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The Limits of Executive Power

Robert J. Reinstein

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The Limits of Executive Power

Abstract

Justice Jackson's concurring opinion in *The Steel Seizure Case* has taken on iconic status among legal scholars and had been adopted by the Supreme Court as the governing framework for evaluating presidential power. But Jackson's principles are conclusory, do not rest on any historical foundation, and raise as many questions as they answer. He fails to examine, much less justify, the existence or scope of implied presidential powers, nor does he meaningfully explain the extent to which those powers are subject to congressional regulation and override. I apply novel originalist methodologies to answer those unexamined questions, with important consequences to several current theories and cases concerning presidential power. The construction of the presidency and the allocation of legislative and executive powers can be understood only by an examination of the historical experiences that influenced the Framers. Prominent among these were the preceding two centuries of constitutional developments in England which critically influenced the allocation of executive and legislative power in the Constitution. The central lesson of these historical experiences was that proscriptive legislative restraints on executive power were necessary but not sufficient to prevent autocracy. Any of the English proscriptions on the exercise of executive power were included in our Constitution, but there was also a massive transfer of previously held executive power to the legislature. Most of the prerogatives that had been exercised by the King were vested completely in Congress, prohibited to the President, or omitted altogether from the Constitution. Of the small number delegated to the Executive, only one was the same as its royal counterpart; the others were more limited or structurally shared with the Legislative Branch. I examine this history in detail and apply its underlying principles to develop a general theory of presidential power. In lieu of creative but ultimately inconclusive arguments over indefinite powers that are said to be "executive" in nature, implied powers should be tied to, and derived from, the powers expressly vested in the President in Article II. I refute the propositions that the Vesting Clause is a residual source of plenary executive power and that there is a presidential "completion" power. I apply and elaborate on these principles in the context of the President's two most important implied powers - executing the laws and developing and implementing foreign policy. The President has broad discretion in choosing how to exercise these powers, but they are not plenary in nature. They are subject to three basic limitations: (1) the President may not, without congressional authorization, use these powers to change domestic law or create or alter existing legal obligations; (2) these powers are subject to regulation by Congress; and (3) in the event of a conflict between the exercise of these powers and congressional legislation, the latter prevails. Finally, I argue that these limits on presidential power have continuing validity despite the enormous changes in the country since these principles were established. We are now in much the same situation as England in the 18th century - the real power of the Executive is much greater than its nominal legal power. Although the Framers viewed the President as a necessary check on an otherwise dominant Congress, the present reality is now the reverse. The Executive has become the most powerful branch of government. There is no reason to adopt legal theories that would further enhance executive power.

Keywords

Separation of Powers, Presidency, Presidential power, Executive power, Prerogative, English constitution, Originalism

ARTICLES

THE LIMITS OF EXECUTIVE POWER

ROBERT J. REINSTEIN*

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* Clifford Scott Green Professor of Law, *Temple University Beasley School of Law*. My grateful appreciation to Jane Baron, Craig Green, Richard Greenstein, Duncan Hollis, Mark Rahdert, and Stephen Vladeck for reviewing drafts of this Article and for providing helpful criticisms and suggestions. I am particularly indebted to Scott Sowerby of Harvard University, an expert on seventeenth-century English history, for reviewing the portions of this Article dealing with constitutional developments in that period.

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INTRODUCTION

Inconclusive debates over the scope of presidential power have erupted regularly throughout American history. The Bush administration’s claims of unilateral executive power were extremely assertive, but they were not unprecedented.¹ These claims may be in remission with the advent of a new administration. However, their intellectual seeds remain, and government officials as well as judges will continue to struggle with these perennial issues. It is time to revisit the proper scope of presidential power.

The prevailing doctrine of presidential power is contained in Justice Jackson’s celebrated concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*.² Jackson concluded from the mixing and sharing of legislative and executive powers in the Constitution that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”³ He then offered his famous tripartite framework for analyzing the scope of presidential power: (1) when the President’s actions are expressly or impliedly authorized by Congress, his authority is “at its maximum;” (2) when the President acts and

1. To take two examples, President Franklin Roosevelt conducted a secret domestic surveillance program in violation of federal law and also established a military commission to try enemy combatants for war crimes. See generally Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002); Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023 (2008).

2. 343 U.S. 579, 634 (1952). Jackson’s framework has been adopted by the Supreme Court, first in *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981), and very recently in *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), *id.* at 638–39 (Kennedy, J., concurring), and *Medellin v. Texas*, 128 S. Ct. 1346, 1367–68 (2008).

3. *Steel Seizure Case*, 343 U.S. at 635 (Jackson, J., concurring). Although the Constitution establishes separate legislative, executive, and judicial branches, it blends and mixes powers across the branches. Familiar examples are the President’s role in legislation (through the qualified veto) and Congress’s roles in executive and judicial appointments and treaties (through prior Senatorial approval). See THE FEDERALIST No. 47, at 234–36 (James Madison) (Terrence Ball ed., 2003).

Congress is silent, “he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain;” and (3) when the President acts contrary to the express or implied will of Congress, “his power is at its lowest ebb.”⁴

Despite its important insights and strengths, including its literary quality, Jackson’s opinion presents a basic problem—it raises extremely important questions about presidential power in the second and third categories of the framework, but it does not really answer those questions.⁵ It fails to examine, much less justify, the existence or scope of implied presidential powers, and it does not meaningfully explain the extent to which those powers are subject to congressional regulation and override.⁶

4. *Steel Seizure Case*, 343 U.S. at 635–38 (Jackson, J., concurring).

5. The first category also presents unanswered questions, but I do not deal with them in this Article. Although congressional authorization almost always validates presidential action, there can be exceptions. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding unconstitutional the Line Item Veto Act even though it was supported by both Congress and the President).

6. Presidential actions can wind up in the first and third categories of Jackson’s framework—and hence be presumptively valid or invalid—according to the “implied will” of Congress. Since this “will” depends on the Court’s interpretation of laws that contain the very gap through which the President acted, Jackson’s framework has been criticized as an “empty vessel” into which litigants and judges pour their desired results. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006).

In the *Steel Seizure Case*, no statute explicitly prohibited Truman’s action in seizing the steel mills. 343 U.S. at 702 (Vinson, C.J., dissenting). Jackson and three other concurring Justices determined that President Truman was acting contrary to law because (a) the relevant statutes covering the field did not grant him the authority that he exercised, and (b) a proposed amendment to one of the statutes, which would have provided that authority was not enacted. *Id.* at 657, 660 (Burton, J., concurring); *id.* at 599–603 (Frankfurter, J., concurring); *id.* at 639–40 (Jackson, J., concurring); *id.* at 665–66 (Clark, J., concurring). But congressional silence and failure to act do not necessarily amount to disapproval. The case could have plausibly been seen as one in which the President acted “in absence of either a congressional grant or denial of authority” (Jackson’s second category), *id.* at 637, which is what the three dissenting Justices argued, *id.* at 701–03 (Vinson, C.J., joined by Reed & Minton, JJ.).

This same indeterminacy is present in the three Supreme Court decisions that adopted the Jackson framework as governing doctrine: *Dames & Moore*, *Hamdan*, and *Medellín*. Each has been criticized for having drawn unupportable inferences from congressional silence or statutory ambiguity in either implying congressional approval or disapproval of the President’s actions. For criticisms of *Dames & Moore*, see generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1164–66 (2008), and Lee R. Marks & John C. Grabow, *The President’s Foreign Economic Powers after Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982). An excellent critical analysis of *Hamdan* is provided in Craig Green, *Wiley Rutledge, Executive Detention and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 160–68 (2006). The portion of the *Medellín* decision

With respect to the second category, Jackson suggested that implied presidential power may exist in a “twilight zone” of congressional inaction or acquiescence, and this theory appeared to command a majority of the Court.⁷ But Jackson rejected the argument that the Vesting Clause⁸ is an independent source of presidential power, and he denied the existence of inherent executive power.⁹ If that stance is correct, what authorizes implied presidential powers, and on what basis can their existence and breadth be determined? And if the President does have implied powers, can those powers have the domestic effect of creating or altering existing legal obligations?

As to the third category, Jackson asserted that in the case of an actual conflict between the exercise of congressional and presidential power, there is a strong presumption in favor of Congress: presidential power is said to be at its “lowest ebb.”¹⁰ But why should this be? A majority of the Supreme Court might have upheld President Truman’s power to seize the steel mills in the absence of legislation. Why should the President lose this power just because Congress passed conflicting legislation?

This Article proposes a general theory of the scope and limits of presidential power and answers the questions raised in the *Steel Seizure*

relating to presidential power is criticized by Ingrid Wuerth, *Medellin: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 5–8 (2009).

These criticisms do not necessarily indict Jackson’s framework itself. Statutory construction frequently involves ambiguous laws in which congressional intent must be divined, often from inadequate sources. Of course this means that Jackson’s framework can be manipulated by litigants and judges to achieve desired results, but I would like to know what doctrine of constitutional law can avoid this fate. For example, the Supreme Court’s tripartite equal protection framework (rational basis, intermediate, and strict scrutiny) can be just as malleable, if not more so. Nevertheless, because Jackson’s second category lacks a principled content, there may well be an inherent centripetal force in Jackson’s framework inducing litigants and judges to push cases of implied presidential powers into the virtually outcome-determinative first or third categories.

7. See *Steel Seizure Case*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (suggesting that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress, and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II”); *id.* at 659–60 (Burton, J., concurring) (suggesting that the President might have the power to act in an “emergency . . . in which Congress takes no action and outlines no governmental policy”); *id.* at 662 (Clark, J., concurring) (stating that “the Constitution does grant to the President extensive authority in times of grave and imperative national emergency”); *id.* at 683 (Vinson, C.J., joined by Reed & Minton, JJ., dissenting) (same).

8. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States.”).

9. *Steel Seizure Case*, 343 U.S. at 640–41 (Jackson, J., concurring).

10. *Id.* at 637.

Case. It applies historical and structural methodologies to answer those unexamined questions, assessing important consequences to several current theories and cases concerning presidential power.

Part I of this Article lays the groundwork for a theory of presidential power that is founded upon the structural allocations of power in Articles I and II of the Constitution and the historical reasons for those allocations. The construction of the presidency owes much less to political theory or to a reflexive reaction to George III than to two centuries of historical experiences in Great Britain and America that shaped the Framers' views on executive and legislative powers. A detailed historical analysis of the royal prerogatives and how they were used to establish dominance over Parliament is necessary to understand how and why the allocations of power in Articles I and II constitute a massive transfer of previously held executive power to the legislative branch.

Part II examines prevailing theories of constitutional executive power using the historical background and its underlying principles to show the weaknesses of those theories and to support an alternate, more plausible general theory of presidential power. First, in lieu of creative but ultimately inconclusive arguments over indefinite powers that are said to be "executive" in nature, implied powers should be tied to the powers expressly vested in the President by Article II. Thus, the implied powers of the President are few in number, but important. The power to enforce the laws is necessarily implied from the President's duty to take care that the laws should be faithfully executed. A presidential power over foreign affairs can be implied from the enumerated powers to make treaties and to receive and appoint ambassadors and other public ministers. The President has broad discretion in choosing how to exercise these implied powers. Second, these implied powers are not plenary in nature. They are subject to three basic limitations: (1) the President may not, without congressional authorization, use these powers to change domestic law or to create or alter existing legal obligations; (2) these powers are subject to regulation by Congress; and (3) in the event of a conflict between the exercise of these powers and congressional legislation, the latter prevails.

Each of these principles follows from the historical limits of prerogative power, the decision to make express presidential powers subject to legislative constraint, and the fundamental theorem that Article II powers cannot be greater than the prerogatives legally exercised by the King.

These principles are contrary to theories of presidential power advanced by notable scholars. This Article rejects the position that the Vesting Clause is a residual source of plenary presidential powers beyond those enumerated in Article II.¹¹ The extent to which the Constitution limits and constrains executive power cannot be reconciled with the theory that the Vesting Clause provides the President with plenary non-delegated powers.

This Article also rejects the proposition that there is a presidential “completion power,” a theory that was advanced by Chief Justice Vinson in his *Steel Seizure Case* dissent and recently by Jack Goldsmith and John F. Manning.¹² A presidential completion power is the modern equivalent of a royal prerogative that was asserted and discredited 400 years ago—that the King could, by proclamation and without legislative authorization, change domestic law by prescribing means that he deemed necessary to make a statutory scheme more effective.

Part III addresses the limits on the President’s implied powers. This Part explains and justifies these limiting principles in greater detail by applying them to presidential powers over law enforcement and foreign affairs. The President has broad authority to set priorities for law enforcement, establish rules by which ambiguous statutes should be enforced, and supervise his subordinates in the executive branch. However, contrary to the views of presidential essentialists led by Justice Scalia,¹³ the President’s authority is subject

11. Important works asserting that the Vesting Clause is a source of residual plenary executive power include: MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) [hereinafter Ramsey, *Executive Agreements*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). *But see* David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L L. & FOREIGN AFF. 75 (2007); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 5 SETON HALL L. REV. 528 (1974); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

12. *See Steel Seizure Case*, 343 U.S. at 667 (Vinson, C.J., dissenting); Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

13. *See Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (asserting that the Vesting Clause gives “[not] some of the executive power, but all of the executive power” to the President). *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* (2008) (arguing for plenary presidential power based on the consistent history of assertions of that authority by Presidents); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to*

to congressional regulation and override. With respect to foreign affairs, the President may establish and implement the nation's foreign policy and effectuate that policy through a broad range of methods, including executive agreements with other countries. But presidential foreign policy decisions, including executive agreements, may be overridden by statutes, and they may not, without congressional authorization, change domestic law or create or alter legal obligations.

The Conclusion of this Article asserts that these original limits on presidential power have continuing validity despite—and perhaps because of—the vast changes in the nation since its founding. We are now in much the same situation as England in the eighteenth century—the real power of the Executive is much greater than its nominal legal power. The executive branch has become the most powerful branch of government. Although the Framers viewed the President as a necessary check on an otherwise dominant Congress, the present reality is now the reverse. There is no reason to adopt legal theories that would further enhance executive power.

I. THE RESTRUCTURING OF EXECUTIVE AND LEGISLATIVE POWER

A. *The Federalist on the Allocation of Royal Prerogatives*

The Federalist attempted to assure Americans that the President would not be a potential king. Alexander Hamilton wrote the papers that deal with the presidency,¹⁴ and his premise was that the royal prerogatives provided the benchmark by which to measure the extent of, and to minimize, presidential power. This was the most extensive and important elaboration of the presidency in the ratification period and is therefore an appropriate starting point for examining the scope of executive power. Unfortunately, it is not the ending point because Hamilton's analysis is not complete and is in some respects inaccurate.

Hamilton introduced his discussion of the presidency with the disclaimer that “[t]here is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it”¹⁵ The problem, of course, was that there was almost universal

Execute the Laws, 104 YALE L.J. 541, 570–79 (1994) (arguing that the Constitution gives the President the plenary power to control the execution of federal law).

14. See generally THE FEDERALIST Nos. 67–77 (Alexander Hamilton), *supra* note 3, at 327–76.

15. THE FEDERALIST No. 67 (Alexander Hamilton), *supra* note 3, at 327.

opposition to an executive who would possess the powers of King George III. The grievances in the Declaration of Independence read like a catalogue of abuses by the King of his royal prerogatives, and the fear of a strong executive with such concentrated power was still prevalent in 1787.¹⁶ At the same time, the Framers understood the necessity of having an executive with more power than was granted to any executive under the Confederacy. The Articles of Confederation did not provide for an executive branch, and each state constitution made its governor “a very pale reflection indeed of his regal ancestor.”¹⁷ Most of the delegates to the Constitutional Convention were convinced that this system did not work and actually endangered the Republic. Indeed, the delegates had little choice but to create a strong executive branch once they decided to vest Congress with enormous powers that would operate directly on individuals.¹⁸ Since reliance on state enforcement of federal law seemed out of the question, this meant that strong executive and judicial branches were needed to enforce federal law. The “greater difficulty”¹⁹ was finding an acceptable intermediate position between the King and the state governors.

The proposed Article II was a predictable lightning rod for the opponents of ratification.²⁰ Their hostility reflected fear that Article II could in fact lead to an elected king with many of the hated royal prerogatives. The Anti-Federalists combined this theme with a variation that the President and Senate could unite in their joint exercise of the appointments and treaty powers to produce aristocratic rule, similar to the union of the King and the House of Lords.²¹

16. 2 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES I (1963).

17. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 136 (1969). Only three state governors served terms lasting longer than one year; only one state (Massachusetts) gave its governor a conditional veto power over legislation; and most of the traditional executive power was in the legislatures. FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 86–88 (1985). In addition, most governors were elected by their legislatures and shared power with Executive Councils. WOOD, *supra*, at 137–39.

18. According to Madison, the delegates’ first major decision was that federal law would operate directly on individuals. Letter from James Madison to Thomas Jefferson (Nov. 1, 1787), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 98–99 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY].

19. THE FEDERALIST No. 67 (Alexander Hamilton), *supra* note 3, at 327.

20. WOOD, *supra* note 17, at 519–23.

21. See William Findley, Remarks at the Pennsylvania Convention (Dec. 7, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 18, at 512–13 (predicting that the President and Senate will combine to make a monarchy); Benjamin Gale, Remarks at the

The Anti-Federalists had a point. Unlike the governors, but like the King, the President alone was vested with the executive power and was not required to share that power with, or be constrained by, an executive council; and the enumerated executive powers appeared to include the royal prerogatives of being the Commander-in-Chief of the armed forces and the militias, having a veto over legislation, appointing executive and judicial officers, granting reprieves and pardons, making treaties, and sending and receiving ambassadors and other public ministers.²²

Hamilton's first response to the Anti-Federalists concerns about executive power was that the President would be elected, would be limited to a fixed term of service, and would be subject to impeachment and removal by Congress.²³ But this was not a fully satisfactory answer. An elected king could be a source of tyranny no less than a hereditary one. The President's four-year term was longer than the term of any state governor and he could be re-elected for the duration of his life. Moreover, the remedy of impeachment, which was borrowed from England, had proven ineffective in that country.²⁴

Hamilton's principal argument was that the powers vested in the President were much less than the prerogatives held by the King. Hamilton used Blackstone's *Commentaries* as his guide to royal prerogative power.²⁵ Blackstone had emphasized that the King's

Connecticut Convention (Nov. 12, 1787), in 3 DOCUMENTARY HISTORY, *supra* note 18, at 426 (predicting that the country will have an elected king, which is worse than a hereditary king); Letter from Hampden to the *Pittsburgh Gazette* (Feb. 16, 1788), in 2 DOCUMENTARY HISTORY, *supra* note 18, at 666–67 (arguing that the President and Senate can combine to create a hereditary monarchy); Patrick Henry, Remarks at the Virginia Ratification Convention (June 5, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 18, at 963–64 (asserting that the President might easily become king); James Lincoln, Remarks at the South Carolina Convention (Jan. 18, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 312–14 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES] (asserting that the President can become monarch for life); George Mason, Remarks at the Virginia Ratification Convention (June 17, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 18, at 1365–66, 1378–79, 1390 (describing the President as an elective monarch); Letter from an Officer of the Late Continental Army to the *Independent Gazetteer* (Pa.) (Nov. 6, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 18, at 212 (same); John Pringle, Remarks at the South Carolina Convention (Jan. 16, 1788), in 4 DEBATES, *supra*, at 268–69 (complaining about the dangers that may result from the President and Senate combining to make treaties).

22. WOOD, *supra* note 17, at 521–23.

23. THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 335.

24. See *infra* notes 172, 218, 263, 278 and accompanying text.

25. WILLIAM BLACKSTONE, 1 COMMENTARIES. Blackstone's seminal work was accepted in America as the preeminent treatise on English law. His first volume, concerning public law, was published in 1765 and was long considered authoritative

prerogatives were not indefinite but were limited “by bounds so certain and notorious” in order to prevent abuses of power.²⁶ Such limits were particularly necessary because one of the prerogatives was the absolute veto over legislation, which effectively meant that Parliament could not abridge any of the King’s prerogatives without his consent.²⁷

Blackstone described each of the then-existing royal prerogatives,²⁸ and Hamilton compared the powers delegated to the President with Blackstone’s enumeration.²⁹ The result of this comparison was that only one of the powers given to the President was the same as those held by the King—that he could receive foreign ambassadors and public ministers.³⁰ As for the rest, Hamilton summarized the differences as follows:

The one [the President] would have a *qualified* negative [veto] upon the acts of the legislative body: The other [the King] has an *absolute* negative. The one would have a right to command the military and naval forces of the nation: The other in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the Legislature in the

in both England and America. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 112 (1998). There are a number of printings and editions of the early publications of the *Commentaries*, and they contain different paginations and, in some instances, different language. This Article cites to the starred version (rather than to the 1979 facsimile of the first edition printed by the University of Chicago Press), because the starred version was used and relied upon by the founding generation in America, including Hamilton who cited the starred version in his discussion of the Presidency. See THE FEDERALIST NO. 69, *supra* note 3, at 337 note a, 338 note b (citing 1 BLACKSTONE, *supra* at *262, *257); see also, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 165, 167 (1803) (Marshall, C.J.) (citing 3 BLACKSTONE, *supra*, at *23, *109, *255, *110); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437, 442 (1793) (Iredell, J.) (citing 1 BLACKSTONE, *supra*, at *243, and 3 *id.* at *256); 2 U.S. at 458, 462 (Wilson, J.) (citing 1 BLACKSTONE, *supra*, at *241–42, *46–52, *155, *160–62). See generally 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Philadelphia, Birch & Small 1803) [hereinafter TUCKER’S BLACKSTONE] (reproducing the entire starred version).

26. See 1 BLACKSTONE, *supra* note 25, at *237. Blackstone called these boundaries “principal bulwarks of civil liberty, or (in other words) of the British constitution,” and explained that by confining the prerogatives to clear bounds, “it is impossible [the King] should either mistake or legally exceed them without the consent of the people.” *Id.* at *141.

27. 1 *id.* at *154–55; see, e.g., FREDERIC MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 282 (1909) (stressing that the King’s assent was necessary for the enactment of all statutes, including those that encroached on his prerogatives).

28. 1 BLACKSTONE, *supra* note 25, at *144–46, *250–79.

29. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 3, at 335–40.

