Executive Power Essentialism and Foreign Affairs: A Critique of the Vesting Clause Thesis

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Executive Power Essentialism and Foreign Affairs:
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Curtis A. Bradley* and Martin S. Flaherty**

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Executive Power Essentialism and Foreign Affairs:  
A Critique of the Vesting Clause Thesis

The so-called “Vesting Clause” of Article II of the Constitution, which provides that “The executive Power shall be vested in a President of the United States of America,” stands in apparent contrast with the Article I Vesting Clause, which provides that “All legislative Powers herein granted shall be vested in a Congress of the United States . . . .” This textual difference, usually bolstered with historical materials, has long undergirded the claim that the Article II Vesting Clause implicitly grants the President an array of residual powers not specified in the remainder of Article II. This argument, which we call the “Vesting Clause Thesis,” was famously advanced by Alexander Hamilton in his first Pacificus essay defending President Washington’s 1793 Neutrality Proclamation. In recent years, the Vesting Clause Thesis has gained newfound popularity. White House officials were apparently prepared to deploy the argument in support of the Bush Administration’s authority to use military force against Iraq had not Congress expressly granted such authority. And Professors Saikrishna Prakash and Michael Ramsey recently defended the Vesting Clause Thesis at length in an important article in the Yale Law Journal. The Thesis also has received recent support from Professor Phillip Trimble, and qualified support from Professor H. Jefferson Powell.

This Article critiques the Vesting Clause Thesis on both textual and historical grounds. As for text, the difference in wording between the Article I and Article II Vesting Clauses can be explained on a number of other plausible grounds and need not be read as distinguishing between a limited grant of legislative powers and a plenary grant of executive power. As for history, the narrative that is offered by proponents of the Vesting Clause Thesis has two central features. First, it presents a story of continuity, whereby European political theory is carried forward, relatively unblemished, into American constitutional design and practice. Second, the narrative relies on what could be called “executive power essentialism” – the proposition that the Founders had in mind, and intended the Constitution to reflect, a conception of what is “naturally” or “essentially” within executive power. We argue that this historical narrative is wrong on both counts. Among other things, the narrative fails to take account of complexity within eighteenth century political theory, the experience of state constitutionalism before 1787, and the self-conscious rejection by the Founders of the British model of government. The narrative also understates the degree to which the constitutional Founders were functionalists, willing to deviate from pure political theory and essentialist categories in order to design an effective government.
I. Introduction

Conflict abroad almost always enhances executive power at home. This expectation has held true at least since the constitutions of antiquity. It holds no less true for modern constitutions, including the Constitution of the United States. Constitutional arguments for executive power likewise escalate with increased perceptions of foreign threat. Perhaps more importantly, such arguments become more appealing than they ordinarily would be. It is therefore hardly surprising that assertions on behalf of presidential power meet with an especially receptive audience in a nation transfixed by September 11, Iraq, North Korea, and international terror.

One perennial weapon in the executive arsenal is the so-called “Vesting Clause” of Article II of the Constitution. This clause, which provides that “The executive Power shall be vested in a President of the United States of America,” stands in apparent contrast with the Article I Vesting Clause, which provides that “All legislative Powers herein granted shall be vested in a Congress of the United States . . . .” This textual difference, usually bolstered with historical materials, has long undergirded the claim that the Article II Vesting Clause implicitly grants the President a broad array of residual powers not specified in the remainder of Article II. This argument, which we will call the “Vesting Clause Thesis,” was famously advanced by Alexander Hamilton in his first Pacifistas essay defending President Washington’s 1793 Neutrality Proclamation. It has had a checkered career in constitutional law and interpretation ever since. One ostensible high point came in Myers v. United States, in which a majority of the Supreme Court relied on the Vesting Clause Thesis in holding that the President had an exclusive power of removing executive officers. Even in Myers, however, the Court’s reliance on the Vesting Clause Thesis was minimal, and the Court’s analysis and holding have since been severely qualified.

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1 See PLATO, THE REPUBLIC 388 (Desmond Lee trns. 1995) (describing the incentives tyrants have to make war abroad to maintain power at home); ARISTOTLE, THE POLITICS 346 (T. A. Sinclair trns. 1988) (“The tyrant is also very ready to make war; for this keeps his subjects occupied and in continued need of a leader.”).

