POWER OF THE PRESIDENCY

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The Power of the Presidency

On September 20, 2000, political commentators George Will and George Stephanopoulos spoke about the power of the presidency as part of the Northern Kentucky University Alumni Association Lecture Series. Their comments, made seven weeks before the presidential election, could not have predicted the outcome: An election on November 7, 2000, that began a protracted six-week ordeal culminating in a U.S. Supreme Court ruling that led to George W. Bush taking office. Will's syndicated column appears in just under 500 newspapers in the United States and Europe; he also is a contributing editor to Newsweek magazine. Will won a Pulitzer Prize in 1977. Stephanopoulos is a visiting professor at the School of International and Public Affairs at Columbia University and a contributor to ABC News and Newsweek. He served on the Clinton/Gore campaign in 1992 as deputy campaign manager and director of communications. Both Will and Stephanopoulos appear on ABC's "This Week."

George Will

I wanted to talk to you tonight about the history of the presidency and why what we're witnessing is something that the Founders never envisioned. . . . I will talk mostly about a historic aspect of the presidency that interests me a lot and leave to George Stephanopoulos perhaps some of the more timely matters about the current campaign, which I think at this point he's probably enjoying rather more than I am.

I got my Ph.D. at Princeton, where I studied in the graduate school, which is located on a hill a fair walk away from the main campus. The decision to locate it there was a decision of epochal importance to the presidency of the United States. The president of Princeton wanted the graduate school elsewhere in the midst of the campus. The dean of the faculty wanted it where it eventually was located. Because he lost that fight, the president of the university left Princeton in a snit as was his wont, went into politics, became governor of New Jersey and president of the United States, and in the process revolutionized the office of the presidency. He is really one of the pioneers of what we live with today: the rhetorical presidency. It is something our Founders did not envision and would, I am confident, have been horrified by.

The rhetorical presidency is defined by a constant recourse to public rhetoric—public rhetoric understood not as the rhetoric between the branches of government, which is all the presidents did for a century or so— but rather public rhetoric defined as rhetoric designed to achieve mass effects. This is novel in American history, beginning in the twentieth century, and I believe the Framers of the Constitution would have said anti-constitutional. It is indeed the way you exercise leadership. But the Founders did not think highly of leadership. To them, the word “leader” was more often than not a synonym for “demigod.” The word “leader” or “leadership” appears in The Federalist Papers exactly twelve times, eleven of them in a derogatory context. The once it is referred to nicely, it is to refer to the leaders of the American Revolution. The executive branch was to their minds there to execute the will of others. It was to direct such public words as it had in mind to the legislative branch, which was to be the dominant
branch of government. They feared, as much as they feared anything else, and they were connoisseurs of fear, they feared a plebiscitary element in government that would pre-empt the indirect nature of American governance and the deliberative process they worked so hard to produce. They, therefore, developed through our early century or so of our politics a common law of rhetoric, and it was that presidents did not speak to the country directly.

George Washington gave on average one speech a year in public. John Adams gave one a year. Thomas Jefferson, garrulous Thomas Jefferson, to whom we will refer in a moment, gave five a year. Madison, who you would have thought had lots to say to the country, having fought a war and had his house burned and had to hide in the woods in Bladensburg, Maryland, you would have thought he might have appealed to the country rhetorically. He gave one public speech a year. Monroe gave five a year; John Quincy Adams, one. Andrew Jackson, the first populist president, the first president who cast himself as a tribune of the people, representing all regions and all classes, gave one speech a year. And so it was.

When Abraham Lincoln began his storied, wandering railroad journey from Springfield, Ill., to Washington, through Pittsburgh and Ohio and Harrisburg and down to Baltimore, stopping along the way to give speeches at every turn, at every turn he said, "It would, of course, be improper for me to talk to you about substantive policy matters." That wasn't what presidents did. You may recall that at Gettysburg, where he eventually did rattle on for two minutes and fifty seconds, he was decidedly the second speaker to Edward Everett. When his successor, Andrew Johnson, was impeached, one of the articles of impeachment of Andrew Johnson was the inappropriate use of rhetoric unsuited to the presidency.

There is a sense in which McKinley was the last pre-modern president in this regard. He never gave a speech to the country about our policy in the Philippines, about the sinking of the Maine, or about the war with Cuba. Not one. But he was succeeded by that man referred to as the "steam shovel in trousers," that Protean figure, the first great twentieth century man in a way, Teddy Roosevelt. Teddy Roosevelt was, by the way, the first man to ever be president who had been filmed by a movie camera, a harbinger of graphic journalism that was to be the technological as opposed to the ideological component of the revolution in the office. Teddy Roosevelt launched, you might say, the modern presidency in 1906 when he did something hitherto never done before: He actively campaigned for a piece of legislation. It is lost to memory now; it was called the Hepburn Act. It had to do with regulation of railroad rates. Railroads held entire regions of our country in their thrall, and it was considered a regime-level issue. And, because it was, he took to the hustings, and the rest is history. But it wasn't for Teddy Roosevelt, not the theoretically inclined sort, to give a new theory of the presidency that would justify his behavior. That fell to the man he so cordially detested: Woodrow Wilson.

Woodrow Wilson was of course a political scientist. Science was in the air at the turn of the century: Marconi, the Wright brothers, Edison, Ford. The heart of the progressive movement's theory was that indeed there could be and should be a new science of politics, to which end Thomas Woodrow Wilson, then of Johns Hopkins University, was a founder of the American Political Science
The theory was that if you could just concentrate experts in Washington and Washington experts in the executive branch, the American people could be pulled up from their anachronistic local attachments and modernized. But it would require executive leadership. The word was about to acquire benign connotations in the hands of Professor Woodrow Wilson, who was in the process making his mark as the first president of the United States to criticize the Founding Fathers. He did not say they failed to do what they should have done. He faulted them for doing what they intended to do, which was to produce a government full of inefficiencies offensive to the scientific spirit.

We have a government designed by those who went to Philadelphia in the summer of 1787, not to design an efficient government – that idea would have appalled them – but rather to design a safe government, to which end they filled it with blocking mechanisms: three branches of government, separation of powers, checks and balances, veto, veto overrides, special majorities, judicial review. It’s a government designed for gridlock. One of the most peculiar aspects of American complaint these days, and we are prolific complainers, is gridlock in Washington. Gridlock, ladies and gentlemen, is not an American problem. It is an American achievement. There are 5.7 billion people on this planet, 6 billion rather, and 5.7 billion of them wish they lived under governments capable of gridlock. The Founders designed a government difficult to move. And it worked, by the way. Between the founding and the Civil War, eight-five percent of the growth of government was in one department: the post office. You still can’t get a postcard across town, but . . . .

The American dream was a government safe, not a government easily moved, least of all by the powerful rhetoric that was to be the specialist of Woodrow Wilson. Woodrow Wilson said it is the president’s job to interpret – his word – to interpret the inchoate longings of the American people, to make articulate their inarticulate strivings, and that only he could do it because everyone else was sunk in local parochial interests, whereas the president would represent the whole country. Well, whether or not you agree with it, he practiced it with a vengeance. He was the first president since Thomas Jefferson to renew the practice of delivering the State of the Union address in person to Congress. Jefferson had stopped that, (a) because he didn’t like the sound of his own voice and (b) because he thought it monarchial for the executive to stand above the legislature and declaim to them. But Woodrow Wilson came along at a time when he could supply the ideology, and science soon would provide the technology – broadcasting – to make the rhetorical presidency work. We’ve seen much of it in our times. It’s a practice by both parties. Ronald Wilson Reagan, as his name is, was a great admirer of the first great master of broadcast media, Franklin Roosevelt. Franklin Roosevelt got his first experience at public office as the assistant secretary of the Navy under Woodrow Wilson.

Now the result, some of us feel, is a presidency that is swollen and unseemly, that we have developed a kind of watery Caesarism in our system. The president is everywhere, and some of us think it is not coincidental that the government is everywhere also. Are we stuck with this? Indeed we are. The American people now want a president who feels their pain, a great therapeutic government in this regard. It’s an emotional bond they want with their political leaderships. Can you imagine someone trying to have an emotional bond with John Adams?
Abigail barely did, probably. On the other hand, now we’re going to have “compassionate conservatism.” That’s just a reluctant right-wing way of feeling the pain. But perhaps it is needed.

There are those, and I will now make the argument, there are those who say that in the kind of country we have developed, this vast continental industrial power, you do indeed have to have someone who inspirits, infuses the country with a kind of heat of rhetoric. The reason for this would be grounded in the American Revolution and democratic theory. Really, the Madisonian revolution. Prior to the American founding, political theorists were unanimous in saying that if – and it was an enormous if – democracy were to be possible anywhere, it had to be practiced in a small polity – Rousseau’s Geneva, Pericles’ Athens – a face-to-face society, because the great enemy of democracy was faction, and a small homogenous society would be free of faction. Madison’s revolution, the American revolution in democratic theory, was to say, no, factions are good things. A saving multiplicity of factions is what we want, because they had a simple catechism. What is the worst that politics can produce? Tyranny. To what form of tyranny are democracies prey? Tyrannies of the majority. Solution: Don’t have majorities. Have unstable majorities composed of shifting, constantly fluid, fluctuating minorities. To which end, he said in Federalist 10 that we should have an extensive republic governed by a government that says its first task is to protect, in Madison’s language, the “different and unequal faculties of acquiring property.” Different and unequal capacities produce different interests, factions, and factions – this plurality of factions – would make a stable tyrannical majority impossible. Interestedness, hitherto thought to be the bane of democracy, was going to be domesticated in America. He said, in Federalist 51, you see throughout our system the process “of supplying, by opposite and rival interests, the defect of better motives.” We very nearly designed a government, he said, our Founders had, that would work if no one had good motives. A swirling maelstrom of interestedness would produce government, not pretty, but safe. And, perhaps once the factions become as muscular and as numerous as they do in a continental industrial society, you do need, perhaps, a president who rises above interestedness and factions and speaks for the commonality.

The great president who did that, of course, was pre-modern in a sense, it was Lincoln, who in one of his greater moments not widely known, at the Wisconsin State Fair in 1858 with war clouds already on the American horizon, spoke to a crowd. He said there was an Oriental despot who summoned his wise men and commanded them to devise a statement, a proposition, to be carved in stone over the city gates to be forever in view and forever true. The wise men departed and awhile later they came back, and the proposition they gave to him that would be forever true was, “This, too, shall pass away.” And yet, said Lincoln, perhaps if we cultivate the moral world within us as prodigiously as we cultivate the physical world around us, that need not be true of the United States. And so it does seem to have fallen to presidents to try and summon “the better angels of our nature,” in Lincoln’s famous phrase.

It has become perhaps the central task of the president to inspirit, to interpret, in Wilson’s language. But as you listen to the rhetoric this year, if you can bear to, remember this is not what the Founders had in mind for the executive branch
to execute the will of others. I mean, the rhetoric today, my goodness. You've all been to Washington, seen the luminous rhetoric of the Jefferson memorial. "I tremble for my country when I reflect that God is just. I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man." It's good stuff. Back then politicians spoke in whole paragraphs, one right after another.

As I mentioned, Lincoln talked for two minutes and fifty seconds. In the age of television, that's forever. Today he would simply have said, "Read my lips: No slaves." So, it's quite curious we have today a rhetorical presidency without the rhetoric. Rather sad. But I ask as you look at this peculiar presidential campaign we're having, to look at it in the light of a history that was not for years welcoming to this kind of prominence on the part of the presidency. Now, I shall subside and leave it to George to pick up the thread of this narrative and tell you who's going to win. I have a pristine record of being wrong about these matters, so when it comes to political prophecy, I subscribe to the Zeke Bonura principle. Zeke, as real baseball fans may remember, was a first baseman of spectacular immobility. But Zeke understood the first rule of baseball, which is you cannot be charged with an error if you do not touch the ball. I give you George Stephanopoulos.

GEORGE STEPHANOPoulos

Never have I been introduced like that before. I was taking notes the whole time. I felt I was back taking classes in history of the presidency. George, maybe you should go into speech writing. The candidates could use some of your help, but I know you're not eager to volunteer.

I come into politics not so much from deep training, though I've studied it, but by heritage. I'm Greek, and we Greeks like to think that we invented politics. In fact, the very word "politics" is Greek. It comes from the Greek root, "poli" which means many, and "tics," which are blood-sucking insects. I thought that often as I was doing my work in politics, but now I am trying to earn my living commenting. This is the first presidential campaign after working in three of them in a row, one losing and two winning, where I'm trying to cover it as a journalist. So, I do want to talk about that at the back end of my remarks and then go to your questions.

But first let me pick up on the thread of what George Will was talking about because I have great sympathy for the position that George enunciated in the fact that presidents almost seem forced or feel forced more than ever to talk rather than do. I do think it's a bit of a strategy born of necessity, having watched a president try to deal with the various contending forces in the White House. And George, I'll add on to some of your notes. By the time we got up to Truman, Truman was speaking eighty-eight times a year. Ronald Reagan, 320. Bill Clinton, 550 speeches a year, all the way from George Washington's one. It does show a dramatic change in the number of times a president of the United States does speak to the country. But, as I said, I don't believe that has necessarily made for a more powerful president, and I agree with George that a powerful president is not what the Founders intended.
I am a follower of the presidential scholar, Richard Neustadt. Like me, he was a Columbia University professor, and in his classic 1960 study of the presidency, which he wrote after serving many years before for President Truman, he put forth the theory that the real story of presidential power is presidential weakness, that even a strong president is weak. He opens the book with this anecdote. He’s talking about Truman’s final days in office, and he’s sitting in the Oval Office with Truman in the late summer of 1952. Eisenhower is going to be president, and Truman is just ruminating and almost feeling sympathy for the former general he never thought he’d feel sympathy for. And he’s sitting at the desk in the Oval Office, and he says, “You know, Ike will sit here. He’ll say, ‘Do this,’ and ‘Do that,’ and nothing will happen. Poor Ike. It’s nothing like the Army.”

I pulled that text out an awful lot when I was working in the White House because I can’t tell you the number of times when I was sitting in the Oval Office with President Clinton, whether he was railing against the intractability of the joint chiefs of staff, or the orneriness of the Congress or the insubordination of The New York Times, the liberal New York Times. He would wail and say he feels like Captain Ahab lashed to the mast and there’s nothing he can do. He has no power. He’s becoming a prime minister, not a president, and he doesn’t have a majority.

Presidents feel, when they’re on the inside, all the weakness that the Framers did intend. I think that in some ways this desire to speak out feels like their only outlet, the only way where they can make the impact that they feel they were elected to make. As Neustadt put it, he felt that the only real power a president has is the power to persuade. The president and the Congress are so interdependent and intertwined that neither one of them has absolute power, and certainly the Constitution does give all the legislative powers to the Congress. Even when these groups come together, he wrote, they face all these other claimants in the share of governing: the courts, the press, the public, private institutions, foreign governments. So, what you have is all of these separate institutions sharing each other’s power, and to share is to limit, he concluded. That is the heart of the matter.

We have countless examples – I’m much more familiar with the modern presidency –countless examples in this century where presidents have still been able to take action on their own that would change or accelerate the course of history with just the stroke of a pen. FDR all but saved the Allied war effort against the Nazis with his destroyer deal. Harry Truman desegregated the military overnight. Following the freedom riots in 1961, John F. Kennedy’s administration petitioned the Interstate Commerce Committee to desegregate all facilities, including bus terminals, railway stations and airports. One of Ronald Reagan’s first acts in office was to fire the air traffic controllers. He earned the unending hatred of organized labor, probably the grudging respect of the country and, perhaps what he most intended, the fear of the Congress, the central element of leadership. He did it on his own. Bill Clinton was not able to force gays to serve openly in the military, but he was able with the stroke of a pen to end discrimination against gays and lesbians seeking security clearances. In a move that was, I’m sure, dramatically unpopular in this state, he ordered the Food and Drug Administration to restrict the activities of tobacco companies. And he
unilaterally protected millions of acres of federal lands from development. So presidents can act when they have to, and the greatest presidents — Franklin Roosevelt, I would argue Lyndon Johnson — have also been able to mobilize great constituencies for big legislative action: the New Deal, the Great Society. But forty years after Neustadt wrote in 1960, I think that his theory is still sound, as presidential power is no more than the power to persuade. Even though we may have, as George Will says, a rhetorical presidency, we are very far from an imperial presidency. I do believe that is, as I said, exactly what the Framers intended, and I think that the presidents have gotten even more constrained over those last forty years.

Let me just throw out a few examples. First of all, we have become and this has become an era not of big government, but an era of divided government. Twenty-six out of the last thirty-two years, we’ve had a president of one party, a Congress of another. Now, I don’t subscribe to this theory that people vote strategically when they go into the booth. I don’t think it will happen this year either, that people will consciously elect a president of one party and then a Congress or a member of Congress of the other. But there is an awful lot of evidence that whenever a president seems to get too much power, in the next election they will lose their majority; people will balance it out. Ronald Reagan comes in at 1980. In 1982, I think he lost close to eighty seats in the House of Representatives. I’m much more painfully aware of what happened in 1993 and 1994. Bill Clinton is elected by a very small margin, forty-three percent of the vote, has the Senate and the House in Democratic hands as well. In 1994, people say Bill Clinton went too far with gays in the military, with his health-care plan, with gun control, and they elect a Republican Congress to balance him out. Then you see the country saying, “Well, wait a second, we don’t want the Congress to get too powerful either.” They re-elect Bill Clinton in 1996. This has become a pattern that is unlikely to break in this election. Whoever wins the White House, even if they get control, even if the Democrats get control of the House if Al Gore wins, you’re going to have a two- or three-seat majority in the House. If George Bush wins, he may have a Republican majority in the Senate, but again, at best, he’ll have only a two- or three-seat margin in the House. That means that the only way he’ll be able to lead is to rally the country behind him and to use the bully pulpit as well as he can.

Presidents have also become constrained more than ever, I think, by the rising expansion of the global economy over the last forty years. Global markets, global corporations, these limit any president’s room to maneuver in economic policy. I mean, can you imagine in 1952, when steelworkers went on strike, Harry Truman seized the steel mills. That would never happen today. It is absolutely inconceivable when you’re dealing with global markets and global corporations, who would feel that they would simply follow through on the threat to move their workers and their plants overseas. It’s impossible for a president to follow through on that kind of action. We saw in the Clinton White House in early 1993, President Clinton ran in 1992 on a big promise of new public investments in education, in infrastructure, in training. He tried to make good on it, but the markets demanded in early 1993 fiscal discipline. Demanded deficit reduction. It would have been literally impossible for the president to even propose the plan as he spelled it out in the campaign. You would have had an
immediate drop in the bond market. My old partner, James Carville, used to say that when he died and was reincarnated, he wanted to come back as the bond market because it ran everything. Every president of every political party will face the same dynamic. The markets react immediately and overwhelmingly to presidential action.

In our first week in office, Secretary of Treasury Lloyd Bentsen gave a television interview. He said that there would be an increase in the energy tax, a direct contradiction of what was promised in the campaign, but there was an immediate reward in the bond and stock markets, a powerful force constraining any president. The same dynamic works in pushing presidents toward being for promoting free trade. One of the most significant public pieces of legislation that the Clinton administration will ever sign was this opening toward permanent normal trading status for China. Pretty close to precisely the opposite of what Bill Clinton promised in the campaign of 1992, where he was quite critical of President Bush for coddling the dictators in China, for being too open to trade and ignoring human rights, abuses, and restrictions of liberty in China. But again, this is something the markets demanded, and because the president absorbed it as his own commitment it will become one of his signature accomplishments. But it is not what he set out to do when he ran in 1992. It was something demanded by the environment in which he worked.

A third dynamic that has really changed the nature of the presidency and constrained the president’s ability to act is really the growth of global, instant, and constant communication, which has made the decision-making process in the White House transparent. That has complicated any president’s ability to be able to take unpopular actions in the short term and hope it would work out and to have private deliberations as policy is made. A lot was made in early 1993 about the secret decision-making of Hillary Clinton’s health-care task force. The truth was, more was known about that plan before it was drafted than would have been known about most bills in the past. As all decisions are dissected in real time with a constant focus of twenty-four-hour cable news networks, it is increasingly difficult for the presidents to command the agenda. Presidents are talking more but being heard less. The only moments where the president is actually controlling the agenda is once a year in the State of the Union, where the president generally has an hour, sometimes in Clinton’s case an hour and a half, to make his case to the American people. Everything else is cut up, dissected, and as George said, eight seconds, twelve seconds, through the filter of a media which is increasingly negative in tone and where we know more about the personal and private lives of the president than we ever have before. All of the media studies of the last thirty years show that the volume of coverage has increased, the intensity of the coverage has increased, but the tone of the coverage has become far more negative. So, presidents feel that the only way they can combat that is to come out with rapid rifle shots every single day of their policies and hope that something breaks through. But it’s with little effect.

The fourth factor constraining presidents, which I think is the most pernicious, is the rise of a permanent investigative apparatus trained on the White House. What we’ve seen is finally, this year, the death of the special counsel law. But every single president since Richard Nixon has faced several investigations by special counsels. Just today, finally the Whitewater
investigation was wrapped up after $52 million and six years and again no criminal charges against the president, first lady, any high White House official. Same goes for the travel office investigation. President Carter had an investigation of his peanut warehouse; Hamilton Jordan of whether or not he used cocaine; Ed Meese in Ronald Reagan's White House; the Iran-Contra investigation in Ronald Reagan's White House. There is still today a special counsel investigation of Samuel Pierce. Do you know who Samuel Pierce is? Ronald Reagan's secretary of housing and urban development. He left office in 1987. The special counsel is still investigating him.

Now, as I said, the law has finally lapsed, but the opportunity costs and the amount of time and attention that White Houses have spent defending themselves against these investigations has made White Houses—you have to set up entire operations within a White House just to deal with it. You combine that with Congresses, and this has been in both Democratic and Republican Congresses, using their oversight powers really just to investigate White Houses for political purposes, and you have a presidency which is hemmed in. Added to that, the Supreme Court has made a decision, which perhaps looks justifiable in retrospect, but I believe that when they decided nine to nothing that a president could be sued in the Paula Jones case, they have set a precedent, which I think will be harmful in the long run because it will reinforce a tendency now to use the legal system for political purposes against the president. Something has got to put a stop to it. I see no evidence that it's going to stop anytime soon. But I do think it has become something that has just creeped up inside the presidency, eaten away at the heart of presidential staffs and our political system. I don't absolve President Clinton from blame for this at all. I think that obviously he has to bear responsibility for his own actions in the Monica Lewinsky affair, but even more than that in the way he carried out his defense of the Monica Lewinsky affair. He probably did more harm to the notion of executive privilege than any president before him.

Finally, in foreign policy the president has seen his room to maneuver, his power to intervene limited greatly, both statutorily—the War Powers Act following Vietnam—but even more at the end of the Cold War, the president is not able to automatically summon the support of the country for action overseas. Now many would say this is a good thing. There's been strong, principled objections to the Clinton administration efforts to intervene in Bosnia, Haiti, and Kosovo. President Clinton was able to lead these efforts, but the long-term lesson to take away from that is that a president can act and is able to act. The same would hold true for President Bush's intervention in the Persian Gulf War in 1992. Only when the conflict is quick, only when the casualties are low, and only when the costs can be shared. So this is a force for limited government, not for a presidency of unlimited imperial powers.

Finally, the point I would make picks up on George's fear of a plebiscitary presidency. That fear is quite real because one final dynamic you've seen take over, when all these other factors are put together and with the prevalence now of permanent polling and permanent attention on the presidency, is that you have basically got what Milan Kundera called, with this perpetual polling, a parliament in permanent session and campaigns that never end. Presidents feel
that we may be suffering from an excess of democracy because a president is constantly rated in real time. They don't really have the ability to demand sacrifice because their approval ratings go down, the Congress responds, and you can't rally the country around any great purposes. So, I believe whoever wins in November, and I do have a prediction on it, I guess you can guess what mine would be, is going to face a presidency as weak as the Framers intended, and they are going to be forced to hold the middle of the road as most presidents in this century have.

So where does it stand now? About dead even. I think that right now it is probably a three- to four-point advantage for Vice President Gore. It's dead even basically in the Electoral College. Both Gore and Bush have about 200 electoral votes sewn up each. But, I believe that if you look at the underlying conditions of the country, the peace and the prosperity, if you look at the fact that since the summer, Al Gore has been able to really separate himself from the president by picking Joe Lieberman, by surrounding himself with his family at the Democratic convention, and by moving the debate back to the issues which favor Democrats - education, health care, and Social Security - he has been able to move the entire campaign back to a trend that is favorable for him. At the risk of making a foolish prediction, I believe this is a campaign that right now is almost impossible for Al Gore to lose.

There's a whole field of political forecasting where you have these political scientists come up with various models where they take presidential approval ratings, the strength of the economy, and try to factor in any kind of fatigue that comes in after two or three terms of a president. Every single one of them predicts an Al Gore victory at fifty-two to fifty-six percent. Now, I don't think it's going to be that high. But, the truth is that no incumbent candidate has ever lost in the face of economic numbers like this or presidential job-approval ratings this high. We've also never had a president at this phase of the campaign who has had personal approval ratings as low as President Clinton has, but I don't believe it's enough to bring Al Gore down.

Secondly, as you match up in these last forty-eight days, it's pretty clear that Al Gore's campaign staff, a real battled-hardened campaign staff, veterans of the '88, '92, and '96 campaigns, is running at this point at least a more competent day-to-day guerrilla campaign than the Bush campaign is capable of. Every campaign makes mistakes, but the Bush campaign hasn't really shown an ability to recover from the mistakes quickly and move back on to their agenda. I think that is matched as well by the personal strengths of the candidates. Clearly, Al Gore had a very bad spring, and he often has a bit of a problem sticking closely to the truth in his claims in the campaign. But he does have experience, a fierce desire to win — and you cannot underestimate the power of pure ambition and a will to win in a presidential campaign — and he is unbelievably disciplined. George W. Bush is disciplined on his message, he is clearly a likable person, but he hasn't been able really to adjust to the rigors of the campaign. And, about every three or four days, he makes a mistake, which I think is born out of pure fatigue. That is starting to break through to the country. Given that, the position for Gore is very strong right now. If he just maintains the leads he has right now in the states of Pennsylvania, Wisconsin, and Michigan, I don't think he can lose the race, even if he loses border states like Kentucky.
George Bush has had a better week. He started to turn the campaign around. He finally ended this debate on debates. He came up with a new message designed to really draw sharp contrasts with Al Gore on tax cuts, on Social Security privatization, on health care and prescription-drug benefits. There are deep differences between the campaigns. He started to articulate them in a clearer way, but he’s really got only one chance left. He’s got this window of debates coming up in about a week, and it’ll have a two-week span, and this is going to be the one moment where this final probably ten to fifteen percent of the electorate is going to turn in. Unless he strikes hard, I don’t believe he can turn this around. Even though expectations are quite low and everybody says he can beat expectations, the truth is that Al Gore is a much more practiced debater. He has been through this before. George W. Bush was not able to perform particularly well in the debates in the primaries. In fact, his standing diminished the more he met his opponents in the debates. I think that even a solid performance will not be enough to unseat Gore. So, I am going to be foolish enough to make a prediction. I do believe that Al Gore will be the next president of the United States, whether or not he wins the state of Kentucky. Thanks very much.

**QUESTION-AND-ANSWER SESSION**

**Question for Stephanopoulos:** In your book there’s a passage in which you describe a time when you were in the Oval Office, and the president handed you a folder in which there was a recommendation from Al Gore and the re-inventing government group, where Al Gore wanted to spend a couple million dollars to study bovine flatulence. And, as I recall, it sounded like the president was putting Al Gore down. What does Bill Clinton really think of Al Gore? Does he think he is a little strange, like some of us do?

**Stephanopoulos:** I think the real question is, what does Al Gore really think of Bill Clinton? First of all, he liked Al Gore from the moment he met him, the moment they met in the vice presidential selection process in 1992. They’d been great rivals before that throughout the 1980s. They were both really rivals for the head of the moderately conservative wing of the Democratic Party. Clinton was always worried that Al Gore would outshine him and get the prize first. Gore did run first in 1988. They were very wary of each other at the beginning of the process.

When Al Gore was considering taking the vice presidency in 1992, he was warned against it by his mom. Pauline Gore said, “I just don’t trust that Bill Clinton.” But when they got together, they had an immediate meeting of the minds. They were both kind of competitive and they enjoyed the intellectual sparring and talking policy issues. The president really respected Gore’s sense of discipline and strength and came to rely on it over time. Also, I think that he came to respect Gore’s ability to help manage the White House. For everything else he was doing in the White House, Al Gore for much of the time – at least that I was there in the first term – was like a shadow chief of staff. President Clinton relied on him for that. He believed, though, that Gore, even with his discipline, was a little too inflexible, a little too rigid. The scene that you point out brings that out. When Gore gets a set idea in his head, he’s impossible to
move off it. That is not really Bill Clinton’s nature at all, and sometimes you would think that the vice president would be a little annoying like that.

I take the president at his word when he says he believes that Al Gore has been the most influential vice president in history. He did rely on the vice president for both management advice as a friend and for his advice on a number of policy issues, and he gave the vice president great leeway on the issues of his expertise: telecommunications, the environment, and some in foreign policy. At the same time, in his heart, I think Bill Clinton believes that he is a better politician than Al Gore. And Al Gore will never be able to create the emotional connection with the American people that he did, but whatever he believes, he also knows that the most important thing for his own legacy is for Al Gore to get re-elected. He would like to be able to do more for the election, but Al Gore won’t let him.

Moderator: Mr. Will, do you have anything to add?

Will: Yes, only with regard to Al Gore and ideas, a dangerous combination. Cardinal Wolsey said of Henry VIII: “Be very careful what you put in his head. You’ll never get it out.” Al Gore wrote that fundamentally preposterous book, *Earth in the Balance*, and he’s just reissued it, saying he believes everything he said in it. If you believe that the biggest threat to our country is the internal combustion engine, go buy that book.

Question for Stephanopoulos: One of the observations you made about limits on the contemporary president is the Independent Counsel Act, which is now defunct and was not renewed. My question is, if there were no independent counsel, if there were no investigation of the Monica Lewinsky affair, would there have been anything different, would Clinton have been able to get more or additional policy positions approved by the Congress if he didn’t have that investigation to worry about and subsequent impeachment proceedings?

Stephanopoulos: There is no easy way to know, but I would think that there is some evidence that yes, he would have. Basically, in 1997, before this whole story broke and when it looked like the independent counsel was winding down, the president was able to reach a balanced budget agreement with the Congress. It was pretty balanced in its outlook. He was setting the table, I believe, in 1997 for reforming Social Security. I think he felt that would be his last major effort. Whether it could have happened is difficult to know, but there would have been a much better chance if you had not lost the entire years of 1998 and 1999. Perhaps the same could have happened with the reform of Medicare, where you could have had bipartisan reform of Social Security and Medicare that would have included some sort of prescription-drug benefit, which is likely to happen in the first year or two of the next president. Now, the factors that were working against that obviously are that Al Gore would have had to watch and be careful of too much compromise towards the Republicans, something that might come back and haunt him in the 2000 campaign. But Clinton would have been powerful enough to overcome it.

Question for Will: My question has to do with issues when capitalism and democracy are at cross-purposes. There are those who feel that some of these free trade issues are an example of that, and why does it seem that the economic factors always seem to win out over the political factors?

Will: Can you be more specific? Give me an example.
Question for both: Well, concerning things like NAFTA, GATT, the permanent normal trade relations with China. There is a large mass of people who feel that this is obviously not in the best interests, and it seems that it has been rammed through to a certain extent by the corporate interests, the bond market of which Mr. Stephanopoulos spoke. Are we not tilting the balance perhaps a little bit too unfairly toward the economic end of the spectrum and not giving the power on the political end of the spectrum?

Will: Of course, conservatives exist to tilt things toward the economic perspective. First of all, let me just quarrel with you on one point. The bond market is not a bunch of bond traders on the southern tip of Manhattan. The bond market is the economic populace of this planet, making billions of decisions every day, communicating that information through their decisions that get objectively measured in bond prices. That is as objective a measure as you can have of the real strength of a currency and an economy. You're right, there are a large number of people distressed by free trade and the simply torrential force that can have in uprooting ancient institutions and jobs and communities. You may remember that the most powerful hymn ever written to the power of capitalism is in The Communist Manifesto where Karl Marx says everything solid disappears into air because of the force of this permanent revolution of capitalism. It does upset people and it does cause pain to communities. But there is, I think, by every measure a clear majority in this country in favor of NAFTA, and a clear majority in favor of trade with China, a clear free-trade majority. Indeed, if it had been blocked, it would have been blocked by a different kind of special interest, particularly organized labor, shortsightedly in my judgment even from their point of view.

Stephanopoulos: I agree with most of that, except there is also a clear majority in this country for labor-rights protections within free-trade agreements. There also is a clear majority in this country for environmental protections within free-trade agreements. The reason you can't get that is that I think for the reason you point out. Right now, at least, the corporate interests are able to get protections for intellectual property, are able to get protections for foreign investment, but labor groups and environmental activists, others who want different kinds of protections in the free-trade agreements have not yet organized to the level where they can guarantee those protections. You've seen some evidence, and it's not in the protests in Seattle, but there have been global communities developing over the Internet, labor coalitions across borders, environmental coalitions across borders, which over time can do more to press for these kinds of protections, just as organized labor here at the turn of the century was able to press for child heath and safety protections in our own labor laws, but we're years away from it.

Question for Will: You spoke about factions that were planned into the early government and society in order to basically make our government safe, and I'm curious what you think about the rise and interest of third-party candidates in the United States and possibly multiple parties within the United States, and how that relates to what we see in many other governments where we have multiparty systems and coalition governments which are somewhat less stable than we see here in the United States.
Will: Our system is consciously designed and, in part, unconsciously achieves a two-party government, the principle mechanism for this being the winner-take-all allocation of electoral votes on a state-by-state basis. In forty-eight states it's statewide, and in Maine and Nebraska it's by congressional district. But what it means is Ross Perot gets nineteen percent of the vote in 1992 and gets zero electoral votes. This guarantees, it seems to me, the dominance of the two established parties. Third parties in our society rise like Roman candles and burn out because they are generally tied to a leader with a vivid personality, a burning issue, and usually a regional base. George Wallace was a classic example of having all three. They serve a venting purpose. They can serve, as Norman Thomas did in the '30s, a purpose of driving certain issues onto the agenda. But our two major parties are nothing if not responsive market mechanisms. When a third party demonstrates a constituency for an idea, it gets adopted in a hurry. So it's because the system is so responsive, it seems to end the institutional problems such as the Electoral College, third parties are destined to be marginal and fleeting affairs.

Question for both: This is in regard to George W. Bush. From what I've been able to learn about him, it seems that he has as little preparation for the presidency and less interest in the complexities of the job than any major party nominee since Warren G. Harding. Would you care to comment on that?

Stephanopoulos: There is not a lot of evidence of long-standing interest. But I think it's a little bit of an unfair rep. First of all, and you didn't make this point, but I would say that sometimes his intellectual engagement gets confused with intelligence. I don't think there's any problem with his intelligence. I don't think the country believes that. He's a plenty smart man. He does not have long experience in government... but he has been around it his whole life. It's hard to argue, though, with your basic point, and that's one of the major advantages that Al Gore has coming into this—experience in the Congress, in the Senate, obviously eight years in the White House, which I believe is the best possible preparation, having been there, having seen how the decisions are made, having seen the pressures, having known what the conflicts are like. But there's also very little evidence that this is necessarily a voting issue for most people. They're going to look at him, it seems that he has a little bit of an unfair rep. First of all, and you didn't make this point, but I would say that sometimes his intellectual engagement gets confused with intelligence. I don't think there's any problem with his intelligence. I don't think the country believes that. He's a plenty smart man. He does not have long experience in government... but he has been around it his whole life. It's hard to argue, though, with your basic point, and that's one of the major advantages that Al Gore has coming into this—experience in the Congress, in the Senate, obviously eight years in the White House, which I believe is the best possible preparation, having been there, having seen how the decisions are made, having seen the pressures, having known what the conflicts are like. But there's also very little evidence that this is necessarily a voting issue for most people. They're going to look at him, instead, is he intelligent enough to handle the job basically right now? They believe he is. Does he seem to have issues that he cares about? Basically, right now, the country believes that there are a few issues, tax cuts, education, where George W. Bush certainly seems to have an agenda, seems to have passion for it. What they're going to look for is some sense of growth over the course of the campaign as he fights for the job, and that's actually been his greatest weakness. He's had some powerful spurts in the campaign, but he hasn't shown any kind of sustained growth over the course and that may come back to haunt him toward the end.

Will: I do think six years as governor of a major and complicated state is evidence of readiness to govern. I think additional evidence is the kind of staff you surround yourself with. It's a fairly recent and not altogether wholesome phenomenon that we look for people who are obsessively drawn to politics from age nine when they should have been practicing their baseball swing in front of the mirror and instead were rehearsing press conferences. Lincoln was a one-term congressman from Illinois. That was it. That was all his experience.
Woodrow Wilson was briefly a governor of New Jersey. It's a fairly recent phenomenon that we want to have this elaborate federal resume in a candidate. Both of these men are eminently qualified to be president.

**Question for Stephanopoulos:** If there's something that the president could do to have more say in governmental issues and for the people to hear and recognize what he does, what do you think that would be?

**Stephanopoulos:** It would be very helpful if you could somehow guarantee that the president — and you can't mandate it — but, say four times a year, the president would do a press conference before the whole country in prime time. It used to happen even as late as Ronald Reagan. We were only able to get once or twice in the Clinton administration. For the country to see the president promoting his agenda, but then getting tough questions on it as the British system does in question time every week in the Parliament, I think that would be good for the country. It would help educate the country. We'd see what the ratings are like. I could probably guess what it would be like, but I think that would be one small change that would be helpful.

**Question for both:** It seems that the next president is going to have an opportunity to nominate up to four Supreme Court justices. First time since President Nixon, I suppose. How do you see that shaping the country as far as decisions on abortion and other issues that the Supreme Court would take up, such as gun control, etc.?

**Will:** I think that's the most important domestic consideration for some of us is the fact that one justice will be eighty years old on Election Day, two more will be seventy or older, and a fourth has had a serious bout of colon cancer. So, including the chief justice, there are four places on the Supreme Court in play. I think it has a profound effect on federalism, on sorting out the states' responsibilities after a blurring of them over the years.

On abortion, I think it will not have the effect some people hope for or fear. Abortion today, 1.3 million a year, is the second most common surgical procedure in this country after circumcision. Some people think that's dandy. Some of us think it's a scandal, but that's beside the point. The fact is, the culture's moved. I believe that if you repeal Roe v. Wade, which does nothing except re-establish abortion as a subject to be handled by democratic debate and consensus, the way it was right up until Roe v. Wade at which point forty percent of the American people lived in jurisdictions with liberalized abortion laws, including Ronald Reagan's California, at which point the Supreme Court slammed the door of democratic conciliation and compromise on this issue. If you restore this as a subject regulable by the states, I don't believe there is a state in the union, not Utah, not Louisiana, that would ban first trimester abortions. That's eighty-seven percent of them. So you're not going to have a revolution in abortion policy no matter what the Supreme Court does.

**Stephanopoulos:** I think that's probably true. I might quibble with you over Louisiana. It's harder to say, but you're basically right. It would go back to the states, and they more likely than not would not have any first trimester restrictions. I would also say that if that were to happen, say if George W. Bush appoints Supreme Court justices who overturn Roe v. Wade, he's a one-term president, regardless of the impact. I don't think he would be looking for justices who would necessarily do that. Just two other notes on that, however. It is
tremendously important, as George said, and all you have to do is look back at the last term, I think there were twenty-two five-to-four decisions in the Supreme Court, so you don’t even have to get to four openings in order to have a profound change in the balance. But presidents can’t really know with any great certainty what their Supreme Court justices are going to do. Just look at two examples: Justice Stevens on the Court right now, generally considered one of the most liberal justices on the Court, appointed I think by Gerald Ford; and Justice Souter, who’s been a pretty consistent liberal voice on free-speech issues, on affirmative action, on a range of issues, prayer in schools, appointed by George Bush. So, presidents don’t always know what they’re getting when they make the choice.

Question for both: Knowing the deeply religious Christian and religious heritage of our Founders and most notably how they expressed in the Declaration of Independence, which at the time was the more important document, could you comment on the so-called separation of church and state? Was that the Founders’ original intent, what the courts have in my view interpreted and redefined this wall of separation?

Will: The wall of separation, as you know, is a phrase not from any public document but from a private letter Thomas Jefferson wrote to the Baptists of Danbury, Connecticut. Clearly, the Establishment Clause was not meant to mandate government neutrality between religion and secularism. It was clearly intended to prevent the government from favoring one sect over another. How the Supreme Court has got itself into such a pretzel-like condition over the Establishment Clause, I do not know. Wherein they say it is establishment of religion to have a crèche on the post office lawn but permissible for fifty state legislatures and the national legislature to have paid chaplains. You figure it out. A few years ago in splitting already well-split hairs, they said, as regards aid to parochial schools, you can give maps but you can't give books, causing Pat Moynihan to say, “Pray then, what of atlases, which are books of maps?” If you reason as I do, and I think people should, you begin by saying, what did the common language mean by those who wrote it? That’s what a constitution does if it constitutes. Then clearly we have to go back to a more permissive interface between the secular and the sacred.

Stephanopoulos: I’m actually quite sympathetic to much of what George says, except I think that in all their messiness the Court has gotten it about right. First, what they’ve really tried to protect is any kind of coercion, particularly in schools. They, therefore, have stopped any kind of teacher-led prayer in schools or anything in major school ceremonies and most recently at the football games. On the other hand, you’re still permitted to pray in schools. You’re still permitted to form prayer groups in schools. They have also permitted the funding of religious groups in universities on an equal footing with other organizations. My guess is, and George is referring to the decision over maps, I believe that either they just decided or they will decide a case whether or not computers can be put into parochial schools. I think they will be permitting more of that. Where they’ll be drawing a clear line is when people in authority in schools are leading the prayers and somehow creating some kind of a coercive environment. I believe that’s the right line.
*Will:* Just if I could add one other thing. The people of this great state know full well how references to God are part of our common patrimony. It was Lincoln who said what both Al Gore and George Bush say tonight. Lincoln said at the beginning of the Civil War, "I want God on my side, but I must have Kentucky."
ASSESSING PRESIDENTIAL POWER:  
A HISTORICAL NEW INSTITUTIONAL AND LEGAL PERSPECTIVE

by Martin J. Sweet

In the two primary paradigms of assessing presidential power, Richard Neustadt and Charles Jones each utilize the concept of the modern presidency. The title of Neustadt’s seminal work in this area, Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan, itself is informative. In The Presidency in a Separated System, Charles Jones examines electoral backgrounds, organizational patterns, mandates, and agendas among other phenomena of “modern presidents” and begins his analysis alternatively with either Roosevelt or Truman. Other scholars similarly and routinely assume that a modern presidency began with Franklin Delano Roosevelt, though a few scholars suggest that an earlier president, including Wilson or Theodore Roosevelt, actually demarcates the beginning of a modern presidency.

Keith Whittington cites as the primary markings of twentieth century modern presidency, the president’s personal authority, active and unilateral presidential policy-making, and the development of institutional executive support for the presidential office. Whittington goes on to persuasively argue that the presidency of Andrew Johnson contained the elements of a modern presidency, though Johnson failed to transform the office in a positive sense. Johnson’s failures, in fact, led to the rise and intransigence of congressional rule extant in the late nineteenth century.

This paper questions the assumption of a modern presidency by examining the concept of political power. The modern presidency thesis posits that current presidents have vast resources at their disposal to effect presidential responsibilities, and high public expectations for action. Many modern presidency scholars consider president during the late nineteenth century to be

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6 Id. at 434-42.

7 Id. at 449-50.
little more than a clerk "unchallenged by the duties of his office and content just to keep the machinery of government humming." Thus, most scholars contend that modern presidents differ in scope and depth of power from earlier presidents. The question, however, is how do we know?

Stephen Skowronek suggests that political power and authority can be examined by comparing and contrasting presidents with one another. Thus, an assessment of presidential power must include a realization of a particular president's place in time and the typology of that particular presidency. Skowronek's analysis brilliantly displays the structural boundaries by which presidents have been constrained, and so provides a framework for determining presidential authority over time. Skowronek, therefore, suggests that instead of comparing Truman with Eisenhower, Truman should be compared to Martin Van Buren, as both men were involved with articulating the ideas of the previous administration - respectively FDR and Andrew Jackson; FDR should be compared to Lincoln, as both men were involved with reconstructing a new form of politics, after defeating the failed ideas of the prior regime. Skowronek's historical comparisons are an important first step in testing the modern presidency thesis, as presidential powers are necessarily relative.

The concept of political power, however, necessitates comparisons to determine not only the authority or capacity to exercise political power, but also to ascertain the will to political power. While one may be able to contrast the leadership capabilities of Jimmy Carter and Herbert Hoover, this comparison may neglect other institutions in assessing presidential power. The actual exercise of presidential power in the face of other competing institutions must be examined before reaching a conclusion regarding political power. Presidents that utilize seemingly identical powers - one in the face of staunch resistance from a powerful and oppositional congress and the other operating with either a weak or friendly congress - should not be thought to be equally powerful.

While Skowronek and others are right to suggest that presidential power ought to be considered in an historical context and should be considered comparatively, the focus on the concept of power within the presidency surprisingly may fail to elucidate the concept of power. As Edward Abbott demonstrated so many years ago, a full analysis of one's situation may necessitate looking beyond traditional paradigms. Instead of scholars merely examining the presidency to determine the powers of the presidency over time, scholars should be considering the perspective of another institution regarding

9 See id. at 11.
10 See Skowronek, supra note 8.
11 Id. at 6.
12 Id. at 198-227, 288-324.
14 See Skowronek, supra note 8.
presidential powers. If the powers of the presidency change over time, one would expect that other institutions would also recognize this change. The central point is that if there is a modern presidency, replete with a shift in the nature and scope of presidential powers, scholars will not be the only ones able to detect such a fundamental shift. Other institutions, such as Congress, political parties, or the media should be cognizant of such a dramatic alteration.

To this end, this paper seeks to lay the groundwork for an assessment of political power and the modern presidency thesis. Part I of this paper is devoted to examining the power of the presidency and competing institutions over time. By tracing the development of power through each institution, we can then overlay each analysis to determine a realistic sense of the power of the presidency. Part II of this paper conducts an analysis of the interaction between two chosen institutions, here the Supreme Court and the presidency, looking for specific evidence regarding the modern presidency thesis. The second part of this paper examines how the Supreme Court has examined presidential power over time.

I. DYNAMIC INSTITUTIONAL POWER

A. Presidential Power

To assess presidential power, the researcher has several different tools available. For example, one could compare the exercise of presidential power to an Article II and delegated powers baseline; a president is strong when acting beyond the scope of authorized powers.\(^\text{16}\) It seems, however, that this analysis would fail to demarcate between actions considered legitimate and what may, after all, be impeachable offenses. A better assessment of power would expand the analysis beyond the exercise of power to account for a president’s ability to legitimize behavior on the part of the executive once considered beyond the scope of presidential authority.

A researcher could also examine the quantity of presidential action. More powerful presidents will, on the whole, be activists — presidents that actually do more. The weaker presidents, the glorified clerks, do less. Sam Kernell typifies this type of research, by cataloguing the growth of instances in which presidents “go public.”\(^\text{17}\) This analysis, however, may suffer from a collinearity problem. The president may do more, because the government does more, not because the presidency itself has been transformed.

Since power is a relative concept, however, the most informative approach is a historical one, spanning the entire presidential history. Skowronek offers such an approach — a paradigmatic shift in presidential scholarship that severely challenges the dominant scholarly conception of a modern presidency.\(^\text{18}\) Without

\(^{17}\text{See Kernell, supra note 16.}\n
\(^{18}\text{See Skowronek, supra note 8.}\)
neglecting the differences associated with presidents since the turn of the century, Skowronek augments the current understanding of secular time by adding the concept of political time.\textsuperscript{19} Patterns of presidential leadership, based upon the circumstances in which a president comes to power and whether the prior regime's message is resilient or can be repudiated emerge that identify the limited possibilities facing incoming presidents.\textsuperscript{20} The President elected in the next election will be able to exercise some independent level of decision-making, though he or she will not entirely be free to pursue any and all open possibilities - regardless of Neustadtian bargaining ability.