30. *Id.* at 339.

formation of treaties: The other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices: The other is the sole author of all appointments. . . . The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of commerce What answer shall we give to those who would persuade us that things so unlike resemble each other?³¹

Hamilton's analysis certainly supports the position that presidential power is limited and narrowly defined. This is consistent with Madison's observation that "the executive magistracy is carefully limited both in the extent and duration of its power," while Congress's powers are "at once more extensive and less susceptible of precise limits."³² But Hamilton's analysis has also been used to argue for an opposite doctrine—that the Constitution vests the entire "executive power" in the President minus the limitations on the prerogatives in Article II and those that were delegated to Congress.³³ The President might still have plenary constitutional powers over matters such as enforcing the law and conducting foreign policy, even though these powers are not enumerated in Article II.

That presidential powers are limited in scope seems a more convincing conclusion from Hamilton's analysis, but ambiguity exists because his comparisons of the Article II powers with the King's prerogatives are not complete or fully accurate. Blackstone's discussion of the royal prerogatives was the "only readily available account"³⁴ and is substantially correct, but it is more of a sketch than a detailed analysis.³⁵ For example, while Blackstone adverted later in his treatise to the numerous statutes that proscriptively limited the exercise of some prerogatives and eliminated others,³⁶ he did not

31. *Id.* at 340–41.

32. THE FEDERALIST No. 48 (James Madison), *supra* note 3, at 241–42.

33. Hamilton himself would make this argument five years later when, writing as Pacificus, he defended President Washington's Neutrality Proclamation. ALEXANDER HAMILTON AND JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 12–13 (Morton J. Frisch ed., 2007) [hereinafter PACIFICUS-HELVIDIUS DEBATES]; *see also* sources cited *supra* note 11 (listing competing scholarly works regarding the executive power and the Vesting Clause).

34. McDONALD, *supra* note 17, at 247.

35. 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340–41 (A.L. Goodhart & H.G. Hanbury eds., Little, Brown & Co. 1938).

36. 1 BLACKSTONE, *supra* note 25, at *334. These statutes include the Petition of Right of 1628, the Habeas Corpus Act of 1679, the English Bill of Rights of 1689, and the Act of Settlement of 1701, which, together with the Magna Carta, form "the Legal Constitutional Code" of England. THOMAS PITT TASWELL-LANGMEAD, ENGLISH

explain how these laws affected the legal scope of prerogative powers. More significantly, Blackstone further made the provocative assertion that the King's real power is much greater than his nominal legal power, because whatever was lost in the statutory proscriptions was more than counterbalanced by the Hanoverian Kings' effective use of their prerogatives to influence Parliament.³⁷ Hamilton basically ignores this portion of Blackstone's discussion in his analyses of the royal prerogatives.

Hamilton was a lawyer trained in English law, as were another thirty-three of the fifty-five delegates to the Constitutional Convention.³⁸ *The Federalist* combines acute political insights with advocacy, and Hamilton had a clear political agenda—to convince the public that fears of an overly powerful President were misguided. In disregarding the statutory limitations on the royal prerogatives, Hamilton was able to exaggerate the King's *legal* powers and thereby relatively diminish the President's powers. Likewise, it was certainly prudent for Hamilton to disregard, except in passing,³⁹ Blackstone's position that the King's *actual* power had been substantially augmented in the practice of government. If the King could do that, why could not the President?

The missing link in Hamilton's analysis is the relationship between executive and legislative power. Thus, he does not discuss the absorption into the U.S. Constitution of parliamentary limitations on royal prerogatives, the allocation of many royal prerogatives to Congress, or the apparent withholding of certain prerogatives from either the President or Congress (what I refer to as the "missing prerogatives"). Nor does he discuss the prerogative in the rich historical context that so deeply informed and influenced the Framers' thinking. As Gordon Wood states,

[T]he eighteenth century's discussion of politics can only be understood in the context of this ancient notion of the Crown's prerogatives, the bundle of rights and powers adhering in the

CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 519 (6th ed. 1905).

37. See 1 BLACKSTONE, *supra* note 25, at *335–37.

38. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 63 (1986).

39. See THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 335 (noting that the King's influence over Parliament had obviated the need for exercising the veto prerogative); THE FEDERALIST No. 76 (Alexander Hamilton), *supra* note 3, at 371–72 (commenting on the "venality" of the House of Commons but stressing the constitutional and practical barriers against undue executive influence upon the legislative branch in the U.S. Constitution).

King's authority to rule, set against the rights and liberties of the people, or the ruled, represented in the House of Commons.⁴⁰

Hamilton's approach in using the royal prerogatives as the benchmark for measuring presidential power is correct, but his resulting analysis is not definitive. This Article provides a more comprehensive examination of the prerogative and its relation to presidential and congressional powers in the Section that follows.

B. Another Look at the Royal Prerogatives and Presidential Powers

In this Section, I will analyze the relationship of the royal prerogatives and presidential powers from the perspective of the historical experiences that shaped the construction of Articles I and II of the U.S. Constitution: "the great disputes of Stuart England, which resonated still in eighteenth-century America; alarms over the rise of ministerial 'corruption' under the Hanoverian Kings; and lessons learned from the efforts of early state constitutions to cabin executive power within strict republican limits."⁴¹

Abuses of the royal prerogatives in the seventeenth century led to the enactment of statutes by which Parliament attempted proscriptively to control the aggrandizement of executive power and prevent future abuses. But these restraints did not prevent the Crown from having dominant power in the eighteenth century. Proscriptive legislative restraints on executive power were necessary but not sufficient to prevent autocracy. Many of these restraints were incorporated into the Constitution, but executive and legislative power was also fundamentally restructured. In that restructuring, most of the prerogatives that the King had exercised were vested completely in Congress, prohibited to the President, or altogether omitted from the Constitution. Of the few prerogatives delegated to the Executive, only one was the same as its royal counterpart; the others were more limited or structurally shared with the legislative branch. Moreover, in this restructuring of governmental power, the President was denied any authority over the internal operations of Congress, but Congress was given substantial power over the creation and operations of the executive branch. This pattern of decisions—and the reasons for those decisions—provides a base for examining theories of presidential power.

40. WOOD, *supra* note 17, at 19.

41. JACK N. RAKOVE, ORIGINAL MEANINGS 245 (1996).

This Section will examine the restructuring of executive and legislative power in five contexts: (1) power over legislation and taxation; (2) power over the execution of laws; (3) control over the legislature; (4) foreign affairs, military, and war powers; and (5) power over commerce.

1. *Legislation and taxation*

a. *Proclamations and impositions*

When James I assumed the throne in 1603, Parliament was recognized as having plenary legal powers over legislation and taxation.⁴² These powers were challenged by the Stuart monarchs in aggressive assertions of prerogative power. The early Stuarts, James I (1603–1625) and Charles I (1625–1649), attempted to legislate through the device of issuing proclamations.⁴³ The King had the prerogative of issuing proclamations that announced the state of the law and how he intended to enforce it, but the early Stuart monarchs tried to go a huge step further by adding legal obligations, beyond those required by statutes, to their proclamations.⁴⁴ James I requested an advisory opinion on his power to issue and enforce such proclamations. In the *Case of Proclamations*,⁴⁵ Chief Justice Coke, on behalf of the common law justices, declared this form of proclamation illegal.⁴⁶ With the common law courts refusing to enforce royal proclamations, the Crown brought prosecutions in the Courts of Star Chamber and High Commission, a practice that became especially draconian in suppressing dissenters when Charles I ruled without Parliament from 1629 until 1640.⁴⁷

The early Stuarts also usurped Parliament's exclusive power over taxation by imposing their own duties on foreign commerce and by

42. 6 HOLDSWORTH, *supra* note 35, at 22–23.

43. See 1 HENRY HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 330–31, 411–12 (William S. Hein Co. 1989) (1827) (detailing the growth in the number and unusualness of proclamations issued by James I and explaining how Charles I dissolved Parliament).

44. 4 HOLDSWORTH, *supra* note 35, at 296–97; 6 *id.* at 31; MAITLAND, *supra* note 27, at 302. The Tudor monarchs also had issued such proclamations, but their attempts to obtain statutory authorization were unsuccessful. JAMES S. HART JR., THE RULE OF LAW, 1603–1660: CROWNS, COURTS AND JUDGES 6 (2003).

45. (1610) 12 Co. Rep. 74, 2 How. St. Tr. 724 (K.B.).

46. See 1 HALLAM, *supra* note 43, at 336–38.

47. 1 *id.* at 433–46. A sympathetic biographer of Charles I has acknowledged that the King punished breaches of proclamations in the Star Chamber in order to suppress dissent, but argues that such practice was ineffective and somewhat counter-productive. See KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I, 644–54 (1992).

exactng compulsory loans.⁴⁸ These practices were declared illegal in the Petition of Right of 1628, which prohibited the imposition of any taxes or loans without the consent of Parliament.⁴⁹ Charles I assented to the Petition but then ignored its requirements. He dissolved Parliament in 1629 and raised money through a variety of devices, the most notorious being “ship-money.” The King issued proclamations imposing annual payments on all English subjects for the purpose of building an effective navy. Although ship-money impositions had been used by prior monarchs, Charles I expanded the impositions in unprecedented ways that made them seem indistinguishable from taxes.⁵⁰ Recognizing the potential controversy, Charles I asked for

48. 1 HALLAM, *supra* note 43, at 313–17, 330, 381–82.

49. 3 Car. 1, c. 1; see MAITLAND, *supra* note 27, at 307. The duties on foreign commerce were initiated by James I in 1606 when he imposed a duty on imported currants that was greater than the amount required by statute. 1 HALLAM, *supra* note 43, at 313–14. The Court of the Exchequer upheld the King’s action in *Bates’s Case (Case of Impositions)*, (1606) 2 How. St. Tr. 371. The Chief Baron stated that, because these duties related to foreign affairs, the King’s prerogative powers were absolute, and that the power to impose duties on foreign commerce was ancillary to the Crown’s control over the kingdom’s ports and ingress into the country. *Id.* at 388–91. In 1608, James I imposed heavy royal duties on almost all imported merchandise. 1 HALLAM, *supra* note 43, at 315. The House of Commons passed a Remonstrance against these impositions of non-Parliamentary taxation in 1610. *Id.* at 315–16. It also passed a bill to make such impositions illegal, but the bill was blocked in the House of Lords. *Id.* at 317.

To validate compulsory loans, Charles I asked the judges for an advisory opinion subscribing to their legality, but the judges refused. RICHARD CUST, *THE FORCED LOAN AND ENGLISH POLITICS 1626–1628*, at 3, 54–55 (1987). The King then decided to force the legal issue in *Darnel’s Case (Five Knights Case)*, (1627) 3 How. St. Tr. 1 (K.B.). Darnel and four others were ordered imprisoned by the King for refusing to comply with the demand for loans. *Id.* at 2. They petitioned for habeas corpus relief in the King’s Bench. Chief Justice Crewe, who doubted that the loans were legal and opposed giving the advisory opinion, was dismissed and replaced by a more compliant successor, Hyde. *Id.* at 1 note; see HART, *supra* note 44, at 68 (describing how Crewe was removed). The King’s Bench denied the petition without ruling on the legality of the loans. *Five Knights Case*, 3 How. St. Tr. at 51. Instead, it held that the justification for the imprisonment stated on the return—that they were held pursuant to the order of the King for no stated reason—precluded judicial review, because the imprisonment was presumably a matter of state and “if a man be committed by the commandment of the king, he is not to be delivered by a Habeas Corpus in this court, for we know not the cause of the commitment.” *Id.* at 52–53, 58–59. This decision led to the provisions in the Petition of Right prohibiting compulsory loans and all non-parliamentary taxation and requiring that the cause of confinement be set forth in responses to petitions for habeas corpus. HART, *supra* note 44, at 129; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2245 (2008) (explaining that “immediate outcry” over the *Five Knights Case* influenced the House of Commons to pass the Petition of Right).

50. As part of its war and military prerogatives, the Crown had the recognized authority to requisition ships from the coastal districts in a national defense emergency or, in lieu of that, to charge those districts for ship construction. Technically, ship-money was considered a payment in lieu of service rather than a tax, and precedent from the time of Elizabeth I supported it. See HART, *supra* note 44, at 148 (noting that Elizabeth I and other monarchs had utilized the Crown’s right

and received an advisory opinion from the twelve sitting judges.⁵¹ The advisory opinion upheld the King's power to impose charges on all subjects in England for the defense of the realm when the kingdom was in danger and asserted that the King was the "sole judge both of the danger, and when and how the same was to be prevented and avoided."⁵²

In *Hampden's Case (Ship-Money Case)*,⁵³ an outspoken opponent of the King, John Hampden, refused to pay his charge of twenty shillings and was prosecuted in the special Court of the Exchequer Chamber.⁵⁴ The judges divided 7-5 in favor of the King.⁵⁵ The decision appeared to validate a royal prerogative allowing the King to assume Parliament's powers upon a declaration of emergency that could not be questioned.

The combination of legislation through proclamation and taxation through the ship-money impositions threatened to concentrate autocratic power in the King. But the decision in the *Ship-Money Case* backfired. With five of the King's hand-picked judges⁵⁶ dissenting,

to requisition ships); SHARPE, *supra* note 47, at 553-54 (explaining that the "service" was actually furnishing a ship to be used by the King). In 1634, fearing a possible war with several European powers and seeking to protect English commerce from pirates, Charles I issued ship-money writs to the coastal districts. The next year, however, he made two decisions that would crystallize challenges to his personal rule: the ship-money writs were extended nationwide, and they were renewed annually for five more years. HART, *supra* note 44, at 148-49; SHARPE, *supra* note 47, at 552-58. Because ships could not have been requisitioned from the inland counties, the impositions functioned as taxes; and because the charges were imposed annually, there seemed no basis for claiming an imminent emergency. Rather, these impositions appeared to be transparent devices for circumventing Parliament's taxing powers. SHARPE, *supra* note 47, at 554.

51. There were eight common law justices (King's Bench and Common Pleas) and four Barons of the Exchequer (plus the Lord Chancellor). WILFRED PREST, *THE RISE OF THE BARRISTERS* 135 (1986). The common law justices served at the pleasure of the Crown, while the Barons of the Exchequer served during good behavior. DAVID LINDSEY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 28, 197 (5th ed. 1969). However, beginning in 1631, Charles I appointed Barons of the Exchequer to serve at his pleasure. HART, *supra* note 44, at 60.

52. 1 HALLAM, *supra* note 43, at 425.

53. (1637) 3 How. St. Tr. 825, 842-46 (quoting the King's question to the judges and the advisory opinion).

54. *Id.* at 846.

55. Nine of the judges upheld the King's power to impose ship-money charges for national defense, despite the statutory prohibitions against non-parliamentary taxation. But two of those judges voted against the King because none of the money collected from the inland districts could be characterized as payments in lieu of services. See SHARPE, *supra* note 47, at 723-24; D.L. Keir, *The Case of Ship Money*, 52 L.Q. REV. 546, 572 (1936).

56. Although merit was sometimes a factor in the appointment and promotion of judges, the key criteria were "Patrimony, Patronage, and Purchase." G.E. AYLMER, *THE KING'S SERVANTS: THE CIVIL SERVICE OF CHARLES I 1625-1642*, at 89, 93-96 (1961).

the message sent to the country was that the impositions were illegal, and most subjects refused to pay the charges.⁵⁷ Although collections then rebounded,⁵⁸ Charles I was not able to raise enough money to fund the Scottish wars; and in 1640, he called Parliament back into session.⁵⁹ The King expected Parliament to cooperate by providing the funds necessary to suppress the Scots, but some of his councilors were concerned about a parliamentary counterattack against his uses of power.⁶⁰ Those concerns were realized. To prevent executive rule through proclamations, Parliament abolished the Courts of Star Chamber and High Commission.⁶¹ Additionally, the House of Lords, acting as the highest Court of England, declared the advisory opinion and the judgment against Hampden in the *Ship-Money Case* to be illegal and vacated the judgment against Hampden.⁶² Parliament then enacted a statute declaring all such royal impositions, and the advisory opinion and decision in the *Ship-Money Case*, null and void.⁶³ These actions marked the beginning of a conflict between a radicalized Parliament and an intransigent King that would culminate in the English Civil Wars and the temporary destruction of the monarchy.

Following the Restoration in 1660, without any prerogative court to enforce executive legislation through proclamations, the later Stuarts, Charles II (1660–1685) and James II (1685–1688), limited proclamations to their legitimate historical uses. They and their successors issued numerous proclamations that either warned the

57. See JOHN ADAIR, *A LIFE OF JOHN HAMPDEN: THE PATRIOT (1594–1643)*, at 124 (2d ed. 2003) (estimating that two-thirds of the charges were not paid); HART, *supra* note 44, at 157 (stating that collections slowed to a “trickle”).

58. SHARPE, *supra* note 47, at 587–91.

59. See ANTONIA FRASER, *CROMWELL: THE LORD PROTECTOR 57–58* (1973); BRENDAN SIMMS, *THREE VICTORIES AND A DEFEAT: THE RISE AND FALL OF THE FIRST BRITISH EMPIRE, 1714–1783*, at 25–28 (2007).

60. See SHARPE, *supra* note 47, at 851–52, 914–21 (detailing how Charles I’s need for funding the Scottish wars led him to convene what became the Short and Long Parliaments).

61. 1640, 16 Car. 1, c. 10; see MAITLAND, *supra* note 27, at 302; *THE STUART CONSTITUTION: DOCUMENTS & COMMENTARY* 106 (J.P. Kenyon ed., 2d ed. 1986) (stating that “the most important single cause of Star Chamber’s unpopularity was the role it was called upon to play in the enforcement of the king’s social and economic policies” through punishing violations of royal proclamations).

62. See 1 *A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS: FROM THE REIGN OF KING RICHARD II TO THE END OF THE REIGN OF KING GEORGE I 716–17* (3d ed. 1742) (House of Lords decision).

63. 1641, 16 Car. 1, c. 14. Parliament also passed a statute explicitly prohibiting royal duties on foreign commerce, which Charles I had continued to impose notwithstanding the Petition of Right. *Id.* c. 8; see also 1 HALLAM, *supra* note 43, at 500–01.

population to obey certain laws, announced how and when they would enforce statutes, or exercised executive powers that had been delegated to the Crown by Parliament.⁶⁴ Thus, the royal prerogative of issuing proclamations returned to its earlier form of being executive of, but subordinate to, statutes.⁶⁵

However, the later Stuarts resumed the earlier practices of raising revenues by fees and loans and also diverted appropriations for purposes extrinsic to the legislation.⁶⁶ The Parliament promptly responded by providing that appropriations to the Crown for war or any other purpose could be used only for the purposes specified in the statute and had to be drawn from the treasury pursuant to a warrant with a proper specification.⁶⁷ The issue was finally settled by the English Bill of Rights of 1689, which provided that all power in levying money was in Parliament and required that money appropriated for the Crown be used for its intended statutory purpose.⁶⁸ Moreover, the House of Commons assumed the power of originating money bills.⁶⁹

The U.S. Constitution adopted these principles of English law. The powers to tax and spend “for the common Defense and General Welfare” and to “borrow Money on the credit of the United States” were vested in Congress.⁷⁰ Furthermore, the Constitution provides: “No Money shall be drawn from the Treasury, but in Consequence of

64. See generally 6 HOLDSWORTH, *supra* note 35, at 303–21 (providing examples and descriptions of the proclamations).

65. See 1 BLACKSTONE, *supra* note 25, at *270. Blackstone explained:

For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And, therefore, his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, *where they do not either contradict the old laws or tend to establish new ones*; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary.

Id. (emphasis added).

66. 3 HALLAM, *supra* note 43, at 49–50; MAITLAND, *supra* note 27, at 308–09.

67. 2 HALLAM, *supra* note 43, at 356–60; 3 *id.* at 117–18; TASWELL-LANGMEAD, *supra* note 36, at 485–88. For an example of a statute passed early in the reign of Charles II that contained these restrictions, see An Act for the Speedy Disbanding of the Army, 1660, 12 Car. 2, c. 15.

68. MAITLAND, *supra* note 27, at 308–09. Section 4 of the English Bill of Rights declares: “That levying Money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal[.]” An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., Sess. 2, c. 2, § 4 [hereinafter English Bill of Rights].

69. MAITLAND, *supra* note 27, at 310.

70. U.S. CONST. art. I, § 8, cl. 1, 2.

Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”⁷¹ It also provides: “All Bills for raising Revenue shall originate in the House of Representatives.”⁷² Furthermore, a special provision limiting appropriations for the armies to two years was also borrowed from English law.⁷³

The executive prerogative of issuing proclamations is not mentioned in the Constitution, nor was it mentioned in *The Federalist*. Although this prerogative looks very much like the issuance of executive orders, it was not included in the Article II enumerated powers, nor was it transferred to Congress. This is one of the “missing prerogatives.”

b. Assent to legislation

The King had one recognized prerogative that made him an essential part of the legislative process. No bill passed by the two Houses of Parliament could become law without the King’s assent.⁷⁴ Blackstone explained that the royal veto served two important purposes: primarily, it prevented the legislature from infringing on royal prerogatives and, secondarily, it prevented the enactment of ill-advised laws.⁷⁵ But the veto was last used in England by Queen Anne (1702–1714) in 1707.⁷⁶ Since that time, the Crown had found other means of controlling Parliament that made the veto unnecessary.⁷⁷ The veto prerogative might have been regarded simply as an incident of history, but for two facts: the prerogative continued to be recognized, with the threat of its use always present in England,⁷⁸ and

71. *Id.* § 9, cl. 7.

72. *Id.* § 7, cl. 1.

73. *Id.* § 8, cl. 12 (“The Congress shall have Power To . . . raise and support Armies, but no Appropriations of Money to that Use shall be for a longer Term than two Years[.]”). For the English precedent, see *infra* notes 142–143, 264–265 and accompanying text.

74. 1 BLACKSTONE, *supra* note 25, at *261–62; MAITLAND, *supra* note 27, at 282. Thus, the statutes passed by the Long Parliament without the assent of Charles I were declared null and void. MAITLAND, *supra* note 27, at 282.

75. 1 BLACKSTONE, *supra* note 25, at *154–55.

76. KEIR, *supra* note 51, at 297; GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 381–82 (1st ed. 1955).

77. See *infra* notes 159–195 and accompanying text (explaining how the King controlled Parliament through the use of various royal prerogatives); *infra* notes 267–269 (same).

78. 10 HOLDSWORTH, *supra* note 35, at 412–13; MAITLAND, *supra* note 27, at 422–23.

the Crown frequently employed the veto against the colonial assemblies.⁷⁹

Four grievances in the Declaration of Independence accused the King of abusing this prerogative by repeatedly refusing to assent to important legislation.⁸⁰ American hostility to the veto power was so great that the early state constitutions denied it to their governors.⁸¹ The Massachusetts Constitution of 1780 was unique in giving this power to the governor alone, albeit qualified, as the veto could be overridden by two-thirds approval of each house.⁸² Massachusetts's system became the model for the U.S. Constitution.