2 A number of constitutional Founders observed that leaders of other countries had often initiated war for personal reasons. See generally William Michael Treanor, Fame, the Founding, and the Power to Declare War, 82 CORNELL L. REV. 695 (1997); see also, e.g., THE FEDERALIST PAPERS, No. 4 (John Jay), at 46 (Clinton Rossiter ed., 1961) (“[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory . . . .”); James Madison, “Helvidius” No. 4 (Sept. 14, 1793), in 15 THE PAPERS OF JAMES MADISON 108 (Thomas A. Mason et al. eds., 1985) (“War is in fact the true nurse of executive aggrandizement.”).

3 U.S. CONST. art. II, § 1, cl. 1.

4 U.S. CONST. art. I, § 1, cl. 1 (emphasis added).


6 272 U.S. 52 (1926).

7 See id. at 118.

8 The Vesting Clause Thesis takes up only one paragraph of the Court’s long opinion. Much of the Court’s opinion is focused instead on a 1789 debate in the House of Representatives over the President’s removal power. See id. at 111-18, 119-39, 174-75. As we discuss below, those who supported a presidential...
offsetting low point famously occurred in the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*,9 in which the Court rejected President Truman’s broad claim of executive power, a claim that was based in part on the Article II Vesting Clause.10 Although the majority in *Youngstown* did not specifically address the Vesting Clause Thesis, Justice Jackson did address the Thesis in his influential concurrence and repudiated it.11

In recent years, the Vesting Clause Thesis has gained newfound popularity. White House officials were apparently prepared to deploy the argument in support of the Bush Administration’s authority to use military force against Iraq had Congress not expressly granted such authority.12 And Professors Saikrishna Prakash and Michael Ramsey recently defended the Vesting Clause Thesis at length in an important article in the *Yale Law Journal*.13 The Thesis also has received recent support from Professor Phillip Trimble,14 and qualified support from Professor H. Jefferson Powell.15

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9 343 U.S. 579 (1952).
10 See id. at 587-88.
11 See id. at 640-41 (Jackson, J., concurring); see also id. at 632 (Douglas, J., concurring) (“Article II which vests the ‘executive Power’ in the President defines that power with particularity.”). The dissenters in *Youngstown* invoked the Article II Vesting Clause in passing, see id. at 681-82 (Vinson, J., dissenting), but ultimately rested their argument on a “practical construction” of the Take Care Clause, see id. at 702.
The principal attraction of the Vesting Clause Thesis is that it provides a straightforward solution to what appears to be a paradox of American constitutionalism: the specific grants of power in Article II are few and limited, especially when compared with Congress’s extensive list of powers in Article I, and yet the President has long been a significant – some argue, dominant – institutional actor in American government. The President has been particularly dominant with respect to foreign affairs, and indeed is sometimes referred to as the “sole organ” for the United States in its international relations. The Vesting Clause Thesis reconciles the text of the Constitution with the breadth of presidential power by stipulating that the Article II Vesting Clause grants the President all powers that are in their nature “executive,” subject only to the specific exceptions and qualifications set forth in the rest of the Constitution.

In addition to the constitutional text, advocates of the Vesting Clause Thesis rely heavily on history. Their historical claim is that constitutional theorists in Britain and Europe had worked out a common, comprehensive, and detailed conception of the natural division of governmental power well before American independence, and that the Constitution of the United States – with discrete textual exceptions – embodied this reigning separation of powers understanding. When the Founders referred in the Article II Vesting Clause to the “executive Power,” the argument runs, they referred to an understood bundle of powers and therefore had no need to enumerate specific executive powers in the remainder of Article II. Rather, such an enumeration became necessary only for those few instances in which the Founders were deviating from the prevailing understanding – for example, when they divided an executive power between the President and the Senate. Proponents of this account line up purported support from every relevant development leading to the Constitution’s ratification: seventeenth and eighteenth century political theory, the “Critical Period” under the Articles of Confederation, the Federal Convention, and the state ratification debates. The most powerful evidence, however, allegedly comes from the statements and practices of government officials during the Washington Administration, which, it is claimed, confirm the consensus underlying Article II.