Skowronek classifies all but three "hard case" Presidents.\textsuperscript{21} He begins by classifying each President as being either opposed to or affiliated with the previous regime, and being subject to either resilient ideas or vulnerable ideas from the previous regime.\textsuperscript{22} Skowronek then cross-tabulates these two dichotomies resulting in four different types of presidential regimes: reconstructive, disjunctive, preemptive, and articulative.\textsuperscript{23} Further, Skowronek identifies the years 1789 - 1832 as patrician, 1832 - 1900 as partisan, 1900 - 1972 as pluralist, and 1972 - present as plebiscitary.\textsuperscript{24} Within each secular time period advancement Skowronek argues that within the patterns of the presidency there are "newly emergent power arrangements" and secular developments that "crowd out" the patterned analysis.\textsuperscript{25}

Like Skowronek, historians too have evaluated the power of presidents. For example, Gary Maranell and Arthur Schlesinger have both surveyed historians in an attempt to decipher the "strongest" presidents over time.\textsuperscript{26} Maranell's poll asked over 500 historians to rate the presidents on a range of strong to weak, measured by "the strength of the role the President played in directing the government and shaping the events of his day," "presidential activeness," "general prestige," and "accomplishments of their administrations."\textsuperscript{27} Schlesinger's survey of historians and political scientists ranked the presidents from "great" to "failure."\textsuperscript{28} Recently a former congressional aide and current journalist turned the tables a bit and rated the worst Presidents.\textsuperscript{29} Though currently no single measure of presidential power by itself is determinative,\textsuperscript{30} one option is to combine each of these analyses. Through this sort of triangulation,

\textsuperscript{19} Id. at 30.
\textsuperscript{20} Id. at 34-36.
\textsuperscript{21} Id. at 45-49.
\textsuperscript{22} Id. at 35-36.
\textsuperscript{23} Id. at 36-45.
\textsuperscript{24} Id. at 52-55.
\textsuperscript{25} See SKOWRONEK, supra note 8.
\textsuperscript{27} Maranell, supra note 26, at 106, 109, 111.
\textsuperscript{28} Schlesinger, supra note 26, at 12.
\textsuperscript{29} See NATHAN MILLER, STAR-SPANGLED MEN: AMERICA'S TEN WORST PRESIDENTS (1998).
some of the outlier problems – associated with any given single analysis – can be minimized, if not eliminated.

Table I charts a combination of these three analyses.\textsuperscript{31} As can be seen from the chart, there is a general pattern of increased presidential power over time. In addition to having more presidents with scores well above the average after FDR, it is clear that the difference between the cumulative average and the overall average decreases over time. Thus the higher scoring presidents are packed towards the country’s most recent history. This gives some credibility to the modern presidency thesis, as it appears that power has increased over time for the presidency.

\textbf{TABLE I}

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\textbf{Presidential Power} \\
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Washington & Jefferson & Monroe & Van Buren & Pierce & Grant & Cleveland & T Roosevelt & Wilson & Roosevelt & Truman & Johnson & Reagan & Clinton \\
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\textsuperscript{31} Utilizing Skowronek’s four typologies, each President from Washington to Clinton was given points in accordance with each typology. \textit{See} Skowronek, \textit{supra} note 8, at 36-45. Reconstructive presidents were given 80 points, preemptive presidents were given 60 points, articulative 40 points, and disjunctive 20 points. For Skowronek’s three hard cases of Cleveland, Coolidge, and Eisenhower, and the not included Washington (he was neither opposed to nor affiliated with a prior regime), these presidents were given 50 points. \textit{Id.} at 45-49. Table I accounts for secular time, by giving each president in the patrician period 10 points, partisan 20 points, pluralist 30 points, and plebiscitary 40 points.

The subtotal for each president was then adjusted according to the outcome of the rankings by Maranell, Schlesinger, and Miller. \textit{See} Maranell, \textit{supra} note 26, at 107-112; Schlesinger, \textit{supra} note 26, at 12; Miller, \textit{supra} note 29. Presidents appearing strongest on both lists for Maranell and Schlesinger were given 30 points, and 10 points for appearing on either list. President Reagan, who served in office after these polls were conducted, merited 20 points. For appearing on Miller’s list, Table I deducts twenty points, but thirty points are deducted from Miller’s bottom three finishers: Andrew Johnson, Harding, and Coolidge. The second line that appears on the graph is the cumulative average of scores up until that point in time. This provides a clearer view of general patterns over time, and provides an additional baseline by which to compare presidents to their predecessors. The third line is an overall average so as to provide a comparison between all presidents, predecessors and successors.
Given, however, how "arbitrarily" these points are designated, especially the increased points for secular time, this conclusion is somewhat limited. Therefore Table Ia factors out Skowronek's secular time analysis, by subtracting the associated points. When this is done, a slightly different pattern develops, with presidential power decreasing after an early peak until the time of FDR again. Post-FDR, the numbers point to increased presidential power, and thus still show support for the modern presidency thesis in this regard. Whether one utilizes Skowronek's four periods, or time according to Ted Lowi (capitalism, to pluralism to interest group liberalism), it seems time and the attenuated changes in government should be factored into the analysis. Regardless of which schematic is chosen, the Tables provide a rough baseline by which to start making some comparisons. The remainder of this section will trace the developing power of both Congress and the Supreme Court over time.

### Table Ia

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32 See **SKOWRONEK, supra** note 8.
33 Id. at 52-55.
B. Congressional Power

James Sundquist, in *The Decline and Resurgence of Congress*, explores the development of congressional power over 200 years. While scholars generally proclaim that congressional power is a function of executive power, whereby executive power comes at the expense of the legislatures, this history is of import for several reasons. First as argued above, the perspective of other institutions may itself be important for assessing presidential power. Second, there is some disagreement over the strength of presidents over time, and thus congressional history, even if part of a zero-sum relationship, would give additional information about the power of the executive. And third, within political science literature Congress has often been at the forefront of quantitative analysis of political behavior.

The early history of our country, commencing with the time of President Washington, was decidedly focused upon the executive, to the exclusion of Congress. Washington through his secretary of treasury, Alexander Hamilton, had a direct hand in the everyday affairs of Congress—including non-executive functions. Congress, however, began to assert itself through the formation of legislative committees, develop their own legislative initiatives, and steer clear of “the appearance of being subservient to executive influence.”

By the time Andrew Jackson came to office, complete with the first real popular electoral support for a President, Congress came under attack. The Whig Party, committed to a weak executive, formed in response. The Whigs succeeded to provide four Presidents of the United States: Harrison, Tyler, Taylor, and Fillmore, though to be sure it would difficult to assess the power of William Henry Harrison. Though the actual record of Taylor and Fillmore contains some bold examples of executive power, Whig victories in the electoral college must be accounted for in assessing congressional power.

Following the ascendancy of executive power and concomitant diminishment in congressional power through the time of President Lincoln, Congress enjoyed its “golden age” from the time of Andrew Johnson up until Teddy Roosevelt became President. The last third of the nineteenth century and early twentieth

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37 Though to be sure, the presence of data should not be confused with the usefulness of the information.
38 See SUNIQUST, supra note 35, at 21.
39 Id.
40 Id. at 22.
41 Id. at 23.
42 Id.
43 Id. at 23-24.
45 See SUNIQUST, supra note 35, at 24; REMINI, supra note 44, at 567.
46 See SUNIQUST, supra note 35, at 25.
century, under the strong leadership of Speakers Reed and Cannon, can be characterized as the victory of Whig philosophy, one house rule, and congressional cohesiveness. As Teddy Roosevelt came into office, though he possessed the sort of "vigorous personality" critical to presidential dominance, faced an entrenched and powerful Congress. With a mild reassertion of congressional power in the face of Taft, once Wilson came into office the balance of power dramatically shifted towards the executive. Harding, Coolidge, and Hoover cooled the executive fervor a bit, though Congress never achieved the sort of dominance it had during its golden age.

FDR's massive activist agenda usurped most congressional power -- albeit largely via congressional delegations of power -- and his legacy of executive aggrandizement even strengthened under Truman. Steadily up through Watergate, the power of Congress kept diminishing until it hit a low point in 1973. The weakened presidency in the 1970s allowed Congress to expand its power until midway through Reagan's first term. By then the executive again reasserted itself, only to be marginally chipped away during the Bush presidency. Though it may be too early to assess the Clinton presidency and recent congresses, clearly there has been a reassertion of congressional power, perhaps culminated by then -- Speaker Gingrich's televised address to the American people. The impeachment and failure to remove President Clinton may take more time to assess accurately the power dynamics between Congress and the administration.

There are some additional factors to add to this analysis of congressional power, beyond Congress' relationship with the executive. Some of the legislative organizations within Congress have undergone dramatic changes. Historian James Currie spells out how the creation of committees between 1794 and 1825 in the House of Representatives added capacity to the legislative branch of government. Similarly, George Galloway elucidates how the growing complexity within the House of Representatives between 1860 and 1890 rendered the institution much more resistant to change. Kenneth Shepsle teaches that from World War II and the Legislative Reorganization Act of 1946 through the 1960s, chamber workload, committee activity, and constituency demands increased. Such a workload and the continued divided Democratic

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48 See SUNDQUIST, supra note 35, at 29-30.

49 Id. at 31-32.

50 Id. at 33.

51 Id. at 34.

52 Id.


control between the North and South rendered Congress much weaker than its capacity would indicate. Legislative reforms, the dying out of the Dixiecrats, and the fiscalization of politics changed Congress once again, and perhaps have had the effect of strengthening the institution.

The growth of national government and the changing control over the budget also could provide avenues for charting congressional power. The mechanics of how this would work remains murky, however, as the growth of national government simultaneously adds presidential power by granting control over the administrative functions of government to the executive and provides opportunities for Congress to bargain with the President. Thus as Ted Lowi argues, this growth in power of the government overall, has perhaps weakened the presidency.

The budget power also displays part of the contingent nature of this venture. Neal Devins examines “the rise and partial decline of Congress’ power of the purse” with respect to the budget. Any and all of this information perhaps should be factored into assessing an accurate portrayal of power. For purposes of this essay, however, the point is to begin to sketch the outlines of power over time—and leave it to the specialists to develop sharper tools of analysis.

Table II displays a charted analysis of congressional power over time. This analysis roughly quantifies the historical analysis laid out above. The pattern that develops over time is an ascendancy of congressional power peaking in the late 1800s, with a precipitous decline after the first decade of the twentieth century until the early 1970s. Since that time, Congress has undergone a bit of a renaissance, perhaps almost tipping the scales once again towards congressional control. Whether that is now an entrenched institutional development or merely a reaction to President Clinton remains to be seen.

56 Id. at 248-49.
58 See SHEPSLE, supra note 55, at 259.
60 See LOWI, supra note 4.
62 One hundred is used as a baseline of total shared powers between Congress and the President; therefore 50 represents equality of powers between the legislative and executive branches of government. The high and low points are first plotted, and then periods of relative equality are noted. Mainly this analysis is extrapolated between these main points, while making allowances for the ebb and flow of exertions of executive power. As a result, spikes either up or down are
Table II

Congressional Power

Table III compares the power of the presidency to the power of Congress. For the most part, these powers appear to have an inverse relationship to one another. As the power of the executive increases in the twentieth century, congressional power declines. Table IIIa, however, instead of comparing the two powers over time combines the two powers into one unit. If the powers were truly zero-sum, one would expect a near straight line approximating the sum of the averages of power of each institution. Instead, however, this Table contains peaks and valleys of combined power, beginning to suggest at least that there may be other components involved. It appears from Table IIIa, therefore, that the two branches combined exert varying levels of power at different points in history. This may be due to the lack of rigor in this quantitative analysis, but even with these crude measures, one should be cognizant that although changes in one institution affect changes in other institutions, such change “is unlikely to run parallel to” change in another. Additional clarity may be found by continuing this analysis with other institutions.

present for the Congress during the time of active or passive presidents.

### Table III

**Presidency and Congressional Power**

<table>
<thead>
<tr>
<th>Presidents</th>
<th>Power of the President</th>
<th>Power of Congress</th>
<th>Cumulative Presidential Mean</th>
<th>Cumulative Congressional Mean</th>
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<tbody>
<tr>
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<td>Polk</td>
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<td>Tyler</td>
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<td>Jackson</td>
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<td>Clay</td>
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<td>Calhoun</td>
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<td>Polk II</td>
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<td>Clay II</td>
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### Table III A

**Presidential and Congressional Power Combined**

<table>
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<tr>
<th>Presidents</th>
<th>Total Power</th>
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<td>Adams</td>
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<td>Jefferson</td>
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<td>Monroe</td>
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<td>Clay II</td>
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</table>

[Graph of Table III and Table III A]
C. Supreme Court Power

"[T]he judiciary . . . will always be the least dangerous" branch of government, proclaims Alexander Hamilton in Federalist #78, "that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."46 Indeed, the early years of the Court were filled with few significant decisions, and the position of Supreme Court Justice was hardly revered.5 When John Marshall became Chief Justice, however, he dominated the Court and the authority of the Court rose a significant degree.66 While some have questioned the extent to which the decision in Marbury in 1803 affected other branches of government, the claimed power of judicial review at least elicited threats and denunciations from the other branches of government.68

The second instance in which the Court invalidated a federal law came during one of the Court's lower points.69 In 1857, the Court in Dred Scott ruled that Congress went beyond its established powers when it prohibited slavery in some of the territories.70 The Court was vilified in the press,71 and was met soon thereafter with a Constitutional Amendment effectively overruling the decision.72

From the reconstruction era through the era of congressional government, the Court's jurisdiction had been somewhat limited by Congress.73 Though as the magnitude of economic regulation prospered into the twentieth century, so too did the Court's national role.74 The Court faced minor opposition from forces that saw the judiciary as too cozy with business interests.75 The Court continued to overturn an impressive amount of economic legislation, and in so doing strayed from the Constitutional design with a deep foray into substantive due process.76

The Lochner era decisions would be repudiated in time, but the most pressing concern facing the Court was the rise of national opposition to its rulings.77 After his overwhelmingly successful re-election, Roosevelt unveiled his Court packing plan.78 Regardless whether one subscribes to the "switch in time that saved nine"

48 Id. at 21-22.
50 See BAUM, supra note 65, at 22.
51 Id.
52 Scott v. Sandford, 60 U.S. 393 (1857).
54 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-6, at 64-65 & n.10 (2d ed. 1988).
55 See BAUM, supra note 65, at 23.
56 Id.
57 Id.
58 See id; MCCLOSKEY, supra note 71, at 101-02.
59 See BAUM, supra note 65, at 23-24; MCCLOSKEY, supra note 71, at 102-04.
60 See BAUM, supra note 65, at 24.
theory, certainly it cannot be gainsaid that Roosevelt was relevant to the Court’s new analysis of economic legislation. In the ensuing years, with conservative members of the Court retired, Roosevelt’s appointments dominated the Court as it turned its attention to civil liberties.79

Since the early twentieth century the civil liberties opinions have expanded upon the earlier dissents of Holmes and Brandeis, mostly regarding free speech.80 The expansion continued with Warren in Brown81 and Gideon,82 and culminated with Miranda83 and Griswold.84 Individual rights waned considerably under the Burger Court with Miller v. California85 and Leon,86 though in this same period the Court expanded Griswold87 with Roe88 and found the death penalty unconstitutional in Furman.89 Rehnquist has continued this muddled road, deciding both Casey90 and Lopez.91 Throughout the modern period, the Court has been under near-constant public attack and scrutiny, but has remained steadfast in its ways.92

The direct push and pull hypothesized by some between the powers of the President and Congress plays a more limited role in affecting the power of the Supreme Court. The President can both empower and reign in a Court through the appointment process.93 President Jackson appointed five Justices, including Chief Justice Taney; Lincoln five Justices, including Chief Justice Chase; Harrison and Cleveland combined for eight Justices, including Chief Justice Fuller; Franklin Roosevelt nine Justices, including Chief Justice Stone; and Reagan and Bush totaled six Justices, including Chief Justice Rehnquist.94 Congress similarly retains the ability to expand or contract the power of the Court, chiefly through its ability to control (partially) the jurisdiction of the Court.

The Court, like the other institutions, lacks a clear mechanism for directly assessing power. Judicial process scholars categorize a number of possible methods, including Court cohesiveness and activism.95 Ronald Kahn suggests

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79 Id.
80 Id. at 24-25.
87 381 U.S. 479 (1965).
94 Id. at 391-92.
that a historical institutionalist perspective on the Court may depend upon analyzing the development of several different doctrinal areas. Keith Whittington, however, largely rebukes these methods, and subscribes to a method dependent upon adducing the president's independent relationship to the Constitution.

Whittington argues that a focus on judicial review and pure conflict between the executive and the Court is insufficient. He reasons that the power of judicial review may not have been sufficiently routinized for the early Court to become an obstruction before the altered strategic environment was clarified in other ways. But by focusing on the executive’s view of the Constitution and the relationship between the presidency and the Constitution, a better framework for assessing power comes into focus.

Whittington examines the Presidents—Jefferson, Jackson, Lincoln, Roosevelt, and Reagan—that subscribe to a philosophy of departmentalist theory of constitutional interpretation. Departmentalist theory, or coordinate construction, posits that each branch of government has the authority and duty to conduct an independent analysis of the constitution. This is a perfect overlap with Skowronek’s reconstructive presidents. A coordinate construction philosophy on the part of the executive is a direct threat to the Court, and a theory of power must account for this cyclical feature.

This theory may be expanded upon for determining other cycles of Court power. For example, Presidents Carter, Buchanan, and John Quincy Adams, who readily acceded to the Court’s authority as the legitimate arbiter of the Constitution, are each disjunctive presidents under the Skowronek typology. We may be able to find additional patterns of judicial authority paralleling presidential patterns. John Gates and others have found patterns of judicial decision-making revolving around critical elections. Similarly, both Whittington and Bruce Ackerman have found that judicial authority has increased over “political time” (Whittington) and during the course of three constitutional regimes (Ackerman). This cyclical, yet thickening, assessment of Court power is strikingly familiar to the presidential analyses discussed above.

This author’s assessment of the Court’s power thus builds upon this analysis in Table IV. The picture that emerges in Table IV is a bit surprising. The chart

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96 See Kahn, supra note 59, at 1430-50.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 See Skowronek, supra note 8, at 39.
105 See Whittington, supra note 97; 1 Bruce Ackerman, We the People: Foundations 58-162 (1991).
106 First I assigned each time frame points according to the typology of the concurrent presidency:
reveals the Court at its weakest point during the time preceding the civil war, a relatively strong Court through the time of congressional government, and the zenith of power in the 1960's. Again, the power of the Court steadily increases, though that was built into this model. And the cycles extant in presidential regimes have their effect as well on the power of the Court.

TABLE IV

<table>
<thead>
<tr>
<th>Supreme Court Power</th>
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A more thorough analysis of the power of the presidency would include tracking the power over time of other political institutions beyond Congress and the Supreme Court, including political parties, interest groups, and the bureaucracy. For now, however, some limited assessments may be made based solely on these rough estimations of power of the three branches of government. Table V displays the combined power analysis from each of the three branches. Though the actual numbers do not translate neatly from one institution to

80 points for disjunction, 60 for articulation, 40 for preemption, and 20 for reconstruction—an inverse of the assessment of presidential power. Second, 10 points were added for the Court in Ackerman’s first constitutional regime of 1787-1860, 20 points for the middle republic from the Civil War to the Depression, and 30 points for the modern regime. See ACKERMAN, supra note 105, at 67-130. Finally points were adjusted up or down 25 for major instances in which the Court has reached beyond its means. I gave points when the Court has been successful (Marbury v. Madison, 5 U.S. 137 (1803); McCulloch v. Maryland, 17 U.S. 316 (1819); Griswold v. Connecticut, 381 U.S. 479 (1965); Miranda v. Arizona, 384 U.S. 436 (1966); Roe v. Wade, 410 U.S. 113 (1973)) and subtracted points when repudiated (Dred Scott v. Sandford, 60 U.S. 393 (1857); Lochner v. New York, 198 U.S. 45 (1905)).
another, we can still glean some important information from the direction, relation, and volatility of movement of power.

**TABLE V**

Comparative Power

<table>
<thead>
<tr>
<th>Presidents</th>
<th>Power of the Supreme Court</th>
<th>Power of Congress</th>
<th>Power of the President</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington</td>
<td>120</td>
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</tr>
<tr>
<td>Adams</td>
<td>110</td>
<td>100</td>
<td>90</td>
</tr>
<tr>
<td>Jefferson</td>
<td>90</td>
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<td>70</td>
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<tr>
<td>Madison</td>
<td>80</td>
<td>70</td>
<td>60</td>
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<tr>
<td>Monroe</td>
<td>70</td>
<td>60</td>
<td>50</td>
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<tr>
<td>Jackson</td>
<td>60</td>
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<tr>
<td>Van Buren</td>
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<tr>
<td>Monroe</td>
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<tr>
<td>Jackson</td>
<td>30</td>
<td>20</td>
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<tr>
<td>Washington</td>
<td>20</td>
<td>10</td>
<td>0</td>
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</tbody>
</table>

As expected, the early republic looks like a government of shared powers, without any single branch of government sharply deviating from the others. Our reconstructive Presidents tower above all else when their time in office came about, and quite clearly the period of congressional government displays the power of Congress above all else. The most striking information that can be seen in this chart, however, is the move towards massive volatility and sharp deviations that the branches of government have from one another beginning around the time of FDR. From the 1930s and forward, we have some of the deepest chasms between branches of government, and we see wild swings of power within and between institutions.

By overlaying an analysis of power within the three branches of government, this essay attempts to use a historical new institutionalist perspective in analyzing the modern presidency thesis. Though, to be sure, the analysis uses rather crude measurements of power, and does not include other important institutions, it demonstrates that so far there is tremendous support for the modern presidency thesis. Characterized by wild swings of power within and across institutions, the three branches of government since the time of FDR give significant credence to the thesis of modernity. The second part of this paper attempts to find either confirmatory or discrediting evidence of this thesis in a much narrower manner. Rather than focus on scholarly assessments of government institutions, this analysis asks, if there is a modern presidency, can we account for it in how the Supreme Court has treated the President in its jurisprudence?
II. THE MODERN PRESIDENCY IN THE EYE OF THE COURT

Part two of this paper seeks to determine whether the concept of the modern presidency has penetrated Supreme Court opinions. If there is such a thing as the "modern presidency," have other branches of government been cognizant of such a transformation? To this end, this essay canvasses several major areas of jurisprudence that reflect the Court’s view of the presidency. By comparing early rulings with more recent opinions, it attempts to detect eras of presidential jurisprudence – eras that may give additional credibility to the modern presidency thesis.

To be sure, there may be some deficiencies with this type of analysis. It may be that the Supreme Court itself is mired in a type of formalism that renders it unable to recognize a modern presidency, even if one exists. Or alternatively, the Court’s analysis may change over time, not due to a qualitatively different presidency, but due to its own development over time. Thus, this analysis should be considered in the context of institutional development or non-development as the case may be. Especially important may be the historical new institutionalist analysis displayed above.

This analysis also is a bit complicated due to its subject matter. First, there is not a concrete portion of the Constitution by which to adjudicate separation of powers issues. Separation of powers cases utilize a host of constitutional clauses, and often must analyze the significance of textual omissions. Second, there does not seem to be a coherent body of law of separation of powers, leading law professor Donald Elliot to label the jurisprudence "abysmal" and "asinine." Elliot contends "any reasonably competent law professor can supply better opinions than the justices of the Supreme Court in separation of powers cases." He continues that because of the use of literalism in constitutional interpretation: "[i]f anything, our separation of powers law is now dumber than the individuals who make it, as if there were some virtue in judges blinding themselves to the practical consequences of their decisions about governmental structure."

Third, in addition to the diffuse nature of the constitutional text of separation of powers, flawed interpretation, and lack of coherence, there have been several competing normative strands of the extent of government power, particularly with respect to the executive. Thus, Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer warned

[a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely


108 Id.

109 Id.
cancel each other.\textsuperscript{110} ... A Hamilton may be matched against a Madison. Professor Taft is counterbalanced by Theodore Roosevelt. It even seems that President Taft cancels out Professor Taft.\textsuperscript{111}

Though we should be chary in taking single statements to prove presidential jurisprudential periods, this very conflict in itself is informative. Primarily it may teach us that perhaps the notion of the modern presidency is not that helpful. If there is a modern presidency, would we not expect that the Court would analyze the President and the presidency in a manner different than earlier periods? Second, the conflict in analysis of presidential power also is useful for the historical new institutionalist perspective addressed in part one of this paper.

While the state of the separation of powers jurisprudence may be abysmal, it does seem that within a subset of this constitutional analysis, some semblance of order may be found. If we break up components of the presidency, some very different areas of law appear. Thus this paper will distinguish between war powers, treaties, and the appointment and removal powers.

\textit{A. War Powers}

Louis Fisher, in \textit{Presidential War Power}, argues that the President has illegitimately usurped the power to make war from Congress.\textsuperscript{112} Fisher traces the development of executive war powers from pre-Constitutional days to George Washington and forward to Bill Clinton.\textsuperscript{113} He begins by examining the setting in which the Constitution developed.\textsuperscript{114} Against a background of a regal system across the pond and an ineffective Continental Congress, there seems to be little doubt the Constitution was designed to draw a demarcation between the power of the purse and the sword.\textsuperscript{115} Before Teddy Roosevelt, Fisher makes the case that to a large extent Presidents have acceded to the constitutional design and resigned themselves to the notion that only Congress could declare war.\textsuperscript{116} The early twentieth century, however, began a period of a changing notion of the presidency and the role of the United States throughout the world.\textsuperscript{117} Thus, by the time of Truman and the creation of the United Nations, serious incursions upon the authority of the legislature to control foreign war involvement had occurred.\textsuperscript{118} Incidents in Southeast Asia then led Congress to pass the War Powers Resolution in 1973 seemingly in an attempt to reign in presidential authority.\textsuperscript{119} Since that time, however, Presidents have not only continued to

\textsuperscript{110} 343 U.S. 579, 634-35 (1952).
\textsuperscript{111} \textit{Id.} at 635 n.1 (citations omitted).
\textsuperscript{113} See \textit{id.}
\textsuperscript{114} \textit{Id.} at 1-9.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 13-44.
\textsuperscript{117} \textit{Id.} at 45-69.
\textsuperscript{118} See Fisher, \textit{supra} note 112, at 70-91.
\textsuperscript{119} \textit{Id.} at 92-97, 128-31.
expand the prerogative of the President, but have also continued and expanded the role of covert operations.120

Though Fisher contends that Presidents in the “pre-modern” era largely followed the dictates of the Constitution, and modern Presidents have been the true culprits in the “regalification” of the presidency, Fisher’s history elucidates some early examples of presidential prerogative of war powers.121 Fisher, however, rejects the notion that these prior examples (e.g., the “Barbary Powers”) involved much prerogative and could legitimately serve as a precedent for modern executive war making.122 While Fisher may be right regarding the state of war powers between Congress and the President, in as much as this paper focuses on the Supreme Court’s interpretation of the modern presidency, the pre-modern and modern split should not end the analysis.

Early in the Court’s examination of executive war powers, the Court limited the “Commander in Chief” President to only “the command of the forces and the conduct of [military] campaigns.”123 Such an analysis has certainly been broadened, as exemplified in cases such as Youngstown Sheet & Tube Co. v. Sawyer.124 Though Truman was rebuked, the analysis did not take the form that the President’s actions failed to command the forces or conduct campaigns.125 Thus, it does seem that there is some example of the Court treating the powers of the President in accord with the modernity thesis.

B. Treaties

Through the creation of treaties, the President retains the ability to create law and bypass the House of Representatives.126 Treaties passed under constitutional requirements are “regarded in courts of justice as equivalent to an act of the legislature.”127 If a treaty, however, necessitates congressional action to effectuate its terms, for an appropriation of funds for instance, the treaty remains without effect unless Congress acts.128

The President for a time as well was able to create a treaty that granted additional powers to Congress.129 For example, through a treaty with Canada, Woodrow Wilson empowered Congress to constitutionally protect the migration of wild birds.130 The Court held that “[i]t is obvious that there may be matters of

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120 Id. at 134-84.
121 Id. at 13-28.
122 Id. at 185-90.
123 Ex parte Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., dissenting). See Fleming v. Page, 50 U.S. 603, 615 (1850) ("[d]oes not extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power").
125 See id.
126 See U.S. CONST. art. II, § 2, cl. 2.
128 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5, at 226 (2d ed. 1988).
129 Id. at 227.
130 See Missouri v. Holland, 252 U.S. 416 (1920); see also TRIBE, supra note 128, § 4-5, at 227.
the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."\(^{131}\)

The Court, however, appeared to have changed its tune in the late 1950s. When the United States attempted to invoke court-martial trials against civilians on foreign land (wives of serviceman husbands), the Court rejected military jurisdiction.\(^{132}\) In *Reid v. Covert*, a plurality reject\[ed\] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source.\(^{133}\) It would be manifestly contrary to the ...Constitution ... to ... [permit] the United States to exercise power under an international agreement without observing constitutional prohibitions.\(^{134}\)

Though the analysis of the treaty power appears to have changed, upon further analysis it appears that this is not due to a new conception of the modern presidency. First, the *Reid* decision limits presidential powers; it does not expand them in accordance with the modernity thesis.\(^{135}\) And second, the Court had actually dealt with this issue previously, albeit in *dicta*, stating "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."\(^{136}\)

The United States Constitution states that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.\(^{137}\)

This proclamation of power has resulted in some constitutional litigation, though the majority of Supreme Court jurisprudence focuses on an area of the Constitution that is textually silent – removal powers.

**C. Appointment and Removal Powers**

With regards to the appointment power, just a few words are warranted. In 1928, the Court ruled, in *Springer v. Government of the Philippine Islands*, that the power to appoint individuals to execute the law lies with the President.\(^{138}\) Congress had attempted to retain the appointment power for those offices that Congress created.\(^{139}\) The Court continued largely down this line in *Buckley v.*

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131 *Holland*, 252 U.S. at 433; see also *TRIBE*, supra note 128, § 4-5, at 227.

132 See *Reid v. Covert*, 354 U.S. 1 (1957); see also *TRIBE*, supra note 128, § 4-5, at 228.

133 *Reid*, 354 U.S. at 5-6 (citations omitted).

134 *Id.* at 17 (citations omitted).

135 See *TRIBE*, supra note 128, § 4-5, at 228.

136 The *Cherokee Tobacco*, 78 U.S. 616, 620 (1870) (dictum); see also *TRIBE*, supra note 128, § 4-5, at 228.

137 U.S. CONST. art. II, § 2, cl. 2.

138 277 U.S. 189 (1928).

139 See *id.*
Valeo when it found unconstitutional a scheme whereby the President Pro Tempore of the Senate and the Speaker of the House appointed four of the six voting members of the Federal Election Commission.\textsuperscript{140} Congress cannot delegate to itself powers that are properly part of the other branches of government.\textsuperscript{141}

The removal power, however, without any textual support in the Constitution — is inextricably linked to the power of appointment.\textsuperscript{142} In 1926, in \textit{Myers v. United States}, the Court found that the Tenure in Office Act had unconstitutionally erected a barrier whereby the Senate had to consent to the President's choice to remove a postmaster.\textsuperscript{143} Notably this is the same Act that served as the basis for Andrew Johnson's impeachment.\textsuperscript{144} Thus for over fifty years, the Court had not accorded the President such plenary powers (in likely derogation of the original intent of the framers).

The Court, however, limited this possible expanse of presidential power from \textit{Myers} in \textit{Humphrey's Executor v. United States}.\textsuperscript{145} In \textit{Humphrey's Executor}, the Court ruled that when Congress creates positions that are not exclusively executive (as was the case of the postmaster in \textit{Myers}), Congress may constitutionally reserve for itself the power to deny absolute discretion to the executive.\textsuperscript{146} The Court explained this distinction in \textit{Wiener v. United States} where it was noted "the difference in functions between those who are a part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."\textsuperscript{147} Tribe suggests that this means "those whose decisions the Executive cannot alter, the Executive cannot remove on his own authority."\textsuperscript{148}

In 1985, the expanse of \textit{Myers} raised again.\textsuperscript{149} The Gramm-Rudman Act had vested the Comptroller General with the power to decide precise program budget cuts to reduce the budget according to a statutory schedule.\textsuperscript{150} The Comptroller General, however, was involved in the execution of the laws, and only subject to removal by Congress.\textsuperscript{151} The Court in \textit{Bowsher v. Synar} cited \textit{Myers} and \textit{Humphrey's Executor} for the proposition that "congressional participation in the removal of executive officers is unconstitutional."\textsuperscript{152}

\textsuperscript{140} 424 U.S. 1 (1976) (per curiam).
\textsuperscript{141} See id.
\textsuperscript{142} See TRIBE, supra note 128, § 4-10, at 246-47.
\textsuperscript{143} 272 U.S. 52 (1926).
\textsuperscript{144} See TRIBE, supra note 128, § 4-10, at 247 n.4.
\textsuperscript{145} 295 U.S. 602 (1935). See TRIBE, supra note 128, § 4-10, at 248.
\textsuperscript{146} 295 U.S. at 602.
\textsuperscript{147} 357 U.S. 349, 353 (1958). See TRIBE, supra note 128, § 4-10, at 249.
\textsuperscript{148} TRIBE, supra note 128, § 4-10, at 249.
\textsuperscript{149} See id. at 250.
\textsuperscript{150} Id. at 251.
\textsuperscript{151} Id.
\textsuperscript{152} 478 U.S. 714, 725 (1986). See also TRIBE, supra note 128, § 4-10, at 251.
A review of the Court's decisions shows that the appointment and removal powers have fluctuated—between relative expansion, mild contraction, and then expansion again. Though this essay has found evidence of the Court's recognition that the power of the presidency has increased, and thus found partial support for the modernity thesis, there is reason to pause. If the modern thesis holds, the timing of the expanse of powers is of import. In the 1950s, the Court curtailed the powers of the presidency, substantially after the beginning of the "modern" presidency. Though one may argue that there is a lag time between the Court's recognition of the modern presidency, it seems likely that the appointment and removal power does not contain confirmatory evidence of the modern presidency thesis.

Thus in these three areas of presidential jurisprudence—war powers, treaty powers, and appointments and removal powers, we see three different results. The war powers component of the presidency displays some solid evidence that the modernity thesis is valid. The treaty power shows a curtailment of presidential authority that is central to the modern presidency thesis. The appointment and removal powers, while showing some expansion of presidential powers, do not conform chronologically with the modernity thesis. Therefore, at best, attempting to determine whether a modern presidency exists, as viewed by the Supreme Court, is met with muddled results.

The legal analysis and historical new institutionalist attempts to decipher a modern presidency has presented some possible evidence of the modern presidency. Though the quantitative measures employed in this analysis are somewhat crude, this methodology appears to have some serious promise. By further exploring some of the larger trends in the manner by which institutional development transforms and constrains other institutions, the complexity of the political system is eased. Complementing this "thickened" analysis with more direct measures, such as the direct view provided from another single institution, may with stronger methodological tools and a less "abysmal" jurisprudential field in the future serve just this function.
THOMAS JEFFERSON AND THE RULE OF LAW: EXECUTIVE POWER AND AMERICAN CONSTITUTIONALISM

by Richard J. Dougherty

The contours of presidential power have been shaped by a variety of factors in American political history, most especially, one might argue, by the interaction between the executive and legislative branches. Yet, from the earliest debates over the extent of executive power it became clear that the Constitution, and the way in which it was interpreted by the judiciary, would play a significant role in any attempt to demarcate the exact confines of that power. Chief Justice John Marshall played the decisive role in establishing the Court’s presence and precedents in constitutional interpretation, in cases from Marbury v. Madison to McCulloch v. Maryland, but his views did not go unchallenged. Perhaps his chief antagonist in his early years on the Court turned out to be the sitting President, Thomas Jefferson.

Jefferson’s antagonism toward Marshall has been well chronicled, and that will not be a concern of this paper. Rather, we will attempt here to arrive at an understanding of Jefferson’s views of the meaning, intent, and authority of the Constitution. As David N. Mayer has pointed out in his substantial work, The Constitutional Thought of Thomas Jefferson, there has only been slight attention to Jefferson’s views on constitutional interpretation, a striking omission given his role as President at a critical juncture in the early republic, and the attention given to his contemporaries. The difficulty in assessing Jefferson’s thought, on this as on many issues, is, in part, that he wrote no book-length manuscript on the issue; rather, one must cull the documents and letters he produced over an extended period of time in order to arrive at any kind of systematic understanding of his thought.

The more particular concern of this essay is the apparent disjunction between Jefferson’s professed views on the Constitution in the first decade of the new government, and the actions he subsequently took as President in the first decade of the nineteenth century. This seeming disunity is seen in its most stark fashion, perhaps, in the events and arguments surrounding the Louisiana Purchase in 1803. The reason for focusing on this matter is not simply that it seems to reflect a dissonance between Jefferson’s principles and his actions, but also because the Purchase has played a critical role in our view of the presidency and the Constitution on a larger scale. In general terms, the Purchase seems to conflict with Jefferson’s clearly stated views on the Constitution, both prior to his taking

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2 See 5 U.S. 137 (1803).
3 See 17 U.S. 316 (1819).
office and even in the months just before the effectuation of the acquisition. In so doing, it raises significant questions about the nature and structure of the Constitution and government, questions that still resonate with us today, and which have had repercussions across the nearly two centuries since. As Frederick Turner remarked, in speaking of the importance of Louisiana:

When the whole sweep of American history and the present tendencies of our life are taken into view, it would be possible to argue that the doctrines of the Louisiana Purchase were farther-reaching in their effect upon the Constitution than even the measures of Alexander Hamilton or the decisions of John Marshall.

Whether one adopts Turner’s view or not, it is important to confront the arguments made in defense of Jefferson’s actions; if one is going to take seriously the notion of constitutional rule, Jefferson himself asserts, one must attempt to square them with the real meaning of our founding document. Before doing so, though, it will be necessary to lay out the principles of Jefferson’s constitutionalism and attachment to the rule of law. I would like to do that by addressing his understanding of the role of constitutions and the separation of powers, the early debate on the establishment of a national bank, and his views on judicial power more particularly. Having done so, we will then be in a position to make a more pointed assessment of the connection between Jefferson’s principles and his practice. And though it will not be the subject matter of this essay, we might then be able to consider further the question of the existence of “prerogative” power in the executive, a power that John Locke suggests must exist in the executive, but which seems to be at odds with the principle of constitutionalism.

I. Jefferson’s Constitutionalism and the Rule of Law

Many interpreters do not take seriously Jefferson’s attention to the forms and formalities of constitutions, because of his fundamental concern with liberty and the right of people to form their own governments. As Merrill Peterson has put it, “in the nation’s search for an equilibrium between liberty and authority, Jefferson typically stressed the first term of the equation, Madison the second.” Yet, Jefferson is the one Publius himself turns to in the Federalist Papers in the context of a defense of constitutionalism and the separation of powers, drawing on Jefferson’s critique of the Virginia Constitution in his Notes on the State of Virginia, published in 1787. In Federalist 48, in the course of criticizing

5 EVERETT BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, at 2 (1920) (quoting FREDERICK TURNER, SIGNIFICANCE OF THE LOUISIANA PURCHASE 27 (1943)).


8 “In the Notes on Virginia appears the most comprehensive statement of Jefferson’s views on American constitutional law to be found in his writings. The basic principles here expressed subsequently shaped his attitude towards the adoption and interpretation of the Constitution of the
"parchment barriers" as insufficient for ensuring the existence of the separation of powers, Publius quotes Jefferson's analysis of the Virginia constitution, which, it turns out, in practice is no constitution, for the legislature can do whatever it wants:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Despotism was exactly the target of the revolution, in fact, Jefferson argues, and that can only be remedied by establishing a separation of powers:

An elective despotism, was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.

The problem in Virginia, though, we are told, is that the state constitution still did not provide the executive (the governor, Jefferson himself) with any means of defending the exercise of his authority, and thus of preventing the legislature from becoming the rule of "one hundred and seventy-three despots."

This is precisely the lesson Publius takes away from Jefferson in this regard, as is indicated in Federalist 47. There, in defending the Constitution against the charge of the Anti-Federalists that there is no separation of powers within it, Publius steps back to establish the principle of that separation: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."


10 Jefferson took this language seriously; consider here the terminology he employed in drafting the Declaration of Independence:

But when a long train of abuses and usurpations, begun at a distinguished period and pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government... The history of the present king of Great Britain is a history of unremitting injuries and usurpations, among which appears no solitary fact to contradict the uniform tenor of the rest, but all have in direct object the establishment of an absolute tyranny over these states.


11 Id. at 245.

there is no concern expressed here for questions of benevolent monarchy or dictatorship; tyranny simply means that there is no separation of powers.

In the end, as Jefferson describes it, what Virginia had was the equivalent of a sitting constitutional convention. As he put it in Query XIII of his Notes, "the ordinary legislature may alter the constitution itself." The development of this point is critical to understanding Jefferson's view of the purpose or function of a constitution, and the authority that the enactment of such an act establishes.

After providing a brief overview of how the state assembly came into existence, prior to the break with Great Britain, Jefferson notes that this assembly had no authority to commission and ratify a constitution, for in its very nature it was incapable of doing so. A constitution, he argues, is an act which transcends the powers of any legislature, and thus no legislature can pass such an act: "if the present assembly pass any act, and declare it shall be irrevocable by subsequent assemblies, the declaration is merely void, and the act repealable, as other acts are." And, indeed, that is not what the assembly did, for though they styled the act passed a "Constitution or Form" of government, the state assembly does not claim higher status for this act than for other acts, nor does it say this act is perpetual or unalterable. In fact, Jefferson points out, that self-same assembly had, in subsequent sessions as a house of delegates, passed "acts of assembly in contradiction to their ordinance of government; and every assembly from that time to this has done the same."

That the "constitution" was passed by an assembly reveals the weakness of its claim; as Jefferson puts it, if the legislature had said, "We, the ordinary legislature, establish an act above the power of the ordinary legislature," the "absurdity of the attempt" would be clear to all. Only an extraordinary assembly, chosen precisely for the purpose of establishing a permanent constitution, could authoritatively engage in such an exercise. Importantly, Jefferson adds, the fact that the people of Virginia have not rebelled against the usurped authority is not evidence of their acceptance of it; a "prudent acquiescence, at a critical time" should not be interpreted to be a "confirmation of every illegal thing done during that period." The danger that is represented by the pretended act of the assembly, that of depriving the people of their "fundamental rights," must be postponed to a more propitious time, he concludes, for "[w]hile an enemy is within our bowels, the first object is to expel him." For Jefferson, then, the establishment of a constitution is critical as a bulwark in defense of the rights of the people, but there is also a particular process that must be followed if one is going to establish a legitimate government. Additionally,

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14 Id. at 247.
15 Id. at 248.
16 Id. at 249.
17 Id. at 249-50. Note, though, the language of Chief Justice John Marshall in an 1828 case (referred to below): "[t]he acquiescence of the people of the United States, fully establishes, that the powers exercised in reference to Louisiana, were properly exercised." American Insurance Co. v. 356 Bales of Cotton, 26 U.S. 511, 525 (1828). Marshall is referring specifically to the inhabitants of the territory being granted the "privileges of citizens." Id.
the fact that the people might suffer the operation of a government for a period of
time is not definitive evidence that they consider its powers licit.

A. The Establishment of a National Bank

Debate on the meaning of the federal Constitution early on led to the
profound disagreement between Jefferson and Alexander Hamilton over the
establishment of a national bank, a debate central to the later Supreme Court
decision in *McCulloch v. Maryland*. The question of the establishment of the
bank arose in 1791, when President Washington requested opinions from his
Cabinet on the establishment of a national bank (Hamilton was then Secretary of
the Treasury, Jefferson the Secretary of State). Jefferson, in a memorandum of
February 15, opposed the proposal as unconstitutional, and Hamilton, asked to
respond to Jefferson, argued in favor of it; Washington, of course, followed
Hamilton's advice. Jefferson, using what has been described by some (including
himself) as the "strict" construction interpretation of the Constitution, argued for
limited powers in the government. Hamilton, with John Marshall a "broad"
constructionist, argued for extended powers; he found support for implied powers
in the document, whereas Jefferson looked only to express powers. 19

Jefferson's argument is based upon his understanding of the principles of
limited government, especially as construed in light of the Tenth Amendment.
The Amendment specifies, for Jefferson, the limits of governmental power, such
that to "take a single step beyond the boundaries thus specially drawn around the
powers of Congress, is to take possession of a boundless field of power, no
longer susceptible of definition." 20 The incorporation of a bank, he argued, was
not within the powers of the government, and that for two reasons; first, it is not a
power specifically granted by the Constitution, not being a part of paying debts,
borrowing money or regulating commerce; secondly, he argued, it cannot be
justified by either of the general phrases where one might look in the document.
There is a power to "lay taxes for the purpose of providing for the general
welfare," 21 but this specifically addresses the need to pay the debts of the Union.
There is no general power in Congress to do whatever it pleases for the sake of
the general welfare, but only to lay taxes for that purpose; to interpret this
otherwise would be to give the government free reign to do whatever they
considered to be good for the country. To interpret the general welfare phrase, he
argued, "not as describing the purpose of the first [phrase, to lay taxes], but as
giving a distinct and independent power to do any act they please, which might
be good for the Union, would render all the preceding and subsequent

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19 See CHRISTOPHER WOLFE, How to Read and Interpret the Constitution, in
CONSTITUTIONALISM IN PERSPECTIVE: THE UNITED STATES CONSTITUTION IN TWENTIETH
CENTURY POLITICS 3, at 11 (Sarah B. Thurow ed., 1988). He describes the difference between
the two approaches as the difference between a "narrow" (or "strict") interpretation and a "broad
but strict" one: "a good example of narrow construction is Jefferson, who read the Constitution
more narrowly than a fair reading would require; Marshall is a good example of broad but strict
construction . . ." Id.

20 THOMAS JEFFERSON: WRITINGS, at 416 (Merrill D. Peterson ed., 1984). For further analysis
of the importance of the Tenth Amendment, see the discussion below of the Kentucky Resolutions.

enumerations of power completely useless." Indeed, he points out, the "very power now proposed as a means," the establishment of a bank, "was rejected as an end" by the Constitutional Convention. A proposal to authorize Congress to open canals would have led them to incorporate for that purpose, but the proposal was rejected, on the grounds that "then they would have the power to erect a bank," rendering the "great cities" adverse to the proposed Constitution.

The second general phrase one might point to in the Constitution justifying the establishing of a bank is the "necessary and proper" clause, and here Jefferson reads the clause to mean only what is necessary "to those means without which the grant of power would be nugatory;" and a bank, in this sense, is not necessary, as all the powers of Congress can be carried out without a national bank. It may be convenient for the government to have a national bank, but that, Jefferson argues, is not the standard — the standard is what is necessary. If Congress were allowed to use convenience as its watchword, "it would swallow up all the delegated powers," thus the Constitution "restrained them to the necessary means," without which it could not act.

Hamilton, in contrast, argues that there are, in addition to the express powers in the Constitution, certain implied powers which are intended to facilitate the carrying out of Congress’ duties. It is, he says, a power of Congress to erect corporations where it sees fit, and in such a manner as it deems necessary, if it has the power to regulate or control a specific matter. (It may not, for instance, establish a corporation to run the police in the city of Philadelphia, because it does not have the power to regulate the police in that city.) Hamilton reads the "necessary and proper" clause broadly, to mean what is "needful, requisite, incidental, useful, or conducive to" the ends of government and the carrying out of legislative powers. Jefferson’s interpretation, he says, would be justified if the word "absolutely" or "indispensably" was used to modify necessary, but neither word is used. The guide to implied powers, according to Hamilton, is whether the end that is sought is justified by the powers which are expressly granted in the Constitution. As he states, "If the end be clearly comprehended within any

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25 Hamilton’s argument can be found in THE PAPERS OF ALEXANDER HAMILTON, at 97-134 (Harold C. Syrett ed., 1965). Hamilton argues that there is even a third “class” of powers, “which may be properly denominated resulting powers,” such as the power to exercise “sovereign jurisdiction over [a] conquered territory.” Id. at 100.

26 Id.

27 Id. at 102-03.

28 The establishment of a national bank, Hamilton argued, has a “natural relation to the power of
of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution — it may safely be deemed to come within the compass of national authority."

The justification for an expanded reading of the Constitution rests, for Hamilton, on the "sound maxim of construction," that the powers of government, "especially those which concern the general administration of the affairs of a country . . . ought to be construed liberally, in advancement of the public good."

Jefferson concludes his assessment of the bank bill with an important reservation about what the executive ought to do when faced with difficult questions:

[U]nless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion.

The willingness to defer to the legislature in cases of dubiety marks the measured character of Jefferson's thought, and the not untypical willingness to accord the representatives of the people a greater voice in the authorization of governmental decisions. Note that he is not simply suggesting congressional supremacy here, but only that the president should not be forceful when he has misgivings about his own purposes and position.

Aligned with Jefferson on the question of interpretation (to a point) was James Madison, as can be seen in the criticism of the Alien and Sedition Acts voiced in the Virginia Resolutions of 1798, where protests were launched against the Federal Government's attempts to enlarge its powers by "forced constructions of the constitutional charter which defines them." In his own draft of the Kentucky Resolutions, Jefferson registers a protest against the existing government of the Union, holding that it was not intended to be the final arbiter of the extent of those powers; to do so "would have made its discretion, and not that of the Constitution, the measure of its powers." As the overreaching of the federal government is the focal point of the Resolutions, Jefferson quotes the collecting taxes, to that of borrowing money; to that of regulating trade; to that of providing for the common defence . . . " Id. at 129 (emphasis added).

29 Id. at 107. See the echo of these words of John Marshall in McCulloch v. Maryland, 17 U.S. 316 (1819): "[I]f the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id. at 421. But consider here the words of Representative Smith in the congressional debate on the bank bill; after noting that the legislature must be guided by its own judgment concerning the constitutionality of a bill, Smith then noted that, "nevertheless, it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by the Constitution." Randy Barnett, Necessary and Proper, in THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 157, 172 (Bradford P. Wilson & Ken Masugi eds., 1998).


Tenth Amendment numerous times, arguing for a restricted understanding of the powers of the government vis-a-vis the states. The thrust of the censure of the 1798 Acts, then, is that they represent improper intrusions on the authority of the states by undertaking to restrict actions that only the states are authorized to proscribe according to the Constitution. Resolution Eight contains a lengthy statement of the outlook of the state on the nature of government and governors, including the following insight into Jefferson's views:

[T]hat it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism — free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go ...

It is well to have some confidence in those in positions of power, but it is also critical to limit that confidence in a clear, unambiguous manner, by fashioning an instrument that serves the purpose of securing restrictions on arbitrary and capricious rule: “In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.” The important lesson that emerges here is like that found in regard to the bank question; the Constitution establishes a government of limited, enumerated powers, and the protection of liberty requires that those limits not be transgressed. Jefferson’s concern is clearly with maintaining the form of government, for the form, or at least this form, ensures the protection of liberty for Americans.

In another instance of Jefferson’s interpretive method, he gave the following description of the fears that motivated those who wanted to uphold strict construction of the Constitution (the case dealt with a bill granting a federal charter to a mining company):

Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at ‘This is the House that Jack Built?’ Under such a process of filiation of

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34 Note Jefferson’s reliance on the Tenth Amendment in his bank memo also; though there he refers to it as the Twelfth Amendment, as the Bill of Rights had not yet been ratified in its final form. Id.
35 Id. at 454. See also THE FEDERALIST NO. 55, at 314 (Thomas Jefferson) (Clinton Rossiter ed., 1999), on the question of what republican government expects, or requires:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

Id.
37 In THE FEDERALIST NO. 78 (Alexander Hamilton), Publius argues for the necessity of a permanent and independent judiciary as the means of maintaining a limited government; but there he speaks not of a government of enumerated powers, but rather the flip side of that coin, a government of powers with precise limits such as those found in Article I, Section 9. Id.
necessities the sweeping clause makes clean work.\textsuperscript{38}

As we will see below, Jefferson does not easily countenance such filiation.

\textit{B. Jefferson and Judicial Review}

Much has been written about Jefferson’s views on the role of the judiciary, but the issue bears some attention here, because it is significant in understanding his view of the operations of the separation of powers. Jefferson’s hostility to the Marshall Court centered around the \textit{Marbury v. Madison} case, but his opposition to the role the Court took on there was more than simply a playing out of a personal squabble. His 1823 letter to Justice William Johnson reflects his lasting distaste for the ruling, with just a touch of hyperbole, as he asks: “could anything exceed the perversion of law” found therein?\textsuperscript{39} Jefferson’s principled opposition to the exercise of judicial review in \textit{Marbury} was part and parcel of his understanding of the proper structure of governmental powers, but his opposition to the \textit{Marbury} decision was largely based on his rejection of the Marshall Court’s exercise of review power over the appointment process, coupled with his frustration at the inability to wrest the judiciary from the hands of the Federalists.

In contrast to the argument for judicial review — as found in the \textit{Federalist Papers}, for instance — Jefferson propounded the notion of “coordinate review,” or “departmentalism.\textsuperscript{40} The basis of this view is that each branch should have equal right and power to interpret the Constitution in light of the circumstances which they confront. Jefferson described his view in a significant 1804 letter to Abigail Adams on the enforcement of the Alien and Sedition Acts, in the context of defending his power of pardoning those convicted under the acts:

\begin{quote}
You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them the right to decide for the executive, more than to the executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hand by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislative and executive also, in their spheres, would make the judiciary a despotic branch.\textsuperscript{41}
\end{quote}

Thus, based on his duty as the executive to defend the Constitution, Jefferson argued that he could not uphold an unjust law, and thus could not carry out those
actions which the judiciary might command of him. Each branch of the
government, in his view, must decide upon the constitutionality of any law, and
execute it or judge it according to its own understanding. To take the opposite
position, Jefferson pointed out to Judge Spencer Roane in an 1819 letter, would
be to create a body independent of the other branches, and indeed, “independent
of the nation”:

The constitution, on this hypothesis, is a mere thing of wax in the hands of the
judiciary, which they may twist and shape into any form they please. It should
be remembered, as an axiom of eternal truth in politics, that whatever power in
government is independent, is absolute also; in theory only, at first, while the
spirit of the people is up, but in practice, as fast as that relaxes.42

The result of the “coordinate review” approach would, presumably, be some
measure of inconsistency and disorder, as each branch interpreted and enforced
the law as it saw fit, but Jefferson looked upon that as part and parcel of
republican rule. Within this argument, though, Jefferson did acknowledge the
supremacy of the legislature, given its proximity to the people, so that in
circumstances of doubt one should defer to legislative action (as he does at the
end of his memo to Washington on the constitutionality of a national bank,
mentioned above). At the same time, Jefferson continually expressed his
confidence in the people to correct abuses by governments, such as in his
proposal in his 1783 “Proposed Revision of the Virginia Constitution,” wherein
he called for a new convention under the following circumstances: “Any two of
the three branches of government concurring in opinion, each by the voices of
two thirds of their whole existing number, that a Convention is necessary for
altering this Constitution or correcting breaches of it,” they shall be authorized
to do so.43 Jefferson’s point, though, may be — as we see elsewhere — that the
remedy for such a confrontation is not necessarily in the courts, but in the
political process.44

II. THE LOUISIANA PURCHASE

In their recent book Presidential Greatness, Marc Landy and Sidney Milkis
comment on the significance of the Louisiana Purchase in the following terms:
“The immense expansion of the country brought by the Louisiana Purchase
constituted the single most important alteration in the character of the country
from its founding until the abolition of slavery.”45 The question before us, then,
is how we get from a commitment to strict construction and adherence to

43 See THE PAPERS OF THOMAS JEFFERSON, at 6:304 (Julian P. Boyd ed., 1952)(emphasis
added). This proposal is precisely the one that Publius alights on in The Federalist No. 49, where
he opposes the recommendation in a series of pointed arguments. Id.
44 For a brief overview of the alternatives to judicial review, see STANLEY C. BRUBAKER, The
Court as Astigmatic Schoolmarm: A Case for the Clear-Sighted Citizen, in THE SUPREME COURT
constitutionalism to what the authors note is an "admittedly unconstitutional" act on the part of now President Jefferson.46

Negotiations leading to the purchase of the Louisiana territory and the congressional approval of such shed considerable light on Jefferson's views of the powers of the executive under the Constitution. The actions taken by the Executive certainly compel us to think more deeply about the principles that animated Jefferson's views of the purpose and function of a constitution, as well as the relationship between the people, their founding contract, and political liberty.

The approach Jefferson and his supporters took to Louisiana seems eminently reasonable. It was understood by many at the time of the Founding that the United States would come to dominate the continent, and by more that critical to the success, and perhaps survival, of the States would be securing unfettered access to the Mississippi River and to a port at New Orleans.47 To that end, American envoys in Europe kept a watchful eye on the negotiations between Spanish and French diplomats in particular, as their two nations were the determining figures in deciding the future of the territory. Relations with both countries were somewhat strained, especially by the pending confrontation between France and Great Britain, and thus it was sometimes difficult to obtain accurate information from any of the parties. Confirmation of the Spanish cession of Louisiana to France in late 1801, though, led the Jefferson administration to think more concretely and directly about the impending possibilities for the United States opened up by the action.48

The administration's primary concern along these lines in the following months was to secure access to the Mississippi by ensuring that the deposit in New Orleans would remain open for use by the United States, and careful negotiations allowed them to achieve that result.49 In the meantime, though, representatives in France were meeting even more good fortune, as on March 8, 1803, an offer was made by Talleyrand to Robert Livingston for the United States to purchase all of Louisiana. Unwilling to delay negotiations, for fear that the French might rethink the offer, and that war might break out at any moment

46 Id.
47 See, e.g., DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 321 (1970) (discussing Thomas Paine's letter to Jefferson of September 23, 1803). "That the idea of extending the territory of the United States was always contemplated, whenever the opportunity offered itself is, I think, evident from the commencement of the revolution that Canada would, at some time or other, become a part of the United States." Id.
48 Id. at 248. Dumas Malone indicates that the secret treaty between Spain and France, the treaty of San Ildefonso, was signed Oct. 1, 1800; confirmation of the cession to the Jefferson administration only came in a letter from Rufus King dated November 20, 1801. Id. King had obtained a copy of the treaty of Aranjuez (March 21, 1801), which refers to Louisiana as already having been ceded. Id.
49 See THOMAS JEFFERSON: WRITINGS, at 511-12 (Merrill D. Peterson ed., 1984) (discussing the Third Annual Message to Congress on October 17, 1803). On the importance of the issue, see ROBERT C. TUCKER & DAVID HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON, at 95-100 (1980). The authors quote Jefferson as stating: "[t]here is on the globe one single spot, the possessor of which is our natural and habitual enemy. It is New Orleans..." Id. at 98.
(as, in fact, it did soon thereafter), Livingston and James Monroe (arriving later) struck a deal which went beyond the instructions given them, and beyond the most that the administration could have hoped for. (That is, at least in terms of the size and scope of the acquisition; some concern was expressed about whether Livingston had been too precipitous, and whether he could have struck a better deal monetarily.) And yet the event could not have been entirely surprising to all involved; Madison, for example, had already mentioned in his instructions the arguments in favor of French withdrawal from the continent, including “the instability of the peace of Europe; the attitude of the British — who viewed French colonial ambitions with disfavor and were now friendly to the United States; the condition of French finances; [and] the necessity of abandoning the West Indies or of sending large armaments to those islands.”

What is of interest for us, though, is the reaction on the part of Jefferson and others to the proposed purchase. Upon hearing official word on July 3 of the signing of the treaty (which took place April 30), Jefferson knew immediately that he would be compelled to overcome some opposition, notably from New England Federalists. More importantly (because he clearly had the numbers on his side), Jefferson knew that he had a difficult constitutional question that, in all honesty, he would need to confront. The problem Jefferson faced is that the Constitution lacks any specific clause providing for the acquisition of territory by the government. Further, questions would necessarily arise in the future concerning another matter, the admission of new states into the Union from these territories, and here again the Constitution is silent. For some interpreters, this would not present an insuperable difficulty; for Jefferson, on the other hand, as we have seen, the problem would have to be more profound.

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51 The impetus behind the opposition was multifarious, and included objections both legal and political. See, for example, Fisher Ames’ letter to Thomas Dwight of October 31, 1803:

Having bought an empire, who is to be emperor? The sovereign people? And what people? All, or only the people of the dominant states, and the dominant demagogues in those states, who call themselves the people? As in old Rome, Marius or Sylla, or Caesar, Pompey, Antony, or Lepidus will vote themselves provinces and triumphs.

53 That Jefferson considered the admittance question is evident in his letter to John Breckinridge of August 12, 1803:

The inhabited part of Louisiana, from Point Coupee to the sea, will of course be immediately a territorial government, and soon a State... When we shall be full on this side [of the Mississippi], we may lay off a range of States on the western bank from the head to the mouth, and so, range after range, advancing completely as we multiply.

54 It is true that the Supreme Court eventually endorsed the view that acquisition and the conferral of the privileges of citizenship were part of the nature of sovereignty, but it is the Marshall-led Court that does so — not exactly a source friendly to Jeffersonian principles, especially considering the last claim made here, justifying the Purchase. See American Insurance Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828):

The rights of the United States to hold territories, not a part of the nation at the time of
Indeed, well before he knew the outcome of the negotiations, Jefferson had conferred with his confidantes about the constitutionality of acquiring the Louisiana territory. Attorney General Levi Lincoln suggested that the constitutional question could be avoided by adding the land to particular states or territories. Treasury Secretary Albert Gallatin, on the other hand, suggested a more forceful approach, by interpreting the Constitution in a manner described by Dumas Malone as "virtually indistinguishable from the liberal construction of his predecessor Hamilton."55 Gallatin’s view, expressed in a letter to Jefferson in January of 1803, was that "the United States as a nation have an inherent right to acquire territory," and that Congress has the power to admit into the Union new states formed out of the acquired territory.56 While he acknowledges that there is no explicit grant of power to Congress to do such, Gallatin asserts that "the existence of the United States as a nation presupposes the power enjoyed by every nation of extending their territory by treaties."57 Gallatin does express some concern about the limits placed on the government by the Tenth Amendment, but suggests that the "more natural construction" would be to say that "the power of acquiring territory is delegated to the United States by the several provisions which authorize the several branches of government to make war, to make treaties, and to govern the territory of the Union."58 Jefferson’s response to Gallatin reveals his support for that position, but with some qualification:

You are right in my opinion, as to Mr. L.’s proposition: there is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now standards, will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment to the Constitution.59

This last statement has lent itself to various interpretations, but without question Jefferson was concerned about the legal aspects of the acquisition, and repeatedly made clear those concerns to others, though only to those he thought could consider such matters discretely.

That Jefferson was concerned with the “technical” question of the purchase is clear in his correspondence of the following months. The treaty had been agreed to on April 30, 1803, and there was a six-month window within which...
ratification had to take place. Jefferson thus was compelled to bring Congress back into session before its scheduled return; he decided upon October 17, which would leave only two weeks for debate and voting on the treaty.\(^{60}\) Suspecting that the Federalist opponents would be unified in their hostility to the measure, Jefferson wanted to avoid raising difficulties with the arrangements of the treaty, even though he had reservations about it. For example, on July 17, in a letter to William Dunbar, Jefferson pointed out that Congress is "obliged to ask the people for an amendment of the Constitution, authorizing their receiving the province into the Union, and providing for its government."\(^{61}\) The following day, writing to Benjamin Austin, he noted that "[t]hey will of course require an amendment of the Constitution adapted to the case."\(^{62}\) More pointedly, in August he indicated to John Dickinson the real qualms he had with the legal issues, but also the potential danger of broadcasting such views publicly:

But there is a difficulty in this acquisition which presents a handle to the malcontents among us, though they have not yet discovered it. Our confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the union. An amendment of the Constitution seems necessary for this.\(^{63}\)

Indeed, so much did Jefferson consider the amendment option a necessity that he even went to the trouble on various occasions of drafting proposed amendments to the Constitution.\(^{64}\)

Perhaps Jefferson's most notable comments in this regard, though, are found in his oft-quoted letter to John Breckinridge of Kentucky, of August 12:

The treaty must of course be laid before both Houses, because both have important functions to exercise respecting it [that is, ratification and appropriation of funds]. They, I presume, will see their duty to their country in ratifying & paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution, approving & confirming an act which the nation had not previously authorized. The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union.\(^{65}\)

Here, of course, Jefferson seems to be accepting the "strict" construction approach, relying on the enumerated powers understanding of the Constitution, read in light of the Tenth Amendment. It is true that there is no specific grant of power in the document that could be relied on here, though, as we have seen with

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\(^{60}\) Initial Senate approval came within four days, on October 20.


\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) See THE WRITINGS OF THOMAS JEFFERSON, at 8:241-45 (Ford ed., 1984).

Gallatin, one could use a broad approach that would construe the Constitution as
presuming such a power existing within the sovereignty of the government.

But Jefferson's concluding comments to Breckinridge indicate the course of
action that he seems to be bent on taking at this point, given the circumstances
that have presented themselves:

The Executive in seizing the fugitive occurrence which so much advances the
good of our country, have done an act beyond the Constitution.66 The
Legislature in casting behind them metaphysical subtleties, and risking
themselves like faithful servants, must ratify & pay for it, and throw themselves
on their country for doing for them unauthorized, what we know they would
have done for themselves had they been in a position to do it.

But what would justify such "action"? Jefferson suggests a parallel:

It is the case of a guardian, investing the money of his ward in purchasing an
adjacent territory; and saying to him when of age, I did this for your good; you
may disavow me, and I must get out of the scrape as I can; I thought it my duty
to risk myself for you. But we shall not be disavowed by the nation, and their
indemnity will confirm and not weaken the Constitution, by more strongly
marking out its lines.67

Jefferson's forthrightness is remarkable, and yet here he relies on two factors in
support of his action: the legislators must risk themselves, by approving the
treaty and appropriating funds for its execution, and the expectation is that the
people, through a retroactive "indemnity," will ratify these actions — by a
subsequent amendment to the Constitution.68 That the action of Congress in this
regard could be viewed as overcoming mere "metaphysical subtleties" seems
astonishing, coming from Jefferson. But his concluding remark, that the support
the people give to the Purchase will strengthen the Constitution, is perhaps even
more difficult to negotiate; it might strengthen the nation, or the presidency, but
it is hard to see how the Constitution will be strengthened. Indeed, instead of
"more strongly marking out its lines," it looks as if it is weakening its lines,
justifying actions that have already been undertaken by the government. The real
source of the danger here, though, is the precedent that the elected officials are
establishing, and what use might be made of such precedents in the future, by

66 Compare here Lincoln's comment in his Message to Congress in Special Session, justifying his
actions taken at the outset of the Civil War: "[i]t is believed that nothing has been done beyond the
constitutional competency of Congress." ABRAHAM LINCOLN: SPEECHES AND WRITINGS, at
68 In the Prize Cases, 67 U.S. 635 (1863), the Supreme Court notes that Congress did retroactively
approve Lincoln's actions at the outset of the Civil War:

If it were necessary to the technical existence of a war, that it should have a legislative
sanction, we find it in almost every Act passed at the extraordinary session of the
Legislature in 1861 . . . [I]n 1861 we find Congress . . . passing an Act 'approving,
legalizing, and making valid all the acts, proclamations, and orders of the President, &c.,
as if they had been issued and done under the previous express authority and direction of
the Congress of the United States.'

Id. at 670 (emphasis added).
others whose actions might be "disavowed by the nation"; Jefferson has more to say about this, as we shall see.

Finally, in a September letter to Wilson Cary Nicholas, Jefferson connects his principles and method of constitutional interpretation with the practical application of such to the Louisiana question. Jefferson, in addressing the issue of acquisition, says first that though the Constitution provides for admitting new states into the Union formed out of territory then held by the Union, "I do not believe it was meant that they might receive England, Ireland, Holland, etc. into it." Again, this might be a conclusion one could reach in a broad reading of the document. But this is not the best reading, for Jefferson:

> When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies & delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President and Senate may enter into the treaty; whatever is to be done by a judicial sentence, the judges may pass the sentence. Nothing is more likely than that their enumeration of powers is defective. This is the ordinary case of all human works. Let us go on then perfecting it, by adding, by way of amendment to the Constitution, those powers which time & trial show are still wanting . . . I confess, then, I think it important, in the present case, to set an example against broad construction, by appealing for new power to the people. 69

Here Jefferson clearly states his principles of construction, principles which are consistent with those he has articulated repeatedly, and which militate against the very action he is contemplating taking. And yet, Jefferson is willing to concede to an alternative method, relying on some other principle as the guide for constitutional interpretation:

> If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects. 70

In the event, this is precisely the counsel Jefferson followed, shying away from raising with Congress his constitutional misgivings about the treaty; and, of course, the treaty was approved with minimal resistance.

The lingering question from the point of view of constitutional jurisprudence, though, is whether this approach to lawmaking is consonant with the structure of constitutional government, and especially how someone like Jefferson anticipates

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70 Id. at 1141.
the people making final distinctions between and among actions consonant with the Constitution and those at odds with it. If the security of the people is to be found in a written constitution, does not the example of “broad construction” make problematic adherence to its letter, and thus endanger the protection of popular liberties with the specter of a “blank paper” document? And as he himself notes in this letter, one significant obstacle to the citizenry making such distinctions is, again, the habit of mind or outlook established by precedents that abandon the delineation of powers established by the people through the Constitution.

III. CONCLUSION

Thomas Cooley, in a statement perhaps too harsh, but certainly one worth reflecting on, made the following comments on the result of the Louisiana question:

The practical settlement of the question of Constitutional power did not heal the wound the Constitution received when the chief officer holding office under it advised the temporary putting it aside, and secured the approval of his advice by a numerical majority of the people. The poison was in the doctrine which took from the Constitution all sacredness, and made subject to the will and caprice of the hour that which, in the intent of the founders, was above parties, and majorities, and presidents, and congresses, and was meant to hold them all in close subordination. After this time the proposal to exercise unwarranted powers on a plea of necessity might be safely advanced without exciting the detestation it deserved; and the sentiment of loyalty to the Constitution was so far weakened that it easily gave way under the pressure of political expediency. 71

Cooley’s insistence on the connection between principle and politics is a precautionary note that ought to be borne in mind at all times, even when — or especially when — one is compelled to choose one over the other. It should be clear that Jefferson did not simply abandon the question of constitutionality, and deserves some credit for at least raising the issue, even if ultimately in a muted way.

The exercise of extraordinary powers that Cooley is referring to is something that Jefferson himself pointedly opposed early on, as can be seen in a passage from the Notes on the State of Virginia where he is critical of the proposal made in the house of delegates to create a dictator:

Every lineament of [our new constitution] expressed or implied, is in full opposition to it. Its fundamental principle is, that the state shall be governed as a commonwealth. It provides a republican organization, proscribes under the name of prerogative the exercise of all powers undefined by the laws; places on this basis the whole system of our laws; and by consolidating them together, chooses that they should be left to stand or fall together, never providing for any circumstances, nor admitting that such could arise, wherein either should be suspended; no, not for a moment. . . . Necessities which dissolve a government, do not convey its authority to an oligarchy or a monarchy. They throw back,

into the hands of the people, the powers they had delegated, and leave them as individuals to shift for themselves.\(^{72}\)

That is, there is no such thing as prerogative power in a constitutional government, for power always reverts to the people in times of crisis; "delegates" themselves may not delegate power to someone else, Jefferson asserts, echoing John Locke's argument in the *Second Treatise*.\(^{73}\) Indeed, Jefferson points out, the circumstances of other states prove that there is no need to revert to dictatorship or the exercise of prerogative power, for they all emerged from difficulties without abandoning "their forms of government." To hold the contrary, that the people were incapable of addressing the dangers brought on by the war, would lend support to the opposition's charges of the "imbecility of republican government."\(^{74}\) In any case, Jefferson makes clear, no republican principle could allow the institution of a dictator employing prerogative powers, and, following the rejection of the recursion argument of "This is the House that Jack Built," neither could any legislature begin down such an avenue without reverting power back to the people. Indeed, Jefferson makes clear his opposition to executive prerogative power in a powerful and explicit way in his own 1776 *Draft Constitution for Virginia*.\(^{75}\)

In assessing the change in Jefferson's approach to questions of constitutionalism and political power, Jefferson's noted biographer Dumas Malone comments:

> It is proper to point out that he was generally more realistic when in office than when in opposition, less doctrinaire; and his situation with respect to the treaty and its promises can be best described by saying that he was caught in a chain of inexorable circumstances.\(^{76}\)

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\(^{72}\) THOMAS JEFFERSON: WRITINGS, at 252-53 (Merrill D. Peterson ed., 1984). On the idea of power reverting to the people, see the charges against the King catalogued in the Declaration of Independence, including the following: "He has refused for a long time after such dissolutions [of representative houses in the colonies] to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise..." *Id.* at 20.

\(^{73}\) See JOHN LOCKE, SECOND TREATISE §§ 142.16-18. In Ch. XI, entitled "Of the Extent of the Legislative Power," he stated that "[t]he Legislative neither must nor can transfer the Power of making Laws to any Body else, or place it any where but where the People have." *Id.*


> [H]e shall not possess the prerogatives; of dissolving, proroguing or adjourning either house of Assembly; of declaring war or concluding peace; of issuing letters of marque or reprisal; of raising or introducing armed forces, building armed vessels, forts or strongholds; of coining monies or regulating their values; of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, lighthouses, seamarks; of laying embargoes, or prohibiting the exportation of any commodity for a longer space than [40] days; of retaining or recalling a member of the state but by legal process pro delicto vel contractu; of making denizens; of creating dignities or granting rights of precedence.

*Id.*

Yet one cannot gainsay the effect of the Louisiana Purchase on the character of the country. As Malone reports, a letter from David Campbell indicates the importance of the Purchase, and the real good it accomplished: "You have secured us the free navigation of the Mississippi. You have procured an immense and fertile country: and all these great blessings are obtained without war and bloodshed." Malone comments as follows: "They were not obtained, and could not have been, without changing the character of the Union, but, outside New England, few doubted that the gain would far outweigh the cost." And one might ask the same question about the Constitution as Malone does about the Union; to what extent do we have a changed Constitution following the Purchase? In a notable observation on the importance of the Purchase in the interpretation of the Constitution, John Quincy Adams, who had in fact voted for the acquisition, and voted to appropriate funds for it, commented:

It made a Union totally different from that for which the Constitution had been formed. It gives despotic power over territories purchased. It naturalizes foreign nations in a mass. It makes French and Spanish laws a large part of the laws of the Union. It introduced whole systems of legislation abhorrent to the spirit and character of our institutions, and all this done by an administration which came in blowing a trumpet against implied power. After this, to nibble at a bank, a road, a canal, the mere mint and cummin of the law was but glorious inconsistency.

For all of Jefferson's express concerns about the binding nature of that document, or of written law generally, when the circumstances presented themselves even he found it difficult to forego acting prudentially, for the good of the nation, as he saw it, or, one might say, for the good of the people. He seems to have belied those who thought that his election to the presidency would lead to a weakening of the institution, because of his reputation for favoring legislative authority. His actions instead seem to have proven Alexander Hamilton right, who thought Jefferson disposed to utilize power when necessary: "It is a fact which I have frequently mentioned, that while we were in the administration together he was generally for a large construction of the Executive authority, & not backward to act upon it in cases which coincided with his views."
It might be well to recall Jefferson's own comments from his *Notes on the State of Virginia, Query XIII*, wherein he criticizes the arrangement of the Virginia Constitution, which, we discovered above in Publius' use of this passage, really turns out to be no constitution. Jefferson makes it clear here that he is not castigating the members of the legislative assembly when he criticizes the political arrangements that developed under the constitution, with the legislature exercising the powers of the executive and the judiciary:

And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. But, he warns us, this will not always be the case, and so we must be careful in overseeing the operations of such bodies:

Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. They should look forward to a time, and that not a distant one, when a corruption in this, as in the country from which we derive our origin, will have seized the head of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price... The time to guard against corruption and tyranny, is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and claws after he shall have entered.

Jefferson's caution, expressed early on in his career, and a result of both his experience in office and the example of British politics, brings to mind a similar admonition expressed by the Supreme Court in 1866, in the *Ex Parte Milligan* case, addressing the right of civilians to be tried in civil court rather than military court. Here, in the recent aftermath of the Civil War, the Court expressed the difficulty it would have had in dealing with the question of military authority during the prosecution of the war:

During the late wicked Rebellion the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

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84 4 U.S. 71 (1866).
85 *Id.* at 109 (emphasis added).
One might wonder whether the Court here is referring to the considerations involved in The Prize Cases, decided in 1863, that is, during the war. Then, the Court fairly readily embraced the proclamation of blockade, given the military and political crisis facing the country. Now, in the relative leisure of the times, when the "public safety is assured," the Court is free to reflect more deeply on and scrutinize more closely the actions of the government. And when it does, it can judge the likely effect of violating the Constitution:

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

The Court, then, takes the position that the Constitution is sufficient to face every danger, and, if we are to follow its interpretation, the procedure for prosecuting war provided by the Constitution need never include the suspension of any rights and privileges recognized therein. If indeed that is the case — without accepting the Court's opinion here as necessarily decisive — one might ask the same about negotiations for peace, the establishment of a permanent constitution, the development of a governmental corporation such as a bank, or the acquisition of territory that appears to be useful for the country.

As David Mayer puts it in his treatment of the Louisiana Purchase, "Jefferson took solace in what he regarded as the 'good sense' of the people, not to permit this one precedent to destroy the whole edifice of enumerated powers upon which constitutional limitations on the federal government rested." The difficulty, again, with such a position lies in an examination of what constitutes and sustains the "good sense" of the people, and whether adherence to the forms of government as embodied in a constitution, or the Constitution, play any significant role in that regard. It might be the case that the good sense of the people could see to the effective maintenance of the political order in spite of the occasional violation of the political form, but one wonders what the long term effects of such violations might be, and just how many of them, taken successively, would mark the establishment of a new regime. Indeed, it is precisely this concern for precedent that led Publius in Federalist 25 to argue:

Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs the sacred reverence which ought to be maintained in the breast of rulers towards the constitution of the country, and forms a precedent for other breaches where the same plea of

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86 67 U.S. 635 (1863).
87 Ex Parte Milligan, 4 U.S. 71, 125 (1866).
88 See id.
necessity does not exist at all, or is less urgent and palpable. 90

Finally, we are led to consider whether the understanding of the Constitution itself is to be guided by the principle enunciated by Locke in his Second Treatise of Government, “Salus Populi Suprema Lex.” 91 The acceptance of that principle would compel us to rethink our approach to the interpretation of the “real meaning” of the Constitution, and, with Jefferson, of thinking further about how one fortifies the “good sense” of the people.

Finally, we find evidence in Jefferson's later writings that he is willing to consider an approach to the law at variance with his earlier expressions of strict construction of a limited constitution. In a critical and revealing letter to John Colvin of September 20, 1810, Jefferson expressed his views in this manner:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. 92

It may be that this is the prudent approach to governing, for the statesman to appeal to the fundamental principle of the law rather than be bound by strictures which would threaten the country's survival. Yet, Jefferson's own principles, articulated throughout his earlier writings, seem to be clearly at odds with this view. "Our peculiar security is in the possession of a written Constitution," he had argued. Adherence to the letter of the law was the measure of our liberty, the principle that prevented abuses of power by those in positions of rule. Further reflection on the exercise of power, and the experience of governing, perhaps gave Jefferson a new perspective, yet he still does not defend capricious, peremptory authority:

It is incumbent on those only who accept great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involve the most difficult consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his peril; and throw himself on the justice of his own country, and the rectitude of his own motives. 93

90 THE FEDERALIST NO. 25, at 135 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Morton Frisch comments that Publius (Hamilton) thus "forces us to reflect on the possibility that future executives might use and extend the practices and principles applied by Jefferson to situations far more constitutionally objectionable than those in which he invoked them." MORTON FRISCH, THE HAMILTON-MADISON-JEFFERSON TRIANGLE, at 29 (1992).

91 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 1 (Peter Laslett, Cambridge Univ. Press 1988) (1690).

92 THOMAS JEFFERSON: WRITINGS, at 1231 (Merrill D. Peterson ed., 1984). Note the reference here and in the quote from Federalist 43, infra, text accompanying note 92, to the principles of the Declaration of Independence.

Not simply anyone, but only those entrusted with rule by the people, are endowed with the freedom to undertake such endeavors, and only in moments of "great occasions." But again we meet the apparent dichotomy. Jefferson seems here to embrace the standard for action that Publius enunciates in *Federalist* 43, quoted above:

The ... question is answered by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.94

Yet, at the same time, we have the lesson of the Kentucky Resolutions to ponder:

[T]hat it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism — free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go ... 96

The question, in the end, is whether self-preservation can only be secured, at times, by the introduction of measures that allow the potential for despotism.

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94 GEOFFREY MILLER, *The Presidential Power of Interpretation: Implication of a Unified Theory of Constitutional Law*, in *LAW AND CONTEMPORARY PROBLEMS*, at 35-61 (1993). Miller argues that the president has substantial independent power of interpretation of the Constitution, but "[o]nce a federal court has ruled, however, and all avenues of higher review have been exhausted, unified theory suggests that the court's judgment binds the president, except in unusual cases in which the integrity of the nation is threatened." Id. at 37 (emphasis added). Later, addressing Lincoln's reaction to the *Ex Parte Merryman* case, he argues: "unified theory can justify Lincoln's action on the ground that, under the circumstances, the suspension of the writ of habeas corpus was a compelling necessity for the preservation of the nation..." Id. at 55 (emphasis added).


A POST-IMPEACHMENT INDICTMENT
OF THE INDEPENDENT COUNSEL STATUTE

by L. Darnell Weeden

I. INTRODUCTION

The issue to be addressed is whether the recently expired independent
counsel statute ignored the Constitution's separation of powers theory by
usurping the role of the Attorney General in deciding whether the President has
committed a criminal offense which Congress may deem an impeachable
test.

The Supreme Court held that the independent counsel law did not violate the
separation of powers doctrine by limiting or neutralizing the President's ability to
supervise the law enforcement judgment of the independent counsel because the
independent counsel function rests with the Executive Branch. The Court

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of Mississippi. I would like to thank Demarcus L. Peters, Research Assistant at Thurgood Marshall
School of Law, Class of 2002, for his valuable comments concerning earlier drafts of this article.

2 The Independent Counsel law was established in 1978 as the Ethics in Government Act with a
at 28 U.S.C. §§ 591-598 (1982)). Each time the law was extended it contained the five-year sunset
provision. In 1994 the law received its last extension with its customary sunset provision in the
amended at 28 U.S.C. §§ 590-599) (1994)). As a result of the sunset provision contained in its last
extension the independent counsel finally expired in June 1999, twenty-one years after it was
originally enacted into law.

3 See Morrison v. Olson, 487 U.S. 654 (1988). In Morrison, former government employees filed a
suit unsuccessfully challenging the constitutionality of the independent counsel statute. Id.

Thus, while "[a]ll legislative Powers herein granted shall be vested in a Congress of the
United States, which shall consist of a Senate and House of Representatives," U.S.
CONST., Art. I, § 1 (emphasis added), "[t]he executive Power shall be vested in a
President of the United States," Art. II, § 1, cl. 1 (emphasis added).

That is what this suit is about. Power. The allocation of power among Congress, the
President, and the courts in such fashion as to preserve the equilibrium the Constitution
sought to establish--so that "a gradual concentration of the several powers in the same
department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted.
Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's
clothing: the potential of the asserted principle to effect important change in the
equilibrium of power is not immediately evident, and must be discerned by a careful and
perceptive analysis. But this wolf comes as a wolf.

Id. at 699 (Scalia, J., dissenting). Unlike the majority of the Supreme Court, Justice Scalia
correctly believes that the independent counsel law violated the Constitution's separation of powers
requirement. Id. at 697.

4 U.S. CONST art. II, § 4. "The President, Vice President and all civil Officers of the United States,
shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other
high Crimes and Misdemeanors." Id.

5 See Morrison, 487 U.S. at 696.
believed the Attorney General's power to initiate an investigation of the Executive Branch by the independent counsel, to present facts defining the counsel's jurisdiction and the power of removal was sufficient control to conclude Congress had not robbed the President of his duty to enforce the law.\(^6\)

Constitutional scholar Susan Low Bloch believes that we are fortunate that Congress allowed the independent counsel statute to expire in June 1999.\(^7\) Professor Bloch, an original supporter of the independent counsel statute, had a change of heart after observing what she describes as recent excesses in the use of the independent counsel law.\(^8\) Professor Bloch's support for the independent counsel statute in 1989 was based on the assumption that the law would allow the Executive Branch to be investigated for criminal misconduct without doing any harm to the constitutional doctrine of separation of powers.\(^9\) By 1999 Professor Bloch was giving the expired independent counsel statute a grade of "F" for its failed role in the Clinton impeachment process.\(^10\)

However, long before Professor Bloch gave the independent counsel statute a failing grade in the aftermath of the Clinton impeachment proceedings, Justice Scalia's dissenting opinion in *Morrison v. Olson* had properly given the independent counsel statute a failing grade.\(^11\) I agree with Professor Bloch's conclusion that any meaningful analysis of the Clinton impeachment process should begin with a critique of the independent counsel statute.\(^12\) Specifically, an

\(^{6}\) Id. at 696-97.


\(^{8}\) See Bloch, supra note 7, at 145. "I [Professor Bloch] must confess, however, that I came to this view only after some of the recent excesses. I had been an early supporter of the statute." Id. & n.9 (citing Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 647 (1989)).

\(^{9}\) See Bloch, supra note 7, at 145 n.9 "Congress had confronted a difficult problem and conscientiously tried to forge a narrow solution that minimized the threat to separation of powers." Id.

\(^{10}\) Id. at 145.

\(^{11}\) See *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). To repeat, Article II, § 1, cl. 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States."

As I described at the outset of this opinion, this does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on...fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

\(^{12}\) See Bloch, supra note 7, at 145. "Our recent experiences under the statute have shown the
analysis of the independent counsel statute should start by revisiting Justice Scalia's dire warning that the independent counsel statute violates separation of powers because decisions regarding the nature of a criminal investigation are beyond the control of the President and other members of the Executive Branch. Justice Scalia said that Congress violated the Constitution's separation of powers jurisprudence by compelling the Attorney General to investigate Mr. Olson, an appointee of the President. Not everyone was happy to see the independent counsel statute expire. Professor Cook believes that Congress should not have allowed the independent counsel statute to expire. Professor Cook argues that without an independent counsel law, an investigation of Executive Branch officials by the Justice Department will be impaired by conflict of interest and appearance of impropriety from less than objective federal prosecutors. Rather than abandoning the independent counsel statute, Professor Cook thinks the independent counsel statute should be modified. Professor Cook's proposed modified independent counsel statute is somewhat problematic because, like the wisdom of those such as Justice Scalia who questioned its constitutionality from its inception."

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13 See Morrison, 487 U.S. at 703 (Scalia, J., dissenting).
14 Id.
15 Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are no reasonable grounds to believe that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.
16 Id.
17 Id.
18 Id.
19 Id. at 1399.

I submit, however, that my proposal, requiring Attorney General approval, with an option for review by the division of the court whenever certain provisions of the United States Attorneys' Manual are implicated, effectively addresses this ongoing congressional effort to regulate independent counsel discretion. By requiring Attorney General consultation, this proposal mandates actual compliance with Department of Justice policies and further preserves the appearance of propriety by permitting the independent counsel to seek refuge in the division of the court from an adverse departmental determination. Thus, the inherent conflicts associated with Attorney General control over Executive Branch prosecutions are avoided, while prosecutorial independence is preserved. Moreover, as the following discussion amply illustrates, when reviewed in light of the Morrison case, the proposal is constitutionally sound, as well.
majority opinion in *Morrison,* it does not adequately address the separation of powers issue raised in Justice Scalia’s dissent.

Although the majority opinion in *Morrison* is the law of the land, it is temporarily a moot opinion for all practical purposes because the independent counsel statute no longer exists. I surmise the reason it no longer exists is because Congress finally realized after the Clinton impeachment proceedings that an independent counsel is not an adequate substitute for leaving all the executive power to enforce the law of the land in the hands of the President and his subordinates.

Our constitutional history strongly suggests that an independent counsel free of the structural constraints of the separation of powers theory would make our freedom under the Bill of Rights worthless. Because our Constitution is based on the principle of separation of powers as necessary for a government based on law rather than men, it is required that all the laws of this land be enforced by the President. Anyone assigned to enforce the law independent of the President of the United States violates the Constitution.

Part I of this article includes a brief discussion of the historical description of the political and constitutional issues surrounding the adoption and application of the independent investigations of the Executive Branch. Part II proposes that those supporting the expiration of the independent counsel law resurrected the ghost of Justice Scalia’s dissenting opinion in *Morrison* with respect to the

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21 See *Morrison,* 487 U.S. at 705 (Scalia, J., dissenting).

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. As my prologue suggests, I think that has it backwards. Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department’s “defense must . . . be made commensurate to the danger of attack,” Federalist No. 51, p. 322 (J. Madison), which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today’s holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibration of powers.

23 See *Morrison,* 487 U.S. at 705 (Scalia, J., dissenting).
24 Id. at 697 (citing *The Federalist* No. 47 (James Madison) (C. Rossiter ed. 1961)).
25 Id. (citing MASS. CONST. of 1780, part 1, art. XXX).

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of law and not of men.

26 Id. (quoting MASS. CONST. of 1780, part 1, art. XXX).
separation of powers constitutional violation theory. Part III engages in an analysis of the separation of powers theory as a basis for opposing the renewal of the independent counsel statute. Part IV includes a discussion on the substantial grounds for impeachment requirement imposed on the independent counsel as violative of separation of powers. Part V proposes a litmus test for deciding whether a statute authorizing investigation of the Executive Branch violates the separation of powers doctrine.

II. AN HISTORICAL DESCRIPTION OF THE POLITICAL AND LEGAL ISSUES SURROUNDING THE ADOPTION OF THE INDEPENDENT COUNSEL STATUTE

Since the 1970s, Congress has struggled to decide what type of legislation would be appropriate to help maintain the public trust in the Executive Branch of the federal government to investigate itself.\(^{27}\) Congress adopted the independent counsel law\(^{28}\) in 1978 as a reaction to President Nixon's firing of Special Prosecutor Archibald Cox because of Cox's investigation of the White House's involvement in the Watergate burglary.\(^{29}\)

Professor O'Sullivan provides an excellent description of the political and legal climate in the nation after the Watergate scandal.\(^{30}\) After the Watergate burglary was proven to be a political operation approved by officials in the Executive Branch of the federal government, there was a strong sense that Congress had to maintain or restore the public's confidence in its national government.\(^{31}\) Watergate was not an ordinary burglary.\(^{32}\) The Watergate incident revealed that after the burglary, high and important officials in the Executive Branch of government planned not to prosecute the Watergate burglars because of their political connections to the President.\(^{33}\) Although the plan not to prosecute the Watergate burglars because of their political ties to Executive Branch officials was not successful, the attempt to circumvent the criminal laws because of one's ties to key governmental officials caused Congress to believe that the public no longer had confidence in its government.\(^{34}\) Congress enacted the independent counsel law because it believed that assigning the investigation of Executive Branch officials outside of the Department of Justice (the "DOJ") and not supervised by the Attorney General that reports to the President would assure the public that "evenhanded justice" existed for all.\(^{35}\)


\(^{31}\) Id. at 463.

\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.
The independent counsel law was born to promote "public confidence in the integrity of the results of the independent investigation" of the Executive Branch. Before the independent counsel law was allowed to expire, it was part of the problem because of the tactics of an Executive Branch official being investigated to "attack as biased the IC, or the judges that appointed him."36 Professor O'Sullivan articulated a very persuasive rationale for allowing the independent counsel law to expire.37 Professor O'Sullivan has proven to be a prophet in declaring the independent counsel law to be bad public policy in actual operation.38 In actual operation the public lost confidence in the integrity of independent counsel investigations because the mechanism was overused39 and gave political partisans incentives to generate doubts in the mind of the public about the fairness of the investigation.40 In 1999, Independent Counsel Kenneth Starr, while testifying before Congress, cited Professor O'Sullivan's conclusion that because partisan political incentives caused a loss of public confidence in the integrity of an independent counsel investigation of the Executive Branch, the independent counsel law should be allowed to expire.41 Starr concluded that he opposed renewing the independent counsel law because Congress had asked

36 See O'Sullivan, supra note 30, at 464.

37 Id.

38 Id.

39 Id. at 463.

40 Id.

41 Id.

42 See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel); See also Cook, supra note 15, at 1385.

This essay suggests that although the IC statute was intended to address a perceived problem in the criminal process, it appears over time to have been adopted as the mechanism by which any questions about the criminal or ethical conduct of senior public officials can credibly be investigated and addressed. The consequences are twofold. First, the IC mechanism is overused; it is invoked to displace the DOJ in cases where the likelihood that political pressure will derail the appearance or reality of prosecutorial fairness is low. Second, in cases where the political stakes are high—where, for example, the allegations of misconduct concern the President or Attorney General—the growth of the perceived function and importance of the IC mechanism has heightened the political consequence of IC investigations. Given the public and press attention devoted to such investigations, partisans cannot afford to let the IC process simply unfold and the political chips fall where they may. Recent experience demonstrates that the favored means by which to blunt the political damage posed by an IC investigation is to attack as biased the IC, or the judges that appointed him. One of the "lessons" of the operation of the IC statute, then, is that in cases of potentially great political import it creates partisan incentives to generate the very "appearance" problems that the statute sought to erase. As a consequence, although the IC mechanism in general may enjoy public support, the political dynamics of the statute mean that in the high-profile cases at the heart of the statute partisans will seek to destroy that which the statute is designed to further: public confidence in the integrity of the results of the independent investigation.

Id. at 463-64.
more of the independent counsel law than it was capable of delivering under our constitutional system of government.\textsuperscript{43}

After carefully considering the statute and its consequences, both intended and unintended, I concur with the Attorney General. The statute should not be reauthorized. The reason is not that criminality in government no longer exists. Nor is the reason that the public has grown serenely indifferent to our tradition of holding government officials to a high standard. Rather, the reason is this: By its very existence, the Act promises us that corruption in high places will be reliably monitored, investigated, exposed, and prosecuted, through a process fully insulated from political winds. But that is more than the Act delivers, and more than it can deliver under our constitutional system.\textsuperscript{44}

Independent Counsel Starr testified against extending the independent counsel law, because extending the law was fundamentally at odds with the "lessons of history and experience."\textsuperscript{45} Our Founders believed in maintaining the public’s trust in government and did not think it necessary to establish by law an independent counsel or an Attorney General independent of the President.\textsuperscript{46} From an historical perspective, there have been situations throughout our history where it was believed that the Attorney General could not adequately "investigate criminal allegations relating to the President or those close to the President" because of a real or apparent conflict of interest.\textsuperscript{47} The presumed real or apparent conflict of interest problem existed because it was generally believed the Attorney General could not be trusted to investigate his boss or those close to the President, according to Starr.\textsuperscript{48}

History reveals no independent statutory or constitutional law is necessary to force the President to appoint special prosecutors\textsuperscript{49} because, what I call political law, inspires the President to use his full discretion in enforcing the law to appoint what Starr calls an "historic special prosecutor."\textsuperscript{50} From an historical perspective, Starr said, "Presidents or their Attorney General appointed prominent outside lawyers to investigate and prosecute the Whisky Ring in the 1870s, Teapot Dome in the 1920s, corruption in the Justice Department in the 1950s, and Watergate in the 1970s."\textsuperscript{51} For more than 100 years the Executive Branch has investigated allegations of serious wrongdoings without the benefit of an independent counsel law because there is a perceived political price to pay for not holding Executive Branch officials accountable for criminal misconduct.\textsuperscript{52}

\textsuperscript{43} See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel).

\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel).

\textsuperscript{50} Id.

\textsuperscript{51} Id.

\textsuperscript{52} Id.
III. THE EXPIRATION OF THE INDEPENDENT COUNSEL LAW RESURRECTED THE GHOST OF JUSTICE SCALIA’S MORRISON V. OLSON DISSenting OPINION’S SEPARATION OF POWERS CONSTITUTIONAL VIOLATION THEORY

A. Facts of Morrison v. Olson

I have taken the liberty of describing the facts as characterized by Justice Scalia because in my view, unlike the Court, he discusses the facts as unnecessarily creating a potential separation of powers crisis. The Morrison case started when the Legislative and Executive Branches engaged in a power battle concerning the scope of the congressional investigatory power. During the oversight hearings into the administration of the Superfund by the Environmental Protection Agency (the “EPA”), two subcommittees of the House of Representatives first requested and subsequently subpoenaed numerous internal EPA documents. President Reagan responded by personally directing the EPA Administrator not to turn over certain documents under a claim of executive privilege. President Reagan also instructed the Attorney General to notify the congressional subcommittees of his assertion of executive privilege. In his decision to assert executive privilege, the President was counseled by plaintiff/appellee Olson, then an assistant attorney general of the Department of Justice with responsibility for providing legal advice to the President (subject to approval of the Attorney General). The House’s response to this assertion of executive privilege by President Reagan was to pass a resolution citing the EPA Administrator, who had possession of the documents, for contempt. Contempt of Congress is a criminal offense under federal law. The United States Attorney, a member of the Executive Branch, initially did not prosecute the contempt citation. Instead, the Executive Branch sought the immediate assistance of the Judicial Branch by filing a civil action asking a federal district court to declare that the EPA Administrator had acted lawfully in withholding the documents under a claim of executive privilege. The district court declined (in Justice Scalia’s view correctly) to get involved in the controversy, and strongly

54 Id. at 699 (citing United States v. House of Representatives of United States, 556 F. Supp. 150, 152 (D.D.C. 1983)).
55 Id.
56 Id. at 699-700 (citing Memorandum of Nov. 30, 1982, from President Reagan for the Administrator, Environmental Protection Agency, reprinted in H.R. REP. No. 99-435, at 1166-67 (1985)).
58 Id.
59 See Morrison, 487 U.S. at 700 (Scalia, J., dissenting).
60 Id. See also 2 U.S.C. § 192.
61 See Morrison, 487 U.S. at 700 (Scalia, J., dissenting).
62 Id.
recommended the Executive and Legislative Branches to aim at "[c]ompromise and cooperation, rather than confrontation." The federal Legislative and Executive Branches eventually reached an agreement giving the House subcommittees limited access to the contested documents.

The limited access agreement concerning the documents did not satisfy Congress. The confrontation and the alleged role of the Department of Justice angered certain members of the House. The House Judiciary Committee was angry because it believed the DOJ had unnecessarily persuaded the President to assert executive privilege despite reservations by the EPA. The House Judiciary Committee was deeply offended because the DOJ had "deliberately and unnecessarily precipitated a constitutional confrontation with Congress because the DOJ had not properly reviewed and selected the documents entitled to executive privilege." It is clear that some members of the Judiciary Committee were very upset because they believed the DOJ had directed the United States Attorney not to present the contempt certification involving the EPA Administrator to a grand jury for prosecution. The general perception that the DOJ made the decision to sue the House of Representatives did not win the Executive Branch any popularity contest on the House Judiciary Committee. The House Judiciary Committee also expressed concern that the DOJ had not adequately advised and represented the President, the EPA, and the EPA Administrator. Staff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's members) to investigate the DOJ's role in the controversy. The investigation went on for two and a half years, generating a 3,000-page report issued by the Judiciary Committee over the vigorous dissent of all but one of its minority-party members. The Judiciary Committee report challenging the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during its investigation was sent to the Attorney General with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.

As a general matter, the Attorney General has to apply for the appointment of an independent counsel within ninety days after receiving a request to do so, unless he decides "there are no reasonable grounds to believe that further

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63 Id. (quoting United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983)).
64 Id.
65 Id.
66 Id.
67 See Morrison, 487 U.S. at 700-01 (Scalia, J., dissenting).
68 Id. at 701.
69 Id.
70 Id.
71 Id. at 701 (citing H.R. REP. No. 99-435, at 3 (1985)) (describing unresolved "questions" that were the basis of the Judiciary Committee's investigation).
72 Id.
73 See Morrison, 487 U.S. at 701 (Scalia, J., dissenting).
74 Id.
inquiry or prosecution is warranted.” As a practical matter the Attorney General did not have any choice but to seek appointment of an independent counsel to pursue the charges against Mr. Olson as requested by Congress. The political consequences for the Attorney General and the President of appearing to break the law by the Attorney General refusing to apply for an independent counsel would have been substantial and an unacceptable political risk. “How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2 1/2 years does not even establish ‘reasonable grounds to believe’ that further investigation or prosecution is warranted with respect to at least the principal alleged culprit [Olson]? The Act establishes more than just practical compulsion. Justice Scalia rejects the majority opinion assertion that the Attorney General had “no duty to comply with Congress’ request,” for an independent counsel is “not entirely accurate.” He had a duty to comply unless he could conclude there were no reasonable grounds to believe that “further investigation” was warranted, after a ninety-day investigation in which he was prohibited from using such routine investigative techniques as grand juries, plea bargaining, grants of immunity, or even subpoenas.

B. Justice Scalia Warns in Morrison v. Olson that Independent Counsel Contains Smell of Threatened Impeachment

Justice Scalia believes that although courts are prevented from reviewing the Attorney General’s decision not to seek appointment of an independent counsel, the separation of powers theory is violated because Congress was not prevented from reviewing the decision not to appoint. The Supreme Court and the public at large were warned by Justice Scalia in 1988, while President Clinton was the governor of Arkansas with the hopes of the White House only a dream, that “the [operational] context of the [independent] statute is acrid with the smell of threatened impeachment.” When a request for appointment of an independent counsel comes from a Judiciary Committee of Congress, the Attorney General must explain to the Committee a failure not to seek an appointment.

75 Morrison, 487 U.S. at 701 (Scalia, J., dissenting) (citing 28 U.S.C. § 592(b)(1)).
76 See id. at 701-02.
77 Id. at 702.
78 Id.
79 Id. (citing Morrison, 487 U.S. at 694). “The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit.” Morrison, 487 U.S. at 694 (citing 28 U.S.C. § 529(g)).
81 See Morrison, 487 U.S. at 702 (citing 28 U.S.C. § 592(a)(2)).
82 Id. (citing 28 U.S.C. § 592(f)).
83 Id.
84 Morrison, 487 U.S. at 702 (Scalia, J., dissenting).
Justice Scalia necessarily and properly objected to the constitutional validity of applying the independent counsel law in *Morrison* because Congress had effectively violated the separation of powers principle of enforcing the law by compelling a criminal investigation of an Executive Branch official because of "a bitter power dispute between the President and the Legislative Branch." Mr. Olson was investigated not because the President or Attorney General believed that an investigation was likely to reveal a violation worth prosecuting, "but only because the Attorney General cannot affirm, as Congress demands, that there are no reasonable grounds to believe that further investigation is warranted." Justice Scalia was correct in asserting that separation of powers was violated because decisions regarding the investigation and prosecution were taken away from the President and other members of the Executive Branch.

The majority in *Morrison* was accused by the dissenting opinion of addressing briefly and only at the end of its opinion the separation of powers issues because of its preoccupation with the Appointments Clause and removal power. Justice Scalia thinks that the Supreme Court has it backwards because of its failure to fully develop the separation of powers issues presented in the case first. Separation of powers is the first principle mentioned when one discusses any power struggle between the two political branches of government, the Congress and the President. It is clear that duties of the independent counsel are executive because the independent counsel is invested with the power to investigate and prosecute crime. The independent counsel statute was fatally flawed under our Constitution's separation of powers requirements because it denied the President exclusive control over the executive activity of enforcing our nation's criminal laws. The Court points out that the President through his Attorney General has some control, but not exclusive control. "That concession is alone enough to invalidate the [independent counsel] statute," according to Justice Scalia. The Supreme Court in *Morrison* greatly exaggerated the extent of the President's control over the independent counsel. Justice Scalia reminded the majority that limiting the President's ability to remove the independent counsel to good cause was viewed by Congress as an impairment to the President's executive power and not an expansion.
While it is true that an independent counsel cannot be appointed without a specific request from the Attorney General, that fact does not cure the separation of powers violation because "once appointed, the independent counsel exercises executive power free from the President's control."\textsuperscript{98} The presidential control was taken away under the independent counsel law because the Attorney General's prosecutorial discretion was taken away under the law.\textsuperscript{99} The balancing of legal, practical, and political considerations in an effort to decide whether prosecution is warranted "is the very essence of prosecutorial discretion."\textsuperscript{100} To deny the Attorney General prosecutorial discretion under the independent counsel law is to deny presidential control of an executive function, and that violates the Constitution's separation of powers requirement.\textsuperscript{101} Once it is conceded that prosecutorial discretion is a purely executive power, it is not for the Supreme Court "to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are."\textsuperscript{102}

\textbf{C. The Impact of the Independent Counsel Statute on Constitutionally Assigned Duties}

The Court's approach to the validity of the independent counsel statute is not consistent with our constitutional traditions on the separation of powers issue.\textsuperscript{103} If Congress passed a statute depriving itself of less than full control of an area of legislation, once the Supreme Court determined that a purely legislative power was at issue the Supreme Court would require the legislative power to be exercised entirely by Congress.\textsuperscript{104} The Supreme Court would reason that Congress' constitutionally assigned duties include full control over legislation.\textsuperscript{105}

control, the Court today considers the "most important[ ]" means of assuring Presidential control. Congress, of course, operated under no such illusion when it enacted this statute, describing the "good cause" limitation as "protecting the independent counsel's ability to act independently of the President's direct control" since it permits removal only for misconduct.

\textit{Id.} at 707 (citing H.R. Conf. Rep. No. 100-452, at 37 (1987)).

98 \textit{Id.} at 707.

99 \textit{Id.} at 708.

100 \textit{Id.} at 709.

It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether "the President's need to control the exercise of [the independent counsel's] discretion is so central to the functioning of the Executive Branch as to require complete control . . . ."

\textit{Id.} at 708-09.

101 \textit{Id.}

102 \textit{Morrison}, 487 U.S. at 709 (Scalia, J., dissenting).

103 \textit{See id.}

104 \textit{Id.}

105 \textit{Id.}
If Congress were to enact a law granting non-Article III judges just a tiny bit of pure judicial power with less than total control in the federal courts, the Supreme Court would hold its “constitutionally assigned duties” include complete control over all exercises of the judicial power.\textsuperscript{106}

In \textit{Morrison}, Justice Scalia stated the majority should have held that the President's constitutionally assigned duties include complete control over investigation and prosecution of violations of the law.\textsuperscript{107} The independent counsel law was an unconstitutional violation of separation of powers because the command of Article II clearly provides that the entire executive power must be vested in the President of the United States.\textsuperscript{108}

Justice Scalia said, “A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused.”\textsuperscript{109} Under our system of checks and balances if any one of the coordinate branches of government breaches its exclusive power, it may be held in check by inter-branch retaliation and/or the political check of the people voting an abuser out of office.\textsuperscript{110}

The perceived misuse of the independent counsel law to trigger the impeachment process against President Clinton might have led to its demise.\textsuperscript{111} Justice Scalia said that Congress could avoid “accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds by simpl[y] triggering a debilitating criminal investigation of the Chief Executive under this independent counsel law.”\textsuperscript{112}

The independent counsel law not only violated the separation of powers doctrine, it damaged the presidency by substantially reducing the President's ability to protect himself and other members of the executive branch. Justice Scalia was surprised that the majority failed to recognize that the successful

\textsuperscript{106} \textit{Id.} at 709-10 (citing Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-59 (1982)).

\textsuperscript{107} \textit{Id.} at 710.

\textsuperscript{108} \textit{See Morrison}, 487 U.S. at 710 (Scalia, J., dissenting).

\textsuperscript{109} \textit{Morrison}, 487 U.S. at 710 (Scalia, J., dissenting).

\textsuperscript{110} \textit{See id.} at 711.

The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, cf. United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946); and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more “dangerous to the political rights of the Constitution,” Federalist No. 78, p. 465) who are guilty of abuse. Political pressures produced special prosecutors—for Teapot Dome and for Watergate, for example—long before this statute created the independent counsel. See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6; 38 Fed.Reg. 30738 (1973).

\textit{Id.}

\textsuperscript{111} \textit{See Cook, supra} note 15, at 1384. “The high drama and tensions associated with Independent Counsel Kenneth Starr’s investigation of President Bill Clinton, and the subsequent impeachment hearings left Congress in a quagmire with respect to the future of the independent counsel law.” \textit{Id.}

\textsuperscript{112} \textit{Morrison}, 487 U.S. at 713 (Scalia, J., dissenting).
purpose of the independent counsel law was to weaken the presidency.\textsuperscript{113} Nothing is so politically effective as the ability to charge that one's opponent, the President and the members of his cabinet, are in all probability crooks.\textsuperscript{114} "And nothing so effectively gives an appearance of validity to such [politically motivated] charges as a Justice Department investigation."\textsuperscript{115} The independent counsel statute weakened the presidency because it provided unnecessary opportunity for politically motivated attacks, which virtually assured "that massive and lengthy investigations will occur."\textsuperscript{116} These investigations will occur not because "the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are 'no reasonable grounds to believe' they are called for."\textsuperscript{117}

\textbf{D. The Independent Counsel is Inferior/Subordinate to Whom}

The President's power to appoint officers is properly understood only as an effective use of separation of powers principles.\textsuperscript{118} An independent counsel appointed to serve in the Executive Branch who is not subordinate to either the President of the United States or his Attorney General is not an inferior officer under a proper application of the separation of powers requirement.\textsuperscript{119}

Because the independent counsel was not appointed by the President with the advice and consent of the Senate, but rather by the Special Division of the United States Court of Appeals, the appointment is constitutional only if the independent counsel is correctly classified as an "inferior" officer under the Appointments Clause.\textsuperscript{120} "The text of the Constitution and the division of power that it establishes . . . [d]emonstrate . . . that the independent counsel is not an inferior

\textsuperscript{113} See id.
\textsuperscript{114} Id.
\textsuperscript{115} \textit{Morrison}, 487 U.S. at 717 (Scalia, J., dissenting).
\textsuperscript{116} Id.
\textsuperscript{117} See \textit{Morrison}, 487 U.S. at 714-15 (Scalia, J., dissenting).

In sum, this statute does deprive the President of substantial control over the prosecutorial functions performed by the independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since all purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today.

\textsuperscript{118} Id. at 715 (quoting U.S. CONST art. II, § 2, cl. 2).

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

\textsuperscript{119} Id.
\textsuperscript{120} Id.
officer because she is not subordinate to any officer in the Executive Branch (indeed, not even to the President).” Justice Scalia said.121

In United States v. Nixon 122 the Supreme Court said that the Attorney General’s appointment of the Watergate special prosecutor was made under the Attorney General’s “power to appoint subordinate officers to assist him in the discharge of his duties.”123 The. Nixon opinion does not support the majority conclusion that the independent counsel is an inferior officer.124 In Nixon, the special prosecutor was a subordinate officer because, in the end, the President or the Attorney General could have removed him at any time without cause.125 Unlike the special prosecutor, the independent counsel is not a subordinate officer because he cannot be removed at anytime by the President or anyone else in the executive branch.126

Under the separation of powers rationale, it is indispensable for inferior officer status that the independent counsel be subordinated to another officer in the Executive Branch.127 “The independent counsel is not even subordinate to the President.”128 Because independent counsels are not subordinate to another officer, they are not inferior officers and their appointments other than by the President with the advice and consent of the Senate is unconstitutional.129 Since independent counsels are appropriately considered as principal officers rather than inferior officers, congressionally imposed restrictions on the independent counsel violate the Constitution’s separation of powers limitations.130 Unlike

121 Morrison, 487 U.S. at 719 (Scalia, J., dissenting). “Dictionaries in use at the time of the Constitutional Convention gave the word ‘inferior’ two meanings which it still bears today: (1) ‘[l]ower in place, . . . station, . . . rank of life, . . . value or excellency,’ and (2) ‘[s]ubordinate.’” Id. (citing S. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785)).
123 Morrison, 487 U.S. at 721 (Scalia, J., dissenting).
124 See id.
125 Id.
126 Id.
127 Id. at 722.
128 Morrison, 487 U.S. at 722 (Scalia, J., dissenting).

The Court essentially admits as much, noting that “appellant may not be ‘subordinate’ to the Attorney General and the President insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act.” . . . In fact, there is no doubt about it. As noted earlier, the Act specifically grants her the “full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice,” 28 U.S.C. § 594(a) (1982 ed., Supp. V), and makes her removable only for “good cause,” a limitation specifically intended to ensure that she be independent of, not subordinate to the President and the Attorney General. See H.R.Conf.Rep. No. 100-452, p. 37 (1987).

Id. at 722-23.
129 See id. at 723.
130 Id.

The Court misunderstands my opinion to say that “every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will.” . . . Of course, as my discussion here demonstrates,
Justice Scalia, the majority in *Morrison* concluded that the restriction on the President's power to remove an official should not be based on whether the official's power is purely executive. When the President cannot remove an independent counsel that he did not appoint, he cannot exercise his executive power because the independent counsel will fear and be accountable only to the authority he believes can remove him.

The separation of powers doctrine was designed to protect the freedom of individual American citizens by making sure that those enforcing the law would be accountable to the President and that the President would be accountable to the American people in the political process for any unfair and discriminatory prosecutions. The independent counsel statute was constitutionally broken because it created a potential for partisan judges to select a prosecutor hostile to the Executive Branch without allowing either the judges or prosecutor to be blameworthy in the political process because they were not subordinate to either of the political branches. "[T]he fairness of a process must be adjudged on the

that has never been the law and I do not assert otherwise. What I do assert—and what the Constitution seems plainly to prescribe—is that the President must have control over all exercises of the executive power. . . . That requires that he have plenary power to remove principal officers such as the independent counsel, but it does not require that he have plenary power to remove inferior officers. Since the latter are, as I have described, subordinate to, subject to the supervision of, principal officers who (being removable at will) have the President's complete confidence, it is enough—at least if they have been appointed by the President or by a principal officer—that they be removable for cause, which would include, of course, the failure to accept supervision. Thus, *Perkins* is in no way inconsistent with my views.

*Id.* at 724 n.4 (discussing United States v. Perkins, 116 U.S. 487 (1886)).

*Id.* at 725.

*Id.* at 726 (citing Bowsher v. Synar, 487 U.S. 714, 726 (1986)).

*Id.* at 727-28.

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted," if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. I leave it to the reader to recall the examples of this in recent years. That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a single Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." Federalist No. 70, p. 424. The President is directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." [citation omitted].

*Id.* at 728-29.

*Morrison*, 487 U.S. at 730 (Scalia, J., dissenting).
basis of what it permits to happen, not what it produced in a particular case." When the independent counsel law expired in 1999, Justice Scalia's great fear that the Supreme Court had perpetually burdened the nation with an independent counsel statute was not realized.

IV. USING THE SEPARATION OF POWERS THEORY AS A BASIS FOR OPPOSING THE RENEWAL OF THE INDEPENDENT COUNSEL STATUTE

One commentator believes that prolific public debate about separation of powers issues impacting the presidency as an institution started with the Paula Jones suits and escalated during the Monica Lewinsky affair. I believe the prolific constitutional debate about the validity of the separation of powers theory prohibiting the use of the independent counsel law started with Justice Scalia's heroic dissent in *Morrison.* Miller was right on the money when he relatively safely predicted, "The most likely government reform to come from the Lewinsky scandal is the death . . . of the independent counsel statute." As a result of the Senate impeachment trial of President Clinton in the Lewinsky business, "political pressure has mounted to end the [independent counsel statute]." Miller cites Justice Scalia's lone dissent in *Morrison* as support for his conclusion that the independent counsel statute violated Article II of the Constitution by allowing a "measured incursion on the president's control of prosecutorial authority." Allowing the independent counsel law to expire will make the presidency a stronger institution at the end of the constitutional law

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135 See id.

It is true, of course, that a similar list of horribles could be attributed to an ordinary Justice Department prosecution -- a vindictive prosecutor, an antagonistic staff, etc. But the difference is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished.

Id. at 731.

136 See id. at 733.

I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Id.

137 See Miller, supra note 27, at 648.

138 See *Morrison,* 487 U.S. at 697 (Scalia, J., dissenting).

139 Miller, supra note 27, at 688.

140 Id.

141 See id. at 690.
Miller's separation of powers attack on the constitutional validity of the independent counsel law follows the Justice Scalia model.\textsuperscript{143}

Starr’s perspective about the wisdom of the reauthorization of the independent counsel statute includes his experience as a federal appellate court judge, as the United States Solicitor General, as a teacher of constitutional law, and as independent counsel before he decided to support allowing the law to expire.\textsuperscript{144} On April 14, 1999, Starr told a Senate committee that prior to the Supreme Court upholding the independent counsel law in \textit{Morrison}, it was his view that “the independent counsel statute . . . would be found unconstitutional as a violation of separation of powers.”\textsuperscript{145}

The independent counsel statute was constitutionally flawed under separation of powers principles because it takes away the Attorney General’s professional legal judgment in criminal investigations while denying the President his executive power to enforce the law, according to Starr.\textsuperscript{146} In his testimony, Starr said that the independent counsel law violated our constitutional respect for

\begin{itemize}
\item From the perspective of the presidency, the independent counsel statute affects an important limitation on the president’s ability to remove at his pleasure purely executive officers. In his lone dissent in \textit{Morrison}, Justice Scalia argued that Article II requires that the president have unfettered control of both the removal of purely executive officers and the investigation and prosecution of the laws. The majority rejected this categorical approach, opining that the limitation on the president’s authority to remove an independent counsel would not unduly impinge upon the president’s ability to discharge his constitutional duties. The constitutional theory that undergirds this analysis is that the need to effectively and independently investigate the rare Teapot Dome and Watergate-level defects in the executive branch warrants a measured incursion on the president’s control of prosecutorial authority. The theory has failed in practice; the weak trigger mechanism and political pressure have combined to produce independent counsel investigating nonserious matters. The penetration into the sphere of presidential sanctuaries cannot be allowed under such circumstances. The Lewinsky experience in particular has led many to conclude that many of the investigations undertaken by independent counsel may competently and more appropriately be pursued by the Department of Justice or by special counsel appointed by the Attorney General. The presidency will be strengthened should the independent counsel statute meet its end this summer.
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\textsuperscript{142} Id. at 691. 
\textsuperscript{143} Id. at 691-92; see also \textit{Morrison}, 487 U.S. at 697 (Scalia, J., dissenting).
\textsuperscript{144} See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
separation of powers by not allowing the Executive Branch to choose its own outside prosecutor.\textsuperscript{147} A three-judge panel makes the appointment.\textsuperscript{148} Starr was opposed to giving the independent counsel statute new law because some of its reporting requirements were a misguided attempt to use the independent counsel law to perform a role that has traditionally been performed by Congress under our understanding of the Constitution.\textsuperscript{149} Congress specifically deviated from customary law enforcement practices by requiring the independent counsel to give the House any information that "may constitute grounds for an impeachment."\textsuperscript{150} Starr pointed out in 1977 that the Justice

\textsuperscript{147} See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel).

Along with the superficially mandatory but legally toothless statutory language, a second major shift from past practice concerns the selection of the outside prosecutor. The job of choosing the outsider is no longer in the Administration's hands. Instead, the three-judge panel makes the appointment.

Like the statute as a whole, this provision grew out of concerns about public trust. Soon after Leon Jaworski's appointment, the New York Times editorial page asserted that "Mr. Jaworski's personal integrity is not in doubt, but he is fatally handicapped from the outset because he enters the Watergate investigation as the President's man." If the Attorney General could not be trusted to conduct an investigation, then perhaps he or she could not be trusted to select the investigator either. That principle led to my appointment. In 1993, the Justice Department was investigating Madison Guaranty Savings & Loan, Whitewater Development Corporation, and the relationship between the two. Pressure mounted for the Attorney General to appoint a regulatory special counsel to take over the investigation -- a counsel, that is, whose independence would be protected only by Justice Department regulations, and not by federal statute. Attorney General Reno resisted. Echoing the 1973 New York Times editorial, she argued that people who didn't trust her to conduct the investigation wouldn't trust her to select the investigator. Then, in early 1994, the President himself requested that she appoint a special counsel. The Attorney General complied. Senior Justice Department staff sounded out several candidates -- I was one of them -- before the Attorney General decided on Robert Fiske. Six months into Mr. Fiske's investigation, the 103d Congress reenacted the Independent Counsel law. Pursuant to the statute, the Attorney General asked the three-judge panel to appoint an Independent Counsel to carry the investigation forward. She recommended the statutory appointment of Mr. Fiske. But the judges decided to appoint someone new -- not, they emphasized, because of any dissatisfaction with Mr. Fiske's performance, but rather because of the philosophy underlying the statute. The law said that Independent Counsels were not to be chosen by the Attorney General, so the three-judge panel appointed someone else. . . . Those, then, are the key features of the statute concerning the appointment of an Independent Counsel. Let me turn now to the Independent Counsel's investigation. The statutory goal, again, is to bypass the Administration's conflict of interest -- to empower an outsider to investigate and, if appropriate, to prosecute. In other words, to do what the Justice Department itself would do but for the conflict. That's the theory. The reality is more complicated.

\textsuperscript{148} Id.

\textsuperscript{149} Id.

\textsuperscript{150} Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel) (citing 28 U.S.C. § 595(c)).
Department opposed the reporting requirement.\textsuperscript{151} Because of the reporting requirement, Starr believed he had an obligation to explain to Congress why the information contained in the report about President Clinton may have constituted grounds for impeachment.\textsuperscript{152} Starr observed that the independent counsel, by complying with the congressionally commanded impeachable grounds requirement, appeared to be violating the separation of powers requirement "as part of the political proceeding of impeachment."\textsuperscript{153} Impeachment is a basic nondelegable congressional responsibility. Starr agreed with the statement made by Professor Akhil Amar of Yale Law School that it is a curious situation for the Congress to defer the issue of probable grounds for impeachment to an inferior officer of the executive branch.\textsuperscript{154} The proper and constitutionally permissible cure for misconduct by Executive Branch officials is vigilance on the part of Congress and the appropriate use of its impeachment powers, according to Starr and former assistant attorney general Timothy Flanigan.\textsuperscript{155}

Starr's most discerning separation of powers blow to the independent counsel statute's constitutionally problematic existence came with the following comments:\textsuperscript{156}

The law also may have the effect of discouraging vigorous oversight by the Congress, in a departure from our traditions. In a variety of ways, the statute tries to cram a fourth branch of government into our three-branch system. But, invariably, this new entity lacks (in Madison's phrase) the "constitutional means . . . to resist encroachments." The result is structurally unsound, constitutionally dubious, and — in overstating the degree of institutional independence — disingenuous.\textsuperscript{157}

Starr correctly concluded that Congress ignored constitutional traditions by enacting legislation creating the independent counsel as a de facto fourth branch of government while ignoring the political and constitutional reality that our government only has three branches.\textsuperscript{158} At the end of his Senate testimony Starr described the independent counsel law as a worthwhile experiment that should come to an end.\textsuperscript{159} The results of the experiment dictate jurisdiction and authority

\textsuperscript{151} See id.
\textsuperscript{152} Id. "In addition, this [grounds for impeachment] responsibility further politicizes Independent Counsel investigations. An impeachment inquiry, Alexander Hamilton predicted in Federalist 65, often 'will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other.'" Id.
\textsuperscript{153} Id.
\textsuperscript{154} See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel). See also Morrison, 487 U.S. at 697 (Scalia, J., dissenting).
\textsuperscript{155} See Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel).
\textsuperscript{156} Id.
\textsuperscript{157} Future of Independent Counsel Act, U.S. Senate Committee on Governmental Affairs, 106th Cong. (1999) 1999 WL 16945975 (Statement of Kenneth Starr, Independent Counsel).
\textsuperscript{158} See id.
\textsuperscript{159} Id.
over cases involving Executive Branch officials should be returned to the Justice Department. "Returning the authority over these prosecutions to Attorneys General, and relying on them to appoint outside counsel when necessary, is the worst system — except for all the others," said Starr. Once these cases involving executive branch officials are returned to the Attorney General, the Congress and press must keep a watchful eye on the President and his Executive Branch officials to enforce the law of the land.

While speaking before the Senate Committee on Government Affairs about the future of the independent counsel law on April 14, 1999, Judge David B. Sentelle, presiding judge of the Special Division authorized to appoint independent counsels, responded to a question about whether the court could supervised independent counsels. Judge Sentelle told the Senators that judges making up the Special Division were a panel of Article III judges, and that under the federal Constitution they could not supervise the independent counsel. "If we supervise the carrying out of Executive functions, we then cross the line of separation of powers by interfering with the carrying out of Article II of the Constitution by an Article II officer." The bottom line for Judge Sentelle was that the Special Division did not oversee the functions of the independent counsel "and cannot constitutionally do so." Judge Richard D. Cudahy of the Special Division testified before the Senate Committee on Government Affairs about the Special Division's apparent lack of ability to engage in a surveillance of the independent counsel's expenses because of Morrison. The independent counsel was free to spend as much money as the independent counsel wanted without being accountable to the Executive Branch, as required under separation of powers, or to the Special Division under a reasonable reading of the flawed analysis of the majority in Morrison.

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160 Id.
164 Id.
165 Id.
166 Id.
168 Id.
V. The Independent Counsel Law Requirement That the Independent Counsel Refer Substantial Grounds for Impeachment to the House of Representatives Violated Separation of Powers

When the President is being investigated for possible misbehavior that may constitute an impeachable offense, it violates the Constitution’s separation of powers requirement to permit the independent counsel to initiate impeachment proceedings against the President on behalf of the House of Representatives. When Independent Counsel Starr complied with the independent counsel law by reporting to the House of Representatives his belief that President Clinton had committed eleven possible grounds for impeachment as a result of the Lewinsky affair, he violated the separation of powers principle. I believe that section 595’s referral provision was the most serious fatal flaw in the independent counsel law because it “turn[ed] the independent counsel into a pre-impeachment deputy for the legislative branch, co-opting him (the executive branch) into performing certain [impeachment] political functions that the Framers carefully reserved to Congress.” The independent counsel referral provisions totally abandoned the separation of powers rationale in the high-stakes presidential impeachment game by allowing an independent counsel performing a legislative role to decide whether to initiate the impeachment proceedings. The United States Constitution states that the House of Representatives will have the exclusive power to impeach the president.

Professor Gormley is unequivocally correct in characterizing Starr’s energetic chase of the Lewinsky matter as “nothing more than a warm-up for the [Clinton] impeachment proceedings.” Section 595 is constitutionally

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170 Id. at 312; see also 28 U.S.C. § 595(c) (1994).

171 See Gormley, supra note 169, at 312.

The Starr Report set out eleven possible grounds for impeachment, including perjury, witness tampering, obstruction of justice, and abuse of power, all flowing from Clinton’s conduct in the Lewinsky affair. The House Judiciary Committee, armed with the independent counsel’s information, immediately began deliberations concerning the initiation of impeachment proceedings against the President. Starr himself testified before the Judiciary Committee as its chief witness.

Id. at 312-13.

172 Gormley, supra note 169, at 313.

173 See id. at 325-26.

The independent counsel statute thus clashes horribly with the constitutional provisions relating to impeachment. The impeachment referral provision of section 595(c) enlists the special prosecutor in the service of Congress in the most sensitive of all political tasks: deciding whether to initiate impeachment proceedings against a President. Yet our constitutional scheme makes no place for a criminal prosecutor in this extraordinary decisionmaking process.

Id.

174 U.S. CONST. art. 1, § 2, cl. 5.

175 Gormley, supra note 169, at 325.
problematic because it allows the political branch of the federal government, the House of Representatives, to avoid its political duty to take the political heat or praise involved in impeaching a president. The independent counsel statute section 595 violates the separation of powers principle because Congress must be held responsible exclusively for the impeachment process. I think Gormley is very generous in suggesting that the referral provision in the independent counsel statute amounts to a constitutionally questionable delegation of authority away from the House of Representatives to the independent counsel. I believe that the referral provision is an unconstitutional, direct delegation of a congressional obligation that cannot be delegated under the separation of powers principle. President Clinton's impeachment proceedings were unique because of the House's "failure to undertake any independent fact finding" separate from the independent counsel.

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176 See id. at 335.

The statute allows Congress to evade its constitutional responsibility at the critical "initiation" stage, and pass off this inherently political judgment to an unelected official in the executive branch, who is immune from the political influence of the citizenry. The Framers believed that even allowing nine Supreme Court Justices to render sensitive impeachment decisions was not good enough. The serious nature of the impeachment task "forbids the commitment of the trust to a small number of persons." A fortiori, allowing one unelected special prosecutor (who has been appointed by three senior judges) to undertake this responsibility guided by the independent counsel statute's "astonishingly low" threshold is an unsatisfactory substitute for the collective judgment of the House of Representatives.

Id. at 337.

Section 595(c) thus allows Congress to hold in abeyance its own considerable powers to initiate impeachment proceedings by issuing subpoenas to witnesses, gathering evidence, holding public hearings, and so on, and "delegate" that nondelegable task to another branch of government. It provides a strong incentive for Congress not to conduct an impeachment inquiry, until the special prosecutor has prepared a report and Congress has had a chance to gauge the public reaction to that report. If Congress wishes to hire its own special counsel, to assist in its investigation relating to impeachment, that is fine. But that person cannot also work for the executive branch as a criminal prosecutor. Such an arrangement shatters the constitutional structure relating to impeachment.

Id. at 351-52.

178 See Gormley, supra note 169, at 348.


The Clinton impeachment proceedings demonstrated two major defects in the Independent Counsel Act (apart from any lingering questions about its constitutionality). The first was evident in the Act's failure to provide adequate safeguards against the aggressive efforts of an independent counsel - Ken Starr - to influence the course of the impeachment proceedings.

The impeachment hearings also exposed one largely overlooked pragmatic justification for abandoning the Independent Counsel Act (apart from any lingering questions about its
VI. A LITMUS TEST FOR DECIDING WHETHER A STATUTE AUTHORIZING INVESTIGATION OF THE EXECUTIVE BRANCH VIOLATES THE SEPARATION OF POWERS DOCTRINE

Because the Framers of the federal Constitution wisely perceived separation of powers as absolutely necessary for the guarantee of a just and fair democratic government for all, including the President whoever he or she may be, I believe Justice Scalia's dissenting opinion in *Morrison* shall serve as the litmus test for any investigation of the president.\(^{181}\)

VII. CONCLUSION

President Clinton's impeachment woes because of his affair with Monica Lewinsky caused me to marvel about the impact of the independent counsel law on the impeachment process. I remembered Justice Scalia telling us in *Morrison*, in 1988 B.C. (before Clinton), that the independent counsel law was, constitutionally speaking, dead on arrival because it violated an ancient cornerstone of our democratic institutions, specifically the separation of powers doctrine.

Today, it is interesting how the Clinton impeachment process has caused many of the politically correct intellectuals to now agree with Justice Scalia's dissent in *Morrison*, protesting the Court's upholding of the independent counsel law as constitutionally valid. Justice Scalia may be the under-acknowledged inspirational leader for those who are glad to see the independent counsel law expire. Everyone who now opposes the independent counsel law will admit that Justice Scalia has always questioned the independent counsel law's legitimacy, but Justice Scalia performed a greater public service than merely questioning the law's legitimacy. He also provided the intellectual, historical, and constitutional analytical framework for allowing the independent counsel statute to die from natural, political, and constitutional causes on June 30, 1999. In the name of political/constitutional law, may the independent counsel law rest in partisan peace.

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THE PRESIDENTIAL POWERS OF JOSIAH BARTLET

by L. Anthony Sutin

We have had many opportunities to study our nation's Presidents, both in "real time" through the funhouse mirrors of media spin and leaks, as well as through after-the-fact glimpses of papers, diaries, tapes, tell-all memoirs, and interviews. Beginning in the fall of 1999, television viewers have had a novel opportunity to observe a fictional President and his staff one hour at a time through the dramatic series entitled The West Wing.

Needless to say, The West Wing is fiction, created principally by Hollywood writer Aaron Sorkin. Despite the input of veterans of actual West Wing tours of duty and the fervent efforts of viewers to deduce the real-life inspirations for some of the characters, it remains fiction. In Mr. Sorkin's words, "[t]he appearance of reality is more important than reality." 2 Perhaps farthest from life is President Josiah Bartlet himself, a former three-term member of the U.S. House of Representatives, two-term Governor of New Hampshire, and Nobel laureate in economics. Bartlet's farfetched persona (aggregating "Ronald Reagan's charisma, Woodrow Wilson's intellect and the libido of Socks, the Clintons' neutered cat") led one reviewer to conclude that "[s]uch a man is too good to get elected, too good indeed to live." 3

The overriding theme of The West Wing is the unwavering commitment of the President and his staff to the pursuit of an idealistic agenda that includes gun control, campaign finance reform, nuclear disarmament, environmental protection, gay rights, and other liberal staples. There is little hint of political vendettas, office politics, or craven compromise. The ends are clear, the battle lines are marked, and the team rises to the task again and again.

Like the extensive coverage of the impeachment proceedings against President Clinton and the contested 2000 presidential election, The West Wing has given an opportunity for those without legal or constitutional training to consider constitutional issues. 4 One might expect, given the overall good policy versus evil policy drift of the show, to see President Bartlet operating by a

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1 Dean and Associate Professor, Appalachian School of Law. Formerly Acting Assistant Attorney General, U.S. Department of Justice. J.D., Harvard Law School.

2 Interview with Aaron Sorkin, Online NewsHour (visited Jan. 6, 2001) <http://www.pbs.org/newshour/media/west_wing/sorkin.html>. Mr. Sorkin also states, "the first thing that’s important is that you buy that this is a real White House. And it’s not necessarily true that I need to make a real White House in order to sell that to you." Id.


4 Peter Conrad, Review: Hail to the New Chief, THE OBSERVER, Dec. 17, 2000, at 1. Indeed, throughout the show, "soapy do-gooderism is played up to operatic proportions and somewhere Frank Capra is standing at attention, saluting Old Glory, a tear in his eye." Tim Goodman, West Wing: A Show to Believe In, SAN FRAN. EXAMINER, Dec. 13, 1999, at B-6.

5 Apparently more television viewers watched The West Wing on November 8 than tuned into the same television network's coverage of the "real" presidential election returns on the previous evening. Andrew Billen, Ladies and Gentlemen, the Next President of the United States, THE EVENING STANDARD, Nov. 24, 2000, at 29.
Lockean prerogative, doing whatever is needed to advance the public good, in the absence of or even contrary to law. On the other hand, perhaps, fealty to the Constitution is part of the White Hat White House's vision. Has *The West Wing* given us a faithful rendition of presidential powers, and thus performed a civic service beyond providing Emmy-award winning entertainment? Or has it failed to make good use of that opportunity, compressing constitutional conundrums into laugh lines? Not surprisingly, it accomplishes some of each.

**POWERS AND POWER**

Familiar comments of Justice Jackson instruct us that the presidency is an office of great authority:

The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified that scope of presidential activity. . . . Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness. . . .

President Bartlet does in many ways exhibit features of Justice Jackson's megapresidency. Aided by a swelling orchestral soundtrack, we see the authority of the presidential motorcade and Air Force One, the majesty of the Oval Office, the permanent encampment of the media in the Press Room, the competition for presidential photo opportunities, and the national attention given to even the most inconsequential remark (such as whether the President likes green beans). All of these snapshots amply illustrate the practical power to dominate the popular field of vision that the modern President enjoys beyond any textual commitments of Article II of the Constitution. President Bartlet, and indeed his staff, summon corporate, foreign, and U.S. government leaders to the White House for meetings, and they always materialize in a seeming matter of minutes. Even a sitting commissioner of the Federal Election Commission appears to be swept off his feet by an invitation to the Oval Office, where he also sips drinks with a gaggle of Cabinet secretaries. A fiercely ideological Republican lawyer accepts

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6 Real, as well as fictional, presidents can offer a dramatic rendition of the presidency. In a discussion of "The Fictionalization of Politics," political scientist James David Barber writes: "The modern Presidency is of necessity a performance -- a media performance -- and the modern arts of President-playing are to be celebrated, not disdained. They make politics interesting and thus encourage participation." James David Barber, *The Presidential Character: Predicting Performance in the White House* 492-93 (4th ed. 1992).

7 *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring).

a job in the Bartlet White House because she feels duty-bound to accept an invitation to serve the President of the United States.  

On the other hand, as presidential scholar James David Barber summarizes, "Americans vastly overrate the President's power -- and they are likely to continue to do so. The logic of that feeling is clear enough: the President is at the top and therefore he must be able to dominate those below him." The reality, of course, is considerably more complex. Richard Neustadt writes, "This is the classic problem of the man on top in any political system: how to be on top in fact as well as name."

Neustadt frames this as the distinction between "powers" and "power." The President's formal constitutional and legal powers are substantial. But a President's actual power to accomplish particular ends can be circumscribed by practical, political, and/or personal limitations, including the President's location within a system of separate institutions sharing power. The West Wing portrays quite well this reality of constitutional interdependence, as well as the practical impact of nongovernmental forces on a President's power. Those interrelationships illustrate the reality that a President, particularly a President whose party does not enjoy control of the Congress, often can do very little except invoke the oft-noted power to persuade. Even where power lies categorically with the President, its exercise may gore oxen that carry significant political costs.

The efforts of the Bartlet White House to advance a generally liberal agenda are met at most turns by Congressional opposition, skepticism, or at times threats of retaliation. When Bartlet staff float the trial balloon of appointing two members of the Federal Election Commission without the traditional Congressional imprimatur, a staff member working for the Senate Majority Leader warns, "Embarrass us on this and we will give it back to you tenfold. Every piece of legislation the White House wants off the table will make a sudden appearance."

So too does the show present other illustrations of instances when the Leader of the Free World just cannot do what he might please. We see President Bartlet's frustration at the inadequacy of existing sanctions for violation of the Iraqi oil embargo, the staff's inability to deal with a reporter's refusal to return a superseded draft of a presidential address, consternation from a retiring Army Chief of Staff's plan to denounce the commander-in-chief on Sunday morning.

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9 The West Wing: In this White House (NBC television broadcast, Oct. 25, 2000).
10 BARBER, supra note 6, at 501.
12 Id. at 10, 29 n.1.
13 The West Wing: Let Bartlet Be Bartlet (NBC television broadcast, Apr. 26, 2000). One educator compliments the show on this "reality" score: "It helps you understand how things really work -- not just the textbook facts on how a bill becomes a law, but all the inter-relationships and the politics involved and the impact these decisions have on individuals and families." Gloria Sesso, president of the National Organization of History Teachers, quoted in Cathy Lynn Grossman, Lessons in Entertainment -- 'West Wing' Manages to Teach Civics Without Going by the Textbook, USA TODAY, Dec. 15, 1999, at 9D.
14 The West Wing: The Portland Trip (NBC television broadcast, Nov. 15, 2000).
talk shows, and the ability of a determined lawyer pressing a Freedom of Information Act lawsuit to ensnare senior staff in depositions for hours.

Likewise, The West Wing provides another important contextual lesson to any study of presidential powers. The daily agenda of the President, the timing and opportunities for action of any kind, and the strategy and tactics of decision-making are driven to a large part by factors outside of the President's control. A day is rare that unfolds in directions contemplated the night before. This certainly is no recent phenomenon. President Woodrow Wilson wrote:

We are at the beck and call of others (how many, many others!) and almost never have a chance to order our days as we wish to order them, or to follow our own thoughts and devices. The life we lead is one of infinite distraction, confusion, -- fragmentary, broken in upon and athwart in every conceivable way...

Indeed, the entire atmosphere of the drama is driven by the staccato rhythm of one person interrupting another with the crisis of the moment, the unexpected international incident, or news story. It seems remarkable that any assignment ever gets completed in this environment. The Bartlet portrayal shows that presidential powers are not merely buttons to be pressed with predetermined results, but rather exist among a broad range of legal and political forces that continuously intertwine and collide.

President Bartlet and the Congress

The West Wing often depicts the President's interactions and exercises of presidential powers with the Congress. The actual or threatened use of the veto power is perhaps the most powerful and bluntest weapon in the President's arsenal in congressional battles. But its very force engenders a reluctance to invoke it unless truly necessary. President Bartlet recognizes this when he declines the request of a major financial backer to make a public threat to veto a "gays in the military" bill. Bartlet explains, "I'm a human starting gun," suggesting that a public veto threat would dramatically raise the profile of an issue that otherwise may not have any prospect of advancing.

But the veto power has not entirely gathered dust in the Bartlet Administration. The President vetoed a Republican-backed education assistance package because it relied on block grants to state and local governments, rather than direct federal funding.

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15 The West Wing: The Lame Duck Congress (NBC television broadcast, Nov. 8, 2000).
16 The West Wing: Lord John Marbury (NBC television broadcast, Jan. 5, 2000).
18 U.S. CONST., art I, § 7, cl. 2: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated ... If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be law." Id.
20 Id.
than his preferred strategy of earmarking funds for textbooks and other specific uses.\textsuperscript{21} He also reluctantly exercised a pocket veto of the Marriage Recognition Act, lamenting that course as a "politician's way out."\textsuperscript{22}

The veto is not the President's sole instrument of power when dealing with Congress. When the White House staff struggles to deal with the loss of five votes in support of their cherished gun control package, some of the other baskets of plums are identified: "We're talking about unions, defense contracts, possible agency appointments...."\textsuperscript{23} Political favors can be withheld, too. Deputy Chief of Staff Lyman invokes President Lyndon Johnson's approach: "He'd have said, 'You're voting my way, in exchange for which, it is possible that I might remember your name.'"\textsuperscript{24} Lyman then warns one wayward member of Congress that a Bartlet-supported opponent will be recruited to oppose him in the next primary election:

\begin{quote}
Do you have any idea how much noise Air Force One makes when it lands in Eau Claire, Wisconsin? We're going to have a party, Congressman. ... Right in the band gazebo, that's where the President is going to drape his arm around the shoulder of some assistant DA we like. And you should have your camera with you. You should get a picture of that. 'Cause that's going to be the moment you're finished in Democratic politics.\textsuperscript{25}
\end{quote}

One of the few affirmative authorities over domestic matters explicitly given to the President by the Constitution is the responsibility for giving Congress "information of the State of the Union,"\textsuperscript{26} implemented in the modern times in the form of the State of the Union Address. In the episode appropriately titled "He Shall, From Time to Time,"\textsuperscript{27} President Bartlet delivers the State of the Union Address only after much scurrying about for want of a formal invitation by the Speaker of the House. Although an invitation may be a traditional element of protocol, it is not a constitutional requirement, as Chief of Staff McGarry misinforms his assistant.\textsuperscript{28} (Indeed, for almost a century, Presidents delivered their observations on the State of the Union to the Congress in writing until President Wilson returned to the verbal address.)

The State of the Union episode also conveyed an appreciation of the Twentieth Amendment, which authorizes Congress to specify the process for succession to a vacant office of President.\textsuperscript{29} The White House staff makes arrangements for a member of the President's Cabinet to stay behind (in the Oval

\begin{footnotes}
\item[21] The West Wing: In This White House (NBC television broadcast, Oct. 25, 2000).
\item[22] The West Wing: The Portland Trip (NBC television broadcast, Nov. 15, 2000).
\item[24] Id.
\item[25] Id.
\item[26] U.S. Const., art. II, § 3: "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." Id.
\item[27] The West Wing: He Shall, From Time to Time (NBC television broadcast, Jan. 12, 2000).
\item[28] Id.
\item[29] U.S. Const., amend. XXV.
\end{footnotes}
Office) while his/her colleagues attend the address at the Capitol.\textsuperscript{30} In this case, the Secretary of Agriculture (ninth in line)\textsuperscript{31} does the honors should a catastrophe occasion the need for the appointment of an Acting President.\textsuperscript{32}

We see also several views into the President’s role of “recommending measures.”\textsuperscript{33} This responsibility can be fulfilled in a variety of ways, and the Constitution does not limit it to formal submissions of a package of proposed legislation by the President to Congress. Rather, much is accomplished informally. In “Let Bartlet Be Bartlet,” a member of Congress perceives a White House “recommendation” on changing existing policy on gays in the military to be insufficiently authoritative:

If the president were serious about changing it, he’d be serious about changing it. He would not send you [Deputy Communications Director Sam Seaborn] in here with me. He would not send you in here with two relatively junior Department of Defense staffers. He’d call his staff together, he’d say, “I want a resolution in the House. I want 50 high-profile co-sponsors. I want a deal, and I want it now.”\textsuperscript{34}

In contrast, the President himself meets with Senator Lobell on the Administration’s effort to stop the use of soft money in election campaigns and seeks the Senator’s support for his FEC nominees.\textsuperscript{35}

Article II also gives the President the authority “on extraordinary Occasions” to call a special session of Congress.\textsuperscript{36} The Bartlet White House considered this authority on two occasions, and lost little sleep on divining the appropriate test for an “extraordinary occasion.” In deciding whether to convene a lame duck session of the Senate to consider ratification of the Comprehensive Test Ban Treaty, the calculus solely turned on whether such a session was more likely to yield ratification than the new Congress.\textsuperscript{37} Communications Director Toby Ziegler explained, “It’s just politics,” and his deputy Sam Seaborn concurred that an “extraordinary occasion is whatever the President says it is.”\textsuperscript{38} Ultimately, the President declined to call the special session after political intelligence suggested it would not be successful.\textsuperscript{39} On another occasion, President Bartlet threatened to call a special session of Congress to help implement a nationalization of the trucking industry, in the face of an impending management-labor impasse: “As for labor, I am calling Congress into Emergency Session to grant me the authority to draft the truckers into military service.”\textsuperscript{40}

\textsuperscript{30} The West Wing: He Shall, From Time to Time (NBC television broadcast, Jan. 12, 2000).
\textsuperscript{31} 3 U.S.C. § 19(d) (1994).
\textsuperscript{32} The West Wing: He Shall, From Time to Time (NBC television broadcast, Jan. 12, 2000).
\textsuperscript{33} U.S. CONST., art. II, § 3.
\textsuperscript{34} The West Wing: Let Bartlet Be Bartlet (NBC television broadcast, April 26, 2000).
\textsuperscript{35} The West Wing: Lies, Damn Lies, and Statistics (NBC television broadcast, May 10, 2000).
\textsuperscript{36} U.S. CONST., art. II, § 3.
\textsuperscript{37} The West Wing: Lame Duck Congress (NBC television broadcast, Nov. 8, 2000).
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} The West Wing: The State Dinner (NBC television broadcast, Nov. 10, 1999).
One constitutional blunder occurs in an episode dealing with members of Congress. In "Mr. Willis of Ohio," Bartlet aides meet with three United States Representatives in an effort to resolve a logjam caused by an appropriations rider prohibiting the use of sampling to conduct the decennial census. Representative Willis explains that he was recently appointed to complete the unexpired term of his late wife. This cannot be. While the Seventeenth Amendment empowers state legislatures to authorize a governor to make a temporary appointment to the United States Senate pending an ensuing election, this power does not extend to vacancies in the House of Representatives. In the latter case, Article I, section 2, clause 4, provides that "the Executive Authority [of a state] shall issue Writs of Election to fill such Vacancies." (This was the same episode in which Communications Director Ziegler dashes about the West Wing in search of a copy of the Constitution, which apparently was not readily at hand.)

PRESIDENT BARTLET AND THE MILITARY

The President is Commander in Chief of the nation’s armed forces. This constitutional power long has rested uneasily with the congressional power to declare war found in Article I, section 8. There have been many instances in which presidents have used force overseas without prior congressional approval under the War Powers Resolution or otherwise, and President Bartlet adds some more. Indeed, Bartlet views his commander in chief role expansively, transcending the border between the presidential and the divine; when Syria shoots down an Air Force transport, Bartlet announces, "I am not frightened. I'm going to blow them off the face of the earth with the fury of God's own thunder." The demonstration of the Constitution's commitment to civilian control over the military resurfaces in the subsequent episode in which the President exercises his command to overrule (temporarily) a military recommendation for a "proportional response" to the Syrian action.

PRESIDENT BARTLET AND THE PARDON POWER

In theory, a President enjoys greatest discretion when exercising the constitutional authority to grant reprieves and pardons. Putting aside the

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41 The West Wing: Mr. Willis of Ohio (NBC television broadcast, Nov. 3, 1999).
42 Id.
43 U.S. CONST., amend. XVII.
44 U.S. CONST., art I, § 2, cl. 4.
45 The West Wing: Mr. Willis of Ohio (NBC television broadcast, Nov. 3, 1999).
46 U.S. CONST., art. II, § 2, cl. 1. "The President shall be Commander in Chief of the Army and Navy of the United States." Id.
49 The West Wing: A Proportional Response (NBC television broadcast, Oct. 6, 1999).
50 U.S. CONST., art. II, § 2, cl. 1. "[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Id. The breadth of the pardon power was one reason cited by George Mason in declining to sign the Constitution. 2
extraconstitutional exercise of the traditional pardon of the official Thanksgiving
turkey,51 President Bartlet was called upon to consider a reprieve from the
imposition of a death sentence for a drug-related homicide following the denial
of a stay from the Supreme Court of the United States.52 President Bartlet did not
grant a reprieve.53 Here, despite broad constitutional power, he saw his actual
power quite circumscribed.54 As President Bartlet told his priest, "I'm the leader
of a democracy, Tom. Seventy-one percent of the people support capital
punishment. The people have spoken. The courts have spoken."55

PRESIDENT BARTLET AND THE APPOINTMENT POWER

The presidential power to nominate or appoint56 has been invoked often in
the Bartlet White House. President Bartlet has had the opportunity to nominate
an Associate Justice of the Supreme Court.57 He tapped federal district court
judge Roberto Mendoza to be the first Hispanic justice on the high court,
following the political immolation of the previous frontrunner Peyton Harrison,
who clung tightly to the view he expressed in a law review note that the
Constitution does not protect a right of privacy.58 In a moment of either
unreality or unprecedented political bungling, the President and staff asked Judge
Mendoza to become the nominee and then promptly announced the nomination
with no apparent consultation with members of the United States Senate.59
Despite this affront to the Senate's advice and consent role, Mendoza
subsequently was confirmed.60

In "Let Bartlet Be Bartlet,"61 two members of the Federal Election
Commission resigned. The statute creating the FEC provides that there are six

51 This power has been exercised from the administration of President Truman forward. Clinton
gives turkey reason to say thanks (Nov. 24, 1999)
52 The West Wing: Take This Sabbath Day (NBC television broadcast, Feb. 9, 2000).
53 Id.
54 Id.
55 Id.
56 U.S. CONST. art. II, § 2, cl. 2. "[H]e shall nominate, and by and with the Advice and Consent of
the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme
Court, and all other Officers of the United States, whose Appointments are not herein otherwise
provided for, and which shall be established by Law." Id.
57 The West Wing: The Short List (NBC television broadcast, Nov. 25, 1999).
58 Id.
59 Id. For a description of the typical judicial appointment process, see Carl Tobias, Federal
60 The West Wing: The Short List (NBC television broadcast, Nov. 25, 1999).
61 The West Wing: Let Bartlet Be Bartlet (NBC television broadcast, April 26, 2000).
commissioners “appointed by the President, by and with the advice of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.” 62 Vacancies in the middle of a term are treated in the same manner as original appointments. 63 Despite the provisions of the statute, Article II of the Constitution, and the holding of Buckley v. Valeo 64 invalidating the predecessor provision for congressional appointment of FEC members, 65 Chief of Staff McGarry says that the Senate leadership will fill the positions. 66 Deputy Chief of Staff Lyman explains, “When a vacancy comes up, it is up to the President to fill it, but the party leadership on both sides, always, always dictates to the President who he’s going to appoint.” 67

Mr. Lyman accurately characterizes the real world practice where a President acquiesces in a congressional usurpation of the appointments power. 68 In an act of political fortitude and constitutional literalism, however, the Bartlet White House decides to defy convention and select its own two nominees (John Branford Bacon and Patricia Calhoun) pledged to campaign finance reform. 69 The President proclaims, “This is more important than reelection. I want to speak now.” 70 This “bold” act of asserting constitutional authority is met with the threat of thermonuclear legislative retaliation. 71 A reporter asks, “Is the President declaring war on Congress?” 72 (To facilitate a shift on the FEC on soft money issues, the President also nominates an incumbent FEC commissioner to become the new Ambassador to Micronesia.) 73

President Bartlet also opts for congressional confrontation in exercising his recess appointment power to nominate a controversial candidate as Assistant Secretary [of Education] for Primary and Secondary Education. 74 He initially professes reluctance, citing a modest view of the recess authority: “A recess appointment assumes the Senate’s going to have no problem with the nomination. The Senate is going to have a considerable problem with this nominee.” 75 But he succumbs to the urgings of Communications Director Ziegler and triggered an angry reaction from a Senate aide claiming an “abuse of the

63 Id. at § 437c(2)(D).
64 424 U.S. 1 (1976) (per curiam).
65 Id. at 125.
66 The West Wing: Let Bartlet Be Bartlet (NBC television broadcast, April 26, 2000).
67 Id.
68 Pat Choate, The First Step in Campaign Finance Reform: Fix the FEC (May 21, 1998) <http://www.intellectualcapital.com/issues/98/0521/icopinions2.asp> (“In practice, moreover, congressional leaders select the two nominees, send their names to the president (who then appoints them as a pair) and returns their nominations to the Senate for confirmation.”).
69 The West Wing: Let Bartlet Be Bartlet (NBC television broadcast, April 26, 2000).
70 Id.
71 Id.
72 Id.
73 Id.
74 The West Wing: Shibboleth (NBC television broadcast, Nov. 22, 2000).
75 Id.
recess appointment." As much as it rankles the Senate, President Bartlet's use of the recess appointment to dare the Senate to defeat a nominee that otherwise has languished in committee proceedings is quite consistent with the practice of several modern presidents.

The power to remove officials from the executive branch has been long recognized as an implied presidential power, being part of the constitutional responsibility to take care that the laws be faithfully executed or an incident to the express power of appointment. In "Celestial Navigation," Chief of Staff McGarry directs Secretary of Housing and Urban Development O'Leary to apologize to members of Congress whom she criticized as racist. McGarry advises Secretary O'Leary that the President would fire her if she did not do so. Too, in "Lies, Damn Lies and Statistics," President Bartlet unceremoniously discharges the United States Ambassador to Bulgaria for carrying on an affair with the daughter of that country's prime minister.

**President Bartlet and the Executive Branch**

Article II, section 3, directs the President to "take Care that the Laws be faithfully executed." The President is the superintendent of the executive branch and bears the obligation to see that its agencies and components discharge their responsibility to administer and enforce the law. In reality, the President does not enjoy the ability to control every aspect of the bureaucracy's movement. President Bartlet laments, "Cashman and [Secretary] Berryhill are dragging their feet. Cashman and Berryhill are trying to make me look like a clown. And State should concern itself with what I damn well tell them to be concerned with." Chief of Staff McGarry counters, "It doesn't work like that." The President acknowledges, "So I've discovered."

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76 Id.
77 Id.
78 As real-life Republican Senator Jim Inhofe recently stated in the course about complaining about a series of Clinton recess appointments, "Republicans and Democrats in the White House have, when they were philosophically opposed to the philosophy of the prevailing philosophy in the Senate, made recess appointments. Ronald Reagan was doing this. I loved him, but he was violating the Constitution." 146 CONG. REC. 8338 (daily ed. Sept. 11, 2000) (statement of Sen. Inhofe).
79 Myers v. United States, 272 U.S. 52, 163-64 (1926) (affirming termination of official as authorized by Article II power to take care that the laws be faithfully executed); In re Hennen, 38 U.S. (13 Pet.) 230, 259 (1839) (affirming termination of official as authorized by Article II power of appointment).
81 Id.
83 The West Wing: Proportional Response (NBC television broadcast, Oct. 6, 1999).
84 Id.
85 Id.
The broad delegations of authority by Congress to the executive branch often allow the President to take quick and unilateral action in appropriate circumstances. When a military coup occurs in the home country of an African leader visiting the White House, the White House staff rapidly is able to package $100 million of foreign aid (emphasizing that it can be done without congressional approval) and arrange for the State Department to grant political asylum to the now-exiled leader.\footnote{86}{The West Wing: In This White House (NBC television broadcast, Oct. 25, 2000). This depiction of the asylum process is another inaccuracy. Authority to grant political asylum under the immigration laws rests with the U.S. Department of Justice, rather than the Department of State. \(8\) U.S.C. \(\text{§} \) 1158 (1994). The writers got it correct in the subsequent "Shibboleth" episode dealing with refugees from China.}

Cabinet officers are occasionally seen but not heard. In what surely must be the view of the relationship between the White House and the agencies held by the former White House staff/screenwriting consultants, agency heads appear only when they need to be disciplined by the Chief of Staff or others for wayward behavior. Indeed, the distaste for their role or the rejection of any possibility that they can usefully inform policymaking fuels one of the show’s constitutional misstatements. In "Enemies," President Bartlet tells his assembled Cabinet: "Actually, I find these meetings to be a fairly mind-numbing experience, but Leo assures me that they are constitutionally required, so let’s get it over with."\footnote{87}{The West Wing: Enemies (NBC television broadcast, Nov. 17, 1999).} The Constitution does not require Cabinet meetings. Rather, the only germane constitutional reference authorizes the chief executive to maintain a written correspondence with the heads of the executive departments.\footnote{88}{U.S. Const., art. II, § 2, cl. 1.}

**PRESIDENT BARTLET AND THE TWENTY-FIFTH AMENDMENT**

In the two-part episode entitled “In the Shadow of Two Gunmen,”\footnote{89}{The West Wing: In the Shadow of Two Gunmen (Part I) (NBC television broadcast, Oct. 4, 2000).} President Bartlet is wounded in a shooting incident and undergoes emergency surgery. During the surgical procedure, he is placed under general anesthesia.\footnote{90}{Id.} After an unspecified but apparently brief interval, he regains consciousness and makes a full recovery.\footnote{91}{Id.} During the surgery, the White House staff does not invoke, much less discuss, the Twenty-Fifth Amendment,\footnote{92}{U.S. Const., amend. XXV, § 3. "Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President." Id.} although several reporters seek to determine who was “in charge” during that time period and under what legal authority.\footnote{93}{Id.} National Security Advisor Nancy McNally correctly states, “Absent

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\footnote{86}{The West Wing: In This White House (NBC television broadcast, Oct. 25, 2000). This depiction of the asylum process is another inaccuracy. Authority to grant political asylum under the immigration laws rests with the U.S. Department of Justice, rather than the Department of State. \(8\) U.S.C. \(\text{§} \) 1158 (1994). The writers got it correct in the subsequent "Shibboleth" episode dealing with refugees from China.}
\footnote{87}{The West Wing: Enemies (NBC television broadcast, Nov. 17, 1999).}
\footnote{88}{U.S. Const., art. II, § 2, cl. 1.}
\footnote{89}{The West Wing: In the Shadow of Two Gunmen (Part I) (NBC television broadcast, Oct. 4, 2000).}
\footnote{90}{Id.}
\footnote{91}{Id.}
\footnote{92}{U.S. Const., amend. XXV, § 3. "Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President." Id.}
\footnote{93}{The West Wing: In the Shadow of Two Gunmen (Part I) (NBC television broadcast, Oct. 4, 2000).}
[the procedures of the Twenty-Fifth Amendment], the Constitution doesn’t give [power] to [the Vice President] unless the president is dead."94 In the following episode, Press Secretary C.J. Cregg reports that staff is still working to resolve the issue.

Viewers will wait indefinitely because there is no response that will provide much reassurance. The Bartlet White House’s failure to conform to the requirements of the Twenty-Fifth Amendment reflects the nature of the situation rather than constitutional disdain. Recalling President Reagan’s shooting in 1981, presidential physician Dr. Daniel Ruge said, “I think very honestly in 1981, because of the speed of everything and the fact that we had a very sick president, that the 25th Amendment would never have entered my mind even though I probably had it in my little black bag. I carried it with me. The 25th Amendment never occurred to me.”95 To deal with such unanticipated circumstances, a national commission recommends that a new President, his Vice President, chief of staff, and physician try to design special rules to cover such a crisis triggering imminent general anesthesia or loss of consciousness, possibly including the preparation of an unsigned and undated letter to be carried by Secret Service personnel.96

DOES PRESIDENT BARTLET RESPECT THE CONSTITUTION?

Vice President John Hoynes remarks at one point, “I think the President of the United States can do pretty much whatever he wants.”97 At times, President Bartlet careens in that direction, at least for effect, acting as if he enjoys inherent powers beyond the constitutional grants.

All law students examine the “Steel Seizure Case,” in which the Supreme Court held that President Truman lacked the inherent authority, absent congressional authorization, to seize steel mills.98 Faced with a lack of progress in labor negotiations between the Teamsters Union and the trucking industry, President Bartlet informs the parties, “At 12:01 a.m., I’m using my executive power to nationalize the trucking industry. ... Truman did it in ’52 with the coal mines.”99 When someone replies that the Supreme Court struck down President Truman’s action, Bartlet retorts, “In fifty years, there is a new bench, and I’ll take my chances.”100 The negotiating tactic succeeds and agreement is reached.101 The President does have the independent responsibility to interpret the

94 Id.
96 Id. at 5-6.
97 The West Wing: 20 Hours in LA (NBC television broadcast, Feb. 23, 2000).
99 Not quite. It was President Franklin Roosevelt who did it with the coal mines a decade earlier.
100 The West Wing: The State Dinner (NBC television broadcast, Nov. 10, 1999).
101 Id.
Constitution in the performance of his or her assigned duties. But threatening to act contrary to a Supreme Court precedent that the passage of time has not appreciably tarnished is not an appropriate exercise of that authority. Were it not an obvious bluff, it would raise a serious issue of the President's lack of respect for the role of the Supreme Court as final arbiter of constitutional questions.

His staff, too, employs disregard for legal or constitutional norms thankfully as a form of humor, rather than as a mode of governing. Josh Lyman asks sardonically, "What's the good of being in power if you're not going to haul your enemies in for questioning?" In another exchange, as Lyman's colleagues counsel him to pursue aggressive legal action against the Ku Klux Klan for its role in his shooting, he quips, "You could throw out the Bill of Rights." Sam Seaborn responds, "Toby tried."

But, when political push comes to shove, President Bartlet displays refreshing solicitude for the Constitution. In a trip to Orange County, California, he clashes with attendees at a town hall meeting called to support a constitutional amendment to prohibit flag burning. While the politically expedient course would be to acknowledge the concerns of the many speakers and propose a commission to study alternative approaches, President Bartlet forcefully and confrontationally rejects the arguments that there is need for such an amendment.

**CONCLUSION**

In the credits for *The West Wing*, the Constitution of the United States most often plays itself, and does so without too much makeup. It is constantly in the background of *The West Wing* dramas, providing both the reason and justification for presidential action as well as for the equal and opposite reactions that presidential action often brings. President Josiah Bartlet uses the presidential powers that the Constitution creates aggressively in pursuit of a political agenda. He wields some of his powers, particularly the power of appointment, at the expense of his political capital, while other times a constitutional power remains unused because the pragmatic cost of its exercise is too great. At the same time, *The West Wing* has broadcast a few constitutional bloopers. Then again, perhaps that is yet another element of realism.

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104 *The West Wing*: *And It's Surely to Their Credit* (NBC television broadcast, Nov. 1, 2000).

105 *Id.* The Bartlet staff also invokes constitutional limitations when useful. In rejecting the counsel of eccentric informal adviser Lord John Marbury for a resolution of a border dispute between India and Pakistan, Chief of Staff McGarry acknowledges that, "[u]nder our Constitution, our president is not empowered to create maharajas." *The West Wing*: *He Shall, from Time to Time* (NBC television broadcast, Jan. 12, 2000). This is presumably a reference to the "title of nobility" prohibition of Article I, section 9, clause 8.


107 *Id.*
THE MORALIST AND THE CAVALIER: THE POLITICAL RHETORIC OF WASHINGTON AND JEFFERSON

by Colleen J. Shogan

In the wake of the Clinton impeachment proceedings and the selection of Senator Joseph Lieberman as a vice-presidential candidate, the moral and religious dimensions of presidential leadership have been pushed to the fore. Pundits, historians, Beltway insiders, and political scientists now routinely debate the importance of moral leadership in the American presidency. Their inquiries invite reflection on the historical antecedents of lofty presidential moralism.

According to Clinton Rossiter, the American president serves as the moral spokesman for the nation. This essay will examine the precedents set by the founding presidents regarding moral and religious rhetoric. Instead of following a single path of institutional development, I argue that two distinct models of rhetorical leadership emerged prior to the Jacksonian era: the moral and the secular. The moralistic and religious approach to presidential rhetoric was established by George Washington. John Adams followed Washington's lead and also predominantly appealed to morality and religion in his rhetoric. However, Thomas Jefferson established a different presidential leadership style. Unlike his predecessors, Jefferson employed rhetorical arguments more concerned with secular individualism, liberty, and self-interest rather than religion, morality, and justice.

These distinct leadership models are reflected in presidential scholarship. In The American Presidency, Rossiter emphasized the duty of the president to serve as the nation's moral leader. To fulfill this role, the president represents the nation's ideals and principles as the "Voice of the People." In this capacity, the president must talk "the language of Christian morality" to succeed. The strength of the president's voice is formidable; he can "shout down any other voice or chorus of voices in the land." Although the president acts as the political leader for some citizens, he "serves as moral spokesman for all." Despite the other facets of the presidency, all of the president's roles are either invigorated or diminished because he serves as the symbol of American "sovereignty, continuity, and grandeur."

1 Colleen Shogan is a doctoral candidate in the department of Political Science at Yale University. This research was supported, in part, by the National Science Foundation Graduate Fellowship. I am indebted to Professor Stephen Skowronek of Yale University for his comments and guidance.


3 Id.

4 Id.

5 Id. at 33.

6 Id.

7 Id.

8 See ROSSITER, supra note 2, at 18.
Richard Neustadt provided a radically different conception of the executive office. His *Presidential Power* characterized the president as a bargainer or strategist versed in art of self-interested persuasion. Neustadt did recognize that outside Washington, the president utilizes his “public prestige” to make citizens believe that hardship is necessary. In this capacity, the president serves as a “teacher” to the American public, but Neustadt did not discuss the nature of this pedagogy in detail. Instead, Neustadt described presidential “teaching” as an inherently difficult and subordinate task. *Presidential Power* emphasized persuasion and politics inside Washington. If the president’s role as a moral leader does not disappear altogether, it appears only as an extension of his Washington strategy.

Instead of defending either depiction of the presidency as wholly correct, I contend that a president’s rhetorical style corresponds to his way of governing. Presidents seek to persuade and influence according to the political circumstances that surround them and the leadership abilities they possess. The way in which a president governs — how he interacts with Washington insiders and how he views his role as the chief executive — influences his rhetorical style. Explaining why a president adopts a particular rhetorical style is an important part of this analysis.

In this essay, I argue that the early presidents adopted alternating moral or secular rhetorical styles and that the distinctions between these two approaches are best exhibited by Washington and Jefferson. In addition to offering empirical content analysis evidence to support my hypothesis, I will also contrast how these two executives publicly responded to political crises, namely the Whiskey Rebellion and the shipping embargo of 1807-1808. Prior to an in-depth analysis of these distinct models of rhetorical leadership introduced by Washington and Jefferson, the first section will briefly explore the constitutional origins of the presidency.

I. ORIGINS

If the Founders designed the presidency with explicit moral or secular leadership prescriptions in mind, the rhetorical styles of Washington and Jefferson might be attributable to their craftsmanship. Strident moralism permeated segments of American pre-colonial culture, but the question remains whether these descendents of Puritanism influenced the presidency’s constitutional design.

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10 Id. at 99.
11 Id. at 100.
12 Id. (The president’s teaching job consists of four features. First, it is aimed at inattentive students, those who are outside the Washington community. Second, students will pay attention only when the president speaks on matters which are independently relevant to them. Third, he teaches by doing, or not doing, rather than telling. Fourth, his prior actions also prove influential.).
13 Id. at 93.
The role of moral and religious sentiment in politics was a contentious issue in the American colonies and the nascent United States. Until the Revolutionary War era, two self-conscious and expansive cultures — the Yankee moralists and the secular Cavaliers — competed for national supremacy in the United States. Secularism, rooted mainly (but not exclusively) in the South, prided itself on an individualistic and self-reliant order. The individualism celebrated by the frontier developed into a tradition that rejected the intervention of law and government beyond certain limits. Seculars abhorred the injection of morality into the political realm. Expediency was the overriding criteria for both law and justice; an overwhelming devotion to the development of public morals simply did not exist.

Conversely, as a direct descendent from the Puritans, Yankee culture exhibited a strong religious and moralistic passion. In the pre-Revolutionary War years, the Puritan slowly transformed into the Yankee. The strict emphasis on order and submission left the Puritan as he became a Yankee, but he did not lose his religious and moral character. A hidden yearning for a communal union with God remained a substantial part of the Yankee persona, although he was less righteous than the Puritan. Yankees believed that high group standards motivated others to adopt a moral and pious lifestyle. Laws and regulations enforcing communal ethics were regarded as politically necessary and desirable. Serving as an early spokesman for the Yankees, Samuel Adams condemned luxury, profanity, and impiety in hopes that America would become the new Christian Sparta.

Starting in the 1780s, changing political circumstances began to push the moral/secular cultural dichotomy into the background. The Treaty of Paris in 1783 gave the United States vast western territories stretching from the Appalachians to the Mississippi. Americans began to think less about the debate between the moralists and the seculars and more about how to remove the Spanish and British forces who still occupied America's newly acquired lands. A surge of national enthusiasm permeated the United States.

14 See generally NEUSTADT, supra note 9.
17 Id. at 33.
18 See generally RICHARD L. BUSHMAN, FROM PURITAN TO YANKEE (1979).
19 See Oscar Handlin, Foreword to RICHARD L. BUSHMAN, FROM PURITAN TO YANKEE (1967).
20 See BUSHMAN, supra note 18, at 286-87.
21 Id. at 287-88.
22 Id. at 282-83.
23 Id.
24 See KELLEY, supra note 15, at 45.
25 Id.
26 Id. at 88-89.
27 Id. at 88.
As the Founders gathered in Philadelphia in 1787, broad and philosophical questions about the moral direction of the nation were subordinated. The moral/secular debate faded in importance as the controversy of centralized power versus individual liberty moved into the limelight. Conflict over the nation's moral direction would resurface with renewed force in later generations.

In the convention itself, the participants rarely used moral language. In fact, the moral ramifications of the most contentious issue, slavery, were not addressed at all. Max Farrand observed that there was comparatively little said on the subject in the convention. The commercial interests of slave states were expressed, but the Founders did not discuss the moral consequences of slavery.

Regarding the design of the presidency, the moral leadership role of the president was only addressed in the context of deciding important institutional provisions. Benjamin Franklin, who worried that inhabitants of the office would not be “wise and moderate, the lovers of peace and good order, the men fittest for the trust,” offered one of the longest discussions about presidential moral character. Rather than presenting a philosophical exegesis about the importance of moral leadership, Franklin’s remarks occurred during a debate about presidential salary. The debates concerning presidential selection also addressed the question of moral character. The Electoral College grew out of a compromise between the large and small states, but its design also addressed the concerns of several delegates — namely Mason, Gerry, and Butler — who wanted the president to possess an eminent, national character.

On the whole, convention delegates avoided discussions about moral leadership. There are several reasons for this neglect. First, the nationalist contingent consisting of Alexander Hamilton, James Madison, James Wilson, and Gouverneur Morris wanted to design a strong, independent executive, but did not concern themselves with how future presidents would handle such a broad prescription of power. Whether the president might imitate the example of kings by claiming an aura of quasi-religious mysticism or adopt a more secular approach to political leadership was a question concerning governing style, not the appropriation of executive power. The Founders left the task of developing specific governing styles to the future inhabitants of the office.

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28 Id. at 91.
29 Id.
30 See Kelley, supra note 15, at 98.
33 See Farrand, supra note 31, at 82.
34 Id.
36 See generally id.
37 See generally Marc Landy & Sidney M. Milkis, Presidential Greatness 21 (2000).
devising a method of selection was so complex, it pushed broader questions about the role or function of the president into the background. 38

Additionally, the presence of George Washington at the convention severely inhibited specific discussions about executive leadership. 39 From the beginning of the convention, most participants assumed that Washington would become the nation’s first chief executive. 40 Any public discussions about the presidency took place under the pretense that the office’s first inhabitant sat in the room. 41 Washington’s highly respected public reputation not only circumscribed debate, but also impacted the design of the institution itself. 42 After the conclusion of the convention, Pierce Butler acknowledged that Washington’s presence shaped the design of the presidency in a letter to British relatives: “Entre nous, I do [not] believe they [the executive power] would have been so great had not many of the members cast their eyes toward General Washington as President; and shaped their Ideas of the Powers to be given a President, by their opinions of his Virtue.” 43 The Founders, assuming that Washington would set influential and sound political precedents during his time in office, decided to trust his moral judgment. 44 His presence at the convention affected the presidency’s institutional design and its ambiguity. 45

The Constitution provided the president with the tools for governing, but did not dictate how they might be used. The Annual Address provision that appears in Article II, Section 3 is an example of such a tool. 46 The creation of an annual address provides the president with a formidable power. It suggests that the president alone possesses the popular authority to address the nation. 47 Representative Thomas Scott of the first Congress described the spokesman role of the president as follows: “He is elected by the voice of the people of the whole Union…No man in the United States has their concurrent voice but him.” 48 The annual address stipulation left future presidents with a difficult task. The Constitution charged the president to serve as the spokesman for a large republic, but provided him with no guidelines or instructions regarding execution. 49

The remainder of this essay examines how Washington and Jefferson served as the nation’s spokesman. Charged with such a nebulous and potentially powerful role, a president must articulate wide-ranging political principles in his

39 See generally Landy & Milkis, supra note 37, at 12-17.
40 Id.
41 Id.
42 Id.
44 See generally Landy & Milkis, supra note 37, at 12-15.
45 Id.
46 U.S. Const. art. II, § 3.
48 Thach, supra note 43, at 168.
49 See Nichols, supra note 47, at 28.
rhetoric. The question remains: what principles should the president emphasize? This discussion will contrast the principles chosen by Washington and Jefferson and also explain why the rhetorical styles of these two early presidents were so distinct.

II. EMPIRICAL EVIDENCE

Left with little official instruction concerning the role of rhetorical leadership in the executive office, the early presidents set crucial precedents. Instead of following a single path of development, George Washington and Thomas Jefferson introduced two different rhetorical styles early in presidential history. Unlike Jeffrey Tulis, who portrays Washington and Jefferson’s styles as reinforcing, I argue that they possessed rhetorical leadership styles that challenged each other.

Presidential scholars, most notably Ralph Ketcham, often classify the first six presidents as the patrician embodiment of Bolingbroke’s patriot king. The data and arguments presented in this section dispute this overly broad classification by demonstrating that Jefferson’s secular model of leadership provided an alternative governing style to Washington’s initial precedent of moral authority. Jefferson and Washington might have both embodied the Bolingbrokean notion of a president above party, but they did not view their role as the rhetorical leader of the nation in similar veins. While both presidents thought seriously about the intersection of morality and politics, only Washington thought that his moral opinions should serve an educative function for citizens.

To demonstrate these distinct rhetorical models, I coded the Annual Addresses of the first six American presidents for secular and moral/religious arguments or references. The unit of analysis was the sentence. When both moral and secular claims were made within one sentence, I coded it as a “mixed” reference.

Secular references were defined as statements stressing the importance of independence, interest, self-interest, skill and industry, individualism, reason, rationality, liberty, prosperity, or local autonomy. These arguments could refer to individual citizens, governmental policy, or the nation as a whole. A typical example of secular rhetoric is contained in the First Annual Message of Thomas Jefferson: “Agriculture, manufactures, commerce, and navigation, the four pillars of our prosperity, are then most thriving when left most free to individual enterprise.”

Moral/Religious references were defined as arguments that government policies should be just, moral, or virtuous. Descriptions of citizens as moral, just, virtuous, temperate, honest, or disinterested were also classified as moral references. The final component of this classification included mentions of a religious deity, Christianity, or religion. An example of a moral/religious

reference is John Adams' pronouncement in his Fourth Annual Address: "Here and throughout our country may simple manners, pure morals, and true religion flourish forever!"  

Mixed references were defined as arguments that employed both moral/religious and secular language. Many of these references thanked a divine power for the prosperous condition of the country. An example of a mixed reference is George Washington's opening statement of his Sixth Annual Address:

When we call to mind the gracious indulgence of Heaven by which the American people became a nation; when we survey the general prosperity of our country, and look forward to the riches, power, and happiness to which it seems destined, with the deepest regret do I announce to you that during your recess some of the citizens of the United States have been found capable of an insurrection.  

Table I demonstrates that moral and secular rhetorical models alternated during the first six administrations. Washington set the initial precedent of moral rhetorical leadership; this model was emulated by John Adams. However, Jefferson departed from this Washingtonian precedent and established a more secular alternative. James Madison is surprising. Typically thought as a president who never distinguished himself from Jefferson's shadow, Madison actually returns to the Washington/Adams rhetorical style. Madison's frequent use or morals and religion in his rhetoric stemmed, at least in part, from the difficult political circumstances he faced during the War of 1812 with the British.

<table>
<thead>
<tr>
<th></th>
<th>Moral/Religious</th>
<th>Secular</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>George Washington</td>
<td>29</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>John Adams</td>
<td>17</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Thomas Jefferson</td>
<td>20</td>
<td>36</td>
<td>8</td>
</tr>
<tr>
<td>James Madison</td>
<td>40</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>James Monroe</td>
<td>29</td>
<td>44</td>
<td>3</td>
</tr>
<tr>
<td>John Quincy Adams</td>
<td>37</td>
<td>28</td>
<td>10</td>
</tr>
</tbody>
</table>

Another unanticipated finding was the overall amount of moral references employed by the early presidents. We expect presidents to use rhetoric that emphasizes the interest and prosperity of a nation — after all, presidents are

54 John Adams, Fourth Annual Message (1800), reprinted in The State Of The Union Messages Of The Presidents Of The United States, at 52 (Fred L. Israel ed., 1966).
55 George Washington, Sixth Annual Message (1797), reprinted in The State Of The Union Messages Of The Presidents Of The United States, at 21 (Fred L. Israel ed., 1966).
56 See Tulis, supra note 51, at 71.
political leaders who must respond to material needs and desires. The expectation for all presidents to use moral or religious language was less certain. To examine these moral references in greater depth, each reference was classified by the political argument it involved. For most presidents of this time era, the vast majority of moral references concerned either foreign or domestic policy issues. However, Washington, Adams, and Monroe frequently utilized moral language without any reference to policy. They often used moral rhetoric to commend the virtue of the citizenry, laud the moral principles of the nation, or praise a religious entity.

Table II supplies further evidence to support the assertion that Washington and Jefferson possessed distinct rhetorical styles. Jefferson used moral language twenty times in the span of his eight annual addresses, but only 10% (2/20) of his moral rhetoric was not directed towards a particular policy. Approximately 30% (8/29) of Washington’s moral rhetoric did not address a policy issue.

Table II: Moral Rhetoric Categories

<table>
<thead>
<tr>
<th></th>
<th>Foreign Policy</th>
<th>Domestic Policy</th>
<th>No policy</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>George Washington</td>
<td>6</td>
<td>15</td>
<td>8</td>
<td>29</td>
</tr>
<tr>
<td>John Adams</td>
<td>7</td>
<td>3</td>
<td>7</td>
<td>17</td>
</tr>
<tr>
<td>Thomas Jefferson</td>
<td>13</td>
<td>5</td>
<td>2</td>
<td>20</td>
</tr>
<tr>
<td>James Madison</td>
<td>25</td>
<td>11</td>
<td>4</td>
<td>40</td>
</tr>
<tr>
<td>James Monroe</td>
<td>12</td>
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</tr>
<tr>
<td>John Quincy Adams</td>
<td>15</td>
<td>12</td>
<td>10</td>
<td>37</td>
</tr>
</tbody>
</table>

More often than Jefferson, Washington engaged in moral rhetoric that had no explicit political purpose. Jefferson used moral and religious rhetoric with political persuasion in mind while Washington assumed a style more akin to a priestly, moral educator. For example, in the middle of his Seventh Annual Address, Washington stated:

Placed in a situation every way so auspicious, motives of commanding force impel us, with sincere acknowledgement to Heaven and pure love to our country, to unite our efforts to preserve, prolong, and improve our immense advantages. To cooperate with you in this desirable work is a fervent and favorite wish of my heart.57

A sentence such as this, containing religious imagery directed by no apparent political argument or purpose, would have been quite rare in Jefferson’s public rhetoric.

57 George Washington, Seventh Annual Message (1798), reprinted in The State Of The Union Messages Of The Presidents Of The United States, at 29 (Fred L. Israel ed., 1966).
Table II also sheds light on Madison's use of moral rhetoric. Only 10% (4/40) of his moral and religious language did not address a particular policy issue. Madison followed Jefferson's rhetorical style in that his public communications did not contain moralizing statements devoid of political purpose.

To examine in greater detail the characteristics of these two models of presidential leadership, I will compare Washington and Jefferson's public messages when faced with difficult political crises, arguing that Washington utilized moral and religious language while Jefferson remained hesitant to act as the national mouthpiece of virtue and justice.

III. WASHINGTON'S WHISKEY REBELLION

George Washington was a gentleman farmer from northern Virginia who did not embody all of the typical characteristics of the secular South. Distinct from the predominantly libertarian South, the cosmopolitan, aristocratic region of northern Virginia endorsed a strong, national government. Led by Washington, the elite of northern Virginia joined nationalists from the middle states and New England Yankee moralists to form the Federalist party.

Washington's defeat of the British during the Revolutionary War made him famous, but his repudiation of kingship earned him moral admiration. Ironically, Washington's decision to refuse political power became the source of his renown. The frequent comparison of Washington to Cincinnatus, the legendary Roman who returned to his farm after his distinguished military career, exemplifies Washington's mastery of disinterestedness. His willingness to subordinate personal ambition for the public good was perhaps Washington's most admirable quality. Washington stressed his disinterestedness in his private letters and rhetoric. In the first paragraph of his 1789 Inaugural Address, Washington advertised his disinterested nature:

Among the vicissitudes incident to life, no event could have filled me with greater anxieties than that of which the notification was transmitted by your order...On the one hand, I was summoned by my country, whose voice I can never hear but with veneration and love, from a retreat which I had chosen with the fondest predilection...On the other hand, the magnitude and difficulty of the trust to which the voice of my country called me, being sufficient to awaken in the wisest and most experienced of her citizens a distrustful scrutiny into his qualifications, could not but overwhelm me with despondence...
Washington believed he was a disinterested gentleman farmer — and he wanted citizens to know it. His self-conception as a man above petty political controversies influenced his governing and rhetorical styles.

As a disinterested patriot king, Washington struggled to transcend the fray of faction. In the middle of his first term, Hamilton and Jefferson began to pull Washington in opposite political directions. Unlike Jefferson, Washington lacked a skillful managerial command of his administration. This does not mean that Washington was an incompetent leader. The context of Washington's authority was unique in that he could not repudiate any previous regime; he utilized the "order-creating" and "order-shattering" institutional mechanisms without any possibility of exercising the "order-shattering" impulse. Washington faced a challenging political situation — he was not only charged with setting precedents, but also holding together an exploding ideological divergence within his own Cabinet.

In the early months of his administration, Washington astutely chose men from all regions of the country to fill the newly created patronage posts of the federal government. His patronage choices were considered a "job well done." However, Washington's selection of men based upon their personal character and reputation proved problematic. In later years, some of these "first characters of the Union" fueled opposition within the administration. Washington made few internal efforts, either through patronage or personal influence, to mollify the mounting tensions. Instead, as a last attempt to gain support amongst supporters of Jefferson and Madison, Washington toured the southern states in 1791. The trip was a success. To gain support for his administration, Washington transformed popular adulation into political loyalty. Washington was no bargainer or strategist, but he skillfully used his eminence for political purposes when necessary.

Washington's attempt to serve as a mediator between Hamilton and Jefferson failed. However, Washington's prestige with the American people never waned. His rhetorical style reflected the particular political circumstances he encountered as president. Although not a Neustadttian bargainer, Washington utilized his political strength — justifying presidential actions on simple principles often

65 See generally STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 20-21 (1993) (the order-creating impulse "prompts each incumbent to use his powers to construct some new political arrangements that can stand the test of legitimacy within other institutions of government as well as the nation at large;" the order-shattering impulse "prompts each incumbent to take charge of the independent powers of his office and to exercise them in his own right.").
67 Id. at 26.
68 Id. at 27.
69 Id. at 26-27.
70 Id. at 27.
71 Id.
72 See ROSE, supra note 66, at 27.
grounded in religious and moral imagery. His rhetoric surrounding the Whiskey Rebellion elucidates the connection between Washington's rhetorical and governing styles. The public viewed Washington as a disinterested, moral Cincinnatus and, in turn, Washington reinforced this notion through his public communications.

The federal government, persuaded by Secretary of Treasury Hamilton in 1791, began levying a tax on whiskey as an attempt to decrease the nation's war debt.73 Farmers in western Pennsylvania, who frequently distilled their grain crop into whiskey for easier transportation, found themselves unable to evade this new excise.74 Despite Congress's ameliorating attempt to remove the strictest provisions of the excise tax, tension mounted steadily in the region.75 In the summer of 1794, four counties grew openly hostile towards the federal government and its whiskey tax.76 The two Democratic Societies in the area, particularly the society of Mingo Creek, were rumored as the source of the escalated discontent.77

In 1793, Democratic Societies began to appear in the United States.78 Inspired from France, these "societies" were organized to discuss politics, spread information, and celebrate patriotism.79 By 1794, approximately 35 Democratic Societies existed in the United States.80 The members of these political clubs were all self-professed Republican followers of Jefferson and Madison, although the leaders of the societies were not the most prominent Republicans of the era.81 Whether or not Mingo Creek escalated anti-governmental sentiment is a matter of historical interpretation, but Alexander Hamilton's lengthy analysis of the trouble in western Pennsylvania, addressed to President Washington, certainly emphasized the role of the region's Democratic Societies.82

The whiskey uprising culminated in a July 1794 raid on exciseman John Neville's mansion.83 Two men were killed.84 The following weeks were filled with "impassioned meetings, radical oratory, threats to take Pittsburgh by force and oust all federal authority."85 Washington became greatly disturbed by the lawlessness in western Pennsylvania and placed much of the blame on Mingo

74 Id.
75 See GLENN PHELPS, GEORGE WASHINGTON & AMERICAN CONSTITUTIONALISM 133 (1993).
76 See generally ELKINS & MCKITRICK, supra note 73, at 462.
77 Id.
78 Id. at 456.
79 Id. at 456-57.
80 See ELKINS & MCKITRICK, supra note 73, at 457.
81 Id. at 459-60.
83 See ELKINS & MCKITRICK, supra note 73, at 463.
84 Id.
He wrote to Henry Lee on August 26, 1794 that the Democratic Societies constituted "the most diabolical attempts to destroy the best fabric of human government and happiness that has ever been presented for the acceptance of mankind." Washington also worried that the Democratic Societies had captured America's brightest talent. In a letter to Secretary of State Randolph written on October 16, 1794, Washington expressed concern that Madison had become involved with the Democratic Societies: "I should be extremely sorry if Mr. Madison from any cause whatsoever should get entangled with them."

In his public communications concerning the Whiskey Rebellion, Washington used repeated moral and religious appeals to justify his actions. The purpose of Washington's strong rhetoric was two-fold. First, Washington hoped to quell the insurrection itself. Because the whiskey insurrection never actually posed a serious threat to domestic tranquility, this justification for employing such strong rhetoric appears unsatisfying. More importantly, Washington used moral and religious language to rouse law-abiding members of the state militia to march against their fellow state inhabitants. Washington needed to convince Pennsylvanians to take up arms against Pennsylvanians. Since Washington was not particularly adept in handling the partisan divisions within his own Cabinet, the fact that Pennsylvania's governor was a strident Jeffersonian was not encouraging. Washington needed to appeal to the moral sense of Pennsylvanians and convince them that the insurgents had committed a serious offense.

In his September 25, 1794 proclamation entitled "Concerning the Western Insurrection," Washington sought to justify his calling forth of the New Jersey, Pennsylvania, Maryland, and Virginia militias to quell the disturbances in western Pennsylvania. Washington's actions were perceived as drastic and even excessive by some since the insurrection hardly qualified as a revolution. To insure that militia members would march, Washington equated the Whiskey Rebellion with a religious transgression:

And I do moreover exhort all individuals, officers, and bodies of men to contemplate with abhorrence the measures leading directly or indirectly to those crimes, which produce this resort to military coercion...and to call to mind, that as the people of the United States have been permitted under the Divine favor, in perfect freedom, after solemn deliberation, in an enlightened age, to elect their own Government, so will their gratitude for this inestimable blessing be best

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86 Id. at 147.
89 See PHELPS, supra note 75, at 134.
90 Id.
91 Id. at 135.
93 See generally MCDONALD, supra note 85, at 145.
distinguished by firm exertions to maintain the Constitution and the laws.\textsuperscript{94}

In this passage, Washington used religious arguments to chastise those citizens who had failed to fulfill the community's moral standards. The people of the United States, reasoned Washington, enjoyed "perfect freedom" only because God permitted it.

In another excerpt from the same proclamation, Washington employed religious rhetoric to justify his calling forth the militia:

Now, therefore, I, George Washington, President of the United States, in obedience to that high and irresistible duty consigned to me by the constitution, "to take care that the laws be faithfully executed;" deploring that the American name should be sullied by the outrages of citizens on their own government; commiserating such as remain obstinate from delusion; but resolved, in perfect reliance on that gracious Providence, which so signalily displays its goodness towards this country, to reduce the refractory to a due subordination to the laws; do hereby declare and make known that...a force, which according to every reasonable expectation, is adequate to the exigency, is already in motion to the scene of disaffection.\textsuperscript{95}

Besides invoking his presidential duty to execute the laws, Washington verbalized his reliance on a religious deity. The Constitution gave Washington the power to quell the disturbance while "Providence" provided him with the firm resolve required to preserve "goodness."

The militia's role in quelling the insurrection was minimal.\textsuperscript{96} Washington met federal troops in Carlisle and led them into the region.\textsuperscript{97} No violent incidents ensued.\textsuperscript{98} Several men were arrested for their leadership role in the rebellion and were returned to Philadelphia for trial.\textsuperscript{99} All were acquitted except two, whom Washington eventually pardoned.\textsuperscript{100}

Although the crisis was over, Washington seized upon a rhetorical opportunity to articulate publicly the moral lessons to be learned from the incident. In his Sixth Annual Address presented on November 19, 1794, Washington used the insurrection in western Pennsylvania to emphasize the importance of virtuous moderation in a democracy and the dangers of passion.\textsuperscript{101} In the second paragraph of the address, Washington explained that Congress originally offered several concessions to the farmers of western Pennsylvania when their objections regarding the excise were first made known to the federal government:

In the four western counties of Pennsylvania a prejudice, fostered and

\textsuperscript{94} GEORGE WASHINGTON, PROCLAMATION (Sept. 25, 1794), reprinted in 33 THE WRITINGS OF WASHINGTON 509 (John C. Fitzpatrick ed., 1931).
\textsuperscript{95} Id. at 508.
\textsuperscript{96} See generally MCDONALD, supra note 85, at 145.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} See WASHINGTON, supra note 55, at 21-22.
embittered by the artifice of men who labored for an ascendancy over the will of others by the guidance of their passions, produced symptoms of riot and violence. It is well known that Congress did not hesitate to examine the complaints which were presented, and to relieve them as far as justice dictated or general convenience would permit. But the impression which this moderation made on the discontented did not correspond with what it deserved. The arts of delusion were no longer confined to the efforts of designing individuals.

In a later paragraph, Washington explained that before calling forth the militia, he appointed commissioners to survey the regions threatening insurrection. Their reports, contended Washington, were an attempt to “unite all virtuous men.” Unsatisfied that the appointed commissioners had quelled the disturbances sufficiently, Washington ordered the troops to march.

At the conclusion of the speech, Washington severely condemned the insurgents, ending with a biting conclusion of moral and religious censure: “Let us unite, therefore, in imploring the Supreme Ruler of nations to spread his holy protection over these United States; to turn the machinations of the wicked to the confirming of our Constitution; to enable us at all times to root out internal sedition and put invasion to flight.” Washington viewed the whiskey rebellion as a lesson about moderation and regulated personal conduct. The embodiment of moral certitude above the fray, Washington as the patriot king never stood more eminently during his presidency. To sustain a moral community in which the public good transcended the private, Washington labeled the insurgents of western Pennsylvania as “wicked.” In Washington’s mind, the Whiskey Rebellion posed a serious challenge to democratic governance guided by the “pure and immutable principles of private morality” emphasized in his first inaugural address.

Capitalizing upon his Cincinnatus image of the moral statesman, Washington’s Whiskey Rebellion rhetoric strongly argued against the continued prevalence of Democratic Societies. Washington’s moral eminence failed to convince some political insiders of the transgression committed; Jefferson stated, “An insurrection was announced and proclaimed and armed against, but could never be found.” However, the locus of Washington’s authority was not insular. While he failed to make Jefferson a believer, his words found their power within the public venue.

Washington’s rhetoric concerning the Whiskey Rebellion is reminiscent of Yankee/Puritan culture. A public condemnation of the immoral Pennsylvanian farmers, deluded by their self-interested passions, restored the moderate balance of the virtuous “city on a hill” depicted in John Winthrop’s speech aboard the

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102 Id. at 21.
103 Id. at 23.
104 Id.
105 Id.
106 Id. at 27.
107 See Washington, supra note 64, at 499.
108 Id. at 462.
109 See McDonald, supra note 85, at 147.
Arbella in 1630. Washington’s Sixth Annual Address followed the pattern of the Puritan jeremiads of the 17th and 18th centuries. The typical jeremiad consisted of an exposition of the communal norms, a series of condemnations of the actual state of the community, and finally a prophetic vision that unveils the good things to come. Likewise, Washington’s Sixth Annual Address began with a recommendation for personal moderation, subsequently condemned the insurgents, and ended with optimism inspired by religious sentiment.

Washington’s management of the Whiskey Rebellion and his public justifications for his actions exemplified the moral model of presidential rhetorical leadership. By 1795, most Democratic Societies disbanded in the United States. One of the explanations for their demise is that they withered under the wrath of Washington, especially after his forceful 1794 annual address. Utilizing the tools of popular leadership to employ powerful moral and religious language in his public messages, Washington’s rhetorical purgation of the impious insurgents helped to establish the leadership model of the virtuous executive above the fray of faction. Washington’s use of rhetoric during the Whiskey Rebellion can be contrasted to Jefferson’s public justifications of the 1807 shipping embargo.

IV. JEFFERSON AND THE EMBARGO

Scholars often grapple with many duplicities and paradoxes exhibited in Jefferson’s political writings, personal letters, and presidential actions. In a recent article, George McKenna concluded that it is impossible to extract from Jefferson’s writings any “final Jeffersonian synthesis.” An irreconcilable disjunction exists between Jefferson’s public persona and his real life. According to McKenna, searching for any firm, guiding political principles in Jefferson’s corpus is an impossible and frustrating task.

Jefferson’s views regarding morality and politics are such a paradox. Although not a philosopher, Jefferson thought a great deal about the essence of human nature and man’s capacity for morality. Perhaps more than any other Founder, Jefferson’s private correspondences are filled with musings on morality, virtue, and Christianity. However, his public presidential statements tell us very little, if anything, about his belief in an innate moral sense. He did not, as James Wilson did, give famous law lectures on public morality — and he certainly did not publish an autobiography like Ben Franklin to describe the

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110 See generally John Winthrop, A Model Of Christian Charity, reprinted in 1 The Annals Of America: Discovering A New World, 1493-1754, at 109-14 (Mortimer J. Adler ed., 1968) (referring to Winthrop’s declaration, upon leaving England, of the principles that he thought should be incorporated into the organization of the Massachusetts Bay Colony.)
112 See Washington, supra note 55, at 21-27.
113 See Elkins & McKitrick, supra note 73, at 461.
114 Id.
116 Id.
117 Id.
development of his own moral virtues. Most importantly, unlike his predecessor Washington, Jefferson did not often employ moral and religious arguments in his public rhetoric. This paradox is puzzling. Jefferson, a man who invested a significant amount of time studying the subject of virtue, chose not to share much of his moral knowledge with the American public during his presidency.

Jefferson's writings clearly suggest that he thought of America in moral and religious terms. In his Notes on the State of Virginia, Jefferson called American yeoman farmers "the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue."118 Despite these musings, Jefferson, as president, did not utilize the language of morality to the same extent as Washington or Adams. Jefferson's belief in an innate moral sense led him to conclude that the natural capacity for virtue is inherent in all human beings.119 Endowed with the ability to perceive right from wrong, Jefferson thought that humans could develop their moral sense through republican institutions, agrarian life, and formal universal education lasting at least three years.120 Jefferson believed that the moral leadership of an individual statesman was not as important as the wide-reaching social propagation of civic virtue.121 Although Jefferson's political thought drew heavily from the classical republican tradition, his liberal reluctance to force his moral views on others contributed to his development of the secular model of rhetorical leadership.122 Ultimately, his belief in an innate moral sense encouraged Jefferson to repudiate the role of the president as a moral spokesman for the nation.123 Jefferson did wage his own sort of abbreviated moral education by writing a vast number of personal letters as president, but he did not extend this political pedagogy to the American public.

The development of a more secular model of presidential leadership can also be traced to the particular political circumstances of the Jeffersonian regime. The opposition Jefferson faced in his effort to dismantle the Federalist regime was not formidable. Stephen Skowronek observed that Jefferson's presidential authority was "singularly disarming and all-encompassing."124 During his first term, Jefferson almost completely transformed the federal government by removing Federalist judges, customs officers, and other bureaucrats and replacing them with Republican appointees.125

Jefferson understood that his political situation allowed him to restructure the government without sacrificing the appearance of consensus.126 He did not

120 Id. at 145.
121 Id. at 103.
123 See generally id. at 117.
124 SKOWRONEK, supra note 65, at 70.
125 See id. at 72.
126 Id. at 70.
justify his actions because he did not have to do so. Without any rhetorical explanation or justification grounded in high-minded principles, Jefferson's simply proclaimed in his first inaugural address that "we are all federalists; we are all republicans."\(^\text{127}\) Jefferson's powerful reconstructive position allowed his statement to carry the weight of a moral pronouncement despite the absence of moral or religious language.

The Louisiana Purchase is an appropriate example of Jefferson's unopposed status. After the treaty's provisions became public, Jefferson remained mute and did not offer any justifications to American citizens regarding this extraordinary occurrence. Jefferson certainly viewed the Louisiana Purchase in moral terms; he believed that a large land acquisition insured that self-reliant agrarian virtue would thrive for many years to come in the United States.\(^\text{128}\) But Jefferson did not make his opinions concerning the Purchase available to the public. The most obvious explanation for this restrained approach was that public sentiment surrounding the Louisiana Purchase was generally positive; only a few ardent Federalists registered opposition to the transaction.\(^\text{129}\) Perhaps more important than the popularity of the Purchase, Jefferson did not believe he should serve as the nation's moral educator. Because of his own philosophical beliefs and the political circumstances that surrounded his first term in office, Jefferson willingly adopted a more secular approach to presidential leadership that did not predominantly utilize appeals to morals or religion.

Unlike the Louisiana Purchase, Jefferson's embargo policy of 1807-1808 lacked broad public support.\(^\text{130}\) Jefferson still refrained from inspirational or moral rhetoric despite the policy's unpopular status. By 1806, the situation of American sailors on the high seas was perilous.\(^\text{131}\) British ships routinely stopped American vessels to impress sailors who had abandoned their military posts.\(^\text{132}\) Jefferson sent ambassadors to London for negotiations, but the treaty they brought back to the United States did not solve the problem of impressment.\(^\text{133}\) Refusing to send the treaty to the Senate, Jefferson witnessed the rapid deterioration of Anglo-American relations.\(^\text{134}\) Jefferson was faced with three choices: he could wage immediate war with Britain, delay war by enforcing an American shipping embargo, or do nothing.\(^\text{135}\) With members of both political parties in Congress pressing for action, the latter option quickly disappeared.\(^\text{136}\)


\(^{130}\) See LOUIS SEARS, JEFFERSON AND THE EMBARGO 61 (1927).


\(^{132}\) See MCDONALD, supra note 129, at 118.

\(^{133}\) Id. 131-32. See also JOHNSTONE, supra note 131, at 257-59.

\(^{134}\) See MCDONALD, supra note 129, at 132-33.

\(^{135}\) See generally JOHNSTONE, supra note 131, at 256-69.
Jefferson relied on his friends and Cabinet members for advice. One influential letter came from J. Barnes, an American living in Italy, who informed Jefferson that an embargo would lead to a quick collapse of the British empire. On the other side, Albert Gallatin favored war, perhaps dreading the burden of implementing such an embargo. In the end, Jefferson's pacifist inclinations and his confidence in the American people's ability to withstand economic hardship led him to choose the embargo over a quick declaration of war.

Jefferson released a special message on December 18, 1807 to recommend the embargo policy to Congress. After little deliberation, the Senate passed the legislation within hours; the House followed suit three days later. The December message was only 107 words, hardly long enough to educate the public or Congress about the necessity of such drastic economic sanctions. Testimony to his powerful control of Congress, Jefferson confidently stated:

The communications now made, showing the great and increasing dangers with which our vessels, our seamen, and merchandise are threatened on the high seas and elsewhere, from the belligerent powers of Europe, and it being of great importance to keep in safety these essential resources, I deem it my duty to recommend the subject to the consideration of Congress, who will doubtless perceive all of the advantages which may be expected from an inhibition of the departure of our vessels from the ports of the United States. Their wisdom will also see the necessity of making every preparation for whatever events may grow out of the present crisis.

Jefferson's confidence regarding the "doubtless" perception of "advantage" eventually proved troublesome. Jefferson did not view his lack of public justification as problematic. Instead, he viewed his short December message as an embodiment of the statesman ideal because he had discovered a way to keep the nation from immediate war. Jefferson did not endorse the embargo because it was just, morally right, or sanctioned by God. Instead, the only justification that Jefferson provided was that the embargo was "advantageous." According to Jefferson, it was in the interest of the nation to enact the embargo; he did not outline any moral or religious reasoning behind his decision.

At first, the embargo only affected New England and Southern shipping towns that depended on trade with the British and the Caribbean. Border states were still free to transport goods over rivers and lakes for trade. On March 3,
1808, Jefferson declared a land embargo and ended frontier trade. Public sentiment surrounding the embargo began to wane as economic conditions worsened. One anonymous letter to Jefferson, written by a New Englander, began with the salutation, "You Infernal Villain." By July of 1808, Jefferson assumed the chief responsibility of embargo enforcement. With Congress adjourned, the president acted with no legislative restraint or guidance. He began to use the navy to insure that American ships did not leave port. Although each successive embargo act increasingly curtailed individual rights, Jefferson never envisioned a program of public education to explain the necessity of the embargo. He also never provided citizens with an estimated timetable for the success of the embargo. Even when Jefferson ordered the regular army to enforce the embargo in August of 1808, he did not issue a proclamation regarding the decree. Jefferson’s advisers pleaded with him to issue some sort of public appeal to provide moral inspiration for those adversely affected by the embargo. In a letter written to Jefferson on July 29, 1808, Albert Gallatin argued that the people needed their patriotism aroused to withstand the economic hardships precipitated by the embargo. Gallatin’s pleas fell on deaf ears; Jefferson did not issue any public statement during the summer months. Jefferson replied to Gallatin that he was surprised that "a crop of so sudden and rank growth of fraud and open opposition by force could have grown up in the U.S." In part, Jefferson’s optimistic view of the innate moral and republican sense of the American people prevented him from adopting a more inspirational rhetorical leadership.

Instead, Jefferson relied upon his personal letters, replies to addresses, and the National Intelligencer newspaper to provide information about the embargo. Jefferson’s numerous letters to acquaintances during the embargo occasionally utilized the language of morality to defend his presidential actions. For example, in a letter to Gideon Granger written on January 22, 1808, Jefferson vowed to "discontinue all intercourse with these nations till they should return again to some sense of moral right." Additionally, Jefferson’s reply to the
Society of Tammany in New York furnished a succinct moral defense of the embargo. In his short reply to the Society, Jefferson explained that a cessation of all intercourse with Britain must continue until it could be "resumed under the protection of a returning sense of the moral obligations which constitute a law for nations as well as individuals." However, replies to memorial addresses did not circulate widely beyond the local group who initiated the correspondence. A series of articles written by James Madison for the *National Intelligencer* attempted to inspire citizens to support the embargo, arguing that the endorsement of peace over war would facilitate the development of a "national character of virtue, firmness, and moderation, as well as sacrifice."

Despite these indirect communications, Jefferson never publicly addressed the concerns and hardships of the nation during the embargo. He might have believed that the exhausting economic strains of the embargo required citizens to exhibit republican virtue, but he did not attempt to dissipate this sentiment. Jefferson's leadership style introduced a more restrained model of executive leadership in which the president presides over the interest and prosperity of the nation, but not its moral well-being. Although Jefferson was influenced by Bolingbroke's patriot king ideal, he did not believe that a leader's moral eminence should be used as a tool for political influence. In Jefferson's secular model of leadership, the president serves as the caretaker of national interest rather than the caretaker of the nation's moral health.

V. CONCLUSIONS

Washington and Jefferson introduced distinct models of rhetorical presidential leadership. The models are not mutually exclusive; Washington often talked about interest and advantage while Jefferson did employ moral and religious language at times. The empirical coding evidence points us in the right direction, but the historical investigation of two leadership crises provides more compelling evidence of these distinct leadership styles.

The Whiskey Rebellion and the embargo reveal the strengths and weaknesses of both models. President Washington's eminence was never so brilliant as after the Whiskey Rebellion, but his reliance upon moral and religious imagery to justify his actions are questionable. We are left to wonder if the insurgent farmers of western Pennsylvania deserved the appellation of "the wicked" or if the insurrection qualified as a religious transgression. Moreover, Jefferson's refusal to serve as a moral spokesman for the nation might have fulfilled his political desire to impose a liberal restraint upon the presidency, but it also left frustrated Americans without a sense that their sacrifices served a higher purpose.

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161 Id.

162 See generally Johnstone, supra note 131, at 238-39.

163 Id. at 270.

164 Id.
Scholars specializing in presidential leadership chastise Jefferson's handling of the embargo, contending the "he remained silent when he needed to speak." Likewise, Washington is criticized because his "praise of virtue, morality, education, and religion" was never supported by public policy proposals that could address his altruistic concerns. Rather than simply describing Jefferson as a skillful leader who abandoned moralism or Washington as a priestly figure with little political acumen, it is more accurate to examine these presidents as precedent-setters who grappled with specific political circumstances using the unique governing skills and resources available to them.

Much akin to Neustadt's portrayal of presidential leadership, Jefferson manipulated his powerful "insider" status to insure the passage of the 1807 embargo act in Congress. Because Jefferson exercised so much singular authority as president, he did not view the role of the president as the moral educator of the nation as appropriate or necessary. As the insular bargainer, Jefferson did not seek popular approval throughout most of his eight years in office. When he was faced with the controversial embargo, he was unable to adapt his rhetorical style to the new demands of governance. Washington faced a different governing situation. During his second term in office, he found himself pulled apart by two competing factions. Washington did not possess the skills of a bargainer, nor did he view the presidency as the proper venue for such political squabbling. Instead, Washington incorporated his strongest governing resource into his rhetoric — the shared national perception of his eminent, virtuous character. As demonstrated by his Whiskey Rebellion rhetoric, a moral condemnation from Washington was worth its weight in gold.

Two hundred years later, Americans still live in the wake of Washington and Jefferson's distinct leadership styles. We want a leader who will emphasize economic prosperity and defend American self-interest, but we also yearn for a president who stands above material concerns and will act as a moral shepherd for the nation. While we are in awe of the Machiavellian prince and his blind devotion to individual advantage, we still remember the legacy of Aristotelian virtue.

American presidents walk a thin line between moral and secular leadership. Very few individuals know the personal motivations of our nation's leaders, but all citizens have access to their rhetorical arguments. The public presentation of the presidency through rhetoric furnishes us with expectations for future inhabitants of the executive office. After all, President Clinton's sexual indiscretions were not the true cause of his impeachment. Rather, his public rhetoric precipitated his political troubles. His audacious lies before a court of law and the American people destroyed his capacity to serve as the moral spokesman for the nation. It is doubtful that history will forget his stinging "I did not have sexual relations with that woman" pronouncement. Still, Clinton reminds us that the presidency is an institution that embodies both moral and secular leadership. The booming economy and the explosion of e-commerce

165 LANDY & MILKIS, supra note 37, at 70.
166 Id. at 37.
167 See generally NEUSTADT, supra note 9.
appeals to the self-interest of Americans. Clinton lost the ability to speak with a moral voice, but his substitution of secular language has been quite successful. Capitalizing on the moral ambivalence of the presidential office, Clinton reminds us that the Machiavellian prince is indeed alive in the twenty-first century.

The tug-of-war between moral and secular leadership was also alive in the 2000 presidential election. During a campaign speech in late August 2000, vice-presidential candidate Joseph Lieberman argued that religion should play a greater role in American public life. Explicitly invoking the words of George Washington and John Adams in his remarks, Lieberman observed that even though the Constitution established freedom of religion, it does not guarantee "freedom from religion." In response to his rhetoric, the Anti-Defamation League asked Lieberman to stop making "overt expressions" of religious belief in his campaign speeches while Al Gore defended his running mate's emphasis on piety. A flurry of op-ed pieces in papers such as the New York Times and the Washington Post quickly appeared, taking sides on the appropriateness of Lieberman's public recommendations.

Lieberman's remarks were certainly appropriate in that he was simply following the model of moral rhetorical leadership established by Washington, who reminded Americans in his Farewell Address that "religion and morality are indispensable supports" for political prosperity. The more relevant question surrounding Lieberman's emphasis concerns democratic governance — do the American people want a president who stresses morality or religion or do they desire a more secular imitation of Jeffersonian statesmanship? The appropriateness of both leadership styles has already been established in American history; instead, citizens must decide if the political challenges facing the nation in the wake of the third millennium warrant such a devotion to elevated moralism.

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SEPARATION OF POWERS AND THE CONSTITUTIONAL TEXT

by Douglas G. Smith

In the era of modern government, where there often appear to be no concrete limits on federal governmental power, debates among legal scholars concerning constitutional provisions rarely, if ever, invoked to constrain the exercise of such power may seem wholly academic. Nonetheless, such debate can only serve to remind us that ours is truly a government of limited and enumerated powers. As the Constitution makes clear, the people of the United States established a government wherein all powers that are not expressly delegated to the federal government and its departments are reserved to the people. This understanding of our constitutional order was reinforced during the earliest days of the new republic in the Tenth Amendment, which makes clear that powers that are not delegated are reserved — either to the states or to the people.

In attempting to understand the governmental structure established in the first three articles of the Constitution, it is important to keep the fundamental principle of divided power in mind. These articles must be viewed in light of the framers’ understanding that the people in establishing a government, the contours of which were outlined in the constitutional text, were laying down expressly the powers delegated by the people to the various departments. Even a cursory examination of the first three articles confirms this understanding of the constitutional design. Each of the three articles is prefaced by a declaration that certain powers were being vested in departments established within the new national government.

The debate over the proper interpretation and meaning of these vesting clauses has received renewed academic scrutiny in the last few years, with some forcefully arguing that the clauses act as an express delegation of power — whether executive, judicial or legislative. In contrast to the more traditional...
view of the clauses, which posited that they served at best as indicators of the framers’ intent concerning the locus of power and at worst were mere inkblots adding nothing more than rhetorical flourishes to the substance found in the subsequent provisions of each article, this view argued that the clauses conveyed real content that meant something in terms of our understanding of the extent of executive power.

No sooner had the vesting-clauses-as-power-grants thesis been advanced than a flurry of academic commentary arose in defense of the traditional understanding. Opponents of the new thesis pointed out that the powers of the presidency appear to be enumerated in Article II, much like those of Congress are enumerated in Article I. Thus, they argued, a unitary executive power flowing from the Article II vesting clause is inconsistent with a plain reading of the constitutional text.

Characterizing this debate has been an attempt by both sides to fit the textual structure within attractive models that simplify our understanding of the various governmental powers, and to provide insight into specific questions that have arisen in actual cases concerning the scope of executive power. Attempting to fit the complex structure found in the first three articles into such simplified models, however, arguably does not do justice to the decisions executed by the framers in devising that structure. In examining the first three articles in light of the historical understandings concerning the nature of governmental power, we see that the powers delegated to each of the three coordinate departments are not so easily separated into judicial, executive, or legislative power. Rather, a fair reading of the text in light of contemporaneous understanding shows that Congress was vested with certain executive powers. Conversely, the Executive was vested with certain power that might best be characterized as legislative. The framers were careful to enumerate those individual powers and provide for them expressly against a backdrop or default rule that whatever power was not delegated was reserved. Viewed in this context, it seems that a blanket assertion that all executive power is vested in the Executive Branch cannot withstand

commendedator has observed:

The lack of a “herein granted” provision in Article II indicates that all executive power that the Constitution allows, whatever that may include, lies with the President, whether the powers explicitly mentioned in Article II are exclusive or exemplary. If there are executive powers that do not fall under the ultimate control of the President, this would open the door for Congress to create executive officials who are independent of the President.


4 See, e.g., A. Michael Froomkin, Still Naked After All These Words, 88 NW. U. L. REV. 1420, 1424 (1994) (arguing that the vesting clauses are “‘performatives’ - that they create the branches”).

5 See Calabresi, The Vesting Clauses, supra note 3, at 1378 (discussing Professor Froomkin’s argument).

6 As Professor Calabresi observes, "Alan Morrison in his Supreme Court brief for John M. Mistretta thus points out that when the Constitution makes exceptions from the general principle of the separation of powers it does so in the most explicit and express terms." Calabresi & Larsen, One Person, One Office, supra note 2, at 1122-23.
scrutiny. Nonetheless, those who assert that the Constitution grants Congress the authority to exercise executive powers that were never delegated by the people are also mistaken.

Most commentators have viewed the powers referenced in Article II as an enumeration of executive powers delegated to the Executive Branch. Upon closer examination, however, one sees that the enumeration also constitutes a list of powers delegated to the Congress. What are frequently identified as limitations on executive power may alternatively be viewed as executive powers delegated to the Congress.

Moreover, there are additional executive powers expressly delegated to Congress in Article I. The power to declare war, for example, when considered in light of contemporaneous understanding is best viewed as a delegation of a prototypically "executive" power to the "legislative" body. Consequently, we find that neither Article I nor Article II deal solely with delegations of legislative or executive power to Congress or the President, respectively. Similarly, we find that neither the "legislative" branch nor the "executive" is delegated solely legislative or executive power. Rather, the constitutional structure is more complex. The three articles represent an express enumeration of powers, with no single department (except perhaps the judiciary) being delegated power of a consistent and singular character.

This article briefly outlines a different view of the separation of powers embodied in the first three articles of the Constitution—a plainly textualist view. Part I presents a brief account of recent academic debate concerning the proper interpretation of the vesting clauses of the first three articles. Part II rebuts the thesis that all executive powers are lodged in the President by examining the executive powers expressly delegated to Congress in Article I. Part III provides further evidence that executive power is divided by examining executive powers delegated to Congress in Article II. Part IV explores the possibility that in some instances executive power that might well have been delegated to the President is reserved to the states. Part V examines the converse proposition, discussing the powers delegated to the Executive that are arguably legislative in character. Finally, Part VI examines the impact of this division of powers on the modern interpretation of the vesting clause of Article II.

The conclusion reached is that, while the framers did indeed view it as critical that there be a unitary executive established under the new government, and that particular executive powers not depend on the will of multiple individuals for their exercise, in particular enumerated situations they did not hesitate to delegate particular powers traditionally thought to be executive in character to the legislative branch of government. As Alexander Hamilton observed in The Federalist No. 66, the "important and well established maxim" that "requires a separation between the different departments of power" was "entirely compatible with a partial intermixture of those departments for special purposes, preserving them in the main distinct and unconnected." Indeed,

7 The Federalist No. 66, at 335 (Alexander Hamilton) (Gary Wills ed., 1982). See also The Federalist No. 48 (James Madison) (Gary Wills ed., 1982) ("[U]nless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be
Hamilton went further, asserting that "partial intermixture [of powers] is even in some cases not only proper, but necessary to the mutual defense of the several members of the government, against each other." Thus, the constitutional framework does not leave the executive power as traditionally understood wholly undivided. Nonetheless, the situations in which the legislative branch may exercise such powers are enumerated and well defined. Consequently, at best, the vesting clause of Article II may serve to vest the undivided residuum of executive power in the President.

I. THE DEBATE OVER THE VESTING CLAUSES

Recently, scholars have engaged in a vigorous debate concerning the proper interpretation of the vesting clauses of the first three articles of the Constitution. As Professor Calabresi has observed, judicial opinion on the subject of the unitary executive has been mixed, with Justice Taft in *Myers v. United States* and Justice Scalia, writing for the majority in *Printz v. United States* and alone in *Morrison v. Olson*, forcefully arguing for the unitary executive, and the majority of the Court in *Morrison* and *Humphrey's Executor v. United States* adopting a non-unitary view.

Commentators such as Professor Calabresi have argued that the absence of the qualifying language "herein granted" in describing the powers vested in the President under Article II implies that the Executive was to be unitary, unlike the Legislative Branch, which is restricted to exercising enumerated powers under...
the vesting clause of Article I, which does contain such limiting language.\textsuperscript{10} Such an interpretation of the first three articles draws support from the long history recognizing the importance of rigid separation within the government that had developed by the time of the founding and significantly influenced the framers in implementing the constitutional design.\textsuperscript{11}

Nonetheless, the current predominant view is to the contrary. As Professor Calabresi acknowledges, his conclusion "runs counter to present constitutional practice, according to which Congress is widely perceived to have a general legislative power whereas the executive and judicial powers have been splintered among independent agencies or officers and legislative courts."\textsuperscript{12} A number of

\textsuperscript{10} As Calabresi & Rhodes have observed:

The most obvious difference is that the Article II and III Vesting Clauses omit the qualifying language "herein granted" found in the Vesting Clause of Article I. What significance can be attributed to this omission? To begin with, it suggests that the President is to have all of the executive power and the Article III judiciary is to have all of the judicial power. In this respect, both these departments differ from Congress, whose legislative powers are limited to the specifically enumerated powers 'herein granted' by the Constitution.

Calabresi & Rhodes, \textit{The Structural Constitution}, supra note 3, at 1175-76. Professor Calabresi has similarly stated:

The presence of the "herein granted" language is unique, since, significantly, it suggests that the Article I Vesting Clause picks up almost its entire content from the list of enumerated powers that follow the Clause in subsequent sections of Article I and of the Constitution. Accordingly, the Vesting Clause of Article I is one of the most limited power grants conceivable.


\textsuperscript{11} See Victoria Nourse, \textit{Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative}, 74 Tex. L. Rev. 447, 456 (1996) ("During the seventeenth and eighteenth centuries, many political theorists, from Montesquieu to Blackstone to Hume, defenders and antagonists of the monarchy both, embraced principles we now associate with the separation of powers."). The framers of the state constitutions had recognized the importance of this principle and "made explicit the idea that governmental power should be exercised by separate and distinct departments." \textit{Id.} at 459. As Calabresi and Prakash have observed:

There are . . . numerous texts from that era reaffirming that the universe of governmental powers is limited to three types—legislative, executive, and judicial. Consider, for example, the famous separation-of-powers clauses in many of the original state constitutions. Those clauses typically described the traditional three powers of government: legislative, executive and judicial.

Calabresi & Prakash, \textit{The President’s Power}, supra note 3, at 607.

\textsuperscript{12} Calabresi & Rhodes, \textit{The Structural Constitution}, supra note 3, at 1176 (footnote omitted); see also \textit{id.} at 1180 ("Justice Scalia’s and Professor Amar’s constructions of the Article II and Article III Vesting Clauses are controversial. The former was rejected by seven Supreme Court Justices in \textit{Morrison."). Lawson and Moore have observed, for example:

It is not clear why so many respected scholars have sought to deny the obvious: that the Constitution vests a particular kind of power—executive power—in the President. Perhaps they fear that a general executive power is too indefinite and that presidents might seek to expand their powers tyrannically by, for example, claiming the power to seize steel mills or to impound appropriated funds.

Lawson & Moore, \textit{The Executive Power}, supra note 3, at 1282.
commentators have written in response to defend the predominant understanding. In doing so, they have rejected the vesting-clauses-as-power-grants construction advocated by Calabresi and argued that there is no difference between the vesting clauses of Article I and Article II. Michael Froomkin argues in a series of interchanges with Professor Calabresi, for example, that the vesting clauses merely create the various branches, without conferring any power.

The historical record, however, provides extensive support for the notion that the framers highly valued a unitary, as opposed to plural, executive. Alexander Hamilton, for example, observed in The Federalist No. 69 that "[t]he first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate." Again, in The Federalist No. 70 Hamilton stated that "[e]nergy in the executive is a leading character in the definition of good government" and that one of the "ingredients, which constitute energy in the executive," was "unity."

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13 See, e.g., Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2 (1994) (concluding that the unitary executive position "ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper"); Froomkin, Still Naked, supra note 4 at 1426. Professor Monaghan, for example, has expressed his view that:

[T]he “legislative history” of the difference in language between the legislative powers “herein granted” and “The executive Power” provides no basis for ascribing any importance to this difference. That discrepancy occurred late in the Convention, on September 12, 1787, as a result of a Report of the Committee on Style, which had narrowed Congress’ legislative powers to those “herein granted,” but left unchanged “The executive Power.” This change seemed designed only to reflect the limits of federalism on national regulatory power, not to ratify or to recognize substantive executive power. Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 22 (1993). See also Martin Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1732 (1996).

Calabresi and Rhodes describe the debate as follows:

Advocates of a unitary executive, such as Justice Scalia, read the Article II Vesting Clause as . . . a power grant, but opponents of the unitary executive disfavor the power-grant construction. Advocates of limited executive power contend that the Article II Vesting Clause should be read as a mere designation of the presidential office, in light of the specifically enumerated presidential powers set out later in Article II. In effect, they read Article II as analogous to Article I: the Vesting Clause is an empty shell and the powers conferred are specifically enumerated later in the text of the Article.

Calabresi & Rhodes, The Structural Constitution, supra note 3, at 1194-95.

14 Froomkin, Still Naked, supra note 4, at 1424 ("contending that the Vesting Clauses are ‘performatives’—that they create the branches"). See also A. Michael Froomkin, The Imperial Presidency’s New Vestments, 88 NW. U. L. Rev. 1346 (1994).

15 The Federalist No. 69, at 348 (Alexander Hamilton) (Gary Wills ed., 1982).

16 The Federalist No. 70, at 355 (Alexander Hamilton) (Gary Wills ed., 1982). See also The Federalist No. 73, at 371 (Alexander Hamilton) (Gary Wills ed., 1982) (“The third ingredient towards constituting the vigor of the executive authority is an adequate provision for its support. It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory.”). In particular, Hamilton pointed to the power to direct war as demanding “those qualities which distinguish the exercise of power by a single hand.” The Federalist No. 74, at 376 (Alexander Hamilton) (Gary Wills ed., 1982).
Nonetheless, as already noted, Hamilton and other framers also recognized that in certain instances it was desirable to alter the traditional allocation of powers and to confer upon the legislative branch certain powers that traditionally had been considered executive in nature. Thus, both sides of the debate may point toward certain historical sources in support of their arguments. In instances where the legislature was expected to exercise some measure of executive power, however, it appears that the framers chose to delegate such power expressly. While it is not always easy to identify those powers that were historically considered "executive" as compared to those that were historically considered "legislative" in nature, the following sections attempt to identify numerous provisions that appear to expressly convey to the legislature powers that were traditionally considered executive in character.

II. THE ENUMERATION OF EXECUTIVE POWERS IN ARTICLE I

Within the powers of Congress enumerated in Article I are certain powers that may be fairly characterized as "executive." Congress, for example, is expressly given a limited and textually-circumscribed role in war-making, foreign relations, and the appointment of executive officers. Thus, the enumeration of "powers" in Article I is not an enumeration of exclusively "legislative" powers.

A. Declaration of War

Under Article I, the executive power to declare war is vested in the Congress along with the power to raise and regulate fleets and armies. As Hamilton noted in The Federalist No. 69, "[the power] of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature." Similarly, Hamilton observed that, while the President has only a right of command over the nation's military forces, the King "in addition to this right, possesses that of declaring war, and of raising and regulating fleets and armies by his own authority." These passages indicate that the congressional role in war-making is best characterized as flowing from an executive power that under the English system was reserved solely to the Monarch.

Similarly, the power of the President to command the militia was constrained. In comparing the presidential powers to those of the King, Hamilton

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17 See Lawson & Moore, The Executive Power, supra note 3, at 1283 ("[I]t is true that the scope of the executive power is not as well understood as the scope of many other constitution powers."). See also Froomkin, New Vestments, supra note 14, at 1365 n.97 (arguing that invoking tradition in this analysis is frequently controversial, particularly in identifying actual 18th century conceptualizations of executive power, although there were several state constitutional models available, as well as English tradition, to serve as a basis for such an analysis).
18 U.S. CONST. art. I, § 8, cls. 11-14. Congress is given additional powers that may fairly be characterized as executive in nature, including the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Id.
19 The Federalist No. 69, at 350 (Alexander Hamilton) (Gary Wills ed., 1982).
20 Id. at 355.
observed in The Federalist No. 69 that "the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain and the Governor of New-York have at all times the entire command of all the militia within their several jurisdictions." Consequently, a fair reading of the text indicates that Congress was delegated certain express powers relating to the traditionally executive power of war-making.

B. Treaty-Making Power

Another area in which Congress arguably received certain executive powers was in the area of foreign relations. The Senate, for example, was conferred a share of executive power in treaty-making. In comparing the powers of the President to those of the British Monarch, Alexander Hamilton noted in The Federalist No. 69 this division of power in arguing that the President's power was not absolute: "The President is to have power with the advise and consent of the Senate to make treaties; provided two thirds of the Senators present concur. The King of Great-Britain is the sole and absolute representative of the nation in all foreign transactions." This power is fairly labeled as executive in character. Indeed, Hamilton referred to this power as the "concurrent authority of the President in the article of treaties."

Nonetheless, Hamilton himself tried to argue that the treaty-making power was not purely executive in character. Opponents of ratification had objected to this "intermixture of powers... some contending that the president ought alone to possess the power of making treaties; and others, that it ought to have been exclusively deposited in the senate." Hamilton responded that the "union of the executive with the senate, in the article of treaties, is no infringement" of the separation of powers and that "the particular nature of the power of making treaties indicates a peculiar propriety in that union." Hamilton, however, went further and argued that "[t]hough several writers on the subject of government place that power in the class of executive authorities," the treaty-making power "partake[s] more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them." Hamilton concluded that the treaty-making power formed "a distinct department, and... belong[ed], properly neither to the legislative nor to the executive." Thus, while there was debate at the time concerning whether the treaty-making power

1 Id. at 349-50.
2 Id. at 351.
3 Id. at 351-52 ("Every jurist of that kingdom, and every other man acquainted with its constitution knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plentitude..." (footnote omitted)).
4 Id. at 353; see also Id. at 394 (noting the President's "concurrent power with a branch of the Legislature in the formation of treaties").
6 Id.
7 Id. at 379-80.
was executive in character, at least some commentators viewed the power as executive in nature, prompting Hamilton's response. Consequently, the treaty-making power is another potential instance in which the legislature received an express delegation of executive power.29

C. The Power to Vest Appointment Power in the Executive, the Courts, or Departmental Officers

Congress was also delegated some measure of executive power in matters relating to internal affairs. Congress, for example, was given the authority to vest power to appoint inferior officers in the executive, the courts or departmental officers.30 Traditionally, control over the appointment power was thought to be purely executive. The framers, however, gave Congress limited power to allow executive (or judicial) officers to exercise such powers. Nonetheless, the fact that Congress was given any role at all in appointments arguably indicates that it was delegated at least some measure of executive power in this respect.

These powers, while not necessarily the only powers in Article I that partake of an executive character,31 do appear to support the notion that Congress was delegated in certain limited instances powers that were traditionally viewed as executive. The fact that there was an express delegation in instances where Congress was to receive such powers supports the position that these delegations were the exclusive instances in which Congress could exercise executive powers.

III. THE ENUMERATION OF EXECUTIVE POWERS IN ARTICLE II

Article II supplements the executive powers of Congress, containing grants of power not only to the President but also to Congress. Numerous commentators have pointed to an "enumeration" of executive powers delegated to the President in Section 2 of Article II. These same commentators, while noting that many of these "delegations" contain congressional limitations on

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29 Interestingly, the exercise of the power to try impeachment cases in the Senate was objected to based, among several reasons, on "their union with the executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust." Id. at 338-39.
30 U.S. CONST. art. II, § 2, cl. 2.
31 While contrasting the President's powers with those of the King in The Federalist No. 69 Hamilton seemed to indicate that other congressional powers might be executive in character or that certain executive powers were withheld from the President:

The one can infer no privileges whatever: The other can make denizens of aliens, noblemen of commoners, can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorise or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction: The other is the supreme head and governor of the national church!

executive power, generally do not construe these limitations on executive power for what they may in fact be – delegations of executive power to the legislature. Article II, Section 2 may fairly be read in large measure as a delegation of powers to Congress rather than "exemplars" of executive power.

The section begins by stating "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." As already noted, in Article I, Congress is given the power to declare war and to call forth the militia, powers that were considered executive in nature. Thus, the inclusion of this clause in Article II serves to underscore the fact that Congress is delegated some measure of the executive power that might otherwise be vested in the President.

Similarly, Section 2 notes that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Again, this provision may be interpreted not as a mere limitation on presidential power, but also as a recognition that Congress was delegated the impeachment power, a power that was most likely considered judicial in character, and thus the limitation on the executive's pardon power merely underscores this delegation.

Next, the President is given the "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." This provision, much like that dealing with the President's power as commander-in-chief, represents the executive power delegated to Congress in its role in treaty-making. As already noted, despite Hamilton's remarks in The Federalist, that power was at the time considered by many to be executive in character. The provision in Article II underscores the delegation of this executive power as well to Congress.

The President is also vested with the power "to nominate, and by and with the Advice and Consent of the Senate" to "appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for." This provision, too, may be viewed as underscoring the executive power of Congress to take part in appointments. Indeed, the congressional power was augmented in the next clause which stated that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, the Courts of Law, or in the Heads of Departments." This delegation of

32 See, e.g., Calabresi, The Vesting Clauses, supra note 3, at 1396 ("Section 2 of Article II imposes six key restraints on the executive power granted to the President by the Article II Vesting Clause.").
33 See id. at 1397 (noting that the list in Article II "does serve as a kind of exemplary list of the kinds of powers that it was expected that the President would have").
34 U.S. CONST. art. II, § 2, cl. 1.
35 Id.
36 U.S. CONST. art. II, § 2, cl. 2.
37 Id.
The Senate's share in the appointment power was expressly recognized as being executive in character in The Federalist Papers. Alexander Hamilton stated in The Federalist No. 65, for example, that "[t]he remaining powers, which the plan of the Convention allots to the Senate, in a distinct capacity, are comprised in their participation with the Executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments." Similarly, in The Federalist No. 67, Hamilton observed that "[t]he ordinary power of appointment is confided to the President and Senate jointly." Again, in The Federalist No. 69, Hamilton cited the President's "concurrent authority in appointing to offices." The Senate's exercise of a share of the executive power with respect to appointments stands in contrast to the English Monarch's absolute power in this area: "The king of Great-Britain is emphatically and truly stiled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments."
Indeed, opponents of the Constitution argued that the appointment power should be vested entirely in the Executive: "The truth of the principles here advanced seems to have been felt by the most intelligent of those who have found fault with the provision made in this respect by the Convention. They contend that the President ought solely to have been authorized to make the appointments under the Federal Government." Hamilton’s response to this criticism of the assignment of powers was that the President in reality possessed a large degree of independent authority in the appointments process. He did not deny the fact that executive power was being delegated to Congress.

The construction of Article II as containing an enumeration of legislative powers rather than an enumeration of executive powers gives support to a more unitary vision of executive power. The framers might as well have specified the enumeration of these legislative powers in Article I, thus eliminating the confusion in construction of the second article. The enumeration, however, fits well within Article II in that the "executive" powers delegated to Congress relate to certain executive powers to be executed by the President.

IV. EXECUTIVE POWERS RETAINED BY THE STATES?

In addition to vesting certain executive powers in the legislature, the framers also made clear that certain arguably executive powers touching upon the national government were to remain with the states. The most salient example is the power to appoint senators. Article I provides that "the Senate of the United States shall be composed of two Senators from each State, chose by the Legislature thereof for six years" and that "if vacancies in that body should happen by resignation or otherwise during the recess of the Legislature of any state, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies." Thus, the legislature and executives of the various states were expressly given the power to appoint senators. This power of appointment for practical reasons, could not easily be given to the Executive Branch. Nonetheless, the fact remains that certain executive powers that concern the federal government originally were granted to the states.

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45 Elsewhere in The Federalist, Hamilton observed that one of the objections to lodging the impeachment power in the Senate was that, in certain instances, the Senate might be called upon to review actions in which it had taken part through its exercise of powers that were executive in character: "A[n] objection to the senate as a court of impeachments is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated." The Federalist No. 66, at 337 (Alexander Hamilton) (Gary Wills ed., 1982).
46 Nonetheless, one counterargument counseling against this interpretation is that certain executive powers were delegated to Congress in Article I. The framers could have included all delegations of power to the Congress within Article I.
47 U.S. Const. art. I, § 3, cl. 1.
48 U.S. Const. art. I, § 3, cl. 2.
49 Similarly, the power of presidential "appointment" is vested in the electoral college: "The convention have been attentive to both these points— they have directed the president to be chosen
Despite this express language, opponents of ratification argued that the President’s executive power extended to appointing senators in instances of vacancy. In Article II, the President is given the power to “nominate, and by and with the Advise and Consent of the Senate,...appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”\(^\text{50}\) That article further states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”\(^\text{51}\) Hamilton shot down this interpretation of the text in The Federalist No. 67, making it clear that this portion of executive power was reserved to the states: “In one instance, which I cite as a sample of the general spirit, the temerity has produced so far as to ascribe to the president of the United States a power, which by the instrument reported is expressly allotted to the executives of the individual States. I mean the power of filling casual vacancies in the senate.”\(^\text{52}\) Hamilton made clear that because the appointment of Senators was “otherwise provided for” in the Constitution, the presidential recess appointment power did not include the power to appoint Senators to seats left vacant.\(^\text{53}\)

V. LEGISLATIVE POWERS DELEGATED TO THE EXECUTIVE

Just as the Legislative Branch may exercise certain powers which are arguably executive in character, so too the Executive Branch is delegated certain powers that at least touch on the legislative. Among the Executive Branch powers that might arguably be characterized as legislative in nature are the veto, the power to make legislative recommendations, the power to adjourn and convene the legislature, and the vice presidential power to break ties in the Senate.

A. The Veto

One of the most important “legislative” powers of the President is the power to veto acts of Congress.\(^\text{54}\) Despite the fact that this power is arguably legislative

\(^{50}\) U.S. CONST. art. II, § 2, cl. 2.

\(^{51}\) U.S. CONST. art. II, § 2, cl. 3.

\(^{52}\) The Federalist No. 67, at 341 (Alexander Hamilton) (Gary Wills ed., 1982).

\(^{53}\) Id. at 342. As Hamilton observed:

Here is an express power given, in clear and unambiguous terms, to the State executives to fill the casual vacancies in the Senate by temporary appointments; which not only invalidates the supposition, that the clause before considered could have been intended to confer that power upon the President of the United States . . .

in character, the *Federalist Papers* note that an absolute power to veto legislation was exercised by the Monarch in Great Britain.\(^{55}\) Thus, while the King possessed an absolute power, the President possessed a lesser "qualified negative upon the acts of the legislative body."\(^{56}\) While on the one hand the veto power might be characterized as executive in nature, given that it was traditionally exercised by the King, nonetheless, in a republican form of government such as the United States, such a power might more properly be construed as legislative.

**B. Legislative Recommendations**

Similarly, the President was given the power to recommend to the consideration of Congress measures he judged "necessary and expedient."\(^{57}\) While this provision arguably confers no real power upon the President since it merely states that he may, like any other citizen, give Congress "recommendations" concerning legislation he deems appropriate, the provision does seem to contemplate some role for the President in the lawmaking process. Coupled with the President's veto power, this provision underscores the important role the President might have in crafting legislation.

**C. Adjournment and Convening Congress**

The President may also convene "on extraordinary Occasions" both houses of the Congress or either of them and "in Case of Disagreement between them, with Respect to the Time of Adjournment ... may adjourn them to such Time as he shall think proper."\(^{58}\) This power over the legislature could be characterized as another "legislative" power of the President. As Hamilton noted in *The Federalist No. 69*, however, the monarch in Great Britain could exercise an even more expansive adjournment power, arguably indicating that such a power was executive rather than legislative in character: "the President can only adjourn the national Legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The Governor of New-York may also prorogue the Legislature of..."

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\(^{55}\) *The Federalist* No. 69, at 349 (Alexander Hamilton) (Gary Wills ed., 1982) ("The King of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament.").

\(^{56}\) *The Federalist* No. 69, at 354 (Alexander Hamilton) (Gary Wills ed., 1982). Hamilton recognized that there were practical constraints on the exercise of this absolute power by the King: "A King of Great-Britain, with all his train of sovereign attributes, and with all the influence he draws from a thousand sources, would at this day hesitate to put a negative upon the joint resolutions of the two houses of Parliament." *The Federalist* No. 73, at 374 (Alexander Hamilton) (Gary Wills ed., 1982).

\(^{57}\) U.S. Const. art. II, § 3.

\(^{58}\) *Id.*
this State for a limited time." At any rate, this power, like the recommendation power, emphasizes the framers' view of the President as having some role in the legislative process.

D. The Vice President and the Senate

Finally, the Executive Branch may at times exercise real legislative power through the Vice President who is given the power to break legislative ties in the Senate. This rather extraordinary delegation of power may not be that significant given that its exercise depends on the existence of a legislative tie. Nonetheless, it is striking that a member of the Executive Branch was given such legislative power.

VI. THE VESTING CLAUSE: INDICATOR OF THE LOCUS OF POWER OR GRANT OF A RESIDUUM OF POWER?

As the foregoing examination of the first two articles of the Constitution shows, a fair reading of the constitutional text indicates that both the legislative and executive departments were given powers that do not fall within their "core" powers. When a department of government is vested by the Constitution with certain power that does not fall within its "core," however, that delegation is express.

One might argue that the vesting clauses merely delegate the residuum of governmental powers that may be described as either legislative, executive, or judicial. Thus, in order to interpret the scope of the power of the three branches of government, one must look to contemporaneous understandings to determine what the framers considered to be the "legislative power," "executive power," and "judicial power" of a properly constituted government.

Alternatively, one might adopt the traditional interpretation that views the vesting clauses as merely identifying the locus of powers that are specified in the subsequent text of each article. Thus, the "legislative powers" delegated to Congress are those spelled out in Article I. The "executive power" delegated to the President is that spelled out in Article II. The "judicial power" given to the courts is that identified more specifically in the text of Article III.

A third interpretation, however, could be adopted. The "legislative powers" delegated to Congress might consist of all those enumerated powers — whether in Article I or Article II — that are delegated to Congress, whether they were understood traditionally as "legislative" or "executive." The "legislative powers" to be exercised by Congress are merely the powers that are textually specified in the first three articles. Thus, the Constitution defines "legislative powers" by the constitutional grant of powers to Congress found throughout the first three articles, or throughout the Constitution (and not just Article I). Similarly, the "executive power" may be those powers — whether traditionally viewed as executive in nature or legislative — that are conferred upon the Executive Branch

59 The Federalist No. 69, at 351 (Alexander Hamilton) (Gary Wills ed., 1982).
60 U.S. Const. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.").
in either Article I or Article II. This interpretation admittedly leads easily to confusion in that Congress may be delegated a power that is best characterized as "executive" in character, while at the same time being described as one of the "legislative powers" granted by the Constitution. Nonetheless, such an interpretation arguably is consistent with one plain reading of the text.

Certain provisions of the first three articles counsel in favor of the enumerated powers interpretation. Article II provides that should the President be unable to discharge the "Powers and Duties" of his office, those powers and duties shall devolve to the Vice President. The reference to "powers" of the Presidency stands in contrast to the "executive power" referenced in the vesting clause of Article II. Similarly, the Federalist Papers, too, in describing the decisions regarding allocation of powers within the Constitution occasionally reference the "powers" of the President.

One interpretation of these references is that the executive powers of the President are multiple and enumerated, much like the powers of Congress. A second interpretation is that the "powers" referenced in the phrase refer to the executive power delegated to the President as well as any powers of legislative or judicial character the President might exercise. A final interpretation of the phrase is that it is perfectly consistent with the vesting of a unitary "executive power" in the President that might consist of a bundle of inherently executive powers all falling under the umbrella of "executive power." Nonetheless, this last interpretation seems inconsistent with reliance on the "legislative powers" of the vesting clause of Article I as support for an interpretation of Article I as conferring enumerated powers in contrast with Article II's vesting of a unitary "executive power."

Whichever of the three interpretations one adopts, one constant is the fact that delegations of executive power to the legislature were express and, by implication, the legislature could not exercise executive powers that were not expressly delegated. Thus, whether one views the executive power of the President as consisting of (1) enumerated powers, (2) enumerated powers plus some residuum of executive power conferred by the vesting clause, or (3) all possible executive power as conferred by the vesting clause, one must accept that the Congress cannot interfere with the President's executive authority by exercising powers that were not expressly delegated. This conclusion flows from the enumeration found in the text. Nonetheless, it appears that the best interpretations of the President's executive power are (1) and (2) above. Article II refers to the President's "powers," implying (albeit weakly) that they are enumerated. Yet, one might view the vesting clause as an additional grant of residual executive power. The fact that the framers felt it necessary to enumerate the executive powers to be exercised by Congress and the states implies that the default rule of interpretation, perhaps embodied in the Article II vesting clause, is that the President received all residual executive power.

61 U.S. CONST. art. II, § 1, cl. 5.
62 THE FEDERALIST NO. 70, at 355 (Alexander Hamilton) (Gary Wills ed., 1982) ("The ingredients, which constitute energy in the executive, are first unity, second duration, thirdly an adequate provision for its support, fourthly competent powers.").
This does not mean that presidential power is unlimited. There are affirmative limits on presidential power embodied in the text. There are also delegations of executive power to the legislature. Further, even if the vesting clause is a delegation of residual power, it is only a delegation of “executive” power. By looking to the historical understanding of this term, we may find that there are other limitations inherent in the delegation. One structural limitation that appears to flow from the text is that the President may execute only those laws that have been enacted by Congress. Thus, it would seem that Congress has a check on executive power through its law-making power. At any rate, any such analysis is beyond the scope of this article.

VII. CONCLUSION

The conclusion advanced here, that Congress is delegated certain executive powers and the executive is delegated certain legislative powers, does not imply that Congress may exercise undelegated executive powers – quite the contrary. The enumeration of specific powers implies that the list of executive powers Congress may exercise is exclusive. Indeed, much of the administrative state constructed by the modern Congress must be questioned in light of this analysis. As Professor Calabresi observes, “[t]here simply is no grant of power to Congress in Article II – or anywhere else in the Constitution – that allows it to override the Article II Vesting Clause as it arguably may override the Article III Vesting Clause.”\(^63\) This lack of an express delegation of executive power means under the theory advanced here that Congress possesses no such power, since the framers expressly delegated and stated in the text those instances in which one branch of government might exercise power that was traditionally alien to it. They did so in order that readers of the Constitution, who would be familiar with the traditional categorization of powers, would know when the people chose to deviate from the important principle of separation. Thus, while it might be true that the framers did not intend to implement a “clear executive hierarchy,”\(^64\) where they deviated from such a plan, they did so expressly and within the body of the constitutional text.

\(^{63}\) Calabresi & Rhodes, The Structural Constitution, supra note 3, at 1192. Professor Calabresi points out that the “Take Care Clause” also supports the conclusion that the framers intended the President to exercise control over subordinates within the Executive Department without congressional interference. See Calabresi & Prakash, The President’s Power, supra note 3, at 643.

\(^{64}\) Lessig & Sunstein, The President and the Administration, supra note 13, at 2.
PACIFICUS & HELVIDIUS RECONSIDERED

by William R. Casto

I. INTRODUCTION

In one of the most highly regarded opinions ever written by an American judge, Justice Robert Jackson stated in the Steel Seizure Case that he was "surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power [under the Constitution]." The available materials, he continued, are "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." In the field of Presidential authority over foreign affairs, the 1793 newspaper debate between Alexander Hamilton and James Madison, writing as Pacificus and Helvidius, has been the classic example of enigmatic materials. The debate's reputation, however, is undeserved. Hamilton and Madison actually agreed on most of the issues that they discussed. A careful reading of the essays with attention to their political context provides useful and unambiguous authority applicable to executive power over foreign affairs.

Some two hundred years after Pacificus and Helvidius were penned, everyone recognizes the brilliance of the essays, but there is a reluctance to pass judgment on the relative strengths of the apparently conflicting arguments. In the history of the Republic, a few have equaled, but no one has surpassed Hamilton's and Madison's understanding of the Constitution. Therefore, we are loath to conclude that either Madison or Hamilton did not understand the allocation of executive and congressional powers under the Constitution. Some dismiss the essays as turning more on partisan politics than constitutional principles. Others ignore the essays. Justice Jackson resolved the problem by simply noting that Hamilton and Madison "largely cancel each other," and today most have followed his lead. The essays usually are read as alternative, conflicting expositions of executive power under the Constitution. Unfortunately, the common perception that Pacificus and Helvidius reached an impasse with no clear winner has obscured some of the most valuable constitutional insights ever written on the Constitution's allocation of foreign affairs powers.

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1 Copyright 2001 William R. Casto. This article will be a chapter in a book on the Neutrality Crisis of 1793 by William R. Casto. The author is an Alvin R. Alison Professor of Law, Texas Tech University. Professor Casto would like to thank the American Philosophical Society for a grant in support of his project. He would also like to thank Frank Newton, William Treanor and Robert Weninger for their comments on preliminary drafts of the article. Due to the unique historical nature of this article, please be advised that the citations do not strictly conform to traditional Northern Kentucky Law Review formatting practices.

2 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

3 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); 1 WILLIAM GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 404 (1974) ("Historians have generally shied away from identifying the winner of this debate."); See, e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 79-80 (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND
The Pacificus and Helvidius essays did not spring from a political vacuum. They addressed painfully specific issues generated by the first significant foreign affairs crisis under the Constitution. Great Britain and Revolutionary France were at war, and the United States had to determine a proper course of conduct toward the warring superpowers. Hamilton wrote his Pacificus essays to justify President Washington's controversial, unilateral proclamation of neutrality. Madison wrote his Helvidius essays at the specific request of Thomas Jefferson, and the Jefferson/Madison correspondence provides an invaluable roadmap for Helvidius. Neither Jefferson nor Madison seriously controverted the President's authority to issue the proclamation. Instead, they were concerned that some of Hamilton's arguments could be read as implying Presidential powers far beyond the authority that Hamilton sought to establish. The Pacificus/Helvidius essays seem to present conflicting arguments, but the two essayists never joined issue on much of what each other said. Indeed they were in substantial agreement on many of the fundamental and most important points. Therefore, the essays are not in significant conflict, and valuable insights may be drawn from one without rejecting the other.

The present essay briefly outlines the Neutrality Crisis of 1793 with an emphasis on the specific issues that engendered the Pacificus/Helvidius exchange. Then Hamilton's and Madison's analyses are critiqued with particular emphasis upon the meaning of the Constitution's "executive Powers" clause and the concept of concurrent powers. Hamilton's analyses of these two issues are valuable and enduring contributions to our understanding of the Constitution's allocation of foreign affairs powers. Madison did not really dispute Hamilton's analyses, but he did write a valuable explanation of why the Constitution vests the power to declare war in the Congress and not in the President.

II. THE NEUTRALITY CRISIS OF 1793

The European war that caused the Neutrality Crisis began on February 1, 1793, but two months passed before firm news of the war reached America. The transatlantic cable and radio lay far in the future, so all communication between the two continents had to be entrusted to the vagaries of slow and unreliable sailing ships. President Washington was at home in Mount Vernon when Secretary of State Jefferson wrote him on April 7 that it was "extremely probable that [France and Britain] are at actual war." The next day Secretary of Treasury Hamilton wrote the President a similar letter. In response, Washington immediately resolved to return to the capital in Philadelphia, and at the same time he wrote Hamilton that he was determined "to maintain a strict neutrality." He asked Hamilton and Jefferson how best to implement a policy of neutrality and noted that he was already hearing of privateers being fitted out in American ports.  

President Washington's determination to maintain a strict neutrality was complicated by the fact that the country had a Treaty of Alliance and a Treaty of Amity and Commerce with France dating from the Revolutionary War. Among other things, the United States, in the Treaty of Alliance, "forever" guaranteed French possessions in the West Indies from attack by all other powers. In addition, the Treaty of Amity and Commerce granted French naval vessels and privateers special rights during wars between France and other countries. These special rights were to create serious problems. Finally, neutrality is a fairly flexible concept, and different members of Washington's cabinet had conflicting ideas concerning what neutrality entailed. Hamilton sought to emasculate the French treaties and favored a strict, impartial neutrality that would, in effect, favor Britain. Conversely, Jefferson wanted to give fuller scope to the treaties and adopt a course of neutrality that tilted in France's favor.  

The problems confronting President Washington and his cabinet were not simply matters of abstract theory. Chief Justice John Marshall later remembered that the outbreak of war in Europe restored full vivacity to a flame, which a peace of ten years had not been able to extinguish. A great majority of the American people deemed it criminal to remain unconcerned spectators of a conflict between their ancient enemy and republican France.

Edmond Genet, the new French ambassador, aggressively and publicly insisted that the United States support France. Moreover the war itself quickly came to America. A powerful French frigate and a flock of French privateers began

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preying upon British shipping up and down the East Coast, and each day's newspaper thrilled Americans with the exploits of Revolutionary France against Britain, the "ancient enemy." American newspapers thundered, "[t]he cause of France is the cause of man, and neutrality is desertion."

The federal government had to resolve a myriad of legal issues most of which involved the treaties with France. The provision in the Treaty of Alliance requiring the United States to guarantee French possessions in the West Indies from attack was particularly troubling because the British would inevitably attack those islands. Although the French decided not to request American support pursuant to the guarantee clause, Americans could not ignore the possibility that changed circumstances might lead the French to seek support. Resolution of this and other problems was further complicated by the fact that Congress was not in session, which raised the issue of the extent of the President's constitutional authority to take unilateral action.

Soon after President Washington arrived in Philadelphia, a cabinet meeting was convened at his residence to consider some of the more important issues implicated by the war. Jefferson immediately suspected that the President's agenda for this important meeting had been written by Hamilton, and he was probably correct. Hamilton used the meeting to launch a direct assault upon Franco-American relations by arguing that the advent of a revolutionary government in France gave the United States the right under international law to suspend the treaties with France and even to "declare them forever null." The Times of London liked this innovative use of Rebus sic stantibus, but the argument was truly obnoxious to friends of liberty and the French Revolution. Hamilton was arguing that the treaties were binding while France was ruled by a King, but they were suspended by the advent of a republic. One American, who may or may not have heard about Hamilton's position, wrote: "If we were to help France in any of her wanton wars, when under the old form of her government, shall we remain unconcerned & guilty spectators when she fights for the dearest rights of man?" This powerful argument soon appeared in the nation's newspapers.

Rather than decide the issue at the Cabinet meeting, the President asked for written opinions. Hamilton, with the blind support of Secretary of War Henry Knox, concluded that the treaties could be suspended or declared void while Jefferson and Attorney General Edmond Randolph opined that the treaties remained in full force. At a subsequent cabinet meeting, President Washington resolved the issue against Hamilton. Washington assured Jefferson that "he had

75 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 8 (1832); [PHILADELPHIA] NATIONAL GAZETTE, May 15, 1793.

8See AMMON, supra note 4, at 28. For the specific concern about changed circumstances, see James Madison to Thomas Jefferson (June 13, 1793), in 15 THE PAPERS OF JAMES MADISON 28-30 (T. Mason et. al. eds., 1985).

never had a doubt about the validity of the treaty: but that since a question had been suggested he thought it ought to be considered.'

At the first cabinet meeting, Hamilton also argued that the President should issue a formal proclamation of neutrality, which Jefferson opposed on prudential and legal grounds. Jefferson believed "that a declaration of neutrality was a declaration there should be no war, to which the executive was not competent." Only the Congress could decide whether or not the nation should go to war. The other members of the cabinet persuaded Jefferson that the President needed to remind Americans that the country was at peace and that our citizens should refrain from attacking British interests. In response, Jefferson acquiesced in a proclamation but stipulated that the proclamation should not use the word neutrality, which was freighted with legal implications. Following this agreement, a proclamation drafted by the Attorney General was published to the nation. Although the word neutrality was not used, the proclamation was then and has always been viewed as a proclamation of neutrality.10

Jefferson confided to his friend and ally James Madison, "I fear that a fair neutrality will prove a disagreeable pill to our friends, tho' necessary to keep us out of the calamities of a war." His prediction that neutrality would "prove a disagreeable pill" immediately came to pass. Almost as soon as the Neutrality Proclamation was published, critics began assailing it as ungrateful to the country that so recently had provided crucial assistance in the revolution against Great Britain. The critics went on to insist that the Proclamation was unwise and even illegal. In early June, a particularly virulent series of open letters addressed specifically to the "President of the United States" and written under the pseudonym, *Veritas*, was published in the capital. *Veritas I* complained that the Proclamation "has the appearance of double dealing [and] savours of monarchical mystery or court intrigue." In subsequent letters *Veritas* attacked the "court satellites [who] may have deceived" the President. These "satellites" were "interested and designing men." Finally, *Veritas* asked the President "whether you consider yourself vested with legal powers to annul solemn treaties by proclamation." *Veritas* believed that Congress should "be speedily convened [to] let all branches of the government unite their councils and their efforts for the promotion of the public good."11


12 See Thomas Jefferson to James Madison (April 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 619-20. For *Veritas*, see [PHILADELPHIA] NATIONAL GAZETTE, June 1, 5, 8, & 12, 1793. For other, less virulent attacks on neutrality and the Proclamation, see To the President of the
III. PACIFICUS: THE “EXECUTIVE POWER” CLAUSE

Hamilton quickly responded to Veritas and other critics of the Proclamation. In a series of seven newspaper essays, written under the pseudonym Pacificus, which means Peacemaker, he presented a comprehensive defense of the President’s action. Although Hamilton used a pseudonym, his authorship of the essays was widely known and even reported in newspapers. All but one of the essays addressed issues of little or no lasting significance, but the wisdom of his Pacificus No. 1 is as valuable two centuries later as it was the day he penned it. In the first essay, Hamilton carefully explained the President’s constitutional authority to issue the Neutrality Proclamation. 3

Hamilton’s analysis is a careful and lucid argument that is firmly grounded in the structure and actual words of the Constitution. He explains exactly how the Constitution enables the Executive Branch to formulate and implement an effective foreign policy. Hamilton also forthrightly addresses the apparent conflict in the Constitution between the President’s and the Congress’s powers over foreign affairs. He saw that the Executive and Legislative Branches have overlapping or concurrent powers, and he explained the practical significance of these concurrent powers. Pacificus No. 1 specifically addressed the objection by Veritas and others that the Neutrality Proclamation was made by the President without lawful authority. Hamilton explained that the Proclamation was made simply to announce to the countries at war that the United States “is in the condition of a Nation at Peace with the belligerent parties, and under no obligations of Treaty, to become an associate in the war with either of them.” At the same time, the Proclamation informed American citizens of the United States’ status as a neutral country and warned American citizens not to violate the nation’s duties of neutrality. “This, and no more,” wrote Hamilton, “is conceived to be the true import of a Proclamation of Neutrality.” 4

Hamilton agreed that the Treaty of Alliance required the United States to go to war under certain circumstances. But he believed and explained in subsequent installments of his Pacificus essays that as a matter of what today we call international law, the present war did not trigger the Treaty’s guarantee clause. In other words, “the Proclamation is virtually a manifestation of the sense of the

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United States, [PHILADELPHIA] NATIONAL GAZETTE, May 15, 1793 (but not signed Veritas); An American, id., June 12, 1793. See also It Is At All Time the Privilege, [PHILADELPHIA] NATIONAL GAZETTE, Aug. 7, 1793 (reprinted from a New York paper). The final Veritas, published on June 12, may be from the pen of a different author. Its heading and writing style is different from the first three pieces. We do not know Veritas’s identity. Ambassador Genet foolishly thought the essays were written by Thomas Jefferson, while Jefferson, in a fit of paranoia, believed that they were written by one of Hamilton’s minions to turn President Washington against the pro-French cause. See AMMON supra note 4, at 78.

13 See New York Journal & Patriotic Register, July 31, 1793. See also A Democrat, [PHILADELPHIA] NATIONAL GAZETTE, Aug. 14, 1793. Pacificus Nos. 2 & 3 dealt with the interpretative problem of whether, as a matter of international law, the specific Guarantee Clause in the Treaty of Alliance obligated the United States to go to war. Pacificus Nos. 4-6 advanced reasons of prudence and policy for not going to war. In Pacificus No. 7, Hamilton explained the reasons of prudence and policy that induced the President to issue the Proclamation sooner rather than later.

14 See Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 34 (emphasis in original).
Government that the United States are, under the circumstances of the case, not bound to execute the clause of Guarantee."  

Having carefully stated the design and purpose of the Proclamation, he began a methodical yet incisive analysis of the President's constitutional authority. Clearly "the affairs of this country with foreign nations is confided to the Government of the United States." Therefore, the inquiry must be which branch of the federal government is the "proper one to make a declaration of Neutrality." Hamilton obviously thought the Executive was the proper branch, and he initially supported this proposition by a logical process of elimination.  

Hamilton argued that neither the Legislative Department nor the Judicial was empowered to make a declaration of neutrality and that the power, therefore, must as a matter of logic reside in the Executive Department. He noted the obvious fact that the judicial power is limited to the adjudication of "litigated cases" and plainly did not extend to making a declaration of neutrality. As for the Legislative Department, Congress "is not the organ of intercourse between the United States and foreign Nations." Nor does its power extend to "making [or] interpreting Treaties." Therefore Congress is "not naturally that Organ of Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers."  

While Hamilton's restrictive reading of the judicial power is almost self-evidently correct, his cursory analysis of congressional power is not persuasive and amounts almost to a slight of hand. The problem is that the Constitution explicitly vests the Congress with extensive foreign affairs powers. Congress is to "provide for the common Defense and general Welfare of the United States...; To regulate Commerce with foreign Nations...; To define and punish...Offenses against the Law of Nations;... [and] To declare War." In addition, Congress has general supplemental authority under the Constitution's "necessary and proper" clause, which Hamilton already had famously construed as broadly as possible. These provisions obviously comprehend extensive foreign relations powers including the power to make a declaration of neutrality. Indeed since the time of the Neutrality Crisis, Congress generally has been the branch that declares the nation's neutrality.  

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15Id. at 36 (emphasis in original). Hamilton's view of the Guarantee Clause is presented in Pacificus Nos. 2 & 3, in 15 THE PAPERS OF ALEXANDER HAMILTON 55-63, 65-69. Veritas had contended that the Proclamation violated provisions of the Treaty of Amity and Commerce dealing with "prizes brought into our ports by the French cruisers." See Veritas No. III, [PHILADELPHIA] NATIONAL GAZETTE, June 8, 1793. Hamilton took the same tack toward these charges as he did with the Guarantee Clause. He denied that the Treaty was being violated. See Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 34-35.  

16See Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 36-37.  

17Id. at 37-38 (emphasis in original).  

18The limitation of judicial power to judicial cases and controversies has come to be a sacred tenet of constitutional law. The early justices, however, frequently wrote advisory opinions for the executive branch in the form of private letters and published grand jury charges. See William R. Casto, The Supreme Court in the Early Republic 75-82, 126-29, & 178-83 (1995). See also Stewart Jay, Most Humble Servants (1997).  

19U.S. CONST., art. I, § 8; Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97; see generally Henkin,
Fortunately for Hamilton, lack of congressional authority was not a *sine qua non* for his analysis. One of his key insights was that Congress and the President have concurrent powers over many aspects of foreign relations. Under the theory of concurrent powers, lack of congressional authority was not necessary, but proof of presidential authority was essential.

Hamilton began his analysis of Presidential authority by stating that as a general proposition a proclamation of neutrality falls naturally within the purview of the Executive Department. Anticipating a famous speech by John Marshall, Hamilton noted that the executive is "the *organ* of intercourse between the Nation and foreign Nations." Moreover the executive must interpret and enforce laws, including treaties. Finally the President as Commander-in-Chief "is charged with the command and application of Public Force." These conclusory assertions were presented to introduce and not to conclude his analysis.

Like all good lawyers, Hamilton began his detailed analysis with the words of the document that he was construing. Needless to say he found confirmation of his natural reading of the President's authority in the words of the Constitution. The crucial language is the opening sentence of Article II: "The executive Power shall be vested in a President of the United States of America." Thus Hamilton rejected the notion that these words are not a significant grant of power. To the contrary, the opening sentence was the Constitution's fundamental grant of Presidential power. Hamilton explained that a general grant was necessary due to "the difficulty of a complete and perfect specification of all the cases of Executive authority." 22

As a matter of textual analysis, the most significant objection to Hamilton's emphasis upon the "executive Power" clause is the embarrassing fact that the second and third sections of Article II contain lists of specific Presidential powers and duties. If the "executive Power" clause is a general grant of authority, these specific provisions seem redundant. Hamilton took this objection seriously and pointed out that Article I contained a roughly parallel grant of legislative powers. The express language of Article I, however, vests Congress only with the "Legislative powers herein granted." In contrast, the "executive Power" clause in Article II is a flat grant of executive power that is not expressly limited to the specific "powers herein granted." 23

*supra* note 3, ch. III. As a matter of practice, subsequent declarations of neutrality generally have come from the Congress. See Henkin, *supra* note 3, at 43, 77, & 78.

20 See infra notes 48-51 and accompanying text.


23 See *Pacificus* No. 1, in 15 *The Papers of Alexander Hamilton* 39. See also Kansas v. Colorado, 206 U.S. 46, 81-83 (1907), discussed in Edward S. Corwin, *The President's Control of Foreign Relations* 30-32 (1917). What the Constitutional Convention actually may have
In other words, the Constitution’s specific grants of executive power are indeed redundant or as Hamilton more elegantly explained,

The enumeration [of specific executive powers and duties] ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power.

The general grant, itself, should be “interpreted in conformity to other parts of the Constitution and to the principles of free government.”

In addition to this textual analysis, Hamilton pointed to a significant legislative precedent that supported his expansive view of the Constitution’s general grant of executive power. In a brief, three-sentence paragraph, he alluded to the 1789 debate in Congress over the President’s constitutional authority to remove cabinet officers. Although the Constitution specifically addresses the appointment of officers, it is silent on their removal. In the decision of 1789, some congressmen - most notably James Madison - argued that the “executive Power” clause gave the President the power to remove officers, and the Congress passed legislation providing or recognizing a Presidential removal power. Relying upon this legislative decision, Hamilton noted that his analysis of the “executive Power” clause is a “mode of construing the Constitution [that] has indeed been recognized by Congress in formal acts, upon full consideration and debate.”

intended by this difference between Art. I and Art. II is unknown. See SOFAER, supra note 3, at 37.

\(^{24}\)See \textit{Pacificus No. 1}, in 15 \textit{The Papers of Alexander Hamilton} 39. When Hamilton wrote that the grant of executive powers should be “interpreted in conformity to other parts of the Constitution,” he had in mind “the exceptions and qualifications which are expressed in the instrument.” \textit{Id.} (emphasis in original). He specifically had in mind treaty powers and war powers, which ordinarily would have been viewed as executive powers but which were partially or completely vested in the Senate and Congress by express constitutional provision. Hamilton also understood that the Senate’s power to approve appointments was another exception or qualification to a power that otherwise would have been viewed as executive. \textit{Id.} at 39.

\(^{25}\)See \textit{Pacificus No. 1}, in 15 \textit{The Papers of Alexander Hamilton} 40. See also FISHER, supra note 3, at 54-58 (discussing the “decision of 1789”). For Madison’s analysis in those debates, see 11 \textit{Documentary History of the First Federal Congress of the United States of America: Debates in the House of Representatives} 845-47, 895-97, & 921-23 (Charlene Bickford et al. eds., 1992) (debates of June 16 & 17, 1789). Hamilton did not emphasize this removal precedent, perhaps because when he wrote as \textit{Publius}, he took the position that consent of the Senate “would be necessary to displace as well as to appoint.” See \textit{Federalist No. 77}, 515 (J. Cooke ed. 1961) (Hamilton). \textit{Publius} and \textit{Pacificus} are not necessarily in conflict on this point. Hamilton stated in \textit{Pacificus} that the Constitution’s general grant of executive powers is subject “to the exceptions and qualifications which are expressed in the instrument.” \textit{Pacificus No. 1}, in 15 \textit{The Papers of Alexander Hamilton} 39 (emphasis in original). If Hamilton, writing as \textit{Publius}, believed that Senate consent to removal was implicit in the Senate’s express power to approve appointments, then \textit{Publius} is not in conflict with \textit{Pacificus}. In any event, Congress’ intervening decision that the Senate’s consent was not necessary should properly have affected Hamilton’s views of the matter. Perhaps Hamilton changed his mind on this issue, or perhaps he simply recognized that his original idea had been rejected by Congress. Other capable Founders fully accepted the use of congressional practice as legitimate precedent in fleshing out the meaning of the Constitution. See Mark Killenbeck, \textit{Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic}, 1999 \textit{Sup. Ct. Rev.} 81, 124-27 (2000) (discussing Madison and Marshall).

If Hamilton changed his mind, Madison experienced a similar intellectual journey with respect
Having established the President’s general executive authority, Hamilton turned to the problem of Congress’s war powers. At first glance, a declaration of neutrality seems the very opposite of a declaration of war and, therefore, does not implicate war powers. Hamilton, however, accepted that the legislative power to declare war “includes the right of judging whether the Nation be under obligations to make War or not.” This expansive reading of the legislative power to declare war would embrace a declaration of neutrality. In addressing the idea of judging whether the nation should make war or not, Hamilton was not indulging in theoretical speculation. The guarantee clause in the Treaty of Alliance with France appeared to oblige the United States to go to war. Hamilton, however, was arguing that, at least at the outset, the President was empowered to judge for himself the nation’s obligations. 26

Hamilton believed that the “executive Power” clause, standing alone gave the President authority to make this determination, but he bolstered his analysis by noting that the Constitution expressly obligates the President to take care that federal laws, including treaties, are “faithfully executed.” As part of this obligation, the President inevitably must interpret the laws to determine their meaning. For example, the Treaty of Amity and Commerce gave France a number of privileges, and Hamilton reasoned that the necessary consequences of this is, that the Executive must judge what are the proper bounds of those privileges — what rights are given to other nations by our treaties with them — what rights the law of Nature and Nations gives and our treaties permit, in respect to those Nations with whom we have no treaties.

Hamilton envisioned a broad authority that extended to determining all “the reciprocal rights and obligations of the United States & of all & each of the powers at War.” Hamilton understood that the Neutrality Proclamation could be justified solely on the President’s duty to see that the laws are “faithfully executed,” and he briefly noted this alternative analysis at the end of Pacificus No. 1. 27

to the President’s removal power. In 1789, when the Congress was debating the issue, Madison confessed that “At first glance he had imagined that the same power which appointed officers should have the right of displacing them. This was a plausible idea.” But upon exploring the matter further, he concluded that the “executive Power” clause gave the President the power to remove officers and the Senate’s approval power should not be expanded to include an implicit right to control the President’s power to remove. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: DEBATES IN THE HOUSE OF REPRESENTATIVES 846, 895, 921. (Charlene Bickford et al. eds., 1992).

26 See Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 40 (emphasis added).

27 See U.S. CONST., art. II, § 3; Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 41-43 (alternative analysis). Hamilton’s decision to de-emphasize his alternative argument exemplifies his superior talents as an attorney/advisor. Everyone who has advised clients — especially clients in government — on significant matters, has encountered situations in which a proposed course of action may be justified by two different or alternative analyses. Of course, the belt-and-suspenders approach is the only way to go in this situation, but there is a tendency to avoid personal responsibility by placing equal emphasis on each analysis. The result is unfocused — perhaps even confusing — advice that has an aura of indecision. Hamilton fought this tendency and clearly emphasized the “executive Power” clause. Being a gifted attorney/advisor, he knew that his “client,” the President and future Presidents, would encounter future questions of authority in which the treaty interpretation approach would not be available. With an eye to unforeseeable
Hamilton advanced another argument that can be supported by reference to the words of the Constitution. He clearly believed that only Congress could declare war, and he understood this power to include an authority to judge whether the nation should make war or not. The power to make war is explicit, but the power to decide not to go to war is implicit. Hamilton believed that the implicit congressional power to reject war did not exclude the President from preliminarily deciding that the nation was not obliged by treaty to go to war and consequently to take executive action to preserve peace. In Hamilton's words,

If the Legislature have a right to make war on the one hand — it is on the other
the duty of the Executive to preserve Peace till war is declared; and in fulfilling
that duty, it must necessarily possess a right of judging what is the nature of the
obligations which the treaties of the Country impose on the Government; and
when in pursuance of this right it has concluded that there is nothing in them
inconsistent with a state of neutrality, it becomes both its province and its duty
to enforce the laws incident to that state of the Nation.

In short, there was nothing wrong with the President taking unilateral steps to
preserve the status quo of peace.28

If Hamilton had concluded Pacificus No. 1 at this point, Helvidius might
never have been written. But Hamilton insisted on reiterating his argument that
the change of government in France had suspended the French treaties. When he
had made the argument in cabinet, Washington, Jefferson, and Randolph handed
him his head. Still smarting from his defeat, Hamilton could not resist parading
his rejected idea before the public. It was, “Once more unto the breach, dear
Friends.” Hamilton again insisted that the change of government suspended the
treaties and that the President had the power to revive the treaties or not by
acknowledging the new French government or not. But Harfleur was not to be
carried. Hamilton’s pet theory of suspension was a forlorn hope that had already
been repulsed by the President and has never gained footing in the United States
as a legitimate principle of international law.29
IV. HELVIDIUS: THE "EXECUTIVE POWER" CLAUSE

As soon as Pacificus No. 1 was published, Thomas Jefferson angrily attacked the essay in a letter to James Madison. Jefferson did not seriously object to the Proclamation, itself. He had agreed to it in cabinet and told Madison that the proper basis for the Proclamation had been explained in an earlier essay, which Jefferson presumed was written by Attorney General Randolph. According to Randolph, when foreign nations engage in war, it is the duty of the United States "to pursue a peaceful line of conduct; unless some treaty [required otherwise]." Randolph then noted that the Treaty of Alliance "as things stood at the time of" the Proclamation could not be construed as requiring the United States to go to war. Presumably he was referring to the fact that Britain had yet to attack any of the French possessions in the West Indies. Moreover, communications from the French government indicated that the United States was not "expected [by the French] to participate in the war." Jefferson did not object to this weak, "milk and water-view" of the Proclamation, but he emphatically disagreed with some "heresies" embedded in Hamilton's elaborate essay.0

In the letter to Madison, Jefferson pointed to three specific "heresies." The first two heresies related to the status of the Treaty of Alliance. Jefferson objected to the specific claim that "we are not bound to execute the guarantee," and he opposed the more general claim that "until the new [French] government is acknowledged the treaties are of course suspended." The third heresy was the idea that the executive was competent "to declare neutrality (that being understood to respect the future)." Jefferson did not believe that a President could unilaterally bind the country to a continuing course of neutrality that would extend into the "future." He thought that these battles had been fought and won in the cabinet, and he was incensed that Hamilton was trying to read his heresies into the President's Proclamation. In a cabinet meeting five months later, Jefferson reiterated these same objections to Hamilton's position.31

Jefferson broadly hinted that Madison should refute Hamilton's arguments: "But is it not a miserable thing that the three heresies... should pass... unanswered?" When Madison did not take the hint, Jefferson made his wishes utterly clear. In a subsequent letter, he urged, "For god's sake, my dear Sir, take

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0See Thomas Jefferson to James Madison (June 29, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 401, 403-04. See also, supra notes 9-10. Except for the word, "heresies," all the quotations in the text accompanying the present footnote are from When Foreign Nations Engage in War, DUNLAP'S AMERICAN DAILY [PHILADELPHIA] ADVERTISER, April 29, 1793, discussed in 26 THE PAPERS OF THOMAS JEFFERSON 404. During cabinet deliberations seven months later, Randolph reiterated the position taken in the April 29 article in DUNLAP'S AMERICAN DAILY [PHILADELPHIA] ADVERTISER. See Jefferson's Notes of Cabinet Meetings (Nov. 8 & 18, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 399-401.

31See Thomas Jefferson to James Madison (June 29, 1793; post script: June 30), in 26 THE PAPERS OF THOMAS JEFFERSON 401-04 (emphasis in original); Jefferson's Notes of Cabinet Meetings (Nov. 8 & 18, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 399-401. Jefferson believed that Hamilton's general argument on the suspension of the treaties and the pretention that the President had some degree of war powers were the more serious of the three heresies. He agreed that there were serious doubts whether the specific clause of guarantee was applicable. See Thomas Jefferson, Opinion on the Treaties with France (April 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 608, 610-11.
Madison was reluctant to assume the task, but he could not refuse such a direct request. He was at his rural estate of Montpelier, and he worried that he did not have access to an adequate library of international law materials. Moreover, he did not have a clear understanding of what compromises had been reached "behind the curtain" in cabinet or how far the President was "actually committed" to all of Hamilton's ideas. Ever the practical politician, Madison was particularly worried that his lack of detailed insider's knowledge might lead him to make "vulnerable assertions or suppositions which might give occasion to triumphant replies."

Even after Madison took pen in hand, his reluctance to enter the fray did not abate. He frankly confided to Jefferson, "I can truly say I find it the most grating [task] I ever experienced." Although Hamilton's essay was straightforward and easily understood, Madison decided to write a technical and complex reply. He believed, "None but intelligent readers will enter into such a controversy, and to their minds [my reply] ought principally be accommodated." He chose to publish his thoughts under the pseudonym, Helvidius, a Roman senator who had vigorously challenged the aggrandizement of imperial power.

After a preliminary *ad hominem* attack upon Pacificus, whom Madison knew to be Alexander Hamilton, Madison explained the specific objectives of his essays. His purpose obviously was to address the heresies that had infuriated Jefferson. Madison restated the heresies by describing them as,

the extraordinary doctrine that the powers of making war and treaties, are in their nature executive; and therefore comprehended in the [Constitution's] general grant of executive power, where not specially and strictly excepted out of the grant.

A refutation of the "extraordinary doctrine" that the President had unilateral constitutional authority to make treaties would address Jefferson's concerns that Hamilton sought to establish the President's right to effect a unilateral suspension or alteration of the French Treaties. Similarly, refuting the claim of unilateral Presidential authority to make war would address Jefferson's objection to the notion that the President was competent to make a declaration of neutrality that would preclude the nation from going to war. In the first four *Helvidius* essays, Madison addressed the general question of Presidential power to make war and treaties, and in the final essay he turned to the guarantee clause.

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32 Thomas Jefferson to James Madison (June 29, 1793; postscript: June 30), in 26 THE PAPERS OF THOMAS JEFFERSON 401-04; Thomas Jefferson to James Madison (July 7, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 443-44.

33 James Madison to Thomas Jefferson (July 22, 1793), in 15 THE PAPERS OF JAMES MADISON 46-47. See also James Madison to Thomas Jefferson (July 30, 1793), in 15 THE PAPERS OF JAMES MADISON 48-49.

34 See James Madison to Thomas Jefferson (July 30, 1793), in 15 THE PAPERS OF JAMES MADISON 48-49. See also James Madison to Thomas Jefferson (July 22, 1793), in 15 THE PAPERS OF JAMES MADISON 46-47. For Helvidius Priscus, see 3 A DICTIONARY OF GREEK AND ROMAN BIOGRAPHY AND MYTHOLOGY 526-27 (W. Smith ed. 1844; AMS reprint 1967).

35 See Helvidius No. 1, in 15 THE PAPERS OF JAMES MADISON 66-67. See also Helvidius No. 4, in 15
In other words, Madison did not write Helvidius as a general discourse upon the scope of the President's executive power. Instead his goals were relatively narrow. Insofar as the Constitution was concerned, his sole purpose was to address the President's power to make war and to make treaties. He explicitly stated his narrow objective in Helvidius No. 1 and restated the objective in each of the subsequent essays. A failure to perceive the limited nature of Madison's arguments was a source of confusion in the twentieth century. From the beginning of the century to the end, virtually everyone assumed that Madison was attempting to present a complete refutation of Hamilton's general theory. He was not.  

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At the beginning of the century, Edward Corwin criticized Helvidius for “its negative character, its failure to suggest either a logical or a practicable construction of the Constitution to take the place of the one it combats.” Edward Corwin, The President's Control of Foreign Relations 28 (1917). See also Arthur Schlesinger, The Imperial Presidency 18 (1973); Sofaer, supra note 3, at 114; Ramsey, supra note 3, at 214-15. But Corwin missed the target. Madison sought only to refute the specific and relatively narrow heresies that the President had unilateral powers to make wars and treaties. Therefore, Helvidius is necessarily negative.

At mid-century, Robert Jackson noted that Hamilton and Madison “largely cancel each other.” See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring). At the end of the century, Louis Henkin wrote that when Hamilton insisted that “the ‘Executive Power’ clause constitutes a large grant of power,” Madison “challenged” him. See Henkin, supra note 3, at 39-40. Accord Rakove, supra note 3, at 17-18; Chemerinsky, supra note 3, at 867-68; Ramsey, supra note 3 at 213-16. But Madison never challenged Hamilton's general theory of executive power, and Hamilton never challenged Madison's specific argument that the President lacked unilateral power to make treaties and wars.

Professor Leonard Levy also failed to understand the limited scope of Madison's project in Helvidius, but instead of simply noting that Madison challenged Hamilton's general theory, Professor Levy concluded that Madison “demolished” Hamilton's analysis. See Leonard W. Levy, Original Intent and the Framers' Constitution 51-52 (1998).

Some scholars have noticed the fact that Helvidius is quite narrowly focused upon war powers and making treaties, but they have not addressed or have given only slight attention to the consequence that Helvidius and Pacificus are in substantial agreement rather than in flat disagreement. See Richard loss, The Modern Theory of Presidential Power (1990) (emphasizing the concept of virtue as a limit upon Presidential power); Clinton Rossiter, Alexander Hamilton and the Constitution 327 n.106 (1964); David Currie, The Constitution in Congress: The Third Congress, 1793-1795, 63 U. Chi. L. Rev. 1, 8-9 n.27 (1996).

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The disconnect between Helvidius and Pacificus is self-evident. The two essayists never joined issue. Hamilton did not dispute Madison’s assertion that the President lacks constitutional authority to make war. To the contrary, he stated and restated in Pacificus and on other occasions that only Congress is constitutionally empowered to “transfer the nation from a state of Peace to a state of War.” Similarly, Hamilton never contended that the President had unilateral power to remove the guarantee clause from the Treaty of Alliance. Instead Hamilton argued that under recognized principles of international law, the United States are “under the circumstances of the case, not bound” by the guarantee clause. Hamilton’s position was based upon a plausible interpretation of the clause’s legal import rather than unilateral Presidential power to ignore or rewrite the clause. Similarly neither Madison nor Jefferson ever disputed Hamilton’s assertion in Pacificus that the “executive Power” clause was a significant general grant of authority. To the contrary, there is general agreement that Jefferson’s and Madison’s words and actions on other occasions indicate that they agreed with Hamilton’s broad theory of executive power.37

One of the several self-evident points that Hamilton made in Pacificus was the simple fact that the phrase “executive Power” was not cut from whole cloth at the Constitutional Convention. The phrase had a well-known (albeit amorphous) meaning. In Europe, the executive power was wielded by Kings and in the field of foreign affairs that power was quite broad. Madison urged that the Western European understanding should be rejected because it was not really focused on the concept of separation of powers and Europeans had “their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince.” If Madison is making the prudential point that a republic should avoid the undiscriminating adoption of a concept inevitably imbued with monarchial values, his point is well taken. In contrast, Madison could not possibly have meant that the Americans who framed and ratified the Constitution understood the phrase “executive Power” as a concept unrelated to their common European heritage. Madison’s rejection of the European understanding of the concept of executive power must be read in context. He was speaking specifically about executive power to make treaties and wage war. Given the Constitution’s express provisions that deprive the President of unilateral authority over these two specific matters, Madison’s analysis makes eminent sense. That does not mean, however, that Madison rejected the European understanding in respect of the administration of foreign affairs that does not involve declaring war or making treaties.38


38 See Helvidius No. 1, in 15 The Papers of James Madison 68-72. For the Founders’ shared understanding of the ordinary meaning of executive powers, see Yoo, supra note 3, at 196-217;
Madison's exclusive concern with wars and treaties is particularly evident when he addressed the President's constitutional authority to remove executive officers. Hamilton had cited the Congress' 1789 decision that the President had this constitutional authority as legislative precedent for Hamilton's construction of the "executive Power" clause and Madison could hardly disagree. In the Congressional debates, Madison had publicly argued that the "executive Power" clause gives the President a power to remove executive officers and that the power may not be limited by Congress. Therefore, he agreed in Helvidius that "the power of removal...appears to have been adjudged to the President." Given Hamilton’s and Madison’s agreement that the "executive Power" clause vests the President with unenumerated powers, the notion occasionally advanced that "the Framers" did not intend the clause as a grant of substantive authority must be reassessed.39

Instead of renouncing the position that he had espoused four years earlier, Madison chose the lawyerly tactic of distinguishing the removal precedent. He tacitly admitted that the "executive Power" clause was a significant grant of authority but denied that the clause gave the President unilateral power to make treaties and wars. Given the clauses in the Constitution that explicitly address war and treaties, Madison's distinction makes sense and is similar to his treatment of the European understanding of executive power. Nevertheless his analysis of the removal precedent, which Hamilton had cited, indicates that he actually agreed with Hamilton's fundamental point that the "executive Power" clause vests the President with significant constitutional authority.

Madison next turned to a functional analysis of the powers to declare war and make treaties. "A treaty," he wrote," is not an execution of laws: it does not presuppose the existence of laws.” Instead, a treaty is, itself, a law. Therefore to say “that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power.” Madison found confirmation of his natural analysis in the words of the Constitution. He noted that treaties are “emphatically declared by the Constitution to be ‘the supreme law of the law’” and that the power of making treaties is expressly "vested jointly in the President and in the Senate.” From these provisions Madison concluded that the "executive

39 See Helvidius No. 1, in 15 THE PAPERS OF JAMES MADISON 72. Madison's speeches of June 7 & 16 as reported in various newspapers, are reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA DEBATES 845-47, 895-97, & 921-23 (Charlene Bickford et al. eds., 1992)(debates of June 16 & 17, 1789). For the notion that the Founders did not intend the clause as a grant of unenumerated powers, see, e.g., KOh, supra note 3, at 76 & 264 n.35 (citing others).
Power" clause could not reasonably be read to vest the President with unilateral treaty making powers.40

Madison concluded the first Helvidius essay by quoting Hamilton's Federalist No. 75. As a preliminary matter, he explained that the Federalist was a valuable tool in construing the Constitution because

It was made at a time when no application to persons or measures could bias: The opinion given was not transiently mentioned, but formally and critically elucidated: It related to a point in the constitution which must consequently have been viewed as of importance in the public mind.41

Although Madison relished quoting Hamilton against Hamilton, the passage from Federalist No. 75 did little more than establish that the power of making treaties was a hybrid combination of executive and legislative functions. Moreover the passage was not pertinent to Hamilton's analysis because Hamilton did not write Pacificus No. 1 to establish a unilateral Presidential power to alter the Treaty of Alliance. Hamilton consistently took the position that the Treaty, itself, when properly construed in accordance with legitimate principles of international law, did not obligate the United States to take action in support of France.

Turning to war powers, Madison wrote a brilliant explanation of the constitutional decision to strip the power to declare war from the Executive and vest it in the Legislature. Although Europeans and the British viewed the power as executive, Madison insisted that it was really legislative, and he backed up his assertion with a wonderfully lucid explanation. A declaration of war is inherently legislative because the declaration "has the effect of repealing all the laws operating in a state of peace, so far as they are inconsistent with a state of war." The declaration also has the effect "of enacting as a rule for the executive, a new code adopted to the relation between the society and its foreign enemy." Although Madison did not elaborate further, obvious examples from the 1790s are easy to imagine. In times of peace, giving aid and comfort to a foreign nation is permissible, but war would make the same conduct a treasonous violation of a criminal statute. Similarly war would completely change the applicability of more mundane statutes. For example, in Bas v. Tingy, decided in 1800, a naval officer sought a salvage award for a ship that he had recaptured from French privateers. The applicable federal statutes, in effect, provided an award of 1/8 the value of the vessel and cargo when the country was at peace and ½ during war.42

In addition to explaining the clear and direct legislative effect of a declaration of war, Madison pointed to important policy reasons for barring presidents from starting wars. Madison introduced his concern in Helvidius No. 1 by noting, "Those who are to conduct a war cannot in the nature of things, be

41Helvidius No. 1, in 15 THE PAPERS OF JAMES MADISON 72-73 (emphasis in original).
42See Helvidius No. 1, in 15 THE PAPERS OF JAMES MADISON 69 (emphasis in original). "In like manner," Madison continued, "a conclusion of peace annuls all the laws peculiar to a state of war, and revives the general laws incident to a state of peace." Id. (emphasis in original). For the statutory examples mentioned in the text, see AN ACT FOR THE PUNISHMENT OF CERTAIN CRIMES AGAINST THE UNITED STATES, 1st Cong., 2d sess., ch. IX, § 1, 1 Stat. 112, and Act of March 2, 1799, §7, 1 Stat. 709, 716, applied in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).
proper or safe judges, whether a war ought to be commenced, continued, or concluded." He returned to this theme in a later essay when he warned that if war powers were placed in the executive department, the "trust and the temptation would be too great for any one man." But Madison did not limit himself to vague generalities.43

As with all good legal analyses, Madison elaborated upon his vague charges of temptations too great for ordinary people. The Founders had a direct and intimate experience with war, and they knew its ugly subplots of personal aggrandizement. "War," explained Madison, "is in fact the true muse of executive aggrandizement." War creates unusual concentrations of power that are subject to misuse. "In war a physical force is to be created... the public treasures are to be unlocked... the honors and emoluments of office are to be multiplied." And these unusual concentrations of power are funneled through the executive. The President directs the physical force and dispenses the public treasures. The honors and emoluments are enjoyed under the executive patronage. In addition to these inordinate powers, war gives the President an unusual opportunity to garner personal laurels. "It is in war," Madison concluded, "that laurels are to be gathered, and it is the executive brow they are to encircle."44

The passage of two centuries bears out Madison's insight that Presidential laurels are to be garnered in war. Many Presidents have striven for greatness, but there is a consensus that only three attained it. Each of these three great Presidents were leaders in the three most important wars in American history. Lincoln brought the nation through the Civil War, and Roosevelt guided us to virtual victory in World War II. The third war was the Revolutionary War, and the third great president was George Washington.

The presence of George Washington at the head of government in 1793 somewhat embarrassed Madison's analysis. Madison knew that President Washington was utterly trustworthy. Washington was no dictator or would-be king. Like Cincinnatus, he had surrendered his powerful wartime office and returned to his farm at the conclusion of the Revolutionary War. Madison believed that "the trust and temptation [of comprehensive war powers] would be too great for any one man," and George Washington was the exception that made the rule. With implicit reference to Washington, Madison excepted "such as nature may offer as the prodigy of many centuries." Instead he was concerned with unknown presidents in the future that "may be expected in the ordinary successions of magistracy."45

43 See Helvidius No. 1, in 15 THE PAPERS OF JAMES MADISON 71 (emphasis in original); see also Helvidius No. 4, in 15 THE PAPERS OF JAMES MADISON 108.

44 Helvidius No. 4, in 15 THE PAPERS OF JAMES MADISON 108. See also James Madison to Thomas Jefferson (April 2, 1798), in 17 THE PAPERS OF JAMES MADISON 104 ("the Ex. is the branch of power most interested in war, & most prone to it"). For an admirably lucid elaboration of this idea, see Treanor, supra note 38.

45 See Helvidius No. 4, in 15 THE PAPERS OF JAMES MADISON 108. This was a common view of George Washington. See, e.g., Treanor, supra note 38, at 739 (quoting George Mason and Patrick Henry). In selecting the word prodigy to describe President Washington, Madison was invoking two of the word's meanings. First, Washington was an individual possessing personal qualities that excited wonder. In addition, Madison was stating that individuals with Washington's qualities were rare and out of the ordinary course of nature. See 8 THE OXFORD ENGLISH DICTIONARY 1420-
The solution to the problem of vesting too much power in one individual exemplifies a general idea that Madison had presented during the process of ratifying the Constitution. In *Federalist No. 51*, Madison explained – with characteristic elegance and insight – that

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls or government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblig[e] it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

In the case of war powers, there was an extraordinary need for “auxiliary precautions.”

Madison wrote that in monarchies the principal auxiliary precaution was “the personal interest of an hereditary monarch in the government.” But in the case of a republic, the executive does not have the same ongoing, permanent personal interest in the government, because the executive is “an elective and temporary magistrate.” Therefore, there is “an increase of the dangerous temptation” of seeking personal glory through war because a temporary magistrate lacked a monarch’s long-term personal stake in government. One of the Constitution’s auxiliary precautions against this danger is to take the power to declare war from the executive and place it in the legislative. Madison’s extended analysis of war powers is quite persuasive, but it in no way refuted *Pacificus* because Hamilton emphatically agreed that only Congress could declare war. Moreover, Madison introduced his analysis of the differences between an hereditary monarch and an elective and temporary magistrate with an extensive quotation from *Federalist No. 75* in which Hamilton had presented precisely the same analysis to explain the decision to require the Senate’s advice and consent in the treaty making process.

V. PACIFICUS & HELVIDIUS: CONCURRENT POWERS

Hamilton’s analysis of the “executive Power” clause was clear, elaborate, and quite persuasive, but *Pacificus No. 1* makes a second, equally valuable contribution to our understanding of the constitutional relationship between the President and the Congress. Hamilton saw that the potential scope of the “executive Power” clause encompassed matters that might with equal plausibility be the subject of valid Congressional action. The resulting conflict between potential Presidential and potential Congressional power could be resolved by defining the powers as mutually exclusive, but Hamilton saw a different solution.

21 (1933).

46 The *Federalist No. 51*, 349 (James Madison) (J. Cooke, ed. 1961).

He believed that in respect of many matters the Congress and the President are equally empowered to act — that they have concurrent powers.48

Hamilton agreed that the Constitution’s express grant to the Congress of the power “to declare war” excluded a concurrent presidential power to declare war. He also understood that the express Congressional power to declare war “includes the right of judging whether the Nation be under obligations to make war or not.” He believed, however, that the President has a power, even a “duty...to preserve Peace till war is declared.” Therefore the President has a “right...to determine the condition of the Nation, though it may consequently affect the proper or improper exercise of the Power of the Legislature to declare war.” Hamilton viewed the Neutrality Proclamation as a proper exercise of the President’s power “to preserve Peace till war is declared.”49

In a flash of true brilliance Hamilton explained the proper resolution of a conflict between the President and the Congress on a matter over which each had concurrent authority. Hamilton clearly stated that the Executive “cannot control the exercise of [legislative] power.” In other words, the President’s Proclamation did not legally preclude Congress from declaring war. “The Legislature,” Hamilton wrote,

is free to perform its own duties according to its own sense of them — though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions. From the division of the Executive Power there results, in reference to it, a concurrent authority, in the distributed cases.

Hamilton’s idea of “an antecedent state of things” explains the real-life significance of countless Presidential actions.50

When Hamilton wrote of “an antecedent state of things,” he presumably was thinking of the Neutrality Proclamation. If Congress were subsequently to consider supporting Revolutionary France by declaring war upon Great Britain, the President’s Proclamation, with its implicit finding that the country was not under a treaty obligation to go to war, “ought” — to use Hamilton’s words — “to weigh in the legislative decision.” Nevertheless, Congress would be “free to perform its own duties according to its own sense of them.” The President’s Proclamation could not preclude or “control the exercise of that power.”51

Over the years, the ability to create “an antecedent state of things” has been one of the President’s most significant foreign affairs powers. Some of these antecedent states now seem amusing as when Theodore Roosevelt dispatched the Great White Fleet on an around-the-world cruise and then requested a Congressional appropriation to bring the fleet home. Other instances are far more serious as when Franklin Roosevelt announced the destroyers-for-bases deal on the eve of America’s entrance into World War II. The most dramatic example in recent history is President Bush’s response to the invasion of Kuwait.

48See Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 41-42.
49Id. at 40-42.
50See Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 42 (emphasis in original). Hamilton did state that the President could veto a declaration of war. Id.
51See id.
Within a week the President officially announced, "I pledge here today that the United States will do its part... to induce Iraq to withdraw without delay from Kuwait." To fulfill this pledge, he dispatched half a million troops to the Persian Gulf. Congress could have rescinded the destroyers deal and called for an ignominious return of the Persian Gulf forces, but in each case as a practical matter the President's antecedent action created enormous political pressure in support of the President's unilateral decision.

In response to Hamilton's theory of concurrent powers, Madison was particularly concerned with the extent to which a Presidential action would influence the Congress. He suggested two different models. The President's prior act might be viewed as "impos[ing] a constitutional obligation on the legislative decision." More specifically, "the executive may 'lay the legislature under an obligation to decide in favor of war.'" Under a looser model, the President's power to create an antecedent state of things would have "an influence on the expediency of this or that decision in the opinions of the legislature."

After positing the loose model of influence and the extreme model of obligation, Madison made a surprising concession. Specifically addressing the loose model, Madison wrote, "In this sense the power to establish an antecedent state of things is not contested." In Pacificus, Hamilton stated with utter clarity that he viewed the Constitution as providing for something akin to the loose model, and he clearly eschewed the extreme model. Therefore at a fundamental level Helvidius embraces Pacificus.

Needless to say, Madison did not intend Helvidius as a pean to Pacificus. His purpose was to refute undesirable implications that he saw in Hamilton's essay. In particular, he feared that Pacificus could be read as supporting a unilateral Presidential power to take the country to war, and he saw the theory of concurrent powers as potentially encompassing Presidential war powers. Madison read Pacificus as endorsing a Presidential power to require or obligate the Congress to declare a war. Hamilton's clear disclaimer of Presidential power to obligate the Congress to declare war severely complicated Madison's task. Nevertheless Madison persevered.

Notwithstanding Hamilton's disclaimer, Madison focused upon a single line in Pacificus, which - if wrenched from its context - could be construed as endorsing Presidential authority to place Congress under an obligation to declare war. In this part of Pacificus, Hamilton briefly assumed solely for the purpose of argument that the Treaty of Alliance required the United States to join France in the war against Great Britain. He then obstinately reiterated the argument, which he had unsuccessfully advanced in cabinet deliberations, that France's change of government suspended the Treaty. Building on this foundation of sand,


53 Helvidius No. 3, in 15 The Papers of James Madison 102-03 (emphasis in original).

54 See id. at 102.
Hamilton next stated that the President's express Constitutional power to receive ambassadors implicitly empowered the President to recognize the new French government and thereby reinstate the suspended Treaty. Therefore, assuming the Treaty required the country to go to war, Hamilton concluded that a Presidential recognition of France's new government "would have laid the Legislature under an obligation...of exercising its power of declaring war."

Madison's insistence that Hamilton was arguing for a Presidential power to take the country to war was, to say the least, a stretch. In Hamilton's hypothetical, the Congress would be under an obligation to declare war because the Treaty, which was made by the President and approved by a supermajority of the Senate, positively required a declaration – not because the President ordained it. The obligation was a treaty obligation. Moreover, Madison presumably agreed that in Hamilton's hypothetical Congress would be under an obligation to declare war. Madison rejected Hamilton's theory that the treaty might be suspended and then reinstated by the President's recognition of the new French government. Therefore, unless Congress chose to violate the treaty, Madison surely agreed with Hamilton's conclusion that Congress would be under a treaty obligation to declare war.

See Helvidius No. 3, in 15 THE PAPERS OF JAMES MADISON 102-03, (quoting Pacificus No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 41). For the cabinet deliberations, see supra note 10 and accompanying text. Madison forcefully contested Hamilton's idea that the President had implicit power to recognize governments, and to be frank, Madison's analysis on this narrow point is more persuasive than Hamilton's. See Helvidius No. 3, in 15 THE PAPERS OF JAMES MADISON 96-98; David Adler, The President's Recognition Power, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 143-47 (David Adler & Larry George eds., 1996). Nevertheless, Hamilton's viewpoint has prevailed, and today the President is viewed as having an exclusive authority to recognize states and governments. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 204.

Actually the French treaties were approved by the Continental Congress rather than pursuant to the Constitution's treaty provisions. The Supremacy Clause provides, however, that treaties previously approved by the Continental Congress have the same status as treaties made by the President with the advice and consent of the Senate. See U. S. CONST., art. VI. Today there is general agreement that Congress could choose to violate a treaty obligation to declare war and thereby subject the nation to remedies available under international law to nations aggrieved by the breach. See GLENNON, supra note 3, ch. 6 (1990). See also HENKIN, supra note 3, at 195-96 & 209-14. Hamilton agreed. Three years later in the context of the dispute over whether the Jay Treaty should be implemented, he advised President Washington that the Congress could enact legislation that would unilaterally "pronounce the cases of non-operation & nullity of a Treaty." Enclosure to letter to George Washington (March 29, 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON 99. More specifically, when the Cabinet revisited the Neutrality Proclamation in November, 1793, Jefferson's notes of the discussion indicate that Hamilton agreed that "the Congress... might declare war in the face of a Treaty, and in direct infraction of it." Jefferson's Notes of Cabinet Meeting (Nov. 21, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 411-13. The notes are somewhat garbled because Jefferson writes that Hamilton went on to state "that the constitution having given power to the President and Senate to make treaties, they might make a treaty of neutrality which should take from Congress the right to declare war in that particular case." Id. These two statements, one after the other, seem in flat contradiction, but they are quite consistent with the modern view of the issue. Presumably Hamilton meant that as a matter of domestic law Congress could declare war in violation of a treaty, but the declaration would nevertheless violate international law.
Many years later after Madison had essentially retired from public life, he looked back at *Helvidius* with regret. He acknowledged that *Helvidius* was a "political tract [that] breathes a spirit which was of no advantage either to the subject, or to the Author." Madison did not identify the portions of *Helvidius* that he regretted, but he surely did not mean to recant his discussion of the reasons for taking the power of declaring war from the executive and vesting it in the Congress. On the other hand, Madison's distortion of Hamilton's hypothetical case of a treaty requiring war is indeed regrettable.

In addition to tendentiously distorting a single line from *Pacificus*, Madison argued that there was no logical basis to cabin Hamilton’s argument short of Presidential warmaking. Madison explained that *Pacificus* had defined war powers to include the right to judge whether or not the nation should go to war. Therefore, if the President is empowered to determine that the nation should remain neutral and not go to war, Madison claimed that the President must have a parallel power to decide that the nation should go to war. In retrospect, his sterile, logical critique of Hamilton’s words without regard to their context seems an unbecoming play on words—a political pun.

In fact, Hamilton stated in *Pacificus* that he was arguing for a Presidential power to preserve peace or neutrality and that this power did not extend to a Presidential authority to declare war. Given Hamilton’s explicit disclaimer, Madison’s arid logic only makes sense if the power to declare war and the power to preserve peace are monolithic and inseparable. As a general proposition all the Founders—including Madison—sincerely believed that peace is more desirable than war. Moreover the Constitution explicitly address the power to declare war but is silent on peace. Therefore, Madison’s linguistic maneuverings have no credibility.

Madison’s entire approach to *Helvidius* is puzzling. His overall style suggests that the essays are a systematic refutation of Hamilton, but upon close reading, *Helvidius* systematically refuses to grapple with *Pacificus*. Notwithstanding Hamilton’s disclaimer of any pretensions to Presidential warpowers, Madison devoted much of his efforts to proving that the President lacks authority to take the nation to war. Similarly on the issue of concurrent powers Madison limited himself to refuting an extreme model that Hamilton expressly disavowed.

Perhaps Madison simply did not trust Hamilton. We know that Jefferson’s distrust of Hamilton verged on paranoia. From the onset of the Neutrality crisis, Jefferson consistently viewed Hamilton as a puppeteer engaged in all sorts of sinister plots. Jefferson believed that Hamilton was secretly manipulating the President, that *Veritas* was written by one of Hamilton’s tools, and that someone might be conspiring to intercept Jefferson’s correspondence with Madison. Madison could not help but be influenced by his friend’s paranoia, which after all

58See *Helvidius* No. 2, in 15 THE PAPERS OF JAMES MADISON 81-82. Madison advanced additional comparably arid but virtually impenetrable logical analyses. *Id.* at 84-85 & 85-86.
was at least partially justified. Madison's distrust came close to the surface when he warned,

that however the consequences flowing from [Pacificus], may be disavowed at this time or by this individual, we are to regard it as morally certain, that in proportion as the doctrines make their way into the creed of the government, and the acquiescence of the public, every power that can be deduced from them, will be deduced and exercised sooner or later by those who may have an interest in so doing.

If Madison actually believed that Hamilton's express disclaimers were false, Helvidius becomes more comprehensible.60

VI. CONCLUDING THOUGHTS

The unfortunate history of Pacificus and Helvidius in the twentieth century was shaped by two highly talented and admirable men. At the beginning of the century, Edward Corwin misread the essays and pronounced them to be a fundamental dispute over the general meaning of the “executive Power” clause. A few decades later, Robert Jackson considered the essays – perhaps under the influence of Corwin’s earlier analysis. Jackson's views probably crystalized on the eve of the nation's entry into World War II when he was the Attorney General. In any event, when he was a Supreme Court justice about a decade later, he pronounced that Hamilton and Madison “largely cancel each other.” In the second half of the century, what were students of the subject to do when the most respected scholar of the Presidency and a highly regarded Supreme Court justice – with special expertise on the interplay between the Constitution and foreign affairs – had so spoken?61

Reading Pacificus and Helvidius is a rite of passage for students of foreign affairs and the Constitution. First comes Hamilton's luminous essay and then the dark pit of Helvidius. Madison had valuable learning to impart, but his essays are lengthy, meandering, disjointed, tedious, and at times hypertechnical. The work is almost impossible to organize into a cohesive system. To Justice Jackson and many others, they are “as enigmatic as the dreams Joseph was called upon to interpret for the Pharaoh.”62 This daunting problem of interpretation probably

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60 See Helvidius No. 1, in 15 THE PAPERS OF JAMES MADISON 106. A similar fear is voiced in It is at All Time the Privilege, [PHILADELPHIA] NATIONAL GAZETTE, Aug. 7, 1793 (reprinted from a New York paper). For Jefferson’s fears specifically mentioned in the text, see supra notes 9 & 12 and accompanying text; Thomas Jefferson to James Madison (June 29, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 401-04.

61 See EDWARD CORWIN, THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS ch. 1 (1917); CORWIN, supra note 3, at 16-17 & 210-11; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Whether Jackson actually read Pacificus and Helvidius is unclear, but he may well have consulted Corwin in the context of his famous Destroyers-for-Bases opinion that was written the year after Corwin’s book on the President was published.

62 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634. At least one capable scholar has chosen to ignore Pacificus and Helvidius because the essays “present difficult questions of interpretation.” Powell, supra note 3, at 1476 n.13. Professor Powell also notes that “it is unclear what weight to give [the essays] as expressions of their authors’ constitutional views.” Id. Presumably he is referring to the common perception that Madison contradicted Helvidius on other
has contributed to a tendency to accept Corwin’s and Jackson’s pronouncements on faith.

The net result has been a scholarship at war with itself. A good example is found in Professor Louis Henkin’s enormously valuable book, *Foreign Affairs and the U.S. Constitution*. Everyone recognizes the empirical fact that in the two centuries since *Pacificus* and *Helvidius*, the President has routinely exercised a broad executive power over foreign affairs that cannot be justified by reference to the specific powers and duties listed in Article II of the Constitution. Professor Henkin understands that *Pacificus* supports this longstanding Presidential practice, but citing *Helvidius*, Professor Henkin notes that Hamilton’s analysis has been “often challenged [and] has had a mixed reception.” He expressly relies upon Corwin and Jackson to paint a picture of two centuries of Presidential conduct that is of dubious constitutional validity.63

The prevailing scholarly ambivalence about the “Executive Power” clause occasionally intrudes into Supreme Court decisions. For example, when the Court in *Crosby v. National Foreign Trade Council* recently cited provisions of the Constitution supporting the President’s general power over foreign affairs, the Court eschewed the “executive Power” clause and limited itself to the President’s power over treaty-making and the appointment and reception of ambassadors. This noteworthy silence is unfortunate because everyone recognizes the simple fact that if *Pacificus* is correct, “the accumulation by the President of vast powers in foreign affairs is neither surprising nor improper (and the Constitution ceases to be as strongly inarticulate about foreign affairs as appears).” James Madison did not dispute *Pacificus* on this score except to note that the President’s foreign affairs powers are limited by Congress’s express power to declare war and the Senate’s express power to approve treaties.64

To be sure, Justice Jackson said in the *Steel Seizure Case*, “I cannot accept the view that [the “executive Power” clause] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.” His bald assertion, however, must be read in the context of his opinion. Jackson was not considering the question whether the clause was a significant grant of power. Rather, he was addressing whether the clause granted the President an exclusive power “beyond the control of Congress” to seize the steel industry. The present essay has demonstrated that Madison and Hamilton agreed that the clause was a significant grant of authority. Indeed a majority of the Supreme Court in *Myers v. United States* so held. When occasions. See, e.g., Edward S. Corwin, The President’s Control of Foreign Relations 28-30 (1917); Henkin, supra note 3, at 338 n.13; Sofaer, supra note 3, at 231, 296, & 303. This common perception, however, stems from a misreading of Helvidius. See supra note 36 and accompanying text. As for Hamilton, his discussion in *Pacificus* of the removal power is in conflict with a casual statement by him in The Federalist, but the conflict is minor and easily explained. See supra note 25.

63SeeHenkin, supra note 3, at 39-40. For much the same view, see Koh, supra note 3, at 79-80; Fisher, supra note 3, at 16-17. The continuing influence of Corwin is also expressly noted in John E. Nowak & Ronald D. Rotunda, Constitutional Law 205, 208, & 211 (5th ed. 1995); Koh, supra note 3, at 267 n.58; Sofaer, supra note 3, at 114.

Hamilton and Madison agree upon an analysis of constitutional power, a majority of the Supreme Court has followed that analysis, and a course of Presidential conduct spanning two centuries is consistent with that analysis, we may safely limit Jackson’s analysis of the “executive Power” clause to comparatively rare situations in which there is actually a direct conflict between Congress and the President. Jackson, himself, so limited his analysis. 65

Justice Jackson was concerned that the “executive Power” clause seems to be “a grant in bulk of all conceivable executive power” – that the clause had no readily discernable limits. Madison was concerned with the same problem, and his Helvidius essays are an extended explanation of two specific limits to the President’s executive power. He stated and frequently restated that the Constitution does not give the President power to declare war and unilateral power to make treaties. Moreover Hamilton agreed that these specific constitutional grants of power to the Congress and the Senate limited the President’s power. Some have assumed that Hamilton was arguing that these specific grants were the only limits upon the President’s broad and amorphous executive power, but that clearly is not the case. His position was that the Constitution, itself, limited executive power by vesting the Congress and the Senate with an exclusive power to declare war and consent to treaties and appointments of officers. In addition, Hamilton’s theory of concurrent powers, which usually is viewed as an expansion of Presidential power, provides a supple and pervasive constitutional process for checking the President’s expanded power. 66

Today everyone agrees that the President and the Congress exercise concurrent powers, but some ambivalence persists about the doctrine’s theoretical legitimacy. Notwithstanding Hamilton’s articulation of the doctrine in Pacificus, some have relied upon Helvidius for the proposition that the Founders rejected the idea of concurrent powers under the Constitution. Instead of tracing the idea back to Hamilton, the modern acceptance of concurrent powers usually is based upon longstanding practice and Justice Jackson’s Steel Seizure opinion. 67

65See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 640-42 (Jackson, J., concurring). In Myers v. United States, 272 U.S. 52 (1926), the Court held that the “executive Power” clause constitutes a significant grant of authority and in the process quoted from Pacificus No. 1, with approval. See generally Fisher, supra note 3, ch. 3.

66In theory, the scope of the Congress’ exclusive power to declare war and the necessity of the Senate’s advice and consent in respect of treaties would operate as limits upon the executive power. Being good lawyers, Hamilton and Madison could not resist the temptation to talk about whether these limits should be construed narrowly or broadly. Hamilton argued that war and treaties were inherently executive matters and that the Congress’s and the Senate’s express powers over these matters were exceptions that should be “construed strictly – and ought to be extended no further than is essential to their executive.” Pacificus No. 1, in 15 The Papers of Alexander Hamilton 42. In response, Madison made exactly the same point, except that he argued “that the powers of making war and treaty being substantially of a legislative, not an executive nature, the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on those subjects.” Helvidius No. 1, in 15 The Papers of James Madison 69. Both of these arguments for conflicting narrow constructions should be dismissed as rhetorical flourishes because the powers of making wars and treaties are mixed powers. Neither is inherently executive or inherently legislative.

67See Henkin, supra note 3, at 86 (relying upon Helvidius). For the modern tendency to ignore
To the extent that the ambivalence about the theoretical underpinnings of concurrent powers is based upon Helvidius, the ambivalence is unwarranted. To be sure, Madison strenuously opposed an extreme model of concurrent powers that would have barred the Congress from overriding prior a Presidential decision. Neither Hamilton nor anyone else, however, has ever advocated the extreme model of concurrent powers that Madison rejected. Instead Hamilton advocated a looser model, and Madison expressly embraced a loose model of concurrent powers that vested the President with authority to make pronouncements of fact that inevitably would have a significant political influence upon the Congress.

Although Hamilton surely agreed that Madison’s loose model of influence was unobjectionable, Pacificus presents a somewhat stronger model. According to Hamilton, the President’s Proclamation was more than a public expression of George Washington’s private opinion. The Proclamation announced the United States government’s official position. Until the President changed that position (presumably in response to changed circumstances) or the position was overridden by Congress (as by a declaration of war), the nation’s official status of neutrality would continue unchanged. Perhaps Madison would have objected to this intermediate model as unconstitutional, but we will never know. He never addressed it. His remarks were addressed to a strong model of concurrent powers that authorized the President to place the Congress under an obligation to follow the President’s antecedent decisions.

Today no one seriously questions the existence of concurrent powers. The more serious constitutional issue arises from the fact that when two branches of government have concurrent authority over the same subject matter, the branches inevitably come into conflict. Moreover, the potential for conflict is enhanced by the breadth of the overlap between the Congress’s and the President’s powers. Hamilton undoubtedly understood the potential overlap to be broad. As a general proposition, he believed that the Constitution’s grants of authority to the national government should be construed quite broadly. He believed that the Congress had a broad implied legislative authority and that the President had a similarly broad executive authority.

The existence of a broad overlap of concurrent powers necessitates a method for resolving the conflicts between the legislative and the executive. Hamilton understood this problem and decided that the Congress’ exclusive power to declare war included a power to override the President’s concurrent power to declare neutrality. Because Hamilton’s purpose in writing Pacificus was specifically to defend the Neutrality Proclamation, he did not elaborate upon conflicts between the Congress and the President over matters other than the Proclamation.

Although Hamilton did not offer a general framework for resolving foreign affairs conflicts between the Congress and the President, Justice Jackson did. The three-part model that he outlined in the Steel Seizure Case orients all

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Hamilton, see id. at 94-95; Glennon, supra note 3, at 15-16; Koh, supra note 3, at 107-10.

See Pacificus No. 7, in 15 THE PAPERS OF ALEXANDER HAMILTON 135.

See Rossiter, supra note 36, ch. 6. For the President’s international authority, see generally Pacificus No. 1. For Congress, see Hamilton’s opinion on the Bank, supra note 19.
contemporary analyses of these conflicts. *Pacificus* paints an expansive picture of concurrent executive power and notes an overlapping congressional power to correct Presidential errors. Jackson's view of the matter was much the same as Hamilton's, but he placed more emphasis upon the Congress' power to override otherwise lawful Presidential actions. Although Jackson believed that the power was a vital check to Presidential excess, he understood that the power was a concurrent one that only Congress could exercise: "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems."

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70Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). For Jackson's three-part model, see generally HENKIN, supra note 3, at 94–96.
Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.

I. INTRODUCTION

The Framers of the Constitution attempted to redress the inadequacies of the Articles of Confederation in the area of foreign affairs by vesting certain powers expressly in a unitary executive. Thus, traditionally the President acts as the sole organ of the federal government in foreign affairs. His status in this role is not challenged with respect to the express or implied powers granted to the executive by the Constitution, or in a situation in which a constituent’s or sub-national entity’s actions conflict with federal law under the Supremacy clause. One might then assume that state or local action in foreign policy that is not expressly or impliedly precluded by the Constitution would be constitutional. This assumption is unsupported by modern jurisprudence.

A federal common law has developed since the 1960’s that vests exclusive power to conduct foreign affairs in the federal government, prohibiting interference from states and localities. Commentators and courts consistently agree that within the foreign policy realm, there exists a broad constitutional principle that foreign affairs are not subject to traditional notions of federalism. The United States is “one people, one nation, one power” in its relationship to other nations. James Madison argued that “if we are to be one nation in any respect, it clearly ought to be in respect to other nations.”

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3 See U.S. CONST. art. II, § 2, cl. 2.

4 See, e.g., Curtiss-Wright, 299 U.S. at 319.

5 See generally Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1643 (1997) (arguing that the common law doctrine of complete federal foreign policy preemption lacks justification, and that there was no federal preemption for 175 years of the nation’s history).


7 Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

The rationale for federal preemption, however, is not textual. The Constitution expressly confers upon the President the power to command the military, to make treaties, and appoint ambassadors. To Congress, it grants war powers, commerce power and control of the purse strings. Beyond the express powers and implied limitations of the Constitution, there is not an equivocal textual basis for federal preemption of foreign affairs. What then is the role of federalism in foreign affairs?

Recently, the Supreme Court grappled with this issue in Crosby, Secretary of Administration and Finance of Massachusetts v. National Foreign Trade Council. In Crosby, the Court examined the constitutionality of state participation in foreign relations where such action is not expressly precluded by the text or preempted by the Supremacy clause. The Court held that Massachusetts' foray into the international arena through its legislation establishing "selective purchasing" regulations that would bar the state from buying foods and services from companies doing business with Burma, was unconstitutional. The Massachusetts Burma Law "impermissibly infringed on the federal government's power to regulate foreign affairs."

The purpose of this note is to examine the historical, structural and textual basis for the Court's unanimous decision, and propose a more formalistic approach that adapts to the increasingly global world. Section II of this note discusses the human rights situation in Burma prompting the Massachusetts law and the specific facts in Crosby. Section III will survey a history of the federal foreign policy preemption doctrine that serves as the basis for the Crosby decision. Section IV analyzes the effects of Crosby and its conflict with Separation of Powers principles. This note argues that there is no textual basis for a constitutional limitation upon sub-national participation in foreign affairs apart from the express preemption of the Supremacy Clause, the explicit subjects such as war and treaty-making in Article I §10, and the implied preclusions in Article I, §8, such as the dormant Foreign Commerce Clause.

II. HISTORICAL BACKGROUND

A. Military Rule and Human Rights Abuses in Burma

The United States State Department has repeatedly declared that "the people of Burma continue to live under a highly authoritarian military regime that is widely condemned for its serious human rights abuses." The governing regime

9 See U.S. Const. art. II, § 2, cl. 2.
10 See U.S. Const. art. I, § 8, cl. 1
12 Id. at 2302.
in Burma at the time, the State Law and Order Restoration Council (SLORC), was described in State Department reports as "continu[ing] to dominate the political, economic, and social life of the country in the same arbitrary, heavy-handed way that it has since seizing power in September 1988 after harshly suppressing massive pro-democracy demonstrations."\(^5\) There continue to be credible reports that "soldiers have committed serious human rights abuses, including extra-judicial killing and rape."\(^6\) State Department officials estimate that there are at least 100,000 people fleeing the oppression and danger that the SLORC has inflicted on its minority populations.\(^7\) Members of the minority groups who do not escape are captured or forced into military camps.\(^8\) Many international organizations, including the United Nations, have reported human rights violations, including: summary execution, systematic racial discrimination, population relocation, prolonged arbitrary detention, torture, rape, and forced portering.\(^9\) The regime's human rights actions violate the United Nations charter and five other international treaties considered legally binding on Burma.\(^10\)

\[\text{B. Crosby v. NFTC: The Facts}\]

In reaction to the abhorrent conditions in Burma, the people of Massachusetts enacted the Burma Law in 1996.\(^11\) The law barred state entities from purchasing goods and services from businesses identified on a restricted purchase list as having done business with Burma.\(^12\) There were three exceptions to the ban on purchasing: when procurements are "essential," if the procurement is of medical supplies, and if the procurement efforts elicit no comparable low bid or offer by a person not doing business with Burma.\(^13\) The statute also required the Secretary
of Administration and Finance to compile a list of firms providing financial services to Burma, having their principal place of business in Burma, promoting the importation or sale of natural resources, or providing any goods or services to the government of Burma. The law aimed to redress the egregious situation in Burma and encouraged Congress to take similar measures. It was reported to have received such strong support in the legislature that it would likely have become law through override, even if [Governor William F.] Weld had vetoed it.

Three months after the Burma law was enacted, Congress passed a statute sanctioning Burma. The federal act authorizes the President to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and quality of life in Burma." The law prohibits most bilateral assistance and multilateral aid.

The President subsequently issued an executive order prohibiting, with some exceptions, new investment in Burma by U.S. individuals and corporations, reasoning that the "actions and policies of the Government of Burma constituted an unusual and extraordinary threat to the national security and foreign policy of the United States and declare(d) a national emergency to deal with the threat."

Despite the gravity of abuse in Burma, the Massachusetts statute was received bitterly by many businesses who appeared on the list. They were collectively represented by the National Foreign Trade Council, a non-profit agency based in Washington D.C. and comprised of nearly 600 corporate members. Thirty-four of its members were on the Massachusetts restricted purchase list in 1998.

The NFTC brought an action against the Commonwealth of Massachusetts petitioning the court to find the Massachusetts statute unconstitutional. The NFTC claimed that the statute is unconstitutional for three reasons: (1) it violates the federal government’s exclusive power to regulate foreign affairs, (2) it

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24 Id.
26 Id.
27 See Crosby, 120 S. Ct. at 2291.
28 Id. at 2292.
29 Id.
32 See Crosby, 120 S. Ct. at 2293.
33 See Baker, 26 F. Supp. 2d at 289.
violates the Foreign Commerce Clause, and (3) it is preempted by federal statute and an executive order imposing sanctions on Burma.\textsuperscript{34}

In November 1998, the federal district court awarded a declaratory judgment against Massachusetts,\textsuperscript{35} holding that the statute was unconstitutional under the 1968 Supreme Court precedent, \textit{Zschernig v. Miller}.
\textsuperscript{36} The United States Court of Appeals for the First Circuit affirmed for three independent reasons. The court found that the state statute was an unconstitutional usurpation of federal authority, specifically executive authority, in foreign affairs.\textsuperscript{37} The statute also violated the dormant Foreign Commerce Clause, and was preempted by the Congressional act dealing with Burma.\textsuperscript{38} The Supreme Court granted certiorari to resolve the issue with respect to Massachusetts, and all other states and localities with laws that reach into the foreign realm.\textsuperscript{39}

\textbf{III. Development Of The Federal Preemption Doctrine}

\textit{A. Who Holds The Power?}

In order to fully understand the Court's reasoning in \textit{Crosby} it is necessary to trace the development of the federal common law preemption doctrine in the realm of foreign policy.

Under the Articles of Confederation, many states conducted their own foreign relations independent of other states or a federal agenda.\textsuperscript{40} The Articles were devoid of an effective Supremacy clause, and thereby Congress could not adequately control the states in foreign affairs.\textsuperscript{41} Congress also lacked the power to raise revenue and maintain an effective military, resulting in a shaky Confederation unable to protect itself from persistent European threats. The result was that "states often pursued their own interests in a manner that undermined the collective national interest in military security, a unified trade policy, and diplomatic respect."\textsuperscript{42}

Many proponents of foreign policy preemption believe that its justification is born of these insufficiencies.\textsuperscript{43} The Constitution was intended to redress the nation's vacuum of international authority under the Articles. The Framers (especially the federalists) agreed that the federal government should have strong
foreign affairs powers. Even Jefferson, although an antifederalist, said, "it is indispensably necessary that with respect to everything external we be one nation only, firmly hooped together." Thus, it is apparent that the Framers wanted the federal government to have the ultimate power to conduct foreign relations. It follows then that this power must vest in the President because state activities that interfere with Congressional foreign policy or treaty making powers are already preempted by the Supremacy clause. Removing the states from foreign affairs strengthens presidential power. Equally important to the Framers was a fundamental distrust of a tyrannical executive. The juxtaposition of these two fundamental doctrines is articulated in this question:

Did the constitutional generation envision a President who could pursue a unilateral foreign policy backed up by, in effect, presidential lawmaking power to preempt state activities that stood in its way? Or did they think that the presidential power in foreign affairs should be checked by the need to secure congressional cooperation to give that policy the force of law?

Courts implementing the foreign policy preemption doctrine answer the first question affirmatively, doing away with the traditional concept of separation of powers.

**B. The Court's Answer: The Development of the Foreign Policy Preemption Doctrine**

The Foreign Policy Preemption doctrine holds that state interference in foreign relations is ultimately an unconstitutional interference with the President's power to conduct foreign affairs. State law dealing with foreign matters could not interfere with express Congressional foreign policy or treaty-based foreign policy because both actions would already be preempted by Article VI. The doctrine most significantly applies to those situations in which the state law is in accord with the federal statute, or Congress is silent on the issue.

The first notion that states are unable to pass laws with international implications is found in the Supreme Court's decision in *Chy Lung v. Freeman* in 1875. The court overruled a state law that appointed a Commissioner of

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46See, e.g., Spiro, supra note 43, at 1231.
47See U.S. Const. art. VI, §1, cl. 2.
49Id. at 387.
50Id. at 347.
51Id.
5392 U.S. 275 (1875).
Immigration with nearly unfettered discretion to require bond from unwanted Chinese immigrants. Justice Miller questioned,

Upon whom would such a claim be made? Not upon the state of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it or the Federal government? Justice Miller believed that the Constitution did not allow California to issue a policy that is offensive to a foreign nation. Thus, the birth of foreign policy preemption doctrine.

The next major decision developing foreign affairs power vested exclusively in the federal government was United States v. Curtiss-Wright Export Corp. In Curtis-Wright, a 1934 Joint Resolution of Congress delegated broad powers to the President to prohibit arms sales to countries engaged in armed conflicts. Justice Sutherland, writing for the majority, allowed President Roosevelt's embargo declaring that the President "alone has the power to speak or listen as a representative of the nation." Sutherland admittedly did not find justification for his view within the text of the Constitution. He wrote, "investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." Thus, Belmont relies on an inherent, yet specifically unidentifiable principle of Constitutional law that "Our system of government is such that the interests of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

54 See id. at 277.
55 Id. at 279.
56 Id. at 280.
57 299 U.S. 304 (1936).
58 See id. at 312.
59 Id. at 319.
60 Id. at 318.
61 Curtiss-Wright, 299 U.S. at 318.
62 301 U.S. 324 (1937).
63 See id.
64 Id. at 330.
65 Hines v. Davidowitz, 312 U.S. 52, 63 (1941), reaaff'g United States v. Belmont, 301 U.S. 324
C. Zschernig v. Miller: Constitutional Argument in Favor of State Exclusion from Foreign Affairs?

The Court finally articulated a Constitutionally-based test on which subsequent cases could rely in the case of Zschernig v. Miller. In Zschernig, the Court invalidated an Oregon state statute that denied intestate inheritance of Oregon property to nonresident aliens if their home country would confiscate the property. The statute was clearly a state attempt to deny inheritance to people of Eastern Bloc countries in the depths of the Cold War, thus commenting on the deplorable state of property rights in communist nations, and preventing United States assets from escheating to the enemy. The Court held that the statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress." The Court feared that the act required judges to determine and interpret a foreign country's policy, which was an intrusion upon federal exclusivity in foreign affairs. There was no treaty, federal statute, or foreign commerce issue applicable that would preclude the Oregon statute from existence.

Thus, the Court articulated what one commentator coined the "foreign relations effects test." It commented that several facts of the case negatively affected foreign nations and created a potential for United States embarrassment or disruption. These factors included: (1) the fact that the efforts of the Oregon courts to apply the Oregon law had led state court judges to criticize foreign governments; (2) that the government of Bulgaria had contacted the State Department and objected to the Oregon law; (3) and that while the statute pertained to probate issues which is usually an exclusive question for state courts, probate judges had made negative comments on foreign nations.

Thus, the Court developed a fact-based approach to determining if state actions impair the effective exercise of federal foreign policy without a textual basis for their argument. They relied solely on the previous cases that implied a general need for exclusivity in the foreign realm, and left other states and localities without a framework from which to formulate policy with respect to foreign matters.

(1937).
67 Id. at 430-31.
68 Id.
69 Id. at 432.
70 Id. at 435, n.6.
73 See Zschernig, 389 U.S. at 434-38.
75 See Patrick Thurston, National Foreign Trade Council v. Natsios and the Foreign Relations
This is the principal case for the articulation of the dominant academic view that "the central government alone may directly exercise power in foreign affairs."76 There are three principal arguments espoused to support this logic. First, state interference in foreign policy would be so unmanageable and inconsistent that the "logic of the federal system" must preclude it, even absent a specific constitutional provision.77 Second, the Framers of the Constitution intended to vest within the federal government sole power to conduct foreign affairs, except for the enumerated powers granted to Congress in Article I §10.79 Third, because the text of the Constitution grants many foreign affairs powers exclusively to the federal branch, the Framers must have intended that all foreign affairs power is granted to the national government.80 Thus, Zschernig stands for the principle that, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed."81

IV. THE CROSBY82 HOLDING AND RATIONALE

It was within the Zschernig framework that the Crosby court analyzed the Massachusetts Burma Law.83 The Crosby court found the Massachusetts law unconstitutional for two primary reasons: (1) the state act is preempted and its application is unconstitutional under the Supremacy clause and (2) under Zschernig, the act infringes on the President's exclusive authority to speak for the United States in foreign affairs.84

A. Preemption under the Supremacy Clause

The Crosby majority argued that even without an express preemption provision, state law must yield to a congressional act if Congress intends to occupy the field,85 or to the extent of any conflict with a federal statute.86 The Supreme Court will find preemption where it is impossible for a private party to comply with both state and federal law, and where the state law is an obstacle to the accomplishment and execution of Congress' full purposes and objectives.87 The Court ruled that the Massachusetts Burma law was such an obstacle because

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76 Ramsey, supra note 44, at 365.
78 See Ramsey, supra note 44, at 365.
79 Id. at 366.
80 Id.
81 Natsios, 181 F.3d. at 52.
82 120 S. Ct. 2288 (2000).
83 Id. at 2292.
84 Id. at 2302.
85 Id. at 2293 (citing California v ARC America Corp, 490 U.S. 93, 100 (1989)).
86 Id. at 2294 (citing Hines v. Davidowitz, 312 U.S. 52, 66-7 (1941)).
87 Id. at 2289.
it undermined the intended purpose and natural effect of three federal act provisions. First, the act diminished the discretion of the President to control economic sanctions against Burma, because, although Congress initially passed the federal legislation, it authorized the President to act with as much discretion to exercise economic leverage against Burma, for national security purposes, as law permits. Second, the state act interferes with Congress’ intention to limit economic pressure against the Burmese Government to a specific range. The state act affects foreign and domestic companies, while the federal act only applies to individuals. Thus, the state law conflicts with the federal law by making conduct that Congress has exempted from sanctions illegal in Massachusetts. Third, the state act undermines the President’s authority to speak for the United States among the world’s nations to develop a strategy to end human rights abuses in Burma. Congress’ delegation of power to the President invests him with the maximum authority of the National Government. The court ruled “if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.”

B. Diminishing the President’s Authority to Conduct Foreign Relations

One of the most important themes running through the federal preemption doctrine case law is that without a preemption, the United States will not be able to speak with one voice in foreign affairs. The Crosby Court echoes this logic in holding that, through the federal law, the President has been given full authority to make a political statement and achieve a political result. The Court held that “the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.”

The Court cites a number of protests from United States’ allies in response to the Massachusetts law. The European Union sent an official Note Verbale to the State Department protesting the state act, and declared that it “could have a damaging effect on EU-US relations.” In addition, the EU and Japan issued formal complaints against the United States in the World Trade Organization.

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89 Id.
90 Id. at 2297-98.
91 Id.
92 Id. at 2298.
93 Id. at 2296.
95 Crosby 120 S. Ct. at 2298.
96 Id. at 2299 (citing Hugo Paemen, Ambassador, European Union, Delegation of the European Commission, to William F. Weld, Governor, State of Massachusetts, Jan 23, 1997 App. 75) (correspondence between the Ambassador to the European Union and the Governor of Massachusetts).
97 Id.
Thus, the *Crosby* Court held that the Massachusetts Burma law could not remain because it stands as an obstacle to the President’s authority to develop, unilaterally, a policy towards Burma.\(^9\)

V. ANALYSIS

The *Crosby* Court, by following the federal preemption doctrine, has once again failed to announce a workable standard by which states and localities can participate in the increasingly global world. Further, the analysis follows the reasoning of the *Zschernig* Court, and many popular analysts, that the functional benefits of a unilateral foreign affairs power vastly outweigh the need for a textual basis for the argument.\(^9\) This analysis is based on three troubling premises. First, the Court seems to rely on “the logic of the federal system” in granting the President full authority to conduct foreign relations for the United States.\(^10\) This expanding executive authority is very dangerous and contrary to separation of powers principles. This functionalist approach is inconsistent with sound Constitutional reasoning. Second, the Court relied on *Zschernig*’s historical argument that the Framers intended to vest the federal government with exclusive authority in foreign affairs.\(^10\) Third, in applying federal preemption in foreign relations, the Court does not account for the increasingly global, interdependent world.\(^10\)

A. The Court’s Reliance on the “Logic of the Federal System”

Courts have argued that allowing state action in foreign relations would create many conflicting policies and usurp the traditional notions of federal authority to conduct foreign affairs.\(^10\) This argument is functional, not textual. The national government cannot act without uniformity and consistency, and that consistency is diminished by states that are likely to have less expertise in international matters.\(^10\) If this were allowed, it is argued, one state’s actions with respect to a foreign nation could cause that nation to retaliate on the United States as a whole, having no plausible recourse against the individual state.\(^10\) This argument fails to recognize a basic fear of the Framers, that the executive branch

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9. Id. at 2300.

9. Constitutional interpretation approaches to separation of powers questions may be characterized as either functional or formalist. Functionalists argue that the Constitution should be interpreted as a maleable instrument that can change and conform to the modern world. Formalists believe that the Constitution should be interpreted strictly, looking only to the original language, even if the formalist approach is more cumbersome or dated. *See generally* BRAVEMAN, ET AL., *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM*, 73 (2000).


10. Id. at 372.

would be vested with tyrannical power similar to the monarchical King George that they were so desperately trying to escape. Limiting states' action in foreign affairs increases Presidential power.\footnote{106} This is because preemption of state activities that "impair the effective exercise of the Nation’s foreign policy," only limits the President’s power, as Congressional and treaty-based foreign policies would already be preempted by Article VI.\footnote{107}

The second danger of the foreign policy preemption is determining which state laws have international implications.\footnote{108} The standard of determination has been, whether the state law is inconsistent with or would impair the "effective exercise of the Nation’s foreign policy."\footnote{109} The difficulty comes in determining who evaluates the degree of inconsistency or impairment.\footnote{110} If this authority falls with the courts, judges are likely to preempt any state law that conflicts with Presidential policy.\footnote{111} Thus, \textit{Crosby} reaffirmed the Supreme Court’s commitment to \textit{Zschernig’s} foreign effects test but did not illustrate a workable method of applying the test.\footnote{112}

\textbf{B. The Historical Basis for Federal Preemption of Foreign Affairs}

A second justification for the federal preemption doctrine espoused in \textit{Crosby} is founded on a supposed intent of the Framers to vest foreign affairs power exclusively with the national government.\footnote{113} Proponents of federal preemption argue that because the Framers assigned the major international political functions to the executive and Congress, the natural inference is that all matters relating to other nations must fall into the national government’s hands.\footnote{114} Outside of Article I, § 10, there is no enumerated power given to the executive or Congress to be the sole voice of the United States in foreign affairs.\footnote{115} Thus, the argument that the Framers intended to empower the federal government exclusively with the duties and responsibilities of international representation is a misinterpretation.\footnote{116}

\begin{flushright}
106 \textit{See} Ramsey, \textit{supra} note 44, at 347.

107 \textit{Id.} (explaining that presidential preemption would derive not from Article VI, but primarily from Article II executive power vesting clause).


110 \textit{See} Ramsey, \textit{supra} note 44, at 375 (describing the choice between fully independent judgment on the one hand, or judicial reliance on the executive, formal or informal, on the other).

111 \textit{Id.}

112 \textit{See} NFTC v. \textit{Crosby}, 120 S. Ct. 2288 (2000). \textit{Compare} Ramsey, \textit{id.} Whether state actions "impair the effective exercise of the Nation’s foreign policy" is subject to preemption even by Congressional silence on an issue, which can be construed as a federal choice to take no action.

113 \textit{See} Ramsey, \textit{supra} note 44, at 346.

114 \textit{See}, e.g., \textit{Banco Nacional de Cuba} v. \textit{Sabbatino}, 376 U.S. 398, 427 (1964) (basing the holding not on preemption principles, but on pure separation of powers principles).


116 \textit{See} Goldsmith, \textit{supra} note 5, at 1643.
The Articles of Confederation did not grant enough power to one single branch for the United States to effectively conduct foreign relations. This caused the states to disagree on international matters and pursue their own separate policies. States could not protect themselves against external enemies, and they had difficulty formulating international trade policies. To remedy this weakness, the Framers drafted clauses in the Constitution that enumerated several powers that were to fall under Congressional or executive authority. This was not, however, a license granting all foreign relations power to the federal government to the exclusion of the states. One author commented that:

the Constitution's primary innovations to control states in foreign relations were (a) to give the federal political branches, including the new president, broader foreign relations powers that were easier to exercise, and (b) to create a more powerful Supremacy Clause, a federal judiciary, and a President with executive power. Taken together, these mechanisms ensured state compliance with the political branches' foreign relations enactments. But they left the determination of when the national foreign relations interest would be best served by the exclusion of state power largely to the discretion of the federal political branches.

The debate places scholars in two camps: those who favor a strong executive, and distrust the process of congressional decision-making will favor a federal preemption, while those who fear the inflation of executive power and believe in distinct separation of powers principles will oppose federal preemption. This is because Congressional preemption (Supremacy Clause) is expressly mandated by the Constitution, and the only federal policy with which a state would interfere would be an executive one. Thus, foreign affairs preemption broadens presidential power.

The question then becomes, was an unrestrained President what the Framers intended, as the cost of an implied foreign affairs preemption? Scholars who argue for a broad foreign affairs preemption often rely on a quotation from Alexander Hamilton: "The peace of the whole ought not be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." This is, however, not dispositive evidence that

117 Id.
118 Id. at 1644.
119 Id.
120 Id.
121 Id.
122 See Goldsmith, supra note 5, at 1644.
123 See Ramsey, supra note 44, at 378 (citing Harold Hongju Koh, The National Security Constitution (1980)) (discussing whether foreign policy should be managed by the executive branch).
124 See U.S. Const. art. VI, § 1, cl. 2.
125 See Ramsey, supra note 44, at 378.
126 Id. at 379.
127 Hines v. Davidowitz, 312 U.S. 52, 64 n.12 (1941) (citing The Federalist, No. 80, at 446 (Alexander Hamilton) (Isaac Kramnick ed., 1987)).
Hamilton intended to preclude states from foreign affairs. It simply reasserts the Supremacy clause power to trump state laws that conflict with federal ones.\(^{128}\) Further, Hamilton wrote in the Federalist Papers that,

State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act, exclusively delegated to the United States...this alienation of state sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union, where it granted in one instance an authority to the Union and in another prohibited the states from exercising that like authority, and where it granted an authority to the union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.\(^{129}\)

It is also vital to consider the Framers' vehement distrust of a strong executive.\(^{130}\) This distrust led to the development of a sophisticated system of checks and balances.\(^{131}\) Madison wrote, "the management of foreign affairs appears to be the most susceptible of abuse of the all trust committed to a Government...because the body of people are less capable of judging, and are more under the influence of prejudices."\(^{132}\) Thus, the Framers' intent to vest foreign affairs exclusively under the President is at best equivocal.

C. Foreign Affairs Preemption Does not Account for the Increasingly Interdependent, Global World

The Crosby opinion held that the Massachusetts Burma law was a threat to the President’s power to speak and bargain effectively with other nations.\(^{133}\) The question that scholars opposed to foreign affairs preemption posed, then, is one of degree. Where do we draw the line between what interferes with the President’s policies and what is permitted as an exclusively state issue?\(^{134}\) Traditional foreign relations was conducted among the executive branches of national governments, concerning military and diplomatic issues.\(^{135}\) Under this framework, foreign policy preemption is the strongest.\(^{136}\) If several states implemented concurrent laws in these arenas, the United States’ national security could be compromised.\(^{137}\) Foreign affairs is no longer limited to these areas.\(^{138}\)

\(^{128}\) Ramsey, supra note 44, at 379.


\(^{130}\) See, e.g., LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985).

\(^{131}\) See Ramsey, supra note 44, at 387 (citing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 250 (1997)).


\(^{133}\) NFTC v. Crosby, 120 S. Ct. 2288, 2298 (2000).

\(^{134}\) See Goldsmith, supra note 5, at 1670 (describing the waning of the traditional distinction between the two due to changing world circumstances).

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) See Spiro, supra note 43.

\(^{138}\) See Goldsmith, supra note 5, at 1670.
During the Cold War, the era in which this doctrine developed, the delicate situation of superpower competition, nuclear threats, and arms escalation, made the foreign affairs preemption sensible. Just as in actual war, the executive is strengthened to provide the United States with a leader who can act unilaterally to defend and lead without cumbersome voting and consensus building (aside from Congress’ express power in Article I to declare war, which has not been utilized since WWII). One commentator wrote,

In the tinderbox world of superpower competition, the potential consequences of giving offense were obviously profound. One could not expect the Soviets necessarily to understand that when a state official spoke, it was not for the nation; or at least one would not want to risk error in assessing that perception. At the very least, there was the specter of state action upsetting the elaborately choreographed relationship between east and west; at the worst one could plausibly draw a scenario in which offense caused by state action lit the fuse to WWII.

Yet, the Cold War is over and the new world order is considerably more interdependent. Issues of trade, investment, energy, transportation, environmental and social issues routinely comprise a fundamental aspect of the foreign policy agenda. There is also a strong component of human rights in federal foreign policy. As one commentator wrote, “Public international law has pierced the veil of sovereignty to regulate the way in which a nation treats its citizens.” Thus, a large number of issues that were traditionally the domain of the states, are an integral part of foreign relations.

In the post Cold War era, states are even more influential because of the sheer size of their economies. “If they [American states] stood as independent nations, seven American states would be counted among the top twenty-five countries in terms of gross domestic product; even Vermont, with the smallest economy among the states, would outrank almost 100 nations.” States have increasing economic power, and when this power affects foreign nations, will the foreign policy preemption operate to force federal policy upon state economic policy? Where is the line to be drawn, and how can the enormity of issues be addressed without completely occupying the federal executive attention?

139 See Zschernig, 389 U.S. at 435.
140 See Spiro, supra note 43, at 1241.
142 Spiro, supra note 43, at 1242.
143 See Thurston, supra note 141, at 778.
144 See Goldsmith, supra note 5, at 1671.
145 Id.
146 Id. at 1672.
147 Id. at 1677.
148 Spiro, supra note 43, at 1249 (citing EARL J. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS (1998)) (emphasizing how the use of this economic clout, particularly by larger states, assumes significant international proportions).
Thus, due to the increasing role of states in foreign economic reality, the Zschernig federal preemption doctrine espoused in Crosby is outdated.\textsuperscript{149}

VI. CONCLUSION

The Supreme Court's opinion in Crosby is troubling because it does not give state and local governments specific guidance about which activities are lawful, and which interfere with federal authority. Specifically, the decision is based on outdated conceptions of foreign relations. The world is no longer clearly divided into Cold War camps, frequently on the verge of nuclear destruction. A different world order exists today, driven by economic development and the technological revolution. In order to successfully participate in the global economy, subnational governments must be trusted to conduct relations with other countries that encourage investment, growth and human rights.

The three principles forming the basis for federal preemption of foreign affairs; that a textual argument for complete dominance of the federal government exists due to the danger of unmanageable or inconsistent policies, that the Framers intended to vest the federal government with complete dominance in this arena, and that state interference will diminish Presidential authority, are outdated. In constructing a test, the Supreme Court should take our changing global structure into account, and frame the precedent in a way that is consistent and progressive.

\textsuperscript{149}Id. at 1253 (particularly given the pace of world change and Congress' relative inability to keep pace with it).