Hamilton defended the presidential veto for the same reasons that Blackstone had defended its royal prerogative counterpart. Without a veto power, the President "would be absolutely unable to defend himself against the depredations of [Congress]... [and] the legislative and executive powers might speedily come to be blended in the same hands."⁸³ The veto power "not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws."⁸⁴ Thus, the only royal prerogative relating to legislation that the Framers gave to the President was the veto power, but the Framers made that power subject to congressional override and therefore less powerful than the counterpart held by the King.⁸⁵

2. *Execution of the laws*

The King had the sole power to enforce the laws and the prerogative of being the nation's prosecutor. The English theory was that all offenses against the law are considered personal offenses

79. BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 67–68 (1967) [hereinafter BAILYN, *ORIGINS OF AMERICAN POLITICS*]; 10 HOLDSWORTH *supra* note 35, at 412–13; RAKOVE, *supra* note 41, at 248–49.

80. THE DECLARATION OF INDEPENDENCE ¶¶ 3, 4, 5, 10 (U.S. 1776) (complaining that the King (1) "refused his Assent to Laws," (2) "forb[ade] his Governors to pass Laws of immediate and pressing importance," (3) "refused to pass other Laws for the accommodation of large districts of people," and (4) "obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers").

81. RAKOVE, *supra* note 41, at 249–51; WOOD, *supra* note 17, at 141.

82. RAKOVE, *supra* note 41, at 253. This power was somewhat muted by the fact that the governor was elected annually. See MASS. CONST. pt. 2, ch. II, § 1, art. II.

83. THE FEDERALIST No. 73 (Alexander Hamilton), *supra* note 3, at 358.

84. *Id.*

85. The President's veto power is also less arbitrary. The King could refuse to assent to the enactment of a law without taking any action or giving any reason. The U.S. Constitution imposes a level of accountability by requiring that, except for periods when Congress is not in session, the President must return the bill to Congress with his written objections, and that if the President does nothing within ten days of its submission to him, the bill becomes law. U.S. CONST. art. I, § 7, cl. 2.

against the King; thus, all prosecutions were brought in his name. “He is therefore the proper person to prosecute for all public offences and breaches of the peace”⁸⁶ From this total control of criminal procedure, the Kings asserted the prerogatives of suspending and dispensing with the laws, appointing and removing judges, establishing courts of law, and granting reprieves and pardons.⁸⁷

a. The suspending and dispensing powers

Two of the Crown’s asserted prerogatives had empowered kings to suspend the operation of statutes and to grant individuals the dispensation of not being bound by statutes. The suspending power was much more powerful than the veto because it allowed a king to nullify not only bills that were presented for his assent but also all statutes that pre-dated his reign—indeed, every law on the statute books. The dispensing power resembled an anticipatory pardon; yet, if used widely enough, the power could be tantamount to suspending a statute.⁸⁸

It is difficult to see how the suspending and dispensing prerogatives could exist in a system of parliamentary supremacy.⁸⁹ But these prerogatives continued to be recognized following the Restoration in 1660, perhaps because earlier monarchs had used them sparingly.⁹⁰

In 1687, James II issued a Declaration of Indulgence that suspended the ecclesiastical laws.⁹¹ He also granted dispensations that exempted large numbers of Catholics from the Test Act, which allowed only conformist Protestants to hold public office.⁹² James II used the dispensing prerogative to appoint many Catholics to high

86. 1 BLACKSTONE, *supra* note 25, at *268; *see also* 10 HOLDSWORTH, *supra* note 35, at 415.

87. 1 BLACKSTONE, *supra* note 25, at *266–69; 10 HOLDSWORTH, *supra* note 35, at 415–17.

88. MAITLAND, *supra* note 27, at 302–05; TASWELL-LANGMEAD, *supra* note 36, at 504–06.

89. 2 HOLDSWORTH, *supra* note 35, at 366 (“In what way could the undoubted power which the crown possessed of dispensing from or suspending the operation of statutes be reconciled with the legislative authority of Parliament?”).

90. *Id.*

91. In 1672, Charles II had tried to suspend the ecclesiastical laws, but the reaction in the House of Commons was so severe that he backed down. 2 HALLAM, *supra* note 43, at 149–50; 6 HOLDSWORTH, *supra* note 35, at 221–22.

92. 6 HOLDSWORTH, *supra* note 35, at 182, 192. A second Test Act excluded all Catholics from both Houses of Parliament (but exempted the Duke of York, later James II). *Id.* at 184–85.

civil and military positions.⁹³ His goal was either to grant equal rights to Catholics and non-conformist Protestants (his claim), or, in conjunction with his powers over the military, to rule despotically and restore Catholicism as the established religion (his opponents' claim).⁹⁴

A stacked King's Bench upheld James II's use of the dispensing power on a doctrine of royal supremacy over the laws: "[T]he Kings of England were absolute Sovereigns; . . . the laws were the King's laws . . . [and] no Act of Parliament could take away [the royal dispensing] power."⁹⁵ The suspending power was challenged in the *Case of the Seven Bishops*.⁹⁶ The Archbishop of Canterbury and six other bishops petitioned the King asserting that he had no power to suspend the laws, and James II prosecuted them for seditious libel on the ground that they falsely denied one of his prerogatives.⁹⁷ Two of the trial judges sided with the King while two sided with the bishops. Justice Powell told the jury that "if [the suspending power] be once allowed of, there will need [be] no Parliament: all the legislature will be in the king, which is a thing worth considering."⁹⁸ The jury acquitted the bishops to general national acclaim (at least among conformist Protestants).⁹⁹

In 1689, following the forced abdication of James II, Parliament enacted the English Bill of Rights. The first declaration of that momentous statute was "[t]hat the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal."¹⁰⁰ The royal dispensing prerogative was also declared illegal.¹⁰¹

93. 3 HALLAM, *supra* note 43, at 52–55, 78–79, 85–86; 6 HOLDSWORTH, *supra* note 35, at 225.

94. See 6 HOLDSWORTH, *supra* note 35, at 192–93.

95. *Godden v. Hales*, (1686) 11 How. St. Tr. 1166 (K.B.). James II packed the bench in advance of the ruling, removing six of the twelve judges and replacing them with his own appointees. The reconstituted court voted 11-1 in favor of the King. See Dennis Dixon, *Godden v. Hales Revisited—James II and the Dispensing Power*, 27 J. OF LEGAL HIST. 129, 139 (2006); Alfred F. Havighurst, *James II and the Twelve Men in Scarlet*, 69 L.Q. REV. 522, 530–32 (1953).

96. (1688) 12 How. St. Tr. 183 (K.B.).

97. *Id.* at 192–202.

98. *Id.* at 427.

99. *Id.* at 430–31.

100. English Bill of Rights, *supra* note 68, § 1.

101. Section 2 of the English Bill of Rights condemned the use of the dispensing power "as it hath been assumed and exercised of late." *Id.* § 2. Article XII of the statute prohibited the King from granting any dispensations except pursuant to statutory authorization. No such statute was passed.

The English Bill of Rights became a template for American constitution drafting. Virtually every secular provision in that statute was incorporated into the U.S. Constitution. The prohibition on the suspending and dispensing powers was encoded in Article II's requirement that the President must "*take Care* that the Laws be *faithfully* executed."¹⁰² Thus, these rejected royal prerogatives¹⁰³ were denied to the President. The Supreme Court stated as much in its most direct conflict with President Andrew Jackson, using language that could have been lifted from Justice Powell's charge in the *Case of the Seven Bishops*.¹⁰⁴

b. Proscriptions on executive power

Many statutes were enacted to protect English citizens from abuses of the King's law enforcement prerogatives. In 1628, the Petition of Right extended the declaration of the Magna Carta in requiring that all persons were entitled to trials according to the "due process of law."¹⁰⁵ It also prohibited the imposition of martial law and guaranteed the writ of habeas corpus to all who were arrested by requiring that specific cause must be shown for detention. The Habeas Corpus Act of 1679¹⁰⁶ prohibited arbitrary executive arrests and detentions, while also prescribing detailed procedures and requirements for "the Great Writ" to guarantee due process of law. This Act also provided criminal penalties for anyone who evaded its provisions, including taking a detainee outside of England, which was beyond the reach of the Great Writ. The English Bill of Rights guaranteed the right to petition the King, free elections for Parliament, jury trials, and the legislative speech and debate

102. U.S. CONST. art. II, § 3 (emphasis added); see Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 870–74 (1994); Robert J. Reinstein, *An Early View of Executive Power and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 320–21 n.50 (1975).

103. See 1 BLACKSTONE, *supra* note 25, at *276–77 (explaining that "the laws of England are absolutely strangers" to the vesting of the legislative or dispensing power "in any single person").

104. See *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612–13 (1838). Justice Thompson explained,

This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.

Id.

105. 1628, 3 Car. 1, c. 1.

106. 31 Car. 2, c. 2.

privilege.¹⁰⁷ It also prohibited the imposition of excessive bail and cruel and unusual punishment.¹⁰⁸ Finally, it required “that for Redress of all Grievances and for the amending, strengthening and preserving of the Laws Parliaments ought to be held frequently.”¹⁰⁹ This list should look familiar, because almost all of these proscriptions were incorporated into the U.S. Constitution.¹¹⁰

c. The courts and judicial independence

The previously absolute royal prerogative of establishing courts was cut back when the Parliament eliminated the Courts of Star Chamber and High Commission in 1641 and when it declared illegal the establishment of ecclesiastical courts by James II.¹¹¹ But George III used this prerogative in the colonies, to the chagrin of Americans, by establishing prerogative courts for the purpose (so Americans thought) of denying jury trials.¹¹² This was one of the grievances in the Declaration of Independence,¹¹³ and the Framers of the U.S. Constitution did not give any such power to the President. Instead, the Constitution created the Supreme Court and vested in Congress the power to create the inferior federal courts.¹¹⁴

107. English Bill of Rights, *supra* note 68, §§ 5, 8, 9, 11.

108. *Id.* § 10.

109. *Id.* § 13.

110. See U.S. CONST. art. I, § 4, cl. 1 (placing control over congressional elections initially in the state legislatures but ultimately in Congress); *id.* § 4, cl. 2 (requiring that Congress must assemble at least once per year); *id.* § 6, cl. 1 (guaranteeing the legislative speech and debate privilege); *id.* § 9, cl. 2 (mandating that habeas corpus shall not be suspended except in specified circumstances); U.S. CONST. art. III, § 2, amend. 6, 7 (mandating the right to jury trials); U.S. CONST. amend. 1 (guaranteeing the right to petition the government); U.S. CONST. amend. 5 (requiring due process of law in all criminal cases); U.S. CONST. amend. 8 (banning excessive bail and cruel and unusual punishments).

The seventh section of the English Bill of Rights provided, “That the Subjects which are Protestants may have Arms for their Defen[s]e suitable to their Conditions as allowed by Law.” English Bill of Rights, *supra* note 68, § 7. In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court interpreted this provision as guaranteeing an individual right to bear arms, at least for Protestants, and therefore as a precursor to the Second Amendment. *Id.* at 2798. This may not be correct. No other right in that statute has a qualification of “suitable to their Conditions” or “as allowed by Law.” And the corresponding grievance in the English Bill of Rights accused the King of “causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and employed contrary to Law.” English Bill of Rights, *supra* note 68, Grievance 6. The operative clause may have dealt more with the respective positions of Protestants and Catholics than with guaranteeing individual rights.

111. English Bill of Rights, *supra* note 68, § 3.

112. BAILYN, ORIGINS OF AMERICAN POLITICS, *supra* note 79, at 68–69; 10 HOLDSWORTH, *supra* note 35, at 414.

113. THE DECLARATION OF INDEPENDENCE ¶ 20 (U.S. 1776).

114. U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

Parliament's elimination of prerogative courts and the statutory proscriptions on the royal prerogatives were major steps towards establishing the rule of law, but they could not be effective without an independent judiciary. The King could appoint all judges and could remove the common law judges at will,¹¹⁵ and he appointed judges whom he could influence, particularly at times of constitutional conflict. Charles II's appointees to the bench have been characterized as "scandalous,"¹¹⁶ and James II relied not only on his prerogatives but also on "a packed bench of judges," who typically acted as servants of the Crown.¹¹⁷

By 1765, when Blackstone wrote his commentaries on the royal prerogative, the King's control over his judges had yielded to an independent judiciary. Through the Act of Settlement of 1701,¹¹⁸ the Parliament took the first major step towards judicial independence by providing that the compensation of judges could not be reduced and that judges would serve during good behavior, at least until the demise of the King.¹¹⁹ This "demise of the King" proviso meant that the judges had to resign upon a change of monarchs, and the next monarch could decide whether to reappoint them or not. This proviso was removed by a statute enacted in 1760, the first year of George III's reign.¹²⁰ Thus, the King lost the power to remove judges; they served for life during good behavior and with a fixed compensation, subject to removal only by Parliament.

The guarantees of judicial independence within England changed the British Constitution. The courts became a critical check on the exercise of arbitrary executive power, and their decisions in cases such as *Wilkes v. Wood*¹²¹ and *Entick v. Carrington*¹²² were not only

115. See discussion *supra* notes 49, 51, 95.

116. 10 HOLDSWORTH, *supra* note 35, at 416.

117. 6 *id.* at 192. For example, the judges vitiated the Habeas Corpus Act by requiring excessive bail for those detained by the Crown, and a stacked court upheld the dispensing power. 10 *id.* at 213; see discussion *supra* note 95.

118. 12 & 13 Will. 3, c. 2. This was enacted near the end of the reign of William III. William and Mary reigned jointly from 1689–1694, and William III continued to reign until 1702.

119. See 2 HALLAM, *supra* note 43, at 391. Parliament could, however, remove judges through a joint resolution of the two Houses. Such a joint resolution was called an "address" of each House.

120. 1 Geo. 3, c. 23.

121. See (1763) 98 Eng. Rep. 489, 490 (K.B.) (holding that the Secretary of State committed an act of trespass by entering an individual's home and destroying his property with a general administrative warrant).

122. See (1765) 95 Eng. Rep. 807, 817 (K.B.) (concluding that messengers of the King had no authority to enter into the private home of an individual and seize his papers and effects without a judicial warrant and probable cause).

significant restrictions on the royal prerogative¹²³ but were venerated by the founding generation in America.¹²⁴ Blackstone and later British historians asserted that the guarantees of judicial independence were essential to the positive features of the British Constitution.¹²⁵

The situation in the colonies was different. Because American judges served at the pleasure of the Crown,¹²⁶ the New York Assembly passed a bill in 1759 providing for the same guarantees of judicial independence as in England. The bill was vetoed by George III in 1760. The following year, the King and Privy Council issued directives to each of the colonial assemblies that all judges in the colonies would continue to serve at the pleasure of the King and his royal governors.¹²⁷ One of the grievances of the Declaration of Independence was that the King denied life tenure and fixed compensation to the colonial judges.¹²⁸

The Framers of the U.S. Constitution embraced the British guarantees against the removal of judges, but they went even further to secure judicial independence. As in Britain, federal judges were guaranteed service during good behavior and compensation that could not be reduced.¹²⁹ The President was given no power to remove federal judges, and Congress could do so only through the cumbersome process of impeachment.¹³⁰ The Framers also established the judiciary as a separate branch of government. In the British system, appeals could be taken from the English courts to the House of Lords, whereas in the American system, appeals could be taken from the Supreme Court to no one. This separation of the

123. KEIR, *supra* note 51, at 310–11.

124. See LEONARD LEVY, *ORIGINS OF THE BILL OF RIGHTS 161–64* (1999). The holdings of *Wilkes v. Wood* and *Entick v. Carrington* were codified in the Fourth Amendment. See U.S. CONST. amend. IV.

125. 1 BLACKSTONE, *supra* note 25, at *269–70. One of Blackstone's most important theoretical achievements was to adapt the work of Montesquieu, who considered only the legislative and executive branches, to the significance of an independent judiciary as a separate branch of government. 10 HOLDSWORTH, *supra* note 35, at 417; VILE, *supra* note 25, at 172–73.

126. RAKOVE, *supra* note 41, at 248–49.

127. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 105 (1968) [hereinafter BAILYN, *IDEOLOGICAL ORIGINS*].

128. THE DECLARATION OF INDEPENDENCE ¶ 11 (U.S. 1776).

129. U.S. CONST. art. III, § 1.

130. The Constitutional Convention rejected the English method of removing judges through legislative joint resolution. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 428–29 (Max Farrand ed., rev. ed. 1966) [hereinafter FEDERAL CONVENTION].

judiciary from the other branches is one of the great innovations in the U.S. Constitution.¹³¹

d. The singular pardoning power

The remaining royal prerogatives in law enforcement are those of pardon and prosecution. Although the pardoning power had been abused as a political weapon, particularly by Elizabeth I,¹³² only two legislative restraints were put on its exercise. The Habeas Corpus Act of 1679 prohibited the Crown from pardoning anyone who took a detainee outside of England and thus beyond the reach of the Great Writ,¹³³ and the Act of Settlement of 1701 prohibited the Crown from using the pardoning power to prevent impeachment.¹³⁴ The latter qualification was included in the U.S. Constitution.¹³⁵ But the presidential pardoning power is still substantially less than its royal prerogative counterpart. With the two exceptions noted above, the King could pardon for any offense. On the other hand, the President can pardon only for “Offenses against the United States.”¹³⁶ This restriction was almost certainly motivated by considerations of federalism, but, inasmuch as most crimes are violations of state law, it has the effect of limiting the presidential pardoning power to a small percentage of all crimes.¹³⁷ This makes the actual extent of the President’s power to grant reprieves and pardons much less than that held by the Crown.

Finally, the King’s prerogatives included the sole power to enforce the laws. Although enforcing federal criminal and civil laws might certainly be viewed as being a central executive power in this country, the Framers did not include it as one of the President’s enumerated powers in Article II. Instead of vesting the President with such plenary power, the Constitution imposes upon the President the *duty* to “take care that the laws [be] faithfully executed.”¹³⁸ This is the second instance of a “missing prerogative.”

131. VILE, *supra* note 25, at 173.

132. See Jean Teillet, *Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?*, 67 SASK. L. REV. 359, 374 (2004) (summarizing the political reasons for which the Crown invoked the pardoning power and noting that the power was not ordinarily used for the intended purpose of mercy or justice).

133. 31 Car. 2, c. 2.

134. 12 & 13 Will. 3, c. 2.

135. U.S. CONST. art. I, § 2.

136. U.S. CONST. art. II, § 2, cl. 1.

137. Thus, the President cannot, for example, pardon or commute the sentence of a prisoner on a state’s death row.

138. U.S. CONST. art. II, § 3.

In summary, while many proscriptive *limitations* on the royal prerogative to enforce the laws were thus constitutionalized, the only prerogative *power* that was given to the President was the authority to grant reprieves and pardons for offenses against the United States.

3. *Control of the legislature*

a. *Direct control*

The King's prerogatives included the powers to summon Parliament into session and to prorogue or dissolve it.¹³⁹ These prerogatives were greatly abused by the Stuart kings. They could, and did, avoid dealing with a difficult legislature by refusing to call it into session or by dissolving it; conversely, they could make use of a compliant legislature by continuing it indefinitely.¹⁴⁰

Acts of Parliament limited these prerogatives. Following the Restoration, a series of acts set maximum terms for Parliament and for elections for the House of Commons and also required that Parliament meet frequently. Parliament asserted the right to determine when it would adjourn.¹⁴¹ Perhaps the most important limitation on the prerogative was a practical one: with Parliament having secured control over revenues and legislation, it was no longer feasible for the King to rule without the assistance of Parliament. This was particularly true on account of the eighteenth-century "Number of the Land Forces" and "Mutiny Acts."¹⁴² These laws authorized standing armies and appropriations for them on an annual basis, which meant, as a practical matter, that Parliament had to meet at least once a year.¹⁴³

But these legal and practical restraints did not apply in the colonies, and the King used his prerogatives to control (or rule) obstreperous colonial assemblies. The royal governors regularly prorogued and dissolved colonial assemblies, which prevented the assemblies from operating like the House of Commons and instead

139. MAITLAND, *supra* note 27, at 422.

140. 1 HALLAM, *supra* note 43, at 173, 188 (James I); 1 *id.* at 193–94, 198–99, 212, 215, 246–52 (Charles I); 2 *id.* at 323–24, 428–30, 440–41, 446 (Charles II); 3 *id.* at 57–60, 73–75 (James II).

141. 6 *id.* at 255–56.

142. 1 BLACKSTONE, *supra* note 25, at *414–15.

143. MAITLAND, *supra* note 27, at 374; *see also* RAKOVE, *supra* note 41, at 248–49 (explaining that the requirement that the Parliament meet regularly served as an important check on executive power).

made them dependent on the governors for their existence.¹⁴⁴ Four grievances in the Declaration of Independence charged the King with abusing these prerogatives.¹⁴⁵

The British model of frequent legislative sessions and fixed terms for elections became an important feature of the U.S. Constitution. With minor exceptions, this was accomplished by eliminating any power in the President over the subject. Congress was required to meet at least once every year, on a specified date,¹⁴⁶ and fixed terms were set for members of Congress.¹⁴⁷ The two Houses were given the power to decide jointly on the time for adjournment,¹⁴⁸ and the President was not given the power to prorogue or dissolve a Congress. The President's authority over when and for how long Congress could meet was limited to two rare situations: he could call Congress or either House into special session "on extraordinary Occasions," and he could adjourn Congress if the two Houses were unable to agree on the time.¹⁴⁹ In essence, the royal prerogative over legislative meetings was effectively transferred to Congress.

b. The theory of the balanced constitution

The Glorious Revolution and its aftermath shattered royal claims to absolute power in England and established the legal supremacy of Parliament.¹⁵⁰ It also led to a British Constitution characterized by a balance of power between the legislature and the executive, and later, the judiciary. Blackstone described the British Constitution as perfect: the total union of executive and legislative power would produce tyranny,¹⁵¹ but the *partial* separation of powers of the branches, and the resulting system of checks and balances between the King's prerogatives and Parliament's taxing and legislative powers, guaranteed liberty and prosperity.¹⁵²

The period from the end of the War of the Spanish Succession in 1713 through the beginning of the American Revolution was one of

144. BAILY, ORIGINS OF AMERICAN POLITICS, *supra* note 79, at 67-68; RAKOVE, *supra* note 41, at 248-49.

145. THE DECLARATION OF INDEPENDENCE, ¶¶ 4, 5, 6, 22 (U.S. 1776).

146. U.S. CONST. art. I, § 4.

147. *Id.* §§ 2-3.