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17 See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (referring to the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”). The genesis of the “sole organ” language is a speech made by John Marshall in 1800 while he was a member of the House of Representatives. President Adams had ordered the extradition to Great Britain of Thomas Nash, alias Jonathan Robbins, who was accused of murder while aboard a British ship. Although Adams acted pursuant to a treaty with Great Britain, he was criticized on the ground that the extradition request from Great Britain should have been processed by judicial action, not executive action. It was in this context that Marshall, defending Adams, proclaimed: “The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 10 Annals of Congress 596, 613 (1800). Marshall went on to argue that the President “is charged to execute the laws,” that a treaty “is declared to be a law,” and that the President therefore has the power to fulfill U.S. responsibilities under an extradition treaty. Id. Marshall therefore was not making any claim about unspecified substantive powers.
Armed thus with text and history, scholars have relied on the Vesting Clause Thesis to cash out a number of specific claims concerning presidential power. Some argue, for example, that the President has the power to terminate treaties because that power is executive in nature and is not expressly delegated to Congress or the Senate. Others assert that the President has broad unenumerated war powers in situations not involving congressional declarations of war, since the war power, too, is in its nature executive. And still others have invoked the Vesting Clause Thesis in support of a power of the President to conclude certain international agreements on his own authority, notwithstanding the requirement in Article II of the Constitution that the President obtain the advice and consent of two-thirds of the Senate in order to make treaties. The potential breadth of the Vesting Clause Thesis is further illustrated by dicta in a recent Supreme Court decision, American Insurance Association v. Garamendi, in which the Court appeared to suggest that the President might have the power to preempt state laws simply by articulating the “foreign policy of the Executive Branch.”

This Article critiques the Vesting Clause Thesis on both textual and historical grounds. As for text, the difference in wording between the Article I and Article II Vesting Clauses can be explained in other plausible ways and need not be read as distinguishing between a limited grant of legislative powers and a plenary grant of executive power. Familiar canons of construction such as *expressio unius* and other interpretive principles

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18 See, e.g., Prakash & Ramsey, supra note 13, at 324-27.


21 See American Insurance Association v. Garamendi, 123 S. Ct. 2374, 2386 (2003). In that case, the Court, in a 5-4 decision, found that a California statute was preempted by executive agreements because, in the Court’s view, the statute had created an obstacle to the achievement of the President’s foreign policy as articulated in the agreements. The Court referred in passing to the Article II Vesting Clause, stating that “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring).” Id. at 2386. Professors Prakash and Ramsey, by contrast, disavow any claim of presidential lawmaking power in their defense of the Vesting Clause Thesis. See Prakash & Ramsey, supra note 13, at 340-46.
further cut against the Vesting Clause Thesis. That thesis, moreover, cannot explain some of Article II’s specific grants of foreign affairs authority, and it sits uneasily with the Constitution’s enumerated powers structure.

Given that the textual case for the Vesting Clause Thesis is at best uncertain, the persuasiveness of the thesis ultimately depends on history. Here there is a particular irony. Proponents of the Vesting Clause Thesis are often also advocates of a classically originalist approach to constitutional interpretation, pursuant to which the understanding of the Constitution’s framers and ratifiers controls constitutional meaning. Yet, as we will show, the historical sources that are most relevant to the Founding, such as the records of the Federal Convention, the *Federalist Papers*, and the state ratification debates, contain almost nothing that supports the Vesting Clause Thesis, and much that contradicts it.

Supporters of the Vesting Clause Thesis attempt to compensate for the lack of direct Founding support by focusing on political theory and practice both before and after the ratification of the Constitution. Their historical narrative thus has two central features. First, it is a story of continuity, whereby European political theory is carried forward, relatively unblemished, into American constitutional design and practice. Second, the narrative relies on what could be called “executive power essentialism” – the proposition that the Founders had in mind, and intended the Constitution to reflect, a conception of what is “naturally” or “essentially” within executive power. This historical narrative, we argue, is wrong on both counts. Among other things, the narrative fails to take account of complexity within eighteenth century political theory, the experience of state constitutionalism before 1787, and the self-conscious rejection by the Founders of the British model of government. The narrative also understates the degree to which the constitutional Founders were functionalists, willing to deviate from pure political theory and essentialist categories in order to design an effective government.

As usually presented, moreover, the post-constitutional practice of the Washington Administration provides only half the story. Washington and his cabinet, perhaps not surprisingly, tended to stake out pro-executive positions with respect to the management of foreign affairs. None of these positions, however, concerned the key substantive powers ascribed to the President by proponents of the Vesting Clause Thesis (treaty termination, war powers, and sole executive agreements). Furthermore, the most important presidential foreign affairs power established during the Washington Administration – the President’s power to negotiate the terms of treaties without soliciting the Senate’s advice – very likely contradicted Founding intent, which shows why reliance on post-Founding practice is a problematic method of discerning the original understanding. In any event, with the partial exception of Alexander Hamilton, neither Washington nor his cabinet actually articulated the Vesting Clause Thesis, preferring instead to make more specific and modest textual claims.

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22 For example, Professors Prakash, Ramsey, and Yoo are all proponents of both the Vesting Clause Thesis and this form of originalism. On the Supreme Court, Justice Scalia is a robust defender of both the Vesting Clause Thesis and originalism. See, e.g., *Morrison*, 487 U.S. at 705-06 (Scalia, J., dissenting); see also Antonin Scalia, *A Matter of Interpretation* (1998) (defending originalism).
This Article proceeds as follows. In Part II, we show why the constitutional text does not by itself establish the case for the Vesting Clause Thesis. In Part III, we consider the views of seventeenth and eighteenth century political theorists, the practices of the states during the Critical Period as they relate to the issue of executive power, and the lessons of the Articles of Confederation. In Part IV, we discuss the constitutional Founding, with particular emphasis on the discussions and debates relating to the presidency. In Part V, we consider some of the most relevant practices and debates that occurred during the eight years of the Washington Administration.

II. Textual Uncertainty

It is important to understand at the outset why the textual arguments in support of the Vesting Clause Thesis are, at best, indeterminate. As noted above, the principal textual argument is the difference in wording between the Article I and Article II Vesting Clauses. The Article I clause provides that “[a]ll legislative powers herein granted shall be vested” in Congress, whereas the Article II clause provides that “[t]he executive Power shall be vested” in the President. This difference in wording, it is argued, suggests that Congress’s legislative powers were intended to be limited to the ones listed in Article I, whereas the President was intended to receive all powers encompassed by the phrase “executive Power,” without regard to whether those powers are listed in Article II.23

As an initial matter, even if this textual argument were correct, and the Article II Vesting Clause were read as a power-conferring provision, the argument would not tell us which powers are encompassed by the Clause. It is possible, for example, that the phrase “executive Power,” even if it is a power-conferring provision, confers simply a power to execute the laws.24 Indeed, to the extent that there are any Founding statements ascribing substantive content to the Article II Vesting Clause, they are all statements equating executive power with the power to execute the laws.25 If this is what the Vesting Clause means, it could not serve as the source of the foreign relations powers claimed by proponents of the Vesting Clause Thesis. Thus, even on its own terms, the textual argument for the Vesting Clause Thesis is inconclusive and depends on history.

It is also worth noting that the textual argument assumes a level of precision on the part of the Founders that may be unrealistic. As Professor Christopher Eisgruber has noted, constitutional law scholars often fall prey to the aesthetic fallacy that “constitutional text possesses hidden harmonies that will reveal themselves to assiduous students” and, relatedly, that “we should be extremely reluctant ever to conclude that it is redundant,

23 See, e.g., Prakash & Ramsey, supra note 13, at 256-57.

24 The Article II Take Care Clause, under this reading, would go further than the Vesting Clause by also imposing a duty on the President to execute the laws.

25 See infra Part IV.
clumsy, ambiguous, or incomplete.” 26 In fact, it could be the case, as Professor David Currie has observed, that the difference in the wording of the Article I and Article II Vesting Clauses “may well have been accidental.” 27 Whether accidental or not, however, there are other plausible explanations for this difference.

The Article II Vesting Clause states that the executive power shall be vested “in a President of the United States of America.” As discussed later in this Article, a significant issue during the drafting of the Constitution was whether to have a unitary or plural executive. The Article II Vesting Clause may simply make clear where the executive power is being vested – in a unitary President – not the scope of that power. 28 In other words, it may have been worded to address an issue that was specific to Article II. Conversely, the “herein granted” language in the Article I Vesting Clause may serve to emphasize the limits of federalism on the national legislative power, a concern that would have been specific to Article I. 29 Another possibility has been suggested by Professor Michael Froomkin. As he notes, there was a Congress already in existence at the time of the framing of the Constitution, so the “herein granted” language in Article I might have been designed to make clear that, from now on, Congress would have only the powers being listed. By contrast, the Founders might not have thought it necessary to use that language for the new executive and judicial branches. 30 As a matter of text, these alternative interpretations are at least plausible.

Not only are there other explanations for the difference in wording of the Vesting Clauses, there is also a significant textual problem with construing the Article II Vesting Clause as conