary legal debates on separation of powers, executive branch removals, and the so-called unitary executive theory.<sup>3</sup> Generally speaking, the latter provides that the President has a freestanding, constitutionally granted unilateral power to remove executive branch officers, or, at least, those high-level executive officers he appointed. Traditionally, *Federalist* No. 77 is the rallying cry of those who oppose the unitary executive position.<sup>4</sup>

To put it another way, partisans of Senate (or congressional) power agree with Hamilton (or, at least, they think that they

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2. THE FEDERALIST NO. 77, at 407 (Alexander Hamilton) (J.R. Pole ed., 2005) (emphasis added). *Federalist* No. 77 has an interesting publication history. The essay first appeared in *The Independent Journal* on April 2, 1788, and then in *The New-York Packet* on April 4, 1788. What is now *Federalist* No. 77 appeared originally as number 76 in the series, and it did not take its present place as number 77 until the first collected edition (the M'Lean edition) in 1788. See 4 THE PAPERS OF ALEXANDER HAMILTON 638 (Harold C. Syrett ed., 1962) (editor's note).

3. To be clear, in this Article, I take *no* position on the validity of the unitary executive theory (in any of its several modern forms) as a matter of the original public meaning of the Constitution of 1787. My goal in this Article is to explain Hamilton's meaning, not the Constitution's. Of course, the former is some evidence, albeit not conclusive evidence, of the latter. My own views on the unitary executive debates are not the topic of this Article.

4. See, e.g., David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 102 (2009) (rejecting the unitary executive theory and noting that "Hamilton assumed that the President would lack the power to unilaterally remove an executive officer; rather he could only do so with the Senate's assent." (citing THE FEDERALIST NO. 77 (Alexander Hamilton))); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 621 (2009) (explaining that "the most prominent and detailed founding refutation of the unitary executive was made by Alexander Hamilton, writing as Publius in the New York ratification debates" and concluding that there was no consensus during ratification on the "[i]mplications of the [s]ingle, [c]ouncil-[l]ess President" (citing THE FEDERALIST NO. 77 (Alexander Hamilton))).

agree with Hamilton). These commentators look back to the Tenure of Office Act<sup>5</sup> and to statements made on the floor of the House circa 1789 when the executive branch departments were organized and when statutory removal was first debated—all of which, purportedly, are consistent with Hamilton's statement in *Federalist* No. 77.<sup>6</sup> Partisans of presidential power disagree with Hamilton (or, at least, they think they do). They argue that Hamilton erred.<sup>7</sup> These commentators look to *Myers v. United States*<sup>8</sup> and to statements made by Madison on the floor of the House during the statutory removal debates. Partisans of presidential power and partisans of congressional power, despite disputing the underlying constitutional issue of the necessity of Senate consent to presidential removal of executive branch officers, both agree with each other on one thing: They both believe that Hamilton was speaking to the issue of the *removal* of federal officers when he stated that “[t]he consent of that body would be necessary to displace as well as to appoint.” This standard or consensus view, the view that Hamilton was speaking to *removal*, has been adopted by Supreme Court majorities and dissents, lower federal courts, and by academics in law and in other fields.<sup>9</sup>

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5. An Act regulating the Tenure of certain Civil Offices, ch. 154, § 2, 14 Stat. 430 (1867) (repealed 1887) (providing that executive branch officers appointed with Senate consent may not be removed from their offices by the President absent Senate consent); *id.* at 432 (noting final passage of the bill by congressional override after veto by President Andrew Johnson).

6. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 26–27 (1994) (“Whatever dispute there may be about the removal power of the President over the Secretary of Foreign Affairs and similar officers, there is no ambiguity about a central point: the first Congress conceived of the proper organizational structure for different executive departments differently. This conception, we believe, argues against the belief in a strongly unitary executive.” (footnotes omitted) (citing THE FEDERALIST NO. 77 (Alexander Hamilton))); see also Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1036 (2006) (“A half dozen or so Representatives spoke in favor of the theory that the Senate’s concurrence was necessary to remove.”).

7. See, e.g., Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2046 n.15 (2006) (“Even *The Federalist* gets some things wrong. Hamilton wrote that the President could not remove subordinates without Senate confirmation of the firing . . . .” (citing THE FEDERALIST NO. 77 (Alexander Hamilton))).

8. 272 U.S. 52, 176 (1926) (stating, in dicta, that the Tenure of Office Act, ch. 154, § 2, was unconstitutional).

9. See, e.g., *id.* at 136–37 (Taft, C.J.) (pointing to discussion of Hamilton’s *Federalist* No. 77 on the House floor in 1789 as supporting the view that the Senate’s con-

However, this understanding of *Federalist* No. 77, the view that Hamilton was speaking to *removal*, creates as many problems as it might resolve. And this is true without regard to whether or not you think Hamilton correct or in error. First, the standard view is puzzlingly inconsistent with everything we know (or, at least, everything that is commonly taught) about Hamilton, the premier Founding-era spokesman for energy and unity in the executive.<sup>10</sup> How is it that he would concede a role for the Senate in the removal of federal officers if a contrary view were even remotely tenable? Second, Hamilton's opining on the scope of the removal power is inconsistent with

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sent is necessary to effectuate removals, but arguing that Hamilton purportedly changed his mind during his service in Washington's cabinet); *id.* at 293 & n.86 (Brandeis, J., dissenting) (suggesting that Hamilton, in *Federalist* No. 77, took the position that the Senate played a symmetrical role in appointments and removals); *United States ex rel. Bigler v. Avery*, 24 F. Cas. 902, 904–05 (C.C.N.D. Cal. 1867) (No. 14,481) (Deady, J.); *The Claim of Surgeon Du Barry for Back Pay*, 4 Op. Att'y Gen. 603, 609 (1847) (Clifford, Att'y Gen.) ("It is conceded that [civil officers] are removable at pleasure [of the President] in all cases under the constitution where the term of office is not specially declared. It seems, however, that one of the authors of the 'Federalist,' before the adoption of the constitution, and while it was pending before the people for ratification, had intimated a different opinion, insisting that 'the consent of the Senate would be necessary to displace as well as to appoint.'"); JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 51–52 (1999) (quoting *Federalist* No. 77 and noting that "the constitutional policy has not worked out as Hamilton argued"); Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WIL-LAMETTE L. REV. 659, 671 n.49 (2009); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1273 n.39 (2006); *infra* note 12 (quoting Professor Akhil Amar). Academics in fields other than law have embraced this view. *See infra* note 10 (quoting, among others, historians and political scientists).

10. *See, e.g.*, Kitrosser, *supra* note 4, at 622 (describing Hamilton as "a staunch defender of a strong President"). The standard view of *Federalist* No. 77 has puzzled more than legal academics and jurists; it has puzzled historians and political scientists as well. *See* JAMES MACGREGOR BURNS & SUSAN DUNN, *GEORGE WASHINGTON* 68 (2004) (denominating Hamilton's position as "odd[]"); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 106 (1993) (denominating Hamilton's position in *Federalist* No. 77 as "careless[]"); Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 458 (2008) ("[A] question remains. If Hamilton is the father of the unitary executive, why did he write in *The Federalist* that the president would share the removal power with the Senate?"). *See generally* FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 130–31 (1979); Jeremy D. Bailey, *The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL'Y 169 (2010) [hereinafter Bailey, *The Traditional View*].

his plan for and the purpose of *The Federalist*. At the outset, his plan for *The Federalist* was to discuss the utility of union; the defects of the then-current regime (the government under the Articles of Confederation); the need for a more energetic government; and, finally, to respond to objections by providing an article-by-article, clause-by-clause defense of the newly proposed Constitution of 1787 as consistent with the principles of republican government, liberty, and property.<sup>11</sup> The problem is that *removal*, as in *pure removal* unconnected to any other political or legal act, is simply not expressly addressed in the Constitution. To bring up *removal* is just bad tactics. Why open up that can of worms, particularly where one's conclusion lacks direct textual support and any closely reasoned argument?<sup>12</sup> Was Hamilton really such a poorly skilled tactician and propagandist?

There is a third problem with the standard view. This problem is not historical, but textual. If you read Hamilton's statement, you will notice that he does not actually use the word *removal*, or any variant on the word *removal*. Rather, he uses the word *displace*. And that is the key to this ancient intellectual puzzle. Hamilton was not speaking to the power of *removing*

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11. See THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 2, at 4.

12. During the congressional removal debates of 1789, some members expressed the opinion that the power to appoint (a joint presidential-senate power, as a practical matter, under Article II) is coextensive with the power to remove. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 860 (Charlene Bangs Bickford et al. eds., 1992) (reproducing a June 16, 1789 extract from THE CONGRESSIONAL REGISTER reporting Representative White as stating in House floor debate: “[i]f then the senate is associated with the president in the appointment, they ought also to be associated in the dismissal from office”); *infra* note 27 (citing Congressman Smith's 1789 personal correspondence, which expresses the view that removals can only be effectuated by impeachment or by subsequent appointments). See generally R. B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 109–10, 208 n.90 (2009) (collecting secondary sources). *Federalist* No. 77 is usually understood as akin to this view. See, e.g., MCDONALD, *supra* note 10, at 131 (describing Hamilton's position in *Federalist* No. 77 as a “short cut to a ministerial system” with officers “responsible to the legislative as well as the executive”); see also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 565 n.40 (2005) (“[I]t should be noted that in *Federalist* No. 77, Hamilton/Publius had suggested *in passing* that the Senate would play a symmetric advice-and-consent role in both appointments and removals.” (emphasis added)); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 440 n.21 (2008) (denominating Hamilton's position in *Federalist* No. 77 as a “*passing comment*” (emphasis added)). Professors Amar, Calabresi, and Yoo's use of “*in passing*” and “*passing comment*” is as sphinx-like as Hamilton's original statement. Cf. Kitrosser, *supra* note 4, at 621 (denominating *Federalist* No. 77 as “*detailed*”).

federal officers; rather, he was speaking to who had authority to *displace* federal officers. The two words are akin, but they are not, at all times and for all purposes, the same.

## II. A PROPOSED SOLUTION

Not only are the two words akin, they frequently have identical meaning. For example, on the heels of Henry VIII, one might say, *The King's wife was removed from her perch*, or equally, *The King's wife was displaced from her perch*. Here *displace* means "to remove from a position, dignity, or office."<sup>13</sup> But there is another way to use *displace*. One might say *The King's wife was displaced by the courtesan*. In this instance *displace* does not mean *removed*; here *displace* means "to take the place of, supplant, [or] 'replace.'"<sup>14</sup> One can find examples of using *displace* for *replace* in any number of documents, both literary<sup>15</sup> and legal,<sup>16</sup> rough-

13. 4 OXFORD ENGLISH DICTIONARY 814 (2d ed. 1989) (defining "displace" as "[t]o remove from a position, dignity, or office").

14. *Id.* (defining "displace" as "[3]b. to take the place of, supplant, [or] 'replace'").

15. See, e.g., 1 OLIVER GOLDSMITH, AN HISTORY OF THE EARTH, AND ANIMATED NATURE 188 (Dublin, James Williams ed., 1777) ("A cork, a ship, a buoy, each buries itself a bed on the surface of the water; this bed may be considered as so much water displaced . . ."), quoted in 4 OXFORD ENGLISH DICTIONARY, *supra* note 13, at 814 (third definition of "displace"); cf., e.g., JOHN MILTON, PARADISE LOST, bk. I, 14 (London, Peter Parker et al. 1667) ("Gods [sic] Altar to disparage and displace For one of *Syrian* mode . . ."), quoted in 4 OXFORD ENGLISH DICTIONARY, *supra* note 13, at 814 (third definition of "displace"). I readily admit that evidence of usage appearing in Anglo-English publications and dictionaries is only some evidence, not conclusive evidence of contemporaneous American usage.

Not surprisingly, contemporaneous dictionaries (from England) define *displace* both in terms of *remove* and *replace*. See, e.g., FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London, J. Wilson & J. Fell 1765) (defining "to displace" as "to put out of a place; to remove from one place to another; to supersede"); 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward Dilly et al. 1775) (defining "displace" as "[to] put out of place, to put in another place, to disturb, to disorder"). Compare 1 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, T. Evans et al. 1772) (defining "to displace" as "[2] to put out of a place. To remove from one place to another. To supersede, remove, or abolish in order to introduce some other person or thing *in the room*. To put an end to disorder" (emphasis added)), with 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 157 (Washington, Duff Green 1828) (reproducing a May 27, 1794 letter from George Washington to the Senate "nominat[ing] William Short . . . to be Minister resident for the United States to his Catholic Majesty, *in the room* of William Carmichael, who is recalled" (emphasis added)).

American dictionaries, albeit post-1789, are also murky, and lean slightly against the "*displace* means *replace*" view. Compare NOAH WEBSTER, A COMPEN-

OUS DICTIONARY OF THE ENGLISH LANGUAGE 90 (Philip B. Gove ed., Bounty Books 1970) (1806) (defining “displace” as “to put out of place; remove, disorder”), and *id.* at 253 (defining “removal” as “the act of moving, a dismissal”), with *id.* at 254 (defining “replace” as “to put again in due place, to supply”); compare NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 261 (New York, S. Converse 3d ed. 1830) (defining “displace” as “1. To put out of the usual or proper place; to remove from its place. 2. To remove from any state, condition, office or dignity. 3. To disorder”), and *id.* at 689 (defining “remove” as “2. [t]o displace from an office”), with *id.* at 692 (defining “replace” as “4. [t]o put a competent substitute in the place of another displaced or of something lost”), and *id.* at 810 (defining “supersede” as “2. [t]o come or be placed in the room of; hence, to displace or render unnecessary”); compare WILLIAM G. WEBSTER & WILLIAM A. WHEELER, A DICTIONARY OF THE ENGLISH LANGUAGE 125 (New York, Ivison, Blakeman, Taylor & Co. 1878) (defining “displace” as “1. To change the place of; to remove 2. To discharge; to depose”), with *id.* at 422 (defining “supersede” as “1. [t]o displace: to replace”). Modern authorities recognize the ambiguity. See KENNETH G. WILSON, THE COLUMBIA GUIDE TO STANDARD AMERICAN ENGLISH 146 (1993) (“[D]isplace, replace (vv.) To *displace* something is ‘to move it, to put something in its place, to remove from office or to fire’: *The new robot displaces nearly twenty workers. The hulls of a catamaran displace surprisingly little water. To replace* something is either ‘to put it back where it was’ or ‘to supplant it with something new’: *I replaced the broken window pane. The new robot replaces nearly twenty workers.*”).

16. See, e.g., DEL. CONST. of 1776, art. IV, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 562–63 (Francis Newton Thorpe ed., Gov’t Printing Office 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (“The other branch shall be called ‘The council,’ and consist of nine members; three to be chosen for each county at the time of the first election of the assembly, who shall be freeholders of the county for which they are chosen, and be upwards of twenty-five years of age. At the end of one year after the general election, the councillor who had the smallest number of votes in each county shall be *displaced*, and the vacancies thereby occasioned *supplied* by the freemen of each county choosing the same or another person at a new election in manner aforesaid. . . . And this rotation of a councillor being *displaced* at the end of three years in each county, and his office *supplied* by a new choice shall be continued afterwards in due order annually forever, whereby, after the first general election, a councillor will remain in trust for three years from the time of his being elected, and a councillor will be *displaced*, and the same or another chosen in each county at every election.” (emphasis added)).

Compare 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, *supra* note 12, at 867 (reproducing a June 16, 1789 extract from THE CONGRESSIONAL REGISTER reporting House floor speech of James Madison in which he arguably uses *displace* in the sense of *replace*: “[The President] is impeachable for any crime or misdemeanor, before the senate, at all times; and that at all events he is impeachable before the community at large every four years, and liable to be *displaced* if his conduct shall have given umbrage during the time he has been in office.” (emphasis added)), with *id.* at 868 (reproducing a June 16, 1789 extract from THE CONGRESSIONAL REGISTER reporting James Madison’s House floor speech: “The question now resolves itself into this, Is the power of *displacing* an executive power?” (emphasis added)), *id.* at 878 (reproducing a June 20, 1789 extract from the GAZETTE OF THE U.S. re-

ly contemporaneous with the Constitution's drafting and ratification. Indeed, one finds *displaced* used by Madison (as Publius) in *Federalist* No. 47, but whether he meant it as *removed* or *replaced* is unclear.<sup>17</sup>

Using *displace* to mean *replace* seems to have occurred with some frequency in colonial charters and grants, albeit such instruments were from an earlier time.<sup>18</sup> In some instances, hold-

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porting Madison's speech as follows: "The question resolves itself into this: Is the power of *displacing* officers an executive, or legislative power?" (emphasis added), and 25 THE PAPERS OF ALEXANDER HAMILTON 569, 573 (Harold C. Syrett ed., 1977) (writing in *The Examination* No. XVII under the name Lucius Crassus, on March 20, 1802, Hamilton arguably used *displace* in the sense of *remove*: "[T]he Executive has such an agency in the enacting of laws, that as a general rule, the *displacement* of the officer [by legislation] cannot happen against his pleasure." (emphasis added)).

17. Compare THE FEDERALIST NO. 47 (James Madison), *supra* note 2, at 266 ("[T]he chief magistrate with his executive council are appointable by the legislature [in Virginia]; that two members of the latter [council] are triennially *displaced* at the pleasure of the legislature . . . ." (emphasis added)), with VA. CONST. of 1776, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3817 ("Two members [of the council] shall be removed, by joint ballot of both Houses of Assembly, at the end of every three years . . . These vacancies . . . shall be supplied by new elections, in the same manner."). My own view is that Madison's use of *displaced* here comes closer to the *replace* meaning than the *remove* meaning. But see THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 2, at 384 (arguably using *displacing* in the sense of *removing*: "It may perhaps be asked how the shortness of the duration in office can affect the independence of the executive on the legislature, unless the one were possessed of the power of *appointing* or *displacing* the other?" (emphasis added)).

18. See, e.g., CHARTER OF GEORGIA of 1732, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 772 ("And our further will and pleasure is, that the said common council for the time being, or the major part of such common council, which shall be present and assembled for that purpose, from time to time, and at all times hereafter, shall and may nominate, constitute and appoint a treasurer or treasurers, secretary or secretaries, and such other officers, ministers and servants of the said corporation as to them or the major part of them as shall be present, shall seem proper or requisite for the good management of their affairs; and at their will and pleasure to *displace*, *remove* and *put out* such treasurer or treasurers, secretary or secretaries, and all such other officers, ministers and servants, as often as they shall think fit so to do; and others in the room, office, place or station of him or them so *displaced*, *remove[d]* or *put out*, to nominate, constitute and appoint; and shall and may determine and appoint, such reasonable salaries, perquisites and other rewards, for their labor, or service of such officers, servants and persons as to the said common council shall seem meet . . ." (emphasis added)); GRANT OF THE PROVINCE OF MAINE of 1639, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1629 ("And the said Judges Justices Magistrates and Officers and every or any of them from time to time to *displace* and *remove* when the said Sir Fardinando Gorges his heires or assignes shall thinke fitt and to *place* others in their roomes and steed[.]" (emphasis added)).



ers of charter-granted powers were given both a *removal* power and a *displacement* power, which might indicate that they were understood to embody distinct, albeit related, powers. For example, *The Charter of Massachusetts Bay* of 1691 provides: “[T]he said Councillors or Assistants or any of them shall or may at any time hereafter be *removed* or *displaced* from their respective Places or Trust of Councillors or Assistants by any Great or Generall [sic] Court or Assembly[.]”<sup>19</sup> To be sure, it is possible that the *Charter’s* use of *removed* is coextensive with *displaced*. Florid and repetitious usage was widespread in contemporaneous documents, particularly documents involving the grant of royal powers. But it is also possible that the two terms were meant to be distinguishable. *Removed* may indicate a pure removal, that is, the removal of an official for policy or ideological reasons, or to save funds. *Displaced* may indicate that the empowered body or official had the power to *replace* a public official, not just to *remove* the current occupant. In other words, when an officer is *displaced*, he is *removed* by and in conjunction with the act of *replacing* him.

### III. A HISTORICAL CONJECTURE

Why might Hamilton have used *displace* in this manner? Modern commentators tend to forget how small the appointed-officer civil list was in the early republic. For example, when a new state came into the Union during the antebellum period, it received few salaried officers. Initially, a new state may have received little more than provision for an Article III district court judge (with salary provided for a clerk of the court), a tax official, a United States Marshal, and a United States Attorney.<sup>20</sup> Moreover, such officers did not always have salary provided for a deputy, a second, an alternate, or an assistant. *A President, even*

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19. THE CHARTER OF MASSACHUSETTS BAY of 1691, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1879 (emphasis added).

20. *See, e.g.*, An Act giving effect to the laws of the United States within the state of Vermont, ch. 12, § 2, 1 Stat. 197, 197 (1791) (providing for a single district court judge in the state of Vermont); *id.* § 7, 1 Stat. at 198 (presuming the existence of a federal marshal); *id.* § 8 (providing for a collector of duties); An Act for the admission of the State of Vermont into this Union, ch. 7, 1 Stat. 191 (1791); *see also* 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 15, at 80 (reproducing a March 4, 1791 letter from George Washington to the Senate nominating a district court judge, a United States Attorney, a United States Marshal, and a collector of duties).

if he had a strong ideological disagreement with an officer within his removal power, may have been quite reluctant to remove a distant federal officer<sup>21</sup> absent an on-hand Senate-approved replacement. Why? Who would serve process and subpoenas, who would execute warrants, and who would seize alleged contraband, evidence of crime, and criminals if the only United States Marshal in the jurisdiction were removed absent a deputy who could function as an acting United States Marshal?<sup>22</sup> Who would represent the United States in ongoing civil litigation and who would prosecute alleged criminals if the only United States Attorney in a jurisdiction were removed absent an assistant who could function as an acting United States Attorney?<sup>23</sup> And who would assess and collect federal duties during the interregnum between a pure removal and a subsequent appointment?<sup>24</sup> Hamilton's *Fed-*

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21. Cf. *Bowerbank v. Morris*, 3 F. Cas. 1062, 1064 (C.C.D. Pa. 1801) (No. 1726) (Tilghman, C.J.) ("The marshals in many districts of the United States, *live so remote from the seat of government*, that a considerable time must elapse before notice can be received: and it cannot be supposed that it was intended to injure bona fide purchasers, who may have paid their money at marshal's sales before it was possible to know the [outgoing] marshal was removed." (emphasis added)).

22. *But see* An Act to establish the Judicial Courts of the United States, ch. 20, §§ 27–28, 1 Stat. 73, 87–88 (1789) (permitting deputies to United States Marshals). Of course, this Act was enacted after *The Federalist* was published and after the Constitution went into force.

23. Possibly, in such a situation, federal powers could have been dumped on available state officers. *See infra* note 24 (describing Hamilton's views in regard to the collection of federal taxes by state officers). But even if it is constitutional to grant such powers to state officers, even if they could constitutionally act in such circumstances, and even if they were duty bound to carry out such duties, there is no reason to believe that a President, in such circumstances, would have had confidence in state officers—officers not under his appointment power and not subject to his removal power. Cf. *Printz v. United States*, 521 U.S. 898, 922 (1997) (Scalia, J.) (discussing the absence of "meaningful Presidential control" over state officers).

It is also interesting to speculate about why the First Congress provided that federal tax collectors and United States Marshals could make use of deputies, but that no similar provision permitted a United States Attorney to appoint an assistant. Compare An Act to establish the Judicial Courts of the United States, ch. 20, § 35 (providing for the appointment of United States Attorneys in each district but not providing for assistants), with *id.* §§ 27–28 (permitting deputies to United States Marshals), and An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, ch. 5, §§ 6–7, 1 Stat. 29, 37 (1789) (permitting deputies to federal tax collectors).

24. Compare *supra* note 23 (discussing potential difficulties in regard to relying on state officers), with THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 2, at 189 ("In other cases [involving the potential for both federal and state taxation], the probability is, that the United States will either wholly abstain from the objects

ederalist No. 77 may not have been a statement about the constitutional or legal limit of the President or the Senate's removal powers, but rather an empirical or practical claim<sup>25</sup> or prediction to the effect that in most cases removal would be effectuated by a subsequent appointment,<sup>26</sup> which, not surprisingly, would involve both the President and the Senate, just as any initial appointment to a vacant office would.<sup>27</sup> To put it another way, Hamilton, writing in 1788, had no way to know whether a future

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pre-occupied for local purposes, or will make use of the state officers and state regulations, for collecting the additional [federal] imposition. This will best answer the views of revenue, because it will save expense in the collection [by the federal government], and will best avoid any occasion of disgust to the state governments and to the people.”).

Even if Hamilton's suggestion here would work in the taxation context, it might fail in the civil or criminal litigation context. Reliance on state attorneys and state marshals may prove ineffective when the federal government is in litigation against a state or its officers, or when the object of the suit is related to property also claimed by a state. Likewise, when both a state and the federal government have claims or pending charges against a third party, reliance on state officers to give priority to federal claims and charges may prove unjustified as a practical matter. The bottom line is that early presidents may have had solid prudential reasons to avoid pure removals (which would leave federal functions at the mercy of state and municipal officers) in favor of subsequent appointments effectuating removal.

25. Compare THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 2, at 407 (“The consent of that body would be *necessary* to displace as well as to appoint.” (emphasis added)), with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–14 (1819) (Marshall, C.J.) (defining “necessary” in the Sweeping Clause, not in terms of absolute physical or legal necessity, but rather, in terms of “any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable”).

26. Obviously, I am leaving aside special circumstances and complexities involving either recess appointments or appointments to inferior offices—appointments not requiring Senate consent. See U.S. CONST. art. II, § 2, cl. 2 (Inferior Office Appointments Clause); U.S. CONST. art. II, § 2, cl. 3 (Recess Appointments Clause).

27. Cf. Letter from William Loughton Smith to Edward Rutledge (Aug. 9, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 1264, 1269 (Charlene Bangs Bickford et al. eds., 2004) (“In one or two states, the Governor & Council appoint another officer, which operates as a supersedure (if I may so call it) of the person in office . . . .”); *id.* at 1270 (“Again, as the Presidt. & Senate jointly appoint, it appears that if there be any other mode of removal than by impeachmt., the proper mode shod. be to remove the officer by the appointmt. of another, which must be by the concurrence of the Senate.”); *id.* at 1271 (“I have indeed heard it said that it was there [at the Philadelphia Convention] understood that the Presidt. & Senate would appoint a new officer & thus supersede the old one . . . .”). Smith's use of *supersedure* in this manner is very similar to how one contemporaneous dictionary defined *displace*. See ALLEN, *supra* note 15 (defining “to displace” as “to supersede”).

Congress would provide key executive branch officers stationed in the states and in the federal territories with assistants or staff.<sup>28</sup> And absent such staff, a pure removal would put federal functions, supremacy, and perhaps the entire constitutional project of “a more perfect Union” at risk.

From this standpoint, one can see the key function played by the Commissions Clause<sup>29</sup> under the original Constitution and in the early republic. When one officer *displaced* another, he tendered his commission to the outgoing officer as evidence of the subsequent *appointment*. Tender or notice effectuated the removal,<sup>30</sup> and if any third party were in doubt about who was

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28. *But cf.* An Act to establish the Judicial Courts of the United States, ch. 20, §§ 27–28 (authorizing United States Marshals to make use of deputies); An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, ch. 5, §§ 6–7 (permitting federal collector of tax duties to be assisted or succeeded by a deputy, or, in lieu thereof, a naval officer of the same federal district). Again, these statutes were enacted after *The Federalist* was published and after the Constitution went into force.

29. U.S. CONST. art. II, § 3 (“[The President] shall Commission all the Officers of the United States.”). The point is that the holder of an appointment needed to *possess* his commission in order to displace an outgoing officer. See Letter from William Loughton Smith to Edward Rutledge, *supra* note 27 (noting Congressman Smith’s views). *But cf.* Michael Stokes Paulsen, *Marbury’s Wrongness*, 20 CONST. COMMENT. 343, 345 (2003) (“If an appointment is complete upon signing by the President . . . then *delivery* is utterly immaterial. If that is the case, then Marbury had no real beef with Madison in the first place. He was legally appointed the nanosecond that President Adams signed the commission. He did not need to sue for delivery of the commission. All he needed to do was ride to the tailor, order a nice robe made, and walk into the courthouse and start deciding cases.” (emphasis added)).

30. See *Bowerbank v. Morris*, 3 F. Cas. 1062, 1064 (C.C.D. Pa. 1801) (No. 1726) (Tilghman, C.J.) (“A removal from office may be either express, that is, by a notification by order of the president of the United States that an officer is removed; or implied, by the appointment of another person to the same office. But in either case, the removal is not completely effected till notice actually [is] received by the person removed.”); *id.* at 1065–66 (Griffith, J.) (“The new commission must be accepted and shown to the old marshal, or other notice of it given to him, before he can be said to be removed from his office by the will or pleasure of the president. There is then a new patentee, and a proper discharge of the old marshal. I do not go the length of saying the new marshal must be sworn in . . . but he must accept and give notice by showing his commission or otherwise, to his predecessor; and from that time he must be considered as the officer, though before he ‘enters on the duties of his office,’ he must be sworn in.”); 1 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 87 n.b (Richard Peters ed., Boston, Charles C. Little & James Brown 1850) (commenting in an editorial footnote to a 1789 statute that: “A marshal is not removed by the appointment of a new one, until he receives notice of such appointment. All acts done by the marshal after

the proper officer, he need only look to the date on the two competing commissions. As the commissions emanated from equal authorities, the last-in-time controlled.

#### IV. CONTRARY EVIDENCE

There are three pieces of contemporaneous historical evidence that contradict the “displace means *replace*” theory. First, there is the simple fact that no one appears to have voiced it before.<sup>31</sup> This includes any number of significant, well-informed commentators who have considered and written on this precise question.<sup>32</sup> One might hesitate to embrace an entirely novel theory, like the one put forward here, unless the new theory carries great explanatory value otherwise lacking in extant competing theories.

Second, there is at least one and perhaps two contemporaneous expositions of *Federalist* No. 77 that make use of the tradi-

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the appointment of a new one, before notice, are good; but his acts subsequent to notice are void.”).

31. Justice Story, however, once put forth a view something like the one I put forward here.

§ 1532. [I]n an early stage of the government, [the power of removal] underwent a most elaborate discussion [in Congress]. The language of the constitution is, that the president “shall nominate, and, by and with the advice and consent of the senate, appoint,” &c. The power to nominate does not naturally, or necessarily include the power to remove; and if the power to appoint does include it, then the latter belongs conjointly to the executive and the senate. In short, under such circumstances, the removal takes place in virtue of the new appointment, by mere operation of law. It results, and is not separable, from the [subsequent] appointment itself.

§ 1533. This was the doctrine maintained with great earnestness by the *Federalist* [No. 77]. . . .

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1532–1533 (Boston, Hilliard, Gray, & Co. 1833) (citation omitted). Story’s understanding of *Federalist* No. 77 seems to be that Hamilton was arguing that the *only* method by which an officer may be *removed* is by *displacement* or *replacement*, that is, subsequent appointment. I am arguing here, by contrast, that the original public meaning of Hamilton’s *Federalist* No. 77 was that *removals* generally would be effectuated by *replacements* and that Hamilton never took a stand either: (i) on whether or not the President had a freestanding removal power (arising from the Constitution even absent a statutory grant), or (ii) on whether or not the President could be awarded a constitutionally valid statutory removal power. If you believe that Story’s view and my own are identical, I am more than happy to give him full credit for the “new” view (by which I mean the original public meaning) of *Federalist* No. 77.

32. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 350 (1996); see also *supra* notes 9–10 (collecting judicial opinions and academic publications stating the standard view).

tional “displace means removal” position. On June 16, 1789, in debate on the House floor over the President’s removal power, Congressman William Loughton Smith stated:

I would premise, that one of these two ideas are just, either that the constitution has given the president the power of removal, and therefore it is nugatory to make the declaration here; or it has not given the power to him, and therefore it is improper to make an attempt to confer it upon him. If it is not given to him by the constitution, but belongs conjointly to the president and senate, we have no right to deprive the senate of their constitutional prerogative; and it has been the opinion of sensible men that the power was lodged in this manner. A publication of no inconsiderable eminence, in the class of political writings on the constitution, has advanced this sentiment. The author, or authors (for I have understood it to be the production of two gentlemen of great information) of the work published under the signature of Publius, has these words:

“It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as [to] appoint.”<sup>33</sup>

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33. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, *supra* note 12, at 861 (indentation added to the second paragraph) (reproducing a June 16, 1789 extract from THE CONGRESSIONAL REGISTER in which Representative Smith’s House floor speech appeared, a speech which quoted *Federalist* No. 77). Smith made a similar point in the next day’s debate. *Id.* at 935 (“On this point I need only refer gentlemen to the authority I quoted before. Publius sh[o]ws clearly the superior advantage of having the president and senate combined in the exercise of this power.”).

Congressman Smith should also be remembered for writing one of the more interesting early commentaries on the Constitution. See WILLIAM SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER, AND WITH THAT OF THE UNITED STATES (Philadelphia, John Thompson 1796). Unfortunately copies of Smith’s short treatise—perhaps better described as a lengthy pamphlet—are difficult to come by. See Letter from A. Hamilton to Wm. Smith, Esq. (April 5, 1797), in 21 THE PAPERS OF ALEXANDER HAMILTON 20, 20 (Harold C. Syrett ed., 1974) (describing Smith’s *A Comparative View* as a “little work”). In any event, Smith’s work was well-informed. Compare SMITH, *supra*, at tbl.1 & n.n (“CONNECTICUT. [Governed under the] Old Colonial Charter of Charles II [of 1662]. unaltered, except where necessary to adapt it to the Independence of the United States. . . . Governor, as Presid[ent] of the council, and the Speaker of the House, have each a vote, besides a casting vote.”), with THE FEDERALIST NO. 68

In context, this particular congressional debate was about *removal*, qua *removal*. Here, Smith identified Publius's *displacement* power with *removal*. There is no indication that anyone speaking on the floor of the House contradicted Smith's representations about Publius's meaning.

In regard to the third piece of contrary evidence, our story takes an unusual twist. It is true that no one speaking on the floor of the House contradicted Smith, but apparently Hamilton, speaking as Publius, did so to one of Smith's contemporaries. On June 21, 1789, after the June 16th debate, Smith wrote Edward Rutledge as follows:

In the course of my speech, I quoted the *Federalist* as an authority on my side, (see 2d vo., pa. 284 [of the 1788 edition of *The Federalist*])—the next day [Congressman Egbert] Benson sent me a note across the house to this effect: that *Publius* had informed him since the preceding day's debate, that upon more mature reflection he *had changed his opinion* & was now convinced that the President alone should have the

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(Alexander Hamilton), *supra* note 2, at 366 ("It has been alleged, that it would have been preferable to have authorised the senate to elect out of their own body an officer [to act as Vice President and as Senate president] . . . [But] to take the senator of any state from his seat as senator, to place him in that of president of the senate, would be to exchange, in regard to the state from which he came, a constant for a contingent vote."), Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, 157 U. PA. L. REV. PENNUMBRA 134, 154 (2008) ("[I]n eight hundred years of English and American history no King, Queen, colonial governor, or President has ever served simultaneously in the legislature."), and John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 333 n.28 (1997) ("We also believe that the Constitution forbids the House from conferring one vote on some Members while providing more than one vote to other Members."). See generally Margaret A. Banks, *The Chair's Casting Vote: Some Inconsistencies and Problems*, 16 U.W. ONT. L. REV. 197 (1977). Why modern commentators rely on (the anonymous) Hamilton, rather than on Smith, is one of the enduring mysteries. See, e.g., JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 51–52 (1965) (quoting Hamilton's language above); ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 448 (1922) (same); Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 822 & n.60 (2005) (same); cf. John F. Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 149 n.46 (1995). But see *supra* note 1 (collecting scholarly authority questioning reliance on *The Federalist*). Is the answer really no more than *The Federalist* is easy to find? Cf. Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 226, 232 (2000) (citing Smith's 1796 first edition and 1832 reprint).

power of removal at pleasure; He is a Candidate for the office of Secretary of Finance!<sup>34</sup>

Looked at from one point of view, this letter, like Smith's floor speech, contradicts the "displace means replace" theory. There would have been no reason to use terminology like "changed his opinion" if Hamilton's views in *Federalist* No. 77 had never spoken to removal in the first instance.

On the other hand, we should remember that this letter is akin to triple hearsay. Smith's letter to Rutledge is summarizing the contents of a note from Benson—a note which we do not have. Benson's note to Smith, assuming it ever existed, purportedly summarized a communication Benson received from Hamilton. And Hamilton, assuming he communicated with Benson as Benson claimed, was purporting, in 1789, to explain his change of mind from views he had first published in 1788. I leave it to those who teach evidence to decide whether this information could come into court proceedings under any exceptions to the hearsay rule. Suffice it to say, not every scholar who has looked at this lengthy chain of communications has been willing to draw strong conclusions from it.<sup>35</sup> Indeed, my own view is that—even if no one was intentionally fabricating—this story does not have the ring of truth. Smith was one of Hamilton's close allies in the House.<sup>36</sup> If Hamilton wanted to bend Smith's ear, it would have

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34. Letter of William Loughton Smith to Edward Rutledge (June 21, 1789), in 69 S.C. HIST. MAG. 6, 8 (1968) (citations omitted); see also Letter from William Loughton Smith to Edward Rutledge (June 21, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, *supra* note 27, at 831, 832–33.

35. See, e.g., MCDONALD, *supra* note 10, at 131 ("[I]n the meantime Benson informed Smith, accurately or inaccurately, that Hamilton had changed his mind . . ."). Compare Prakash, *supra* note 6, at 1038 n.121 ("During the debates, Hamilton apparently had a change of heart." (citing the Smith to Rutledge letter of June 21)), with Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 120 n.185 (2006) (denominating Hamilton's later position as a "repudiat[ion]"). But see RAKOVE, *supra* note 32, at 350 (concluding, based on the Smith to Rutledge letter of June 21, that Hamilton had indeed changed his mind from the position announced in *The Federalist*); Richard S. Arnold, *Madison Lecture: How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 273–74 (1997) (agreeing with and quoting Rakove's position).

36. See, e.g., RON CHERNOW, *ALEXANDER HAMILTON* 459 (2004) ("Jefferson had guessed shrewdly: Hamilton either drafted Smith's speech or provided the information."); 12 THE PAPERS OF ALEXANDER HAMILTON 545 n.4 (Harold C. Syrett ed., 1967) (noting that "Smith was a Federalist Congressman from South Carolina and a frequent spokesman for H[amilton] in the House of Representatives"); *id.* at 543–44 (reproducing a letter, dated October 10, 1792, discussing Smith, from



made more sense to have spoken to Smith directly. Hamilton's speaking through Benson was a strategy that needlessly risked embarrassing or alienating Smith, an actual or potential political ally.

#### CONCLUSIONS

So which view is correct: the traditional view ("*displace* means *removal*") or the new view ("*displace* means *replace*")? The truth is we can never really know.<sup>37</sup> But the new theory does answer the three queries posed at the beginning of this Article. The new theory explains why Hamilton would have opined on a role for the Senate. His concession to Senate powers only went as far as to admit that the Senate had a role in any successive appointments, just as it had a role in any initial appointment. The new theory is in accord with his views (or, at least, the common understanding of his views) about unity in the executive. He never conceded any role for the Senate in *removals*, qua *removal*. Unity in the executive would still exist so long as the President had an independent removal power, unrelated to new appointments. The new theory is in accord with Hamilton's plan for *The Federalist*: Hamilton never addressed *removal*, an issue not expressly addressed by the Constitution's text. Finally, the new theory accounts for Hamilton's actual language in *Federalist* No. 77: Hamilton used the term *displace*, not *removal*.

In any event I would ask you, the reasonable reader, to re-read Hamilton and decide for yourself.

It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. *The consent of that body would be necessary to displace as well as to appoint.* A change of the chief magistrate

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Hamilton to Charles Cotesworth Pinckney: "[Smith] is truly an excellent member—a ready clear speaker of a sound analytic head and the justest views—I know no man whose loss from the House would be more severely felt by the good cause"). Admittedly, the communications above were drafted after 1789 or described post-1789 events. See MCDONALD, *supra* note 10, at 130 (describing the 1789 removal debates and noting that "Smith . . . was soon to become one of Hamilton's staunchest supporters").

37. The new view, however, has already received some approbation. See Letter from Professor Forrest McDonald to Seth Barrett Tillman (Feb. 14, 2009), available at [http://works.bepress.com/seth\\_barrett\\_tillman/115/](http://works.bepress.com/seth_barrett_tillman/115/) ("Your argument [that is, the new view] is, in my opinion, irrefutable.").

therefore would not occasion so violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change, in favour of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which from the greater permanency of its own composition, will in all probability be less subject to inconstancy, than any other member of the government.<sup>38</sup>

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38. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 2, at 407 (emphasis added). Recently, a group of prominent professors of constitutional law submitted a legal brief stating:

Even Hamilton, who indicated some ambivalence about presidential removal in *The Federalist No. 77*, regarded the Decision of 1789 as settling the matter. See 4 PAPERS OF ALEXANDER HAMILTON 638 n.3 (reprinting the 1804 version of *The Federalist Papers* personally edited by Hamilton, which noted [in a footnote] that “it is now settled in practice, that the power of displacing belongs exclusively to the president [which amounts to the ‘displace means remove’ view]”).

Brief of Law Professors as Amici Curiae in Support of Petitioners at 14 n.6, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 129 S. Ct. 2378 (Aug. 3, 2009) (No. 08-861), 2009 WL 2372919, at \*14, 2009 U.S. S. Ct. Briefs LEXIS 661, at \*25 (authored by Steven G. Calabresi et al.); accord Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103, 112 n.44 (2009), available at <http://www.vanderbilt.edu/lawreview/articles/2009/11/Calabresi-Yoo-62-Vand-L-Rev-En-Banc-103.pdf> (same). The authors of the amicus brief were apparently referring to the 1802 edition of *The Federalist*, edited by George F. Hopkins. See 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 2, at 290 & n.13 (citing THE FEDERALIST (New York, George F. Hopkins 1802)). As far as I know, no 1804 edition exists: 1804 was the year of Hamilton’s death at the hands of Burr. (Adding to the confusion, Professors Lessig and Sunstein suggest the footnote goes back to an 1810 edition. See Lessig & Sunstein, *supra* note 6, at 25 n.114.)

In my view, there is no solid basis for concluding that Hamilton approved of the footnote first appearing in the Hopkins edition. Admittedly, Harold C. Syrett, the editor of *The Papers of Alexander Hamilton*, concluded that the 1802 “Hopkins edition . . . must be taken as Hamilton’s final version of *The Federalist*.” 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 2, at 290. However, it is hardly clear that Syrett believed this to be the case in respect to the *footnotes* (that is, those footnotes originally authored by Hamilton when first published), as opposed to that part of the *main text* of *The Federalist* authored by Hamilton. *Id.* at 291 (“The [1788] McLean and [1802] Hopkins editions thus constitute Hamilton’s revision of the *text* of *The Federalist*.” (emphasis added)). Moreover, there is *no* written record from Hamilton indicating that he approved of this footnote or of *any* of the

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changes first appearing in the Hopkins edition. *But see* Lessig & Sunstein, *supra* note 6, at 25 n.114 (stating obliquely “[t]here is no indication that this [purported 1810] note is not Hamilton’s own words”—which is not particularly surprising given that Hamilton had already died six years prior to this edition’s publication).

The only evidence Syrett puts forward indicating that Hamilton approved of the changes first appearing in the Hopkins edition is that Hamilton’s son, John C. Hamilton, in 1847, *forty-five years after publication of the Hopkins edition and fifty-nine years after publication of the M’Lean edition of 1788*, inquired from Hopkins about Alexander Hamilton’s involvement in the Hopkins 1802 edition. “Hopkins replied that the changes had been made by a ‘respectable professional gentleman’ who, after completing his work, had ‘put the volumes into the hands of your father, who examined the numerous corrections, most of which he sanctioned, and the work was put to press.’” 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 2, at 291 (quoting Letter from George F. Hopkins to John C. Hamilton (February 8, 1847) (on file with the Library of Congress)). Even if one fully credits this extraordinary tale about Hamilton’s *overall participation*, and Syrett notes conflicting accounts of Hamilton’s role, this story hardly establishes that Hamilton approved of the particular footnote at issue here. *See id.* at 291 (“[I]t is impossible to resolve the contradictory statements on Hamilton’s participation in the revisions included in the 1802 edition . . .”). And, finally, even if we were one hundred percent sure that Alexander Hamilton approved of the Hopkins edition footnote in 1802—a footnote which no one contends he authored—that does not establish what he intended circa April 2, 1788 (when he first published *Federalist* No. 77) or how he was understood by the well-informed public at the time of ratification. *See* Bailey, *The Traditional View*, *supra* note 10, at 175 n.20. *See generally* Michael Coenen, Note, *The Significance of Signatures: Why the Framers Signed the Constitution and What They Meant by Doing So*, 119 YALE L.J. (forthcoming 2010) (manuscript at 17 n.67, 18 n.69), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1308991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1308991) (opining on ambiguities relating to Hamilton’s conduct at the Federal Convention).