148. *Id.* § 4. This provision allows either House to adjourn without the other's consent for up to three days. In England, either House could also adjourn for short periods of time. 1 BLACKSTONE, *supra* note 25, at *186.

149. U.S. CONST. art. II, § 3.

150. TASWELL-LANGMEAD, *supra* note 36, at 519.

151. 1 BLACKSTONE, *supra* note 25, at *145-47.

152. *Id.* at *154-55; see VILE, *supra* note 25, at 58-82 (elaborating on the theory of the balanced constitution in Britain).

British triumphalism—the first British Empire—and there was a widespread belief that the eighteenth-century British Constitution was largely responsible for the country's success.¹⁵³ That constitution was lauded, not only by Blackstone, but by such diverse figures as Montesquieu, Voltaire, and Hume.¹⁵⁴ The universal view was that the key to the British Constitution was the division of powers to produce a system of balanced government,¹⁵⁵ and that “[t]he very idea of liberty was bound up with the preservation of this balance of forces.”¹⁵⁶ For many years, the colonists shared the view that the British Constitution was the best and freest system of government in the world.¹⁵⁷

c. Executive dominance

This was the classical view of the British Constitution. The reality was quite different. Blackstone suggested as much in comments contained in a later portion of his treatise. He wrote that if one looked at the statute books alone, it would seem that:

[T]he powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the first . . . [and] we may perhaps be led to think, that the bal[ance] [of power] is [i]nclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left, to form that check upon the lords and commons, which the founders of our constitution intended.¹⁵⁸

But, happily for Blackstone, by making full use of certain prerogatives, the King was able to exercise tremendous “influence” and “power” over Parliament.¹⁵⁹ Blackstone concluded, “Upon the whole therefore I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the crown has not been too far

153. BAILYN, ORIGINS OF AMERICAN POLITICS, *supra* note 79, at 17-23.

154. KEIR, *supra* note 51, at 293-96.

155. BAILYN, IDEOLOGICAL ORIGINS, *supra* note 127, at 70-72.

156. *Id.* at 76-77.

157. *See, e.g.*, BOWEN, *supra* note 38, at 57 (“Even the youngest man present [at the Constitutional Convention] had been born under the British government; all of them had grown up in the belief that the English government and the English common law comprised the best and freest system on earth.”); WOOD, *supra* note 17, at 10-13.

158. 1 BLACKSTONE, *supra* note 25, at *334.

159. *Id.* at *335-37; *see also* THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 335 (“The disuse of [the royal veto] power for a considerable time past, does not affect the reality of its existence; and is to be ascribed wholly to the crown’s having found the means of substituting influence to authority . . .”).

weakened by any transactions in the last century. Much is indeed given up; but much is also acquired.”¹⁶⁰

The King’s prerogatives included the sole power to make appointments to all government positions outside of the House of Commons and to create and dispense offices, pensions, privileges, and honors, including titles of nobility.¹⁶¹ Except for the judges and members of Parliament, all office-holders served at the pleasure of the King and were removable at his will.¹⁶² William III and Anne began to assert royal control over the government by appointing ministers independently of parliamentary majorities.¹⁶³ The House of Lords was easily subject to royal influence because the Crown appointed all of its members.¹⁶⁴ It could be counted on to block measures of the House of Commons to which the King objected, thus obviating the need for the veto power.¹⁶⁵ And it could be manipulated to support the Crown’s agendas. Thus, when a majority of the House of Lords did not support her foreign policy, Anne created twelve new peers and effectively established a new majority supportive of the Crown.¹⁶⁶

Control over the House of Commons was accomplished over time through the creation of a massive patronage system that used honors, pensions, and bribes, as well as appointments to and removals from offices.¹⁶⁷ The system was enforced by the Crown’s ministers who held parliamentary positions.¹⁶⁸ In 1713, the House of Commons adopted Standing Order No. 66, which provided that no appropriation could be voted for any purpose except on a minister’s motion.¹⁶⁹ Thus, by the end of Anne’s reign, the Queen, through her ministers, had taken substantial control over the direction of finance.

160. 1 BLACKSTONE, *supra* note 25, at *337.

161. *Id.* at *271-72.

162. MAITLAND, *supra* note 27, at 428-30.

163. KEIR, *supra* note 51, at 276-82.

164. 1 BLACKSTONE, *supra* note 25, at *157-58; 10 HOLDSWORTH, *supra* note 35, at 412-13.

165. This practice continued through the reign of George III, who used the House of Lords to block objectionable bills. 10 HOLDSWORTH, *supra* note 35, at 607. Peers who opposed George III were deprived of their offices, while those who supported him were rewarded with offices and pensions. *Id.* at 618.

166. KEIR, *supra* note 51, at 282-88; SMITH, *supra* note 76, at 381-82.

167. 10 HOLDSWORTH, *supra* note 35, at 418; SMITH, *supra* note 76, at 401-02. These ideas were not original to the Hanover monarchs. Charles II had used similar techniques to corrupt Parliament. 2 HALLAM, *supra* note 43, at 355-56, 398-99; *see also* 3 *id.* at 189-90 (describing William III’s use of bribery).

168. Although the 1701 Act of Settlement prohibited members of Parliament from holding other offices, that portion of the statute was repealed in 1705 to the extent that it applied to then-existing offices. *See* KEIR, *supra* note 51, at 282-88.

169. *Id.* at 281-82.

As Britain became richer, the patronage machine flourished. By the reign of George III, nearly 200 members of the House of Commons enjoyed separate offices under the Crown.¹⁷⁰ Another thirty or forty members were beholden to the King for the awards of lucrative contracts, and yet other members benefited by being able to nominate their friends or supporters to the 8000 or so available excise offices.¹⁷¹ As a result, “[t]his influence of the crown helped it to control the Legislature all through the eighteenth century.”¹⁷²

An embryonic form of cabinet government that began under Anne continued to function under George I (1714-1727) and George II (1727-1760).¹⁷³ Ministers acted primarily as the King’s servants and were responsible for conducting the government and dispensing his patronage.¹⁷⁴ One of their principal tasks was to ensure that the King’s policies would be supported by Parliament, and this was a major criterion of their usefulness to the Crown.¹⁷⁵ Consequently, the King and his ministers had to take into account the views of the leaders of the House of Commons, and ministers were replaced if they unduly antagonized the leaders of the House.¹⁷⁶ But this situation barely resembled true cabinet government, which was not instituted in England until 1827.¹⁷⁷

George I and II delegated much of their prerogative powers to their ministers. George III was determined to exercise his prerogatives personally:

170. SMITH, *supra* note 76, at 401-02.

171. BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 79, at 29.

172. 10 HOLDSWORTH, *supra* note 35, at 419. One measure of the increasingly successful “influence” of the Crown over the House of Commons is the number of ministerial impeachments during the period of 1689-1787. There were fifteen impeachments during the reigns of William III, Anne, and George I; only one during the reign of George II (Lord Lovat, in 1746, for high treason in supporting the Scottish rebellion); and none during the reign of George III. THOMAS ERSKINE MAY, *A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGES OF PARLIAMENT* 38-39 (1844).

173. SMITH, *supra* note 76, at 381-97.

174. KEIR, *supra* note 51, at 297.

175. *Id.* at 280-82, 316-17.

176. *Id.* at 330-34.

177. SMITH, *supra* note 76, at 398. Even a minister as powerful as Sir Robert Walpole, referred to as the first “prime” minister, owed his position solely to the King’s pleasure. J.H. PLUMB, *ENGLAND IN THE EIGHTEENTH CENTURY* 70 (1963). Although he exercised great power, “Walpole did not . . . enjoy any tenure independent of royal favor,” nor did he choose the other ministers. KEIR, *supra* note 51, at 332. Walpole was eventually removed when widespread opposition in the House of Commons convinced George II that Walpole’s utility in influencing Parliament had ended; the government did not fall, however, because the other ministers stayed on. *Id.* at 330-34. If cabinet government had developed in England before the American constitutions were enacted, the presidency might look quite different. RAKOVE, *supra* note 41, at 268.

George III was not bound to accept the advice of his ministers. True, they were chosen to give him adequate advice. But they held office during his pleasure. The majority in the House of Commons was made and held largely by Crown patronage. The effective ministers of the smaller Cabinet were only responsible to George III and to the courts, including the House of Lords before which they might be impeached. They were not responsible to Parliament. The idea, as well as the practice, was simply alien to the age. Nor was there collective or corporate Cabinet responsibility. That idea was not accepted until 1827. Responsibility was thus individual and legal. It was not collective and it was not Parliamentary.¹⁷⁸

All of the parties in England understood that the appointment, removal, and related prerogatives were the sources of the King's power.¹⁷⁹ Until the disastrous results of George III's reign,¹⁸⁰ this system was widely supported in England because it brought stability and efficiency to government and riches to its beneficiaries:

The whole system operated with remarkable effect. No king had to resort to the royal veto, never employed after Anne in 1708 No government ever lost a general election, nor did any government, until the ill-success of that of Lord North in the American War caused its overthrow in 1782, ever fail to sway Parliament so long as it possessed the King's confidence.¹⁸¹

A vocal opposition within England was disgusted by the amount of corruption in the government and was fearful of the concentration of power in the Crown, which the opposition saw as destroying the necessary balance of powers in the British Constitution and violating the liberties of the people. The opposition filled the printing presses

178. SMITH, *supra* note 76, at 398-400.

179. WOOD, *supra* note 17, at 143-45.

180. As one historian explained, the judgment of George III was as damning in England as in the colonies:

During the first twenty-four years of his reign, by his meddlesome energy and restless activity in regulating every affair of State from the greatest to the least, combined with a resolute obstinacy in enforcing his own views against the opinions of his Constitutional advisers, he succeeded in alienating the affections of his people, in reducing the nation from prosperity to the depths of adversity, and of depriving the country for ever of its American colonies.

TASWELL-LANGMEAD, *supra* note 36, at 545.

181. KEIR, *supra* note 51, at 297; *see also* BAILYN, ORIGINS OF AMERICAN POLITICS, *supra* note 79, at 27-29. North's ouster on a vote of no confidence was, at the time, an anomaly. The loss of the American colonies was catastrophic and briefly curtailed the King's ability to select his ministers, but by the election of 1784, normal conditions were restored with George III again personally choosing ministers whom he used to control Parliament. RAKOVE, *supra* note 41, at 268.

with exposés and protests.¹⁸² From these opposition writings, as well as from first-hand observations by colonial visitors to London, the colonists knew of the widespread corruption and consolidation of power in England.¹⁸³ This opposition had little effect in England but had a profound effect in America.¹⁸⁴

The fears of the colonists were compelling: if these distortions of the British Constitution could happen in the mother country, what would stop the same calamities from being imposed on the colonies? The colonists saw an unmistakable pattern of coercive actions emanating from the Crown that had the same purpose as the abuses of power in England—"the destruction of the English constitution, with all the rights and privileges embedded in it."¹⁸⁵ This belief "added an inner accelerator"¹⁸⁶ to the colonists' opposition to the King:

It was this—the overwhelming evidence, as they saw it, that they were faced with conspirators against liberty determined at all costs to gain ends which their words dissembled—that was signaled to the colonists after 1763, and it was this above all else that in the end propelled them into Revolution.¹⁸⁷

Complementing the use of the appointments and related prerogatives was ministerial control of elections to the House of Commons. On behalf of the King, the ministers used their "influence" in Parliament to maintain rotten boroughs, buy and sell seats, and severely restrict the number of eligible voters.¹⁸⁸ The elections, expulsion, and exclusions of John Wilkes from the House of Commons were orchestrated by the ministers and deeply affected the colonists:

Americans could only watch with horror and agree with [Wilkes] that the rights of the Commons, like those of the colonial Houses, were being denied by a power-hungry government that assumed to itself the privilege of deciding who should speak for the people in

182. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 127, at 48-54; BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 79, at 31-52; Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 *TEX. L. REV.* 447, 456-58 (1996).

183. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 127, at 86-93.

184. BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 79, at 35, 53-58.

185. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 127, at 95.

186. *Id.*

187. *Id.*

188. BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 79, at 27-29; KEIR, *supra* note 51, at 323-25.

their own branch of the legislature. . . . [T]he constitution was being deliberately, not inadvertently, torn up by its roots.¹⁸⁹

The colonial governors tried to replicate this control over the assemblies. They began developing the same patronage system that had corrupted the legislature in England,¹⁹⁰ a practice that was condemned in the Declaration of Independence.¹⁹¹ But the conditions in the colonies were not suitable for the successful executive use of “influence” to control the assemblies. The governors were unable to establish huge patronage machines, rotten boroughs did not exist, and there were many more eligible voters.¹⁹² The King and his governors resorted to coercion and force as means of destroying colonial autonomy and exporting executive autocracy to America.¹⁹³

This explains why the post-independence hostility of having a king in America, even an elected one, was so great. When drafting the state constitutions, the revolutionaries minimized executive power because they did not trust the British system of limiting executive prerogatives through proscriptive laws. “The King may have been rigidly confined in the eighteenth-century constitution; but few Englishmen would deny that the principal duties of government still belonged with the Crown.”¹⁹⁴ The problem facing the Constitutional Convention was this: a strong executive was essential, but the approach taken in the Glorious Revolution of limiting executive power through proscriptive laws had not prevented the Hanoverian Kings from obtaining autocratic power through the *lawful* exercise of prerogative power.¹⁹⁵ The Framers took a new approach. While

189. BAILY, IDEOLOGICAL ORIGINS, *supra* note 127, at 112; *see also* Powell v. McCormack, 395 U.S. 486, 527–31 (1969) (explaining the circumstances that led to the expulsion of Wilkes and the impact of the case on the colonies); VILE, *supra* note 25, at 118–20 (discussing the importance of Wilkes’s case).

190. BAILY, IDEOLOGICAL ORIGINS, *supra* note 127, at 109–10.

191. THE DECLARATION OF INDEPENDENCE ¶ 10 (U.S. 1776).

192. BAILY, IDEOLOGICAL ORIGINS, *supra* note 127, at 71–91.

193. *Id.* at 131–50; *see also id.* at 117 (“Unconstitutional taxing, the invasion of placemen, the weakening of the judiciary, plural officeholding, Wilkes, standing armies—these were major evidences of a deliberate assault of power upon liberty.”).

194. WOOD, *supra* note 17, at 136.

195. After the British surrender at Yorktown in 1781, Charles James Fox, the leader of the Whig opposition, accused the Crown’s corruption of Parliament as having caused the loss of the American colonies:

There was one grand domestic evil, from which all our other evils, foreign and domestic, had sprung. To the influence of the Crown we must attribute the loss of the army in Virginia . . . [and] the loss of the thirteen provinces of America; for it was the influence of the Crown in the two Houses of Parliament, that enabled His Majesty’s ministers to persevere against the

adopting legal *prohibitions* on abuses of executive power from the British Constitution, the Framers also *restructured* power by transferring many royal prerogatives to the legislative branch, requiring prior legislative approval for others and eliminating some altogether.

Given that the royal prerogatives to create offices, appoint and remove officials, and dispense pensions and titles were so central to the concentration of malignant power in the Crown, one would expect the Convention delegates to treat these prerogatives with exceptional care.¹⁹⁶ Their concerns are reflected in eight constitutional provisions. The royal prerogative of appointing members of the legislature (to the House of Lords) was eliminated; the President was given no power to appoint members of Congress, not even to fill vacancies.¹⁹⁷ The power to create offices and pensions was vested in Congress.¹⁹⁸ Titles of nobility were abolished.¹⁹⁹ Members of Congress were prohibited from simultaneously holding any other federal office;²⁰⁰ they were also prohibited from accepting appointment to any federal office that was created, and from accepting compensation that was increased, during the terms for which they were elected.²⁰¹ The unlimited royal prerogative of appointing all executive and judicial officers was greatly qualified in

voice of reason This was the grandparent spring from which all our misfortunes flowed.

SIMMS, *supra* note 59, at 666 (quoting Parliamentary debates).

196. Madison told Jefferson that the Convention delegates focused on two issues concerning the executive department: whether there should be a single or plural presidency, and how to deal with appointments to office and the potential of executive control over the Legislature. Letters from James Madison to Thomas Jefferson (Oct. 24 & Nov. 1, 1787), in 1 DOCUMENTARY HISTORY, *supra* note 18, at 98-99.

197. U.S. CONST. art. I, § 2, cl. 4; *id.* § 3, cl. 2.

198. This power was vested in Congress through the spending power, *id.* § 8, cl. 1, the Necessary and Proper Clause, *id.* § 8, cl. 18, and the requirement that no money could be drawn from the Treasury except in conformity with appropriations made by law, *id.* § 9, cl. 7.

199. *Id.* § 9, cl. 8.

200. *Id.* § 6, cl. 2. This constituted a return to the repealed provision of the 1701 Act of Settlement. See VILE, *supra* note 25, at 171 (examining how the hatred of corruption and influence in the British legislature caused the Framers to separate executive and legislative personnel); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1053-54 (1994) (same).

201. U.S. CONST. art. I, § 6, cl. 2. Hamilton linked these provisions to insulating Congress from the kind of executive corruption that was prevalent in England, with the observation that “[t]he venality of the British House of Commons has been long a topic of accusation against that body, in the country to which they belong, as well as in this; and it cannot be doubted that the charge is to a considerable extent well founded.” THE FEDERALIST No. 76 (Alexander Hamilton), *supra* note 3, at 372.

Article II. For 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,” the President was given the power of appointment, but only with the prior approval of the Senate.²⁰² And, in an apparent attempt to prevent the President from having the authority to create a massive patronage system, “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.”²⁰³ These restrictions on the President’s appointment power constitute a network of responses to the gross abuses of the corresponding royal prerogatives.

At the time of the Constitutional Convention, the King’s prerogatives included the power to remove any government official, except members of Parliament and judges. The U.S. Constitution vested the power to remove a member of Congress in his or her House and provided that federal judges would hold their offices during “good behavior,” being subject to removal only through impeachment.²⁰⁴ The President and all other executive officials could also be removed by Congress through impeachment,²⁰⁵ but here again, there is a “missing prerogative”—the President’s removal power. The removal of executive officials by the President is not an enumerated power under Article II. Because the King’s power to remove his ministers and all other executive officers was so critical to his aggrandizement of power at the expense of Parliament, the omission of a removal power appears significant. This is our third “missing prerogative.”

Finally, the Constitution excluded the President from having any role in elections for Congress or in its internal operations. Voting qualifications for the House of Representatives, and later the Senate, were determined by the qualifications required of voters for the lower state houses.²⁰⁶ Congress was given plenary power to determine the times, places, and manners of holding elections; each House was given the authority to be the judge of its elections, to determine the rules for its proceedings, and to punish and expel members.²⁰⁷

202. U.S. CONST. art. II, § 2, cl. 2.

203. *Id.*

204. U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6; U.S. CONST. art. III, § 1.

205. U.S. CONST. art. I, § 5 (Congress); U.S. CONST. art. II, § 4 (President); U.S. CONST. art. III, § 1 (Judiciary).

206. U.S. CONST. art. I, § 2, cl. 1.

207. *Id.* § 4, cl. 1.

Although the President was given no power over congressional elections, the converse was not true. Congress was given the power to count the votes of presidential electors, and if no candidate received a majority, the election of the President would be made in the House of Representatives with each state having one vote.²⁰⁸ And, while the President was given no authority over congressional operations, Congress was vested with substantial authority over the exercise of power by all three branches in the Necessary and Proper Clause.²⁰⁹

4. *Foreign affairs and the war powers*

a. *Diplomatic relations*

In *The Federalist*, Hamilton discussed the three presidential powers over foreign affairs related to diplomacy that are enumerated in Article II (appointing and receiving ambassadors and other public ministers, and making treaties) and, following Blackstone's descriptions, compared them to the royal prerogatives.²¹⁰ The King had the "sole power" of sending and receiving ambassadors and ministers to and from foreign states.²¹¹ The President was given the power to receive foreign ambassadors and ministers, but the President's power to appoint ambassadors and ministers to represent the United States was made subject to the prior approval of the Senate.²¹² As part of his power over foreign affairs, the King had the prerogative of making treaties with foreign states without the involvement of Parliament. The only check on the making of bad treaties, according to Blackstone, was ministerial impeachment.²¹³ The President was given the power to make treaties only with the approval of two-thirds of voting Senators.²¹⁴ Thus, for two of the three foreign policy powers related to diplomacy, the U.S. Constitution places prior legislative constraints on the President, though the British Constitution placed no such constraints on the King.

208. U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XVII; U.S. CONST. art. I, § 4; U.S. CONST. art. II, § 2, *amended by* U.S. CONST. amend. XII; U.S. CONST. art. I, § 5, cl. 1–2. The Framers anticipated that the House of Representatives would frequently decide presidential elections, with the electors simply nominating candidates for President. See RAKOVE, *supra* note 41, at 265. This expectation proved inaccurate because of the unexpected—and unwelcome to the Framers—development of the two-party system.

209. U.S. CONST. art. I, § 8, cl. 8.

210. THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 327, 338–39.

211. 1 BLACKSTONE, *supra* note 25, at *253.

212. U.S. CONST. art. II, § 2, cl. 2; *id.* § 3.

213. See 1 BLACKSTONE, *supra* note 25, at *257.

214. U.S. CONST. art. II, § 2, cl. 2.

Hamilton's treatment of the Article II power to receive foreign ambassadors and ministers is puzzling. He dismissed it as "more a matter of dignity than of authority."²¹⁵ But the power to receive ambassadors and ministers is the power to recognize foreign governments, which is consequential.²¹⁶ This appears to be an occasion in which Hamilton downplayed presidential power for the sake of political advocacy.²¹⁷

Both Blackstone's and Hamilton's treatment of the treaty power is also problematic. Given the extent of the King's control over Parliament, and especially the House of Lords, ministerial impeachment was not a real check against bad treaties. By the time Blackstone wrote, it had been fifty years since a minister had been impeached for negotiating a bad treaty—or for any other political reason—and even the results of that case were ambiguous.²¹⁸ There was, however, a real parliamentary check against bad treaties. Although the King could make a treaty, authorizing or implementing legislation by Parliament was required if the treaty required appropriations or if it changed any domestic legal relationships.²¹⁹

215. THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 339.

216. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1560 (1833); *see also* 1 TUCKER'S BLACKSTONE, *supra* note 25, at app. 341.

217. In his 1793 defense of President Washington's Neutrality Proclamation, Hamilton (writing as Pacificus) argued that the power to receive ambassadors was the power to recognize foreign governments. PACIFICUS-HELVIDIUS DEBATES, *supra* note 33, at 14–15.

218. The last impeachment of ministers for political reasons occurred in 1715, when, at the instigation of George I, the House of Commons voted articles of impeachment against three of Anne's ministers for their roles in negotiating the 1713 Treaty of Utrecht. Two of the ministers fled to France and were attainted in their absence. The third, the Earl of Oxford, pled as a defense that he was acting under the instructions of the Queen. The Commons never presented a prosecution. After two years of imprisonment without trial, the House of Lords acquitted Oxford, and one of the attainted ministers was allowed to return safely to Britain. TASWELL-LANGMEAD, *supra* note 36, at 416 n.1; *see also* SIMMS, *supra* note 59, at 128–29, 180.

As St. George Tucker observed, impeachment was even less likely to be a check on bad treaties in the United States because it seems practically inconceivable that two-thirds of the Senate would vote to convict an official for negotiating a treaty that had been previously approved by two-thirds of the Senate. TUCKER'S BLACKSTONE, *supra* note 25, at app. 335–36.

219. 14 HOLDSWORTH, *supra* note 35, at 66 ("Though . . . Blackstone assigned no limitation to the treaty-making power of the Crown, two very definite limitations were recognized in the eighteenth century The Crown can make a treaty; but if the terms of that treaty involve the imposition of any charge upon the subject, or an alteration in the rules of English Law, they cannot take effect without the sanction of Parliament."); *see* IAN SINCLAIR ET AL., *National Treaty Law and Practice: United Kingdom*, in NATIONAL TREATY LAW AND PRACTICE 733–36 (Duncan Hollis ed., 2005); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 614 (2008).

This rule of English law was generally understood by the Framers,²²⁰ and Americans were certainly familiar with one example: the 1783 Paris Treaty of Peace.²²¹

Hamilton followed Blackstone in failing to distinguish between treaty formation and implementation in Britain.²²² This appears to be another example of Hamilton's advocacy in maximizing the King's powers in comparison to the President's. But Hamilton did not need to avoid this distinction because, even if described accurately, the King's treaty powers were greater than the President's. The King had the unilateral power to enter into treaties affecting war, peace, and commerce. The parliamentary check was after-the-fact implementation. Parliament could limit the effectiveness of a treaty by denying necessary funding, and it could refuse to pass legislation that would give the treaty domestic legal effect. But the kingdom's obligation under international law to comply with the treaty remained, and this also provided a powerful political impetus for parliamentary implementation.²²³ By contrast, the U.S. Constitution requires that treaties negotiated by the President could not have *either* international *or* domestic legal effect without first having obtained *advance* approval by a two-thirds vote in the Senate.

The Supremacy Clause classifies treaties as "the supreme Law of the Land" and directs state judges to enforce them as against contrary state law.²²⁴ Thus, without the requirement of advance Senatorial approval, the President could have had the unilateral power *both* to bind the country internationally *and* to change domestic law, which would have made the President's treaty power greater than the

220. See Ramsey, *Executive Agreements*, *supra* note 11, at 225–28; see also Ware v. Hylton, 3 U.S. 199, 273–74 (1796) (Iredell, J.) (recognizing that while the King has unlimited power in making treaties and representing Great Britain in the international arena, any commitment requiring a change in domestic law could only be carried out by parliamentary legislation).

221. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80. Following the defeat at Yorktown and the fall of Lord North's government, Parliament enacted a statute declaring that it shall "be lawful for his Majesty to . . . agree, and conclude . . . a Peace or a Truce with the said [North American] Colonies . . . any Law, Act or Acts of Parliament . . . to the contrary . . . notwithstanding" and to "repeal, annul, and make void, or to suspend . . . the Operation and Effect of any Act or Acts of Parliament which relate to the said Colonies . . ." 1782, 22 Geo. 3, c. 46; see MAITLAND, *supra* note 27, at 424–26.

222. THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 338.

223. See MAITLAND, *supra* note 27, at 426; see also Ware, 3 U.S. at 274 (Iredell, J.) (noting that the "law of nations" requires Britain to comply with treaties ratified by the King and that Parliament has a "moral obligation" to enact enabling legislation).

224. U.S. CONST. art. VI, cl. 2.

King's.²²⁵ The Framers not only avoided this result, but they placed a stronger legislative constraint on the treaty-making prerogative than the British did in their requirement of after-the-fact parliamentary implementation.

Here again we confront the problems of the "missing prerogative." The Framers knew that countries entered into agreements other than treaties.²²⁶ Yet the President's power to enter into executive agreements with foreign countries is not enumerated in Article II, nor is this power specifically given to Congress.

The greater problem is another, and more important, "missing prerogative." Blackstone describes the King's plenary power over foreign affairs as follows: "With regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is an act of the whole nation" ²²⁷ Although the President is given three elements of the foreign affairs power related to diplomacy (two of which he must share with the Senate), Article II does not state that the President holds a *general* power over foreign affairs. It does not, for example, incorporate Blackstone's language that the chief executive is the "delegate or representative" of the nation in conducting foreign affairs, or that his action is that "of the whole nation." This was not included as an enumerated presidential power in Article II, nor was it specifically vested in Congress.

Blackstone might be read as asserting that the King maintained entire control of foreign affairs, but Parliament had already assumed the power to regulate foreign commerce,²²⁸ criminalize piracy,²²⁹ and

225. The Supreme Court has not followed the literal language of the Supremacy Clause as it relates to the effect of treaties on domestic law. *See* cases cited *infra* note 385 and accompanying text.

226. Vattel, whom the Framers frequently relied upon, had distinguished between treaties and agreements, and his choice of words may have influenced the drafting of Section 10 of Article I, which prohibits the states from entering into any "Treaty" or "Agreement or Compact" with any foreign power. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. (forthcoming 2009); *see also* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 228 (1945) (citing examples of non-treaty international agreements concluded under the Articles of Confederation).

227. 1 BLACKSTONE, *supra* note 25, at *252.

228. *See* 10 HOLDSWORTH, *supra* note 35, at 401–02. George III claimed the right to institute embargoes while the country was at peace, and did so by proclamation in 1766. His ministers later conceded that this proclamation infringed on the authority of Parliament to regulate foreign commerce, and an act of indemnity was passed. *Id.* at 365, 401.

229. Piracy Act, 1698, 11 Will. 3, c. 7.

naturalize aliens.²³⁰ All of these powers were vested in Congress.²³¹ The King's prerogatives included control over immigration; he could give foreigners safe-conduct passes to enter England and could prescribe (and proscribe) their conduct within the country.²³² The King also had the prerogative of making foreigners into denizens—that is, an alien could be given certain rights that English citizens possessed, such as the right to purchase and hold property.²³³ The immigration and denizen prerogatives were not given to the President. Instead, these powers were subsumed in the naturalization power.²³⁴

b. The military and war

There are no powers more important than control over the military and the decision to engage in war. Blackstone described the King as “the generalissimo, or the first in military command, within the kingdom”²³⁵ and stated that this prerogative included “the sole prerogative of making war and peace.”²³⁶ The King had the power to declare war,²³⁷ which meant that he could invade another country without parliamentary authority.²³⁸ He could also prosecute undeclared wars and had the prerogative of granting letters of marque and reprisal.²³⁹ According to Blackstone, the King had the sole powers of raising and regulating the army, navy, and militia, including forts and places of strength.²⁴⁰

The actual relationship of the Crown and Parliament with respect to the military was more complex than Blackstone outlines. Following the Restoration, an Act of Parliament recognized the plenary power of the King for the supreme government and command of the army, navy, and militia, as well as forts and places of strength, “and that both or either of the Houses of Parliament cannot nor ought to pretend to the same.”²⁴¹ But Parliament passed many statutes regulating the army, navy, and militia both before and after

230. 1 BLACKSTONE, *supra* note 25, at *289.

231. U.S. CONST. art. I, § 8, cl. 3, 4, 10.

232. 1 BLACKSTONE, *supra* note 25, at *259.

233. *Id.* at *260; see MAITLAND, *supra* note 27, at 427–28.

234. See U.S. CONST. art. I, § 8, cl. 4, 18.

235. 1 BLACKSTONE, *supra* note 25, at *262.

236. *Id.* at *257.

237. *Id.* at *258.

238. See MAITLAND, *supra* note 27, at 423–24.

239. 1 BLACKSTONE, *supra* note 25, at *258–59.

240. *Id.* at *262–63.

241. 1661, 13 Car. 2, c. 6.

that statute. The Petition of Right of 1628 declared that the quartering of soldiers in private houses in times of peace was illegal; it also prohibited trials of civilians by courts martial within England and protested against the trial by courts martial of members of the military for crimes committed within the country.²⁴² Except in cases of invasion, the impressment of troops into the army (but not the navy) and forcible service outside the country were made illegal.²⁴³ Enacted in response to James II's creation of an army that had threatened to produce military despotism, the English Bill of Rights of 1689 prohibited the King from raising or keeping a standing army in time of peace without the authority of Parliament,²⁴⁴ although he retained the prerogative of raising an army in time of war.²⁴⁵ Subsequent "Number of the Land Forces" and "Mutiny Acts" authorized the King to raise armies in times of peace, but these statutes and their appropriations had to be renewed annually.²⁴⁶ A 1702 statute gave the King the power to issue Articles of War, but a 1717 statute recognized the same power in Parliament.²⁴⁷ Through a succession of statutes, soldiers were placed under a special legal code, where they were subject to discipline and trials by courts martial and exempted from the jurisdiction of the common law courts.²⁴⁸ Parliament enacted a statute in 1757 that rendered all men between the ages of eighteen and fifty liable to serve, or to find substitutes, as privates in the militia.²⁴⁹ In case of rebellion or invasion, the King could call up the militia, appoint officers, and employ it as part of the army.²⁵⁰ "From this account of the Crown's prerogatives in relation to the army and the navy, it is clear that, when Blackstone wrote, they had been considerably added to, and to some extent controlled, by Parliament."²⁵¹

242. 1628, 3 Car. 1, c. 1.

243. 1640, 16 Car. 1, c. 28 (Preamble). Subsequent statutes exempted the disorderly, the idle, and criminal prisoners, who could be forcibly sent abroad—exemptions that were used quite liberally. KEIR, *supra* note 51, at 305–07.

244. 1688, 1 W. & M. Sess. 2, c. 2, § 6.

245. See MAITLAND, *supra* note 27, at 328.

246. See 10 HOLDSWORTH, *supra* note 35, at 377–82.

247. *Id.*

248. These statutes therefore modified the Petition of Right and took away jurisdiction from the common law courts. See KEIR, *supra* note 51, at 305–07; MAITLAND, *supra* note 27, at 328–30. This history is recounted in *Loving v. United States*, 517 U.S. 748, 760–66 (1996).

249. MAITLAND, *supra* note 27, at 456.

250. *Id.* at 456–57.

251. 10 HOLDSWORTH, *supra* note 35, at 382.

George III's use of the military and war powers against America was condemned in eight grievances in the Declaration of Independence,²⁵² and some of the British statutory provisions that related to military power were put into the U.S. Constitution.²⁵³ The Framers designated the President as Commander-in-Chief of the armed forces, which guaranteed civilian control over the military.²⁵⁴ Otherwise, the Framers vested *all* of the royal and legislative prerogatives concerning the military and war powers in Congress,²⁵⁵ which meant, as Hamilton emphasized, that the President's authority "would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it."²⁵⁶

One of the prerogative powers transferred to Congress now looks quaint but was, at the time of the Constitutional Convention, important and provides an insight into the Framers' treatment of the presidency. Although the President was declared to be the Commander-in-Chief of "the Militia of the several States, when called into the actual Service of the United States,"²⁵⁷ he was not given the power to call the militia into federal service. Instead, Congress was vested with the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."²⁵⁸ Inasmuch as Congress did not have to create a standing army—and there was substantial opposition to its doing so—the militia could be the first line of defense in cases of military emergencies that could threaten the nation. Of course, Congress could delegate that power to the President (as it did in 1795),²⁵⁹ but

252. THE DECLARATION OF INDEPENDENCE ¶¶ 11–12, 14–15, 23–26 (U.S. 1776).

253. See U.S. CONST. art. I, § 8, cl. 12 (limiting the use of appropriations for raising and supporting the army to two years); U.S. CONST. amend. III (prohibiting quartering soldiers in private homes during times of peace); U.S. CONST. amend. V (exempting cases arising in the military from presentment or indictment by grand juries).

254. U.S. CONST. art. II, § 2 cl. 1.

255. U.S. CONST. art. I, § 8, cl. 3 (regulate foreign commerce); *id.* § 8, cl. 11 (declare war, grant letters of marque and reprisal, and make rules concerning captures); *id.* § 8, cl. 12 (raise and support an army); *id.* § 8, cl. 13 (provide and maintain a navy); *id.* § 8, cl. 14 (make rules for the government and regulation of the military); *id.* § 8, cl. 15 (provide for calling forth the militia to execute federal laws, suppress insurrections, and repel invasions); *id.* § 8, cl. 16 (provide for organizing, arming, and disciplining the militia and regulating it when called into federal service).

256. THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 3, at 336. Hamilton's description of the President as Commander-in-Chief was that "[i]t would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy" *Id.*

257. U.S. CONST. art. II, § 2, cl. 2.

258. U.S. CONST. art. I, § 8, cl. 15.

259. See Militia Act of 1795, ch. 36, § 10, 1 Stat. 424 (1795). This statute provided,

that would be a matter of legislative choice.²⁶⁰ The constitutional authority for dealing with such emergencies was vested in Congress.²⁶¹

What other checks could there have been to prevent presidential abuse of these most dangerous powers? Blackstone suggested that ministerial impeachment was a check on the King's abuse of his military and war powers.²⁶² This suggestion seems as ineffective here as in the case of bad treaties.²⁶³ The real parliamentary check was control over appropriations for the military, and these had to be renewed annually.²⁶⁴

In theory, this appropriations check might have provided a prospective limitation on the King's war powers because Parliament had to decide annually the extent of military force that the King could control. The Framers followed this practice by imposing a two-year time limit on appropriations for the armies, which requires every new Congress to revisit this funding.²⁶⁵ But in Britain, this check had not operated effectively. The need to have a funded, permanent, standing army was demonstrated by the fact that England was at war as much as it was at peace during the eighteenth century. In the ninety-nine years between the Glorious Revolution and the Constitutional Convention, England had fought six wars over forty-eight years.²⁶⁶ Moreover, the appropriations check suffered from the

"[W]henver the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper."

Id.

260. The Supreme Court upheld this delegation of power and also held that, under the 1795 statute, the decision as to when an emergency arises necessitating that the militia be called was for the President to make. *Martin v. Mott*, 25 U.S. 19, 29–30 (1827).

261. See Stephen I. Vladeck, Note, *Emergency Powers and the Militia Acts*, 114 YALE L.J. 149, 157–58 (2004).

262. See 1 BLACKSTONE, *supra* note 25, at *258.

263. From the Glorious Revolution through the Constitutional Convention, no British minister was impeached for abusing the military or war powers. See discussion *supra* note 172. If any British minister was deserving of impeachment, it was Lord North for his leading role in losing the American colonies. Although the House of Commons forced his resignation, he was not impeached. See discussion *supra* notes 181 & 221 and accompanying text.

264. See discussion *supra* notes 244–246 and accompanying text.

265. U.S. CONST. art. I, § 8, cl. 12.

266. England fought the War of the Grand Alliance (1688–1697), the War of the Spanish Succession (1702–1713), the War of the Quadruple Alliance (1718–1720), the War of the Austrian Succession (1740–1748), the Seven Years War (1754–1763), and the War of American Independence (1775–1783). See generally SIMMS, *supra* note 59 (describing each of these wars in detail).

same after-the-fact defect as the requirement that legislators implement treaties. If the King, with the army and navy at his disposal, went to war with another country, there would be enormous political pressure on Parliament to support that decision. Blackstone recognized as much. In emphasizing that the King's real power was much greater than his nominal legal power, Blackstone pointed to two forces. The first, discussed above, was the King's prerogative to make appointments, create offices, and dispense honors and privileges. The other was the King's control over the military, which Blackstone considered part of the King's "domestic" prerogatives²⁶⁷:

[T]here is still another newly acquired branch of power; and that is, not the influence only, but the force of a disciplined army: paid indeed ultimately by the people, but immediately by the crown; raised by the crown, officered by the crown, commanded by the crown. They are kept on foot it is true only from year to year, and that by the power of parliament: but during that year they must, by the nature of our constitution, if raised at all, be at the absolute disposal of the crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people. A trust, that is more than equivalent to a thousand little troublesome prerogatives.²⁶⁸

A power based on "trust" that is greater than "a thousand little troublesome prerogatives!" These words must have made chilling reading for Americans who had fought a war of independence—a war they blamed on George III. This blame was mirrored by the opponents of royal dominance in London who saw the King's military assault on America as a threat to liberty in England.²⁶⁹

With respect to the appointments power, another prerogative that had been greatly abused by George III and his predecessors, the U.S. Constitution imposed the check of prior Senatorial approval. The same technique of requiring prior Senatorial approval was used to constrain the prerogatives of making treaties and sending

267. 1 BLACKSTONE, *supra* note 25, at *261–63.

268. *Id.* at *335–36; *see also* 10 HOLDSWORTH, *supra* note 35, at 418, 577–81 (stating that the King's control over the military was a substantial factor in his ability to hold sway over governmental policy).

269. SIMMS, *supra* note 59, at 594 ("[T]he attack on American freedom was of a piece with the attack on their own rights. The Earl of Rockingham, a Whig grandee, feared in June 1775 that 'If an arbitrary military force is to govern one part of this large Empire . . . it will not be long before the whole of this Empire will be brought under a similar thralldom.' As the Whig leader Charles James Fox put it towards the end of the conflict: 'if the ministry had succeeded in their first scheme on the liberties of America, the liberties of this country would have been at an end.'" (quoting Parliamentary debates).

ambassadors and ministers abroad to represent the United States diplomatically. Greater protection was necessary against the abuse of the royal military and war-making prerogatives, which were not only exceptionally more dangerous in principle but also had proven disastrous in practice. To provide greater protection, the Framers removed these powers from the President almost in their entirety and vested them in the Congress as plenary powers.

5. *Commerce*

Blackstone called the King the “arbiter of commerce,”²⁷⁰ and the King’s prerogatives in this area included granting monopoly patents of limited time periods for manufacturing inventions,²⁷¹ chartering corporations,²⁷² establishing public markets, regulating weights and measures, and coining money as well as determining its value and the value of foreign currency.²⁷³ None of these prerogatives were included in Article II. The general power to regulate interstate commerce, along with most of the subsidiary powers—patents, weights and measures, coining and valuing money and foreign currency—were vested in Congress.²⁷⁴ The other two subsidiary powers—establishing markets and corporations—were presumably left to the states, or to Congress, when necessary and proper to execute its powers over interstate and foreign commerce.²⁷⁵

6. *An overview*

The U.S. Constitution effected a wholesale restructuring of governmental power from its British antecedent. The reallocation of executive and legislative powers as between the British and U.S. Constitutions may be summarized as follows:

No power held by Parliament was given to the President. Most of the prerogatives that had been exercised by the King, in whole or in

270. 1 BLACKSTONE, *supra* note 25, at *273–74.

271. The Crown’s general prerogative to grant monopolies was eliminated by the Statute on Monopolies. 1624, 21 Jac. 1, c. 3. However, manufacturing inventions were exempted from the statute, *id.* § 6, and this became the foundation for the development of modern patent law. See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1271–73 (2001).

272. 1 BLACKSTONE, *supra* note 25, at *472–74.

273. *Id.* at *274–79. The Crown’s prerogatives over corporations, weights and measures, and the value of money had been diluted because Parliament had frequently legislated on these subjects. 10 HOLDSWORTH, *supra* note 35, at 402–11; see also Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1028 (2008).

274. U.S. CONST. art. I, § 8, cl. 3, 5, 8.

275. See *McCulloch v. Maryland*, 17 U.S. 316, 410–11 (1819).

substantial part, were transferred in their entirety to Congress. Eighteen royal prerogatives were removed entirely from the Executive and delegated to Congress.²⁷⁶ Although we tend to view Article I, Section 8 of the Constitution in terms of federalism, that section should also be viewed as representing decisions that reflect the allocation of power between the President and Congress²⁷⁷—or, more specifically, a massive transfer of previously held executive power to the legislative branch.

Six other prerogatives were delegated to the President, but in substantially limited ways. The Commander-in-Chief power was limited by vesting the war powers and substantial control over the military in Congress. The treaty and appointments powers (including the appointment of ambassadors and other public ministers) were made subject to the prior approval of the Senate, while the veto power was subject to congressional override. The pardoning power could be applied only to a relatively small percentage of criminal cases. Only the power to receive foreign ambassadors and ministers was left intact in the Executive, and no presidential power is greater than its royal counterpart.

The royal prerogatives over the legislature were eliminated. The King's prerogative to appoint members to one of the houses of the legislature was not replicated in the U.S. Constitution nor were his prerogatives to prorogue or dissolve the legislature. Moreover, the President was stripped of authority over congressional elections and the internal operations of Congress, and he could not remove any member of Congress or the Judiciary. On the other hand, Congress was given the power to expel its members and remove members of the other two branches, including the President, albeit through the cumbersome and questionable method of impeachment.²⁷⁸ Congress

276. These include fourteen of the twenty-five specific plenary powers that are vested in Congress in Article I, Section 8: (1) regulating interstate commerce; (2) coining money; (3) regulating the value of money and of foreign currency; (4) fixing the standards of weights and measures; (5) granting patents; (6) creating the lower federal courts; (7) declaring war; (8) granting letters of marque and reprisal; (9) making rules concerning captures; (10) raising and supporting the armies; (11) providing and maintaining a navy; (12) making rules for the government and regulation of the army and navy; (13) providing for federalizing the militia; and (14) providing for organizing, arming, and disciplining the militia. In addition, four other royal prerogatives—(1) creating offices; (2) giving out pensions; (3) controlling immigration; and (4) determining the rights of aliens—were also vested in Congress through the Necessary and Proper Clause.

277. See 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 428–29 (1953).

278. Under the U.S. Constitution, the only penalties for impeachment convictions are removal and disqualification from holding federal office, although the removed

was also given the authority to regulate and, in certain circumstances, decide presidential elections. And perhaps most importantly, Congress was vested with a broad power over the creation and operations of the executive branch by the Necessary and Proper Clause.²⁷⁹

The U.S. Constitution adopted supplementary measures to contain presidential power by including numerous proscriptions from English laws. Some of these proscriptions were aimed at preserving the powers of the legislative branch, while others were included to guarantee civil liberties. At least sixteen of these proscriptions are encoded in the U.S. Constitution, some particularly directed at the President²⁸⁰ and others broadened as guarantees²⁸¹ against the entire government.²⁸²

official can be subsequently tried in the courts. U.S. CONST. art. 1, § 3, cl. 7. These penalties reflect a departure from the British system in which the impeachment trial also included a criminal proceeding—a convicted minister could lose not only his office, but also his head. Separating removal from a criminal proceeding might have made impeachment more attractive as a means of removing government officials from office. But impeachment in the United States has been ineffective as a removal device, partly because of the seminal acquittals (each by one vote) of Justice Samuel Chase and President Andrew Johnson, but more importantly, because of the supermajority requirement for conviction in the Senate. *Id.* § 3, cl. 6. Even before the House of Representatives voted articles of impeachment against Justice Chase, St. George Tucker warned that the system was fundamentally flawed by the choice of the Senate as the trial court for impeachment. He called this provision of the Constitution “the most defective and unsound, of any part of the fabric.” TUCKER’S BLACKSTONE, *supra* note 25, at app. 338.

279. *Id.* § 8, cl. 18.

280. These proscriptions include: the requirements that no money can be drawn on the Treasury except pursuant to specific appropriations, that military appropriations last for only two years, and that all money bills cannot originate outside of the House of Representatives; the bans on dual office-holding by members of Congress and on titles of nobility; and the prohibitions of arresting members of Congress during legislative sessions and prosecuting them for legislative speech and debate.

281. These guarantees include: the rights of due process, habeas corpus and jury trials, as well as the right to petition for redress of grievances; the requirement that there must be two witnesses to treasonous acts; the assurances that soldiers will not be quartered in private homes in times of peace and that excessive bail and cruel and unusual punishment will not be imposed; and the requirement of warrants based on probable cause for searches and arrests.

282. Despite the massive reallocation of, and constraints upon, executive power, Saikrishna Prakash argues that presidential powers are greater than the royal prerogatives in that the former are constitutionally entrenched, while the latter could be changed by “ordinary legislation.” Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 717–18 (2003). But under the British Constitution, no legislation affecting a prerogative could become law without the assent of the King, while the President’s Article II powers can be changed through an amendment process in which he has no involvement. Prakash also argues that the King could not personally execute the laws, while the President can. *Id.* But the King personally exercised such power by directing all prosecutions, which were

The prerogatives that had been discredited in England were naturally rejected by the Framers. The powers to tax and legislate, which the Stuart monarchs had attempted to assume, were vested entirely in Congress. The royal prerogative to suspend or dispense with the laws, made illegal by the English Bill of Rights of 1689, was negated by the President's duty to "take Care that the laws be faithfully executed."

II. THEORIES OF PRESIDENTIAL POWER

A. *The Vesting Clause*

"The executive Power shall be vested in a President of the United States . . ." ²⁸³ The delegates to the Constitutional Convention engaged in a contentious debate over whether there should be a single or plural Executive and whether the Executive should be constrained by a council. ²⁸⁴ The Vesting Clause makes the important statement that the executive power is delegated to a single person called the President of the United States.

But what is the scope of "[t]he executive Power?" Following the structure of Article I for congressional powers, Article II lists the President's enumerated powers. ²⁸⁵ But the proposition that the

brought in his name, and various kings of England personally led armies into battle, the last example being George II. SIMMS, *supra* note 59, at 313–15.

Steven Calabresi argues that the English monarchy was in fact "part of the model upon which the presidency was built," with the Framers "clearly reject[ing] executive tyranny of the kind exercised by George III . . . but . . . favor[ing] a president who was a forceful but constitutionally constrained executive like William III." Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 481 (2006). Calabresi's claim confuses power with prudence. The prerogative powers and legislative constraints under which William III and George III operated were substantially the same (actually, William III had somewhat more legal power). A good lesson that the Framers might have drawn was that giving all chief executives the powers of a William III could eventually produce a tyrant like a George III.

²⁸³ *Id.* § 1, cl. 1.

²⁸⁴ See generally BOWEN, *supra* note 38, at 55–62 (discussing the heated debate surrounding the structure of the executive).

²⁸⁵ The legislative Vesting Clause states that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I, § 1 (emphasis added). The phrase "herein granted" is not contained in the executive Vesting Clause. This appears to be a difference in form and not substance. As Justice McReynolds stated in his dissent in *Myers v. United States*, 272 U.S. 52, 230–31 (1925):

I hardly suppose, if the words "herein granted" had not been inserted, Congress would possess all legislative power of Parliament, or of some theoretical government, except when specifically limited by other provisions. Such an omission would not have overthrown the whole theory of a government of definite powers, and destroyed the meaning and effect of the

President has non-enumerated powers residing in the Vesting Clause has a long pedigree. In 1793, only five years after he minimized the scope of presidential power when writing as Publius in *The Federalist*, Alexander Hamilton did an about-face in justifying President Washington's controversial Proclamation of Neutrality.²⁸⁶ Writing as Pacificus, Hamilton defended the President's authority to issue the Proclamation without an enabling congressional statute.

Hamilton made two arguments justifying the Proclamation. The narrow argument was that the President's duty to faithfully execute the law means that he must interpret treaties to determine the legal relationship of the United States to other countries.²⁸⁷ In issuing the Proclamation, the President was merely advising the government and the public that he interpreted the treaties as establishing a neutral legal condition of the United States with respect to the participants in the European war.²⁸⁸

Hamilton's broader argument was that the President has a general power over foreign affairs derived from the Vesting Clause. According to Hamilton, the Vesting Clause gave the President the entire executive power except as specifically restricted in the Constitution.²⁸⁹ Thus, the enumerated powers in Article II were "exemplary," and not exclusive, of a broader range of executive power vested in the President. This argument was subsequently endorsed by the Supreme Court in *Myers v. United States*,²⁹⁰ but that decision was qualified, if not eviscerated, in *Humphrey's Executor v. United States*²⁹¹ and *Morrison v. Olson*.²⁹² More recently, this argument has been advanced by scholars as the basis for plenary presidential

particular enumeration which necessarily explains and limits the general phrase. When this article went to the committee on style it provided, "The legislative power shall be vested in a Congress," etc. The words "herein granted" were inserted by that committee September 12, and there is nothing whatever to indicate that anybody supposed this radically changed what already had been agreed upon. The same general form of words was used as to the legislative, executive, and judicial powers in the draft referred to the committee on style. The difference between the reported and final draft was treated as unimportant.

286. GEORGE WASHINGTON, PROCLAMATION OF NEUTRALITY OF 1793, reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 430–31 (John Fitzpatrick & David Matteson eds., 1939). In *The Federalist*, Hamilton had not suggested that the Vesting Clause was an independent or residual source of presidential power.

287. PACIFICUS-HELVIDIUS DEBATES, *supra* note 33, at 16.

288. *Id.* at 16–17. Justice Story made this argument to justify the Neutrality Proclamation. 3 STORY, *supra* note 216, § 1564.

289. PACIFICUS-HELVIDIUS DEBATES, *supra* note 33, at 12–13.

290. 272 U.S. 52, 117–18, 128–31, 163–64 (1926).

291. 295 U.S. 602, 632 (1935).

292. 487 U.S. 654, 696 (1988).

power in such areas as foreign affairs, law enforcement, and the removal of executive officials.²⁹³ If correct, this theory would make some, if not all, of the “missing prerogatives”—and whatever other powers are deemed “executive” in nature—plenary powers of the President.

Based on the analysis in the previous Part of this Article, this argument is quite implausible. The extent to which the Framers limited and constrained executive power and placed numerous proscriptions on its exercise strongly indicates that the Vesting Clause is not a residual source of plenary powers in the presidency. The powers delegated to the President in Article II do not suggest a residue of unspecified powers that can be characterized as “executive” in nature. What they do suggest is that most of the royal prerogatives were vested in Congress, not in the President; that those few prerogatives that were delegated to the President were subject to substantial legislative constraints and constitutional prohibitions; and that no presidential power is greater than its royal prerogative counterpart, with only a single one being the same. Similarly, the fact that most of the enumerated powers in Article II are limited by legislative constraints is not grounds for viewing such constraints as exceptions to unspecified and unlimited powers that can be characterized as “executive.” Rather, the enumerated powers in Article II are carefully constructed exceptions to the mass of prerogative powers that were vested entirely in Congress, and they are additionally subject to the constitutional proscriptions on executive action that restrained the royal prerogatives. And if indeed the Vesting Clause were a source of plenary executive powers, a bizarre result would follow—that presidential powers listed in the Constitution are limited by legislative constraints, but unspecified powers said to reside in the Vesting Clause are not so limited.

B. A Presidential “Completion Power”

In a recent article, Jack Goldsmith and John F. Manning argue that there is an implied executive “completion power,” which enables the President to prescribe means that are necessary to execute a legislative scheme, and thereby change domestic law, even in the absence of congressional authorization to do so.²⁹⁴ The authors draw upon Chief Justice Vinson’s dissent in the *Steel Seizure Case*. Joined by

293. See sources cited *supra* note 11.

294. Goldsmith & Manning, *supra* note 12, at 2282.

two other Justices in the dissent, Vinson relied on the Take Care Clause as the source of this implied power.²⁹⁵ He pointed to numerous appropriations and regulatory statutes that effectively authorized the United States military actions in Korea.²⁹⁶ He argued that this statutory scheme would be incapable of execution if, in a labor union strike, the steel mills were shut down and the production of war materials were suspended.²⁹⁷ Thus, in order to comply with the duty to ensure that the statutory scheme was executed, the President should have the power to seize the steel mills and keep them in operation, even though that action had not been authorized by Congress.²⁹⁸ Goldsmith and Manning strengthen this argument by pointing to the discretion that the President necessarily possesses in deciding how and when to execute the laws.²⁹⁹

The *Steel Seizure Case* illustrates why the “completion” approach is flawed. President Truman’s executive order directing the seizure of the steel mills was the twentieth-century equivalent of an illegal royal proclamation. With the statutes available to him, Truman had two means that could have kept the steel mills in operation. He could have sought an injunction for an eighty-day “cooling off” period under the Taft-Hartley Act.³⁰⁰ He did not, presumably because the labor injunction is detested by unions—one of the reasons Truman had vetoed Taft-Hartley.³⁰¹ Alternatively, Truman could have gone through the seizure procedures specified in the Selective Service Act of 1948,³⁰² but those procedures were time-consuming.³⁰³

President Truman directed the seizure of the steel mills without any statutory authority because he found the existing statutes inadequate according to his own policies; he chose to supplement the statutes with the policy that he preferred. In so doing, he infringed upon the property rights of the owners and thereby changed existing legal rights and obligations. This looks remarkably like the misuse of

295. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 667 (1958) (Vinson, C.J., dissenting)).

296. *Steel Seizure Case*, 343 U.S. at 669–72 (Vinson, C.J., dissenting).

297. *Id.* at 672.

298. *Id.* at 672, 678–80, 700–04.

299. Goldsmith & Manning, *supra* note 12, at 2293–95.

300. *Steel Seizure Case*, 343 U.S. at 657–58 (Burton, J., concurring).

301. See MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 75–78 (1994); Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 66 (2002).

302. 62 Stat. 625. Section 18 of that Act authorizes the President to take possession of a plant or other facility that does not fill defense orders if those orders have been placed in a manner prescribed by the statute.

303. See MARCUS, *supra* note 301, at 77–78.

proclamations by the early Stuart monarchs.³⁰⁴ The need for executive discretion in the enforcement of the laws was well understood in seventeenth-century England, and kings appropriately issued proclamations announcing to their government and to the public how and when they would enforce statutes.³⁰⁵ But the early Stuarts crossed the line when they issued proclamations that changed domestic law or imposed new legal obligations. This is what Truman did.³⁰⁶

It is not the function of the executive to “improve” the laws without authorization from Congress, no matter how sensible the improvement might appear.³⁰⁷ A presidential “completion power” that changes domestic legal relationships by imposing new legal obligations raises the same objections to the usurping of legislative power by the executive that were recognized 400 years ago in the *Case of Proclamations*.³⁰⁸

Vinson also argued that the President was faced with an emergency.³⁰⁹ But the threat of a strike had been present for almost

304. See discussion *supra* notes 42–47, 61, 64–65 and accompanying text.

305. See discussion *supra* notes 44, 64–65 and accompanying text.

306. President Washington’s 1793 Proclamation of Neutrality warned that anyone who violated its admonitions would be subject to criminal penalties. Inasmuch as no statute of Congress made violations of neutrality a crime (that would happen the next year), it would appear that Washington was adding legal obligations through executive fiat. But the courts had not yet rejected enforcement of non-statutory federal common law crimes. See *United States v. Hudson*, 11 U.S. 32, 33 (1812) (holding that federal courts could not enforce prosecutions for common law crimes in the absence of congressional enactments). When Henfield was indicted for violating the Neutrality Proclamation, three Supreme Court Justices (Jay, Wilson, and Iredell) all expressed the view that a private person who violated the law of nations committed a federal crime, even in the absence of a statute. *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (Jay, C.J.); *id.* at 1120 (Wilson, Iredell, Peters, JJ.). Despite a strong pro-prosecution charge to the jury by Wilson, Henfield was acquitted.

307. In his *Steel Seizure Case* concurrence, Justice Clark relied on *Little v. Barreme (Flying Fish Case)*, 6 U.S. 170 (1804). Congress had passed a statute authorizing the recapture of seized American ships that were heading to France. The *Flying Fish* was seized, on the instructions of the President, while heading away from France. In specifying the direction that the ship was to be heading before capture would be authorized, the law made no apparent sense. Upholding the seizure could have arguably strengthened the legislative policy. But, whether by inadvertence or for some reason of policy, the law was written explicitly; therefore, Marshall held that the seizure was unlawful. See also *Gelston v. Hoyt*, 16 U.S. 246, 330–33 (1818) (holding that the President could not authorize *revenue officers* to make seizures of vessels for violations of neutrality because the statute only authorized such seizures by *the military*); *Orono v. Franklin*, 18 F. Cas. 830 (C.C.D. Mass. 1812) (No. 10,585) (Story, J.) (holding that the President had statutory authority to suspend the Non-Intercourse Act but no power to revive it).

308. See case summary *supra* text accompanying notes 45–47.

309. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 678–80 (1958) (Vinson, C.J., dissenting).

four months, which gave Truman more than enough time to seek congressional authorization to seize the mills if necessary. Again, the history of a discredited royal prerogative is instructive. Charles I justified the ship-money impositions as a necessary incident of his war powers, but he could have sought that funding by calling Parliament into session.³¹⁰ In bypassing Parliament, the King created his own emergency and then justified the assumption of legislative power as necessary to meet the emergency. This idea should have been laid to rest when the House of Lords vacated the decisions in the *Ship-Money Case* and Parliament declared the ship-money impositions illegal.³¹¹

C. Implied Presidential Powers

We return to the problem of the “missing prerogatives.” The Framers plainly anticipated that the President would vigorously

310. See discussion *supra* notes 50–63 and accompanying text.

311. The text of the U.S. Constitution is inconsistent with the notion of inherent emergency power in the Executive. There are two provisions dealing with emergencies: (1) the power to call forth the militia “to execute the Laws of the Union, suppress Insurrections and repel Invasions,” U.S. CONST. art. I, § 8, cl. 15, and (2) the power to suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it,” *id.* § 9, cl. 2. Both of these powers are vested in Congress. See Vladeck, *supra* note 261, at 152–53.

Much has been written about President Lincoln’s assumptions of congressional military powers and funding of the military at the beginning of the Civil War in violation of Art. I, § 9, cl. 7. A fractured Congress had adjourned before the attack on Fort Sumter in April 1861. Because congressional elections were being held in one-third of the loyal states between March and June, a functioning Congress could not have been assembled until the special session called by Lincoln for July 4, 1861. See JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 23–24 (2008) (explaining that Lincoln’s decision to act under his Commander-in-Chief mandate, but without congressional approval, was “a consequence of the electoral calendar at the time” and “was not the result of [his] desire to prosecute the war without Congressional interference”). Unlike the situation facing any previous or subsequent president, Lincoln could not have sought congressional authorization for extraordinary measures necessary to execute the laws of the United States. Lincoln acted in effect as a default surrogate “caretaker” until Congress convened. Congress then enacted a law that “approved and in all respects legalized and made valid” all of Lincoln’s actions “respecting the army and navy . . . as if they had been issued and done under the previous express authority of . . . Congress . . .” Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326. In my view, that statute settled the constitutionality of all of Lincoln’s war measures up to that point, except the suspension of habeas corpus, which Congress did not ratify.

Lincoln’s actions in the spring of 1861, when Congress could not act, are *sui generis*, and, barring the decapitation of Congress, will remain so. They will continue to be the subject of academic interest and controversy, but their precedential value is nil. Congress has passed a number of statutes authorizing the President to deal with emergencies and is capable of meeting and acting virtually at a moment’s notice. For example, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), was enacted only three days after the September 11th attacks.

enforce the laws³¹² and play a major role in foreign relations.³¹³ They also contemplated that the President would issue proclamations (now called executive orders) that instructed subordinates in the executive branch and the public on how his discretion would be exercised in enforcing the laws.³¹⁴ But if these powers do not derive from the Vesting Clause, or from a presidential “completion power,” then from what source are they derived, and what is their scope?

We can provide an answer by applying Marshall’s structural approach in *McCulloch v. Maryland*³¹⁵ to the powers that are enumerated in Article II. It is true that Article II does not contain a Necessary and Proper Clause, but Marshall’s argument in *McCulloch* was that, even without that clause, Congress would have a broad choice of the means by which to effectuate its enumerated powers.³¹⁶ According to Marshall, the Necessary and Proper Clause served two functions: it confirmed the existence of implied powers; and, by being written as an enumerated grant of, rather than a restriction on, legislative power, it also confirmed that Congress has an extensive range of means by which it may effectuate governmental powers.³¹⁷

Marshall’s analysis can be applied to Article II. The President’s duty to take care that the laws are “faithfully” executed necessarily implies the existence of a power to enforce the laws, including directing his subordinates on how that enforcement should be conducted. Similarly, a more general foreign affairs power can be implied from the enumerated powers to make treaties and to receive

312. See, e.g., 1 FEDERAL CONVENTION, *supra* note 130, at 65–66 (James Wilson’s statement in the Constitutional Convention) (“He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. . . . The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.”).

313. See, e.g., THE FEDERALIST No. 72 (Alexander Hamilton), *supra* note 3, at 352 (stating that the President would be responsible for “[t]he actual conduct of foreign negotiations”); THE FEDERALIST No. 64 (John Jay), *supra* note 3, at 314 (“It seldom happens in the negotiations of treaties of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained [A]lthough the president must in forming [treaties] act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.”).

314. THE FEDERALIST No. 72 (Alexander Hamilton), *supra* note 3, at 352 (stating that the employees of the Executive Branch “ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence”).

315. 17 U.S. 316 (1819).

316. *Id.* at 406–10.

317. *Id.* at 411–12, 419–21. The clause serves a third function: it authorizes Congress to enact laws to carry into execution the powers vested in the executive and judicial branches, as well as the legislative branch.

and appoint ambassadors and other public ministers. Treaties cannot be made without negotiations based on foreign policy objectives, and the purpose of exchanging ambassadors and public ministers is to recognize and negotiate with foreign governments. Indeed, at the time the U.S. Constitution was written, and for many years later, the exchange of ambassadors “constitute[d] the only accredited medium, through which negotiations and friendly relations [were] ordinarily carried on with foreign powers.”³¹⁸ And the inclusion of “other public ministers” is significant given the practice of sending special diplomatic missions to resolve issues of great importance and delicacy. Those governmental objectives cannot be exercised intelligently unless the President has the authority to establish a foreign policy that will guide negotiations and diplomatic relations.³¹⁹

The methods that the President can use to carry out these powers are not frozen in time. A central message of *McCulloch* is that the methods used to effectuate governmental power must be adaptable to changing historical circumstances.³²⁰ Accordingly, the President has the discretion to choose from a broad variety of methods, which can evolve over time, in exercising law enforcement and foreign affairs powers. Thus, in supervising an executive branch that in size, breadth, and complexity barely resembles the one established by the First Congress, the President can and must develop new methods in meeting the responsibility to ensure that the laws are faithfully executed. Similarly, the nature of foreign affairs and the position of the United States in the world have changed dramatically since the founding generation, and the President must be able to use new methods in conducting the nation’s international relations.

The *McCulloch* approach differs from reliance on the Vesting Clause in several respects. It restricts the President’s implied powers to those that are tied to the powers specifically vested in the President. This is consistent with one of the major themes that derives from this Article’s analysis of the Framers’ treatment of the royal prerogatives: the powers of the President are subject to careful

318. 3 STORY, *supra* note 216, § 1560.

319. Michael Ramsey argues that a general foreign affairs power does not seem ancillary to the President’s enumerated powers. Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 437–38 (2000) [hereinafter Ramsey, *Myth*]. Actually, the need for a general foreign affairs power to effectuate the President’s enumerated powers seems much stronger than the need for a privately owned and operated national bank to effectuate Congress’s enumerated powers, which was upheld in *McCulloch*.

320. 17 U.S. at 407–09.

limitations. By approaching the indefinite term “executive powers” with this theme in mind, one can avoid the intractable issue—raised by those who rely on the Vesting Clause as a source of residual “executive” powers—of having to explain what the term means and what powers are contemplated by it. The debate between Hamilton and Madison as to whether the foreign affairs power is “executive” or “legislative” in nature³²¹—a debate that has been reprised in recent scholarship³²²—provides a good illustration of the pitfalls in using the Vesting Clause as an indefinite source of plenary presidential powers.

In addition, although the President has considerable discretion in carrying out his implied powers, that discretion is subject to legislative restrictions. The Framers responded to the abuses and dangers of royal prerogative powers by eliminating them as executive powers, assigning them entirely to Congress, or by splitting them and assigning a portion to the legislative branch.³²³ From this response, it follows that the implied powers of the President are not plenary because executive power, in contrast to prerogative power, is subject to legislative limitations. Implied presidential powers are subject to three legislative restrictions: (1) these powers are subject to regulation by Congress; (2) in case of a conflict between the exercise of an implied presidential power and a congressional statute, the statute prevails; and (3) absent congressional authorization, these powers cannot be used to change domestic law or to impose or alter legal obligations.

In the Section that follows, I elaborate on these principles and the justifications for them in the context of the two most important implied presidential powers: enforcement of the laws and the conduct of foreign affairs.

321. In response to the Pacificus letters, Madison, writing as Helvidius, argued for a narrow construction of executive power. PACIFICUS-HELVIDIUS DEBATES, *supra* note 33, at 63–64. He denied that treaties were “executive” acts and taunted Hamilton with the latter’s previous conclusion in *The Federalist* No. 75 that treaties are more in the nature of “legislative” than “executive” acts. *Id.*

322. Compare Prakash & Ramsey, *supra* note 11, at 254–68 (arguing that the Framers understood that aspects of foreign affairs are “executive” and are plenary powers of the President pursuant to the Vesting Clause), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 561–69 (2004) (arguing that the Framers did not view foreign affairs as an “executive” power and had not settled on a single, widely held doctrine of what “executive” power meant).

323. See discussion *supra* notes 276–282 and accompanying text.

III. THE LIMITS OF IMPLIED EXECUTIVE POWERS

A. *Enforcement of the Laws*

As anyone who has worked in government knows, enforcing the laws is not a mechanical task. Many statutes are ambiguous and have not been definitively interpreted by the courts. Many other statutes delegate considerable authority to the executive branch to decide how the underlying purposes of the statutes should be effectuated. Because there will never be enough resources to bring enforcement actions against every potential statutory violation, and because judgments must be made as to whether enforcement actions will be successful, discretion must be exercised and enforcement priorities must be set. In short, supervisory policies must be established to ensure the effective and consistent enforcement of the laws. As the head of the executive branch, the President has broad authority to make those policies and to supervise, manage, and control the actions of his subordinates.

For the reasons stated in my discussion of a presidential “completion power,”³²⁴ executive orders can control the internal operations of the executive branch, but they cannot be used to change domestic law or to create or alter existing legal obligations. I also reject claims of plenary or exclusive authority in the President to enforce the laws. The President’s law enforcement powers are subject to congressional regulation and override. I reach this conclusion for several reasons that relate to prerogative powers.

Suppose that the Framers had listed in Article II an enumerated power that, following the royal prerogative, declared that the President “shall have the power to prosecute offenses against the United States.” This would have provided the President with a plenary power over federal law enforcement that would be equivalent to the pardoning power—that is, it could not be restricted or negated by Congress. But the Constitution does not vest such an enumerated power in the President, and we are instead dealing with a power that is implied from the Take Care Clause. That clause, however, denies to the President the royal prerogatives of suspending and dispensing with statutes—prerogatives that were eliminated in England because they placed the King above the law. Yet, whenever a congressional statute is nullified because of a conflict with an asserted presidential prerogative, the President has effectively suspended the law. It would

324. See discussion *supra* notes 294–311 and accompanying text.

be quite strange to have an implied law enforcement power to suspend statutes that is derived from an enumerated duty which prohibits the President from suspending statutes. As the Supreme Court has explained, “To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”³²⁵

My second reason for rejecting executive essentialism in law enforcement is that the power to create offices in the executive branch—a power which had been a royal prerogative—was vested in Congress. This allocation was part of a package of decisions made in response to the Hanoverian Kings’ use of that prerogative and related prerogatives, including appointments, removals, and pensions. The kings used those prerogatives to create a massive system of political patronage by which they were able to maximize executive power at the expense of the legislature.³²⁶ With the power to create executive offices vested in Congress, the legislative branch can control the operations of those offices through funding decisions and through the exercise of an enumerated power. Although the implied powers of the President were not codified in the U.S. Constitution, those of Congress were: Congress was given the enumerated power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.”³²⁷

Thus, in the absence of legislation, the President may direct the Justice Department, the United States Attorneys, and the Federal

325. *Kendall v. United States*, 37 U.S. 524, 613 (1838); see also *The Confiscation Cases*, 87 U.S. 92, 112–13 (1873) (“No power was ever vested in the President to repeal an act of Congress.”); *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420) (Johnson, J.) (holding that when Congress vests discretionary authority with respect to the enforcement of a law to a subordinate executive official, that official’s decision is not subject to presidential control). In 1806, Justice Paterson held that “[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.” *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342). Paterson explained that if the President were granted such power, such a grant “would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government.” *Id.* But cf. *United States v. Midwest Oil Co.*, 236 U.S. 459, 481–83 (1915) (upholding presidential withdrawals of public lands from exploitation contrary to the explicit terms of a statute because there was a long history of such withdrawals, which Congress subsequently ratified).

326. See discussion *supra* notes 158–209.

327. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

Bureau of Investigation that law enforcement priorities are, for example, anti-terrorism and prosecutions of gun control and drug laws. But there is no doubt that Congress can override those priorities with its own priorities—for example, prosecuting official corruption and financial white-collar crime. Similarly, the President may issue an executive order instructing subordinate executive officials to employ a cost-benefit analysis when developing policies or to issue rules concerning how ambiguous statutes should be enforced.³²⁸ Again, however, Congress can nullify those instructions through the enactment of a contrary statute.³²⁹ The President cannot control executive officials with respect to duties that are imposed by law.³³⁰

Historical experience also speaks volumes in this area. For seventy-plus years, Congress has vested the enforcement of important federal laws in independent agencies whose members are not removable by the President.³³¹ These agencies exercise a significant portion of the “executive power,” and through a process of continuous operation and acceptance by all three branches of government,³³² they have become an established and irreversible feature of our constitutional system.³³³

Finally, if the President has plenary law enforcement power, it should follow that he has the inherent authority to enforce every federal law without statutory authorization. Such a doctrine was inferred in a most unusual case, *In re Debs*.³³⁴ The President, through the Attorney General, sought and obtained an injunction to stop the Pullman strike, and, when the injunction was disobeyed, sought and

328. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked* by Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended* in 5 U.S.C. § 601 (2000) (implementing review procedure for executive agency rule-making process).

329. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2322–27 (2001) (asserting that Congress has the authority to confine the President’s discretion over executive agencies but has refrained from exercising that authority).

330. See 3 STORY, *supra* note 216, § 1563 (endorsing the “incidental” power of the President to supervise his subordinates except when they are subject to legal duties imposed by Congress).

331. *Humphrey’s Executor v. United States*, 295 U.S. 602, 632 (1935).

332. Cf. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1009–10 (2001) (arguing for an approach of constitutional incrementalism—that is, when the text is uncertain, changes in governmental operations can obtain validity through a long history of cooperative usage and acceptance).

333. See generally HAROLD J. KRENT, *PRESIDENTIAL POWERS* 60–64 (2005) (discussing the process through which independent agencies became a legitimate and pervasive feature of the federal government).

334. 158 U.S. 564 (1895).

obtained a criminal contempt sentence.³³⁵ But there was no federal statute that made the Pullman strike illegal or that authorized an enforcement action by the Executive.³³⁶ Nevertheless, the Supreme Court upheld the injunction and the criminal contempt ruling because the United States had the power to prevent interstate commerce from being obstructed.³³⁷

Of course the United States has that power, but in that case, it had not been exercised by the lawmaking branch of the government. Because Debs was a private person and not a state actor, he could not have violated the dormant Commerce Clause. And in constantly referring to “the United States,” the Court never addressed the issue that the President’s actions had not been authorized by Congress. The Court somehow converted an unexercised congressional power into an affirmative presidential power.³³⁸

Debs was contrary to earlier Supreme Court decisions³³⁹ and is an anomaly that has not since had generative power. One might argue

335. *Id.* at 598.

336. *Id.* at 578–80.

337. *Id.* at 599–600.

338. In *The Protective Power of the Presidency*, *supra* note 11, Henry Monaghan posits that the President generally does not have the unilateral power to violate private rights, but an exception may exist to preserve, protect, and defend the personnel, property, and instrumentalities of the national government. The strongest case for such a power is *Cunningham v. Neagle*, 135 U.S. 1 (1890). Without statutory authorization, the Attorney General assigned a U.S. Marshal to protect Justice Field, and the marshal killed a man who may have threatened Field. *Id.* at 5–6. The marshal was then prosecuted for murder by the State of California, and he applied for a writ of habeas corpus, arguing that he was authorized by the United States Constitution and laws to have used deadly force. The Supreme Court upheld this claim in a confusing decision that may boil down to the proposition that the President’s duty to take care that the laws are faithfully executed implies the power to protect those who enforce the laws. Still, the Supreme Court did not satisfactorily explain how unilateral executive action could override the laws of California on the use of deadly force. As an alternative ground for decision, the majority held that a federal statute gave the marshal such power. *Id.* at 75–76. *Debs* is much farther removed from the theory of protective presidential power because it rested on a generalized national interest—executive “protection” of a constitutional power that Congress had not seen fit to exercise. As Monaghan concludes, however, a theory of protective presidential power may be better suited in the present era for statutory, rather than constitutional, construction, given the proliferation of statutes that are ambiguous or that broadly delegate authority to the Executive. Monaghan, *supra* note 11, at 74.

339. For example, more than eighty years earlier in *Brown v. United States*, 12 U.S. 110 (1814), Chief Justice Marshall, writing for the Court, held that Congress’s declaration of war in 1812 did not give the President authority to seize British property in the United States. The Court stated:

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. . . . [W]hen the sovereign authority shall ch[oo]se to bring it into operation, the judicial

that the strongest case for the application of *Debs* would be the authority of the President to bring civil enforcement actions against state officials who violate constitutional rights. But, although Congress has authorized the President, through the Attorney General, to bring civil enforcement actions under a variety of civil rights statutes,³⁴⁰ Congress has not provided that general authority in constitutional cases, and has instead left them to private enforcement actions.³⁴¹ Accordingly, the courts have properly held that the President has no such inherent authority.³⁴²

For these reasons, the President's power to execute the laws is subject to plenary legislative control: the President's implied power to enforce the laws must be exercised consistently with the laws that Congress enacts. This conclusion is not subject to the objection that Congress can thereby remove all of the President's authority to enforce the laws. The President has his own protective power. He was given the power to veto legislation principally for the purpose of resisting encroachments by Congress.³⁴³ The President's veto cannot be overridden except by a vote of two-thirds of each House. In practical terms, this requires the President to obtain support from only thirty-four Senators or 146 Representatives, which are,

department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court.

Id. at 122–23. The Court then held that Congress's power to authorize captures was distinct from its power to declare war; and, inasmuch as Congress had not exercised this power, the President lacked the power to seize British property:

Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

Id. at 129.

340. A number of these statutes are cited in *United States v. Solomon*, 563 F.2d 1121, 1126 n.4 (4th Cir. 1977).

341. *See, e.g.*, 42 U.S.C. § 1983 (2006) (authorizing private causes of action against persons acting under color of state law who violate federal rights).

342. *United States v. City of Philadelphia*, 644 F.2d 187, 206 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295, 1300–01 (9th Cir. 1979); *Solomon*, 563 F.2d at 1127–29; *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (arguing that the Executive does not have the authority to enjoin a newspaper's publication of classified material because Congress has not delegated that authority to the Executive); *id.* at 732–34, 740 (White, J., concurring) (“[Congress] has not . . . authorized the injunctive remedy against threatened publication [of classified material]. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press.”); *id.* at 741–47 (Marshall, J., concurring) (asserting that the Court cannot authorize the creation of a civil remedy for the Executive to employ against the newspaper when Congress has refused to do so).

343. *See* discussion *supra* notes 83–85 and accompanying text.

respectively, only six percent and twenty-seven percent of the entire Congress.

Moreover, in the real world of governing, there is no reason Congress would want to severely restrict the President's law enforcement powers. It is in the interest of Congress to have its laws enforced uniformly and vigorously. The President can provide that energy and consistency in law enforcement. But there are countervailing values that may call for exceptions, and if Congress decides that certain laws should be enforced by independent agencies, by an independent counsel,³⁴⁴ by some other Executive officials,³⁴⁵ or by private parties, these are policy decisions that

344. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that Congress has the authority to authorize the courts to appoint independent counsel to investigate the Executive Branch under a statute requiring the Attorney General to request the appointment and providing that the counsel may be removed only for cause).

345. See *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420). *Gilchrist* involved one of the most dramatic confrontations between the judicial and executive branches during the early period of the Marshall Court and produced a now virtually forgotten decision by Justice William Johnson, who was President Jefferson's first appointee to the Supreme Court. At Jefferson's urging, Congress passed an embargo act prohibiting commercial intercourse with either Great Britain or France. To prevent evasions of the embargo, the statute directed port collectors to determine whether a ship claiming to be heading to another American port was actually heading to that port, or if there was reason to believe that the ship was instead going to one of the warring countries. If the collector decided there was no evasive purpose, he was to allow egress. If the collector had reason to believe that there was an evasive purpose, he could detain the ship, and the owner could appeal the decision to the President. The *Gilchrist* case arose when the Charleston port collector detained four ships purportedly heading for Baltimore. He stated that he had no reason to believe that there was any intent to evade the embargo but that the President, through Secretary of the Treasury Gallatin, disagreed and instructed him to prevent the ships from leaving. Justice Johnson held that the President's instructions were illegal because Congress had vested the authority to grant egress in the collector. He explained,

The officers of our government, from the highest to the lowest, are equally subjected to legal restraint. . . . Congress might have vested this discretion in the president, the secretary of the treasury, or any other officer, in which they thought proper to vest it; but, having vested the right of granting or refusing in the collector, with an appeal to the president only in case of refusal—the right of granting clearances remains in him unimpaired and unrestricted.

Id. at 356. Johnson then issued a writ of *mandamus* to the collector ordering him to allow the ships to depart.

This decision so enraged Jefferson that his Attorney General published a letter in the press denouncing it. Significantly, the Attorney General barely argued that Johnson was wrong in stating that Congress could vest final enforcement authority in the collectors. Instead, he challenged at length the Court's jurisdiction and, relying on *Marbury v. Madison*, its authority to issue the writ of *mandamus*. *Id.* at 357. He also argued that issuing the writ of *mandamus* against an executive official violated the separation of powers; if the collector acted illegally in following the President's instructions, the remedy was a damage action. *Id.* at 359. Johnson, in turn, was so angered by the Attorney General's letter that he published a long public rebuttal. *Id.* at 359–66. The bulk of this rebuttal was a defense of Johnson's authority to issue the

Congress has the power to make. To be sure, these decisions may frustrate presidential authority,³⁴⁶ but they do not violate any Article II power. Justice Brandeis made this point cogently:

The separation of the powers of government did not make each branch completely autonomous. It left each in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial. Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose; or because Congress, having created the office, declines to make the indispensable appropriation; or because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any

writ of *mandamus*, but he concluded with an observation “which cannot have escaped the notice of the most superficial observer”: that “the legality of the [President’s] instructions given to the collector, is immediately put aside [by the Attorney General; while the public attention is fixed [on the technical *mandamus* issue]. . . . The argument is not that the executive have done right, but that the judiciary had no power to prevent their doing wrong.” *Id.* at 366.

This important decision regarding presidential power has never been cited by name by any federal court, even though, as Jerry L. Mashaw has observed, it “foreshadowed” the decision in the *Steel Seizure Case*. *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1678–79 (2007). There are two postscripts to this decision. Jefferson instructed the collectors to follow Secretary Gallatin’s directions rather than Johnson’s decision. There were newspaper reports that collectors were obeying this directive, but Gallatin told Jefferson he doubted that the collectors were complying because of the risk of facing possibly ruinous damages actions. *Id.* at 1679–80. As for the *mandamus* remedy, in *McIntyre v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813), the Supreme Court held that the circuit courts did not have the statutory power to issue writs of *mandamus* except in aid of their jurisdiction. Justice Johnson wrote the opinion and noted that his decision to issue *mandamus* in the Charleston “collector” case (a case of some “notoriety”) was incorrect as a statutory matter. *Id.* at 506.

346. The most direct intrusion on the President’s law enforcement power would occur if Congress legislated as to individuals. Suppose that Congress believed that the Attorney General was prosecuting an innocent person for illegitimate reasons. A legislative order not to prosecute would seem to violate the separation of powers, until one considers that Congress can exempt individuals from specific laws. Although the President does not have a suspending or dispensing power, Congress does, and it may direct the President to suspend a law. *Field v. Clark*, 145 U.S. 649, 693 (1892). Or suppose that Congress believed someone was guilty of a serious federal crime, but, for political or other illegitimate reasons, the Attorney General refused to prosecute. A statute ordering that prosecution would not violate the principles stated above but would probably be unconstitutional as a bill of attainder. *See, e.g., United States v. Lovett*, 328 U.S. 303 (1946) (holding that a statute excluding suspected Communists from government jobs was an unconstitutional bill of attainder because it legislatively targeted and punished particular people). These hypotheticals assume, of course, that such attempts by Congress would not be vetoed or that the vetoes would be overridden.

such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.³⁴⁷

B. Foreign Affairs

The modern jurisprudence of presidential powers over foreign affairs began with the 1936 decision in *United States v. Curtiss-Wright*.³⁴⁸ That case involved a joint resolution of Congress that authorized the President to prohibit the sale of arms to combatant countries in an area of South America. The President proclaimed an embargo, and Curtiss-Wright was prosecuted for selling arms to Bolivia.³⁴⁹ The President's action was authorized by Congress, but Curtiss-Wright argued that the joint resolution was an unconstitutional delegation of legislative power to the President.³⁵⁰ Although the non-delegation doctrine was still in effect,³⁵¹ Justice Sutherland avoided it; instead, he advanced a historical narrative that the foreign affairs powers were

347. *Myers v. United States*, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting). A brief note regarding the President's removal power is warranted. Consistent with the approach taken in this Article, I view the removal of executive officials as a presidential power that is implied from the appointments power. Thus, in the absence of legislation, the President may remove executive officials at will. But as an implied power, removal is subject to congressional restriction. Given the care with which the Framers cabined the President's appointment power, it is difficult to understand how an unrestricted plenary removal power, which was a critical prerogative used by the Crown to exercise dominance over Parliament, can be engrafted onto Article II. Moreover, since Congress creates offices in the Executive Branch and can set the legal duties and salaries of the office-holders, why cannot Congress also prescribe a term of office or require cause or Senatorial consent for removal? Such prescriptions may or may not be good policies, but that is not the test for the validity of legislation.

However, this is another situation in which historical experience has its claims. Joseph Story, writing in 1833, termed the plenary presidential removal power a "monarchical" relic, but he recognized that "it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory." 3 STORY, *supra* note 216, §§ 1533, 1538. For many more years than Story was considering, the rules governing removal have been established. Congress and the President have adjusted politically to these rules (as a practical matter, the tenure of a high-level executive official depends heavily on the official's relationship with Congress). For one of many thoughtful articles on removal, see John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853 (2006).

348. 299 U.S. 304.

349. *Id.* at 311.

350. *Id.* at 314.

351. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (striking down a domestic statute that authorized the President to prohibit the transportation of petroleum as an unconstitutional delegation of power from Congress to the President).

extra-constitutional in nature, derived not from any enumerated or implied powers but from “the conception of nationality.”³⁵² Sutherland then opined that the foreign affairs powers of the United States belong to the President who “alone has the power to speak or listen as a representative of the nation . . . [as well as] plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress”³⁵³

Sutherland’s extra-constitutional historical narrative, which is inconsistent with the premise that the Constitution is one of delegated powers, has been shown to be more creative than descriptive.³⁵⁴ But more interesting is that Sutherland’s description of the President’s foreign affairs power tracks almost precisely Blackstone’s description of the royal prerogative of the King: “With respect to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is an act of the whole nation: what is done without the king’s concurrence is the act only of private men.”³⁵⁵

A poorer candidate for plenary presidential power could hardly be found. The Constitution vests in Congress the most important royal prerogative in foreign affairs—the power to declare war.³⁵⁶ It also vests in Congress other royal prerogatives concerning foreign affairs,³⁵⁷ as well as the foreign affairs powers that had been exercised by Parliament.³⁵⁸

The enumerated powers of the President in foreign affairs pale by comparison. The President was given three of the royal prerogatives subject to substantial legislative controls that had not restrained the King. The President is designated as the Commander-in-Chief of the military, when raised and regulated by Congress, and of the militia, as

352. *Curtiss-Wright*, 299 U.S. at 318.

353. *Id.* at 319–20.

354. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 30 (1973); see also Ramsey, *Myth*, *supra* note 319, at 391–93.

355. 1 BLACKSTONE, *supra* note 25, at *252. This similarity is probably not coincidental given Sutherland’s thesis that the foreign affairs powers of the United States “were passed from the Crown.” *Curtiss-Wright*, 299 U.S. at 315.

356. U.S. CONST. art. I, § 8, cl. 11.

357. *Id.* § 8, cl. 11–16 (raise and support the army and navy; make rules for the government and regulate the military; provide for calling forth the militia to repel invasions; grant letters of marque and reprisal; make rules for captures on land and sea; regulate the value of foreign currency and regulate immigration).

358. *Id.* § 8, cl. 1, 3, 5, 10 (regulate foreign commerce; naturalize aliens; define and punish piracies on the high seas and offenses against the laws of nations); *id.* § 9, cl. 5 (tax imports).

organized and armed and when called into service as provided by Congress.³⁵⁹ The President can also make treaties and appoint ambassadors and ministers, subject to the prior approval of the Senate.³⁶⁰ The only royal prerogative given to the President without qualification was the power to receive foreign ambassadors and ministers.

These select delegations of power explain why the President's foreign affairs power is a "missing prerogative." The Constitution does not give the President plenary power in foreign affairs because that power is shared with, and constrained by, Congress. A plenary presidential power over foreign affairs is inconsistent with the allocation of the royal prerogatives in Articles I and II.

Using the structural approach taken by Marshall in *McCulloch*, a presidential power over foreign affairs can be implied from the Article II enumerated powers; and the President has a broad range of methods that could be employed to conduct the nation's international relations.³⁶¹

The President's enumerated foreign affairs powers, as strictly construed, cannot be abrogated by Congress. Congress cannot, for example, designate someone other than the President as Commander-in-Chief of the military,³⁶² nor can Congress order the President to nominate a certain person to be an ambassador or to negotiate a treaty.³⁶³ But the implied powers of the President are different because they are subject to limitations: (1) the implied foreign affairs powers are subordinate to congressional statutes, and

359. U.S. CONST. art. II, § 2, cl. 1.

360. *Id.* § 2, cl. 2.

361. See discussion *supra* notes 312–323 and accompanying text.

362. The Reconstruction Congress tried to designate an alternative Commander-in-Chief when it passed the Command of the Army Act, 14 Stat. 485, 486–87 (1867), which required all generals appointed by the President to take orders from General of the Army, Ulysses Grant. The Act rendered contrary orders (i.e., those of President Andrew Johnson) void, and imposed criminal penalties on officers who refused to obey Grant's orders. This law was an attempt to shield congressional reconstruction policies from presidential interference. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 333 (Harper 2002). See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (providing an exhaustive historical argument that the President's plenary power as Commander-in-Chief is very narrow).

363. See, e.g., *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993) (holding unconstitutional a statute directing the Secretary of State to negotiate with foreign countries to develop treaties that would protect sea turtles); *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1427–28 (M.D. Fla. 1998) (same for treaties for international shark management).

(2) the President may not use these powers to alter domestic legal obligations without congressional authorization.

Starting with *Little v. Barreme (Flying Fish Case)*,³⁶⁴ the courts adopted the first limitation on the President's implied powers. In that case, the Supreme Court held that the President could not issue military instructions to recapture seized American ships in a manner contrary to the terms of a federal statute.³⁶⁵ The Court has also held that, in the absence of a conflict with an enumerated presidential power, Congress has plenary authority over foreign affairs through the exercise of its enumerated powers³⁶⁶ and that an executive order is invalid when it conflicts with a treaty³⁶⁷ or statute. This principle was recently reaffirmed and applied in *Hamdan v. Rumsfeld*.³⁶⁸ Similarly, the lower federal courts have held that congressional statutes concerning foreign affairs prevail over conflicting executive foreign policy statements, orders, and executive agreements.³⁶⁹ As is true for law enforcement, the President's implied powers over foreign affairs

364. 6 U.S. (2 Cranch) 170 (1804).

365. See case summaries *supra* note 307.

366. See, e.g., *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 328–29 (1994) (holding that foreign policies of the Executive cannot displace state law condoned by Congress under the Foreign Commerce Clause); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459–62 (1899) (concluding that a financial dispute with Mexico was ultimately subject to congressional resolution); see also *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (stating that Congress can require the Executive to impose sanctions on foreign countries that exceed prescribed fishing limits).

367. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188–90 (1999) (holding that hunting and fishing rights granted to the Chippewa Indians by treaty could not be revoked by Executive Order).

368. 548 U.S. 557, 635 (2006) (holding unconstitutional military commissions established by the President to try enemy combatants for war crimes because of conflicts with the statute governing such commissions).

369. See, e.g., *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003), *cert. denied*, 524 U.S. 915 (2004) (“There is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement.”); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182–83 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (holding that the President's foreign affairs powers do not preclude statutory enactments by Congress on subjects in which it has an interest); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (holding an executive agreement unlawful because it conflicted with a federal statute regulating interstate commerce); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (executive agreement related to, but not part of, the Panama Canal Treaty was invalid because of a conflict with the Internal Revenue Code); *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620 (D.D.C. 1980) (holding the President's Petroleum Import Adjustment Program invalid as contrary to the Energy Policy and Conservation Act); *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 716–18 (E.D. Va.), *aff'd*, 295 F.2d 24, 25 (4th Cir. 1961) (holding that the President, acting through the Coast Guard, could not prevent the United States Marshal from arresting a Cuban vessel pursuant to a statutory warrant).

cannot be used to suspend or dispense with a statute enacted by Congress.

The second limitation—that the President’s implied powers over foreign affairs cannot change domestic law without congressional authorization—has proven more problematic. A decision by Chief Justice Marshall in 1814 applied this principle in the extreme circumstance of a declared war.³⁷⁰ And in 1936, the Supreme Court made this principle explicit. In *Valentine v. United States ex rel. Neidecker*,³⁷¹ the Court held that the President could not extradite a person to the country where he allegedly committed a crime without authorization by a treaty or statute:

It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the states. . . . But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision. . . . [*This rule*] rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.³⁷²

The very next year, in *United States v. Belmont*,³⁷³ and subsequently in *United States v. Pink*,³⁷⁴ the Supreme Court held that an executive agreement with the Soviet Union displaced state laws on property rights. The executive agreement was designed to resolve outstanding differences between the United States and the Soviet Union as a necessary element of President Roosevelt’s recognition of the Soviet government.³⁷⁵ One of the most serious areas of friction had been the multiple unresolved claims to property in New York that had been the subject of Soviet expropriation decrees.³⁷⁶ Under the executive agreement, the Soviet Union assigned its claims to the United States

370. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); see discussion *supra* note 339.

371. 299 U.S. 5 (1936).

372. *Id.* at 8.

373. 301 U.S. 324 (1937).

374. 315 U.S. 203 (1942).

375. *Belmont*, 301 U.S. at 326.

376. *Pink*, 315 U.S. at 211.

(the “Litvinov Assignment”).³⁷⁷ The United States committed to acquire title to the assets, by litigation if necessary, as a prelude to pooling them in a fund and then making equitable distribution to various claimants. The New York courts held that the Soviet Union had never acquired legal title to the assets because, according to that State’s public policy, expropriation without just compensation amounted to illegal confiscation.³⁷⁸ The Supreme Court held that New York’s law could not be applied in cases covered by the executive agreement.³⁷⁹

As a necessary method of conducting international relations, the President may enter into executive agreements with foreign governments without congressional authorization, and those agreements are binding under international law. This is particularly true in the context of recognition because the resolution of disputes “certainly is a modest implied power of the President.”³⁸⁰ As the Court explained, “Unless such a power exists, the power of recognition might be thwarted or seriously diluted.”³⁸¹ But it does not follow that the unilateral exercise of this implied executive power can change domestic law governing private rights.

The first reason for questioning *Belmont* and *Pink* goes back to the scope of the royal prerogative of foreign affairs. The King had the unilateral power to make treaties with foreign nations, but those treaties had no domestic legal effect without authorizing or implementing legislation by Parliament. Yet if the President can unilaterally change domestic law through the device of an agreement with a foreign nation, then the President will be exercising a greater power than was recognized in the royal prerogatives.³⁸²

This result becomes even more questionable when one compares executive agreements with Article II treaties. The President’s power to make treaties is an enumerated power, but it can be effective only with the consent of a super-majority vote in the Senate.³⁸³ The Supremacy Clause classifies treaties as laws; but Chief Justice Marshall imposed a judicial gloss in *Foster v. Neilson*³⁸⁴ that while treaties are

377. *Belmont*, 301 U.S. at 326.

378. *Id.* at 327.

379. *Id.* at 335–36.

380. *Pink*, 315 U.S. at 229.

381. *Id.*

382. See Ramsey, *Executive Agreements*, *supra* note 11, at 229.

383. U.S. CONST. art II, § 2.

384. 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (“A treaty is in its nature a contract between two nations, not a legislative act.”).

binding between countries under international law, not all treaties operate to alter domestic legal obligations. How, then, do treaties that are not self-executing become part of the domestic law and impose new legal obligations? Marshall answered, “[T]he ratification and confirmation . . . must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.”³⁸⁵

Thus, treaties have domestic legal effect only upon the authorization of Congress—either by the action of a super-majority in the Senate approving self-executing treaties, or by the enactment of implementing legislation by the full Congress for non-self-executing treaties.³⁸⁶ But in giving domestic legal effect to the executive agreements in *Belmont* and *Pink*, the Supreme Court appeared to hold that unilateral executive agreements have a greater force than treaties, even though (a) treaties involve the exercise of an enumerated constitutional power, while executive agreements are implied powers; and (b) treaties have been approved by a constitutionally designated house of Congress, while unilateral executive agreements have not.

Justice Sutherland’s opinion in *Belmont* suggested, and Justice Douglas’s opinion in *Pink* stated explicitly, that executive agreements enjoy the status of federal law under the Supremacy Clause.³⁸⁷ This holding, which purports to give unilateral domestic lawmaking power to the President, is wrong.³⁸⁸ A simple example exposes the fallacy in

385. *Id.* at 314–15. The Court’s latest application of this principle was in *Medellín v. Texas*, 128 S. Ct. 1346 (2008). In that case, the Court applied the principle without stating a general presumption in favor or against self-execution. I am not suggesting that this portion of the *Medellín* decision is correct. The Supremacy Clause provides that “all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land: and the judges in every State, shall be bound thereby” U.S. CONST. art. VI, cl. 2 (emphasis added). Given this unambiguous language, a treaty should be part of domestic law absent a statement that it requires legislative implementation, an approach Marshall seemed to suggest in *United States v. Percheman*. 32 U.S. at 88–89; see Vázquez, *supra* note 219, at 643–45, 666–67.

386. See Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 354–58 (2006).

387. *United States v. Belmont*, 301 U.S. 324, 331–32 (1937); *United States v. Pink*, 315 U.S. 203, 230 (1942).

388. Bradford R. Clark has recently attempted to justify the results in *Belmont* and *Pink* on other grounds, thus relegating the Court’s discussion of the status of executive agreements under the Supremacy Clause as dictum. *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1641–47 (2007). The argument is that the President’s recognition of the Soviet government triggered the act of state doctrine, which meant, independently of the executive agreement, that no American court could question the legality of the acts of that government retroactively to the commencement of the regime. See, e.g., *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 308

this contention. The executive agreement with the Soviet regime dealt with one source of friction—claims settlement—that needed to be resolved as a condition of recognition. Another possible source of friction was the presence in the United States of many Trotsky followers who obtained refuge in this country following the first Stalinist purges and who were condemned as criminals by the regime. Suppose that the Soviet Union demanded their extradition as a

(1918); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302–03 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897); *Williams v. Bruffey*, 96 U.S. 176, 186 (1877). See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–27 (1964) (describing the history of the act of state doctrine and concluding that its source is preemptive federal common law that applies to both state and federal courts).

The problem with this argument is that the act of state doctrine does not apply extraterritorially. See, e.g., *Sabbatino*, 376 U.S. at 401; G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 128–29, 129 n.439 (1999). Thus, although the New York courts could not question the legality of a Soviet decree that seized property in that country, that bar did not apply to the assets in *Belmont* and *Pink*, which were in New York.

Clark attempts to avoid the extraterritorial problem by arguing that, under corporate law, the assets in New York were part of the expropriated and liquidated Russian corporations, and their situs was therefore in the Soviet Union. This argument conceivably might work in *Belmont*, which involved money deposited by the Russian corporation in a New York bank before it was expropriated and liquidated in 1918. 301 U.S. at 326–27.

But *Pink* is very different. That case involved funds that had been assets of the New York branch of a Russian insurance corporation that was expropriated and liquidated in 1920. 315 U.S. at 210–11. The branch was a company that had been licensed by New York to do business in that State; had always done business in New York subject to the laws of New York, including the regulations of the State Insurance Commissioner; had continued to operate in New York for five years after the Russian corporation was liquidated; and had been liquidated under New York law by the State Insurance Commissioner when it ceased doing business. *Id.* The asset in question was a fund of about one million dollars held by the Insurance Commissioner, which was the net of annual security deposits made by the company as collateral for creditors and the money from liquidating the company's assets, less payments of claims to American creditors. *Id.* at 211. All of the money in this fund had been generated by transactions in New York that were governed by state law. Most significantly, under New York corporate law, the branch of a foreign insurance company licensed to operate in the state is a separate juridical entity from its parent corporation, and “[i]n its transaction of business in New York, it is to be dealt with, *pro hac vice*, as a domestic corporation.” *Comey v. United Sur. Co.*, 111 N.E. 832, 834 (N.Y. 1916) (Cardozo, J.). The act of state doctrine could not apply to the foreign seizure of domestic funds that were collected by the state from a company that was privileged to do business in the state with the legal status of a New York corporation.

Another possible justification for *Pink* is that Congress impliedly ratified the executive agreement. In 1939, before *Pink* was decided, Congress passed a joint resolution, 53 Stat. 1197, that authorized the President to appoint a claims commissioner with quasi-judicial powers (including subpoenaing witnesses and requiring the production of documents) to determine the validity and amounts of claims against the Soviet Union. This legislative ratification of the executive agreement would have mooted any question of unilateral presidential power to change domestic law, but for the fact that it applied only to claims of American citizens—and all of the claimants in *Pink* were foreigners. The Supremacy Clause issue had to be reached in *Pink*, if not in *Belmont*.

condition of recognition. It seems inconceivable that an executive agreement providing for such extraditions would be legally enforceable. If, as the Supreme Court held in *Valentine*, the President cannot extradite anyone without congressional authorization, how could the President obtain the unilateral power to extradite through a contract with a foreign power? As stated in *Valentine*: “The Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.”³⁸⁹ The same principle applies to property rights and demonstrates why *Belmont* and *Pink* were incorrectly decided.

The Supreme Court next dealt with executive agreements some forty years later in *Dames & Moore v. Regan*,³⁹⁰ which involved an executive agreement freeing the American hostages held in Iran.³⁹¹ While most of the executive orders implementing that agreement were authorized by statutes, the provision for suspending claims pending in United States courts against the government of Iran was not so authorized.³⁹² In writing for the majority, Justice Rehnquist did not rely on a broad reading of *Belmont* and *Pink*. Instead, Rehnquist asserted that the settlement of claims against foreign nations in executive agreements had a long history and had been authorized in analogous situations by Congress.³⁹³ He concluded, therefore, that the suspension of claims was impliedly authorized by Congress.³⁹⁴ Although Rehnquist’s historical analysis has been criticized,³⁹⁵ it seemed to return the Court to the principle that the President could not unilaterally change domestic legal obligations without authority from Congress. Indeed, implied congressional authorization was said to be “crucial” to the decision.³⁹⁶

Then the Court gave its remarkable decision in *American Insurance Ass’n v. Garamendi*.³⁹⁷ California had passed a law to provide relief through litigation for Holocaust-era survivors whose life insurance policies had been unlawfully appropriated by private companies.³⁹⁸ The portion of the law at issue in the case required all insurers who

389. *Valentine v. United States*, 299 U.S. 5, 9 (1936).

390. 453 U.S. 654 (1981).

391. *See id.* at 659–60.

392. *Id.* at 666.

393. *Id.* at 679–86.

394. *Id.* at 677–82.

395. *See* Eskridge & Baer, *supra* note 6, at 1164–66; Marks & Grabow, *supra* note 6, at 77–92.

396. *Dames & Moore*, 453 U.S. at 680.

397. 539 U.S. 396 (2003).

398. *Id.* at 409.

did business in the state and who sold insurance policies in Europe during the Holocaust era to disclose information about those policies to the state insurance commissioners or risk losing their licenses.³⁹⁹ Those disclosures would, of course, be very useful to present and prospective plaintiffs in lawsuits against insurance companies.⁴⁰⁰ But the disclosure provision was said to undermine the executive agreements that the President had negotiated with Germany, Austria, and France, which sought to provide relief for Holocaust victims from the insurance companies through a voluntary process.⁴⁰¹ The Supreme Court held, in an opinion by Justice Souter, that the California law had been preempted by the executive agreements, even though the executive agreements had not been authorized by Congress and nothing in those agreements prohibited the disclosures required by the state law.⁴⁰²

There are two ways to read this decision. The first is that it is an extension of *Dames & Moore*. Souter claimed that the longstanding practice of executive claims-settlement established the authority of the President to settle *all* claims through executive agreements.⁴⁰³ This argument, however, cuts against the grain of the “narrowness” of the *Dames & Moore* holding,⁴⁰⁴ and it is difficult to sustain because the longstanding executive practice, which Congress impliedly approved, was the settlement of claims against foreign governments, not lawsuits against private parties.⁴⁰⁵ Nevertheless, this reading of *Garamendi* has the virtue of being grounded on congressional authority to change domestic law.

The other reading of *Garamendi* is that the California law was nullified because it interfered with the President’s ability to conduct

399. *Id.* at 409–10.

400. *Id.* at 410–11.

401. *Id.* at 410–12.

402. *See id.* at 428–29; *id.* at 430 (Ginsburg, J., dissenting) (“Although the federal approach differs from California’s, no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like [California’s statute].”).

403. *Id.* at 420 (majority opinion).

404. *See* 453 U.S. at 688 (“Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities.”).

405. Claims against foreign countries challenged the legality of those governments’ actions and were barred by the doctrine of sovereign immunity. *See* *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135, 145–46 (1812). However, claims against private parties were not barred by sovereign immunity, and there is no history of private party claims settlement through executive agreements. *See* Ingrid Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1, 20–39 (2003).

foreign affairs as he saw fit—that is, the President’s policy was to settle the claims through voluntary means and not through litigation.⁴⁰⁶ This reading of the decision is based on Souter’s reliance on *Zschernig v. Miller*,⁴⁰⁷ a 1968 decision that struck down an Oregon law that denied an inheritance to a resident of East Germany because of the likely lack of reciprocity.⁴⁰⁸ Even though the Justice Department advised the Supreme Court that the Oregon law did not “unduly interfere[] with the United States’ conduct of foreign relations,” the Court held that it was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”⁴⁰⁹

Zschernig is a controversial decision, suggesting the existence of a dormant foreign affairs power. Describing this as “new constitutional doctrine,” Louis Henkin thought that it “will take many years and many cases” to work out its application.⁴¹⁰ Perhaps because of the opinion’s apparent lack of coherence,⁴¹¹ however, *Zschernig* was ignored by the Supreme Court until it was resurrected and greatly extended in *Garamendi*.⁴¹² The Court then made the same mistake it had made in *In re Debs*⁴¹³—it equated the United States with the presidency. A dormant prohibition on state power necessarily presupposes the existence of a positive grant of federal power. No one doubts that Congress, in exercising its legislative powers over foreign affairs, can create new legal obligations and preempt state laws that stand in the way of its objectives.⁴¹⁴ But unexercised congressional power does not create power in the President. And there is no such power in the presidency itself, unless one assumes that *all* executive agreements, and perhaps all diplomatic policies, are

406. 539 U.S. at 421–23.

407. 389 U.S. 429 (1968).

408. *Id.* at 430–31.

409. *Id.* at 434, 432.

410. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 239 (Foundation Press 1972).

411. *See id.* at 476–77 n.51; Brandon D. Deming & Michael D. Ramsey, American Insurance Company v. Garamendi and Executive Preemption in Foreign Affairs, 46 WM. & MARY L. REV. 825, 855–57 (2004) (analyzing three alternative readings of *Zschernig*, and extensively criticizing *Garamendi* on both separation of powers and federalism grounds).

412. 539 U.S. at 417–21; *see also id.* at 439 (Ginsburg, J., dissenting) (“We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here.”).

413. *See* discussion *supra* notes 334–342 and accompanying text.

414. *See, e.g.,* Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000) (holding that a Massachusetts law restricting trade with Myanmar was preempted by a federal statute that imposed similar sanctions on that country).

“laws” under the Supremacy Clause. The result of *Garamendi* was an unprecedented expansion of unilateral presidential power that went beyond any prerogative that was ever recognized in the British monarch.

The Supreme Court recently adopted the narrower reading of *Garamendi*. In *Medellín v. Texas*,⁴¹⁵ treaty obligations required the United States to provide consular access, as well as judicial review and reconsideration of convictions and sentences, to Mexican detainees when that access was not provided. Texas refused to comply with these obligations. As the case wound through the courts, the President issued a memorandum that appeared to order Texas to comply.⁴¹⁶ *Medellín* was a much stronger case than *Garamendi* for the invalidation of a state law because: (1) the state law was in direct (not indirect) conflict with (2) a treaty obligation (as opposed to an executive agreement), and (3) the President instructed Texas to comply with the treaty obligation. But the Court held that the treaty was not self-executing and that the President did not have the unilateral power to give domestic effect to the treaty.⁴¹⁷ Instead, congressional implementation was needed to require compliance by Texas. In a logically consistent world, this decision cannot co-exist with the broad reading of *Garamendi*, and the Court treated *Medellín* as belonging in the niche of claims-settlement cases in which the President acts pursuant to the implied authority of Congress:

The claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals. . . . They are based on the view that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,” can “raise a presumption that the [action] had been [taken] in pursuance of its consent.”⁴¹⁸

And as for the President’s unilateral authority to use his foreign affairs power to change domestic law, the Court returned to original principles:

[T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the

415. 128 S. Ct. 1346 (2008).

416. *Id.* at 1355–56.

417. *Id.* at 1368–70.

418. *Id.* at 1371–72 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). Significantly, the Court did not cite *Zschernig*.

President's signature or a congressional override of a Presidential veto. Indeed, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."⁴¹⁹

CONCLUSION

Through a historical and structural analysis of Article II, this Article argues that implied presidential powers must be derived from the enumerated powers vested in the President. Accordingly, although the President's implied powers are few, they include the important powers of law enforcement and the establishment and implementation of foreign policy. The President has a broad range of methods to choose from in exercising these powers. However, these implied powers cannot change domestic laws or impose new legal obligations without congressional authorization. The President cannot legislate by proclamation. Moreover, these implied powers are subject to congressional regulation. In the event of a conflict between a statute or treaty and the exercise of an implied presidential power, the statute or treaty prevails. To hold otherwise would resurrect the royal suspending power and turn the Take Care Clause upside down.

The country has changed dramatically since these principles were made part of the Constitution, but their validity remains notwithstanding—indeed, perhaps because of—those changes. Adherence to these principles will not leave the President with less power than the country needs. Although the Framers gave the bulk of governmental power to Congress and expected it to be the strongest force in government, the reality is that the Executive has become the most powerful branch. Blackstone observed in 1765 that the real power of the King was much greater than his nominal legal power. The same is now true for the President.

The nation looks to the President, and not to Congress, for leadership in dealing with crises, and for good reason. The President is the only national official who is elected by the entire country. He is the object of insatiable media attention, which provides him with the unrivaled ability to advance his policies.

Moreover, with the development of a huge economy that is integrated both nationally and globally, Congress has passed a massive number of regulatory laws that would have been beyond the

419. *Id.* at 1369 (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 587 (1952)).

imagination of the founding generation. Every law that Congress passes requires enforcement, and this has in turn resulted in a tremendous expansion of the size and power of the executive branch. The very complexity of governing has meant that Congress cannot micro-manage the country, and it has delegated (or, more accurately, ceded) a considerable amount of its legislative authority to the President. This has resulted in a self-reinforcing phenomenon: the President has much more access to information and expertise, with broader views of national issues, and can make decisions more efficiently and decisively than the 535 members of Congress.

With the emergence of the United States as an economic and military world power, the President has predictably (and perhaps necessarily) seized the initiative in developing and implementing foreign policy. To be sure, the President usually needs funding and other implementing legislation to follow through with these initiatives, but these are after-the-fact legislative checks of uncertain strength. Although the Framers envisioned that the President would serve as a check on an otherwise all-powerful Congress, those roles are now reversed.

Justice Jackson was aware of these developments nearly two generations ago, when the power of the presidency was less than it is now. He understood that the imbalance of power in our government means that the President does not need more plenary constitutional powers. “I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.”⁴²⁰ On the contrary, these developments make it all the more important that the President be held accountable to the law: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”⁴²¹

420. *Steel Seizure Case*, 343 U.S. at 654 (Jackson, J., concurring).

421. *Id.* at 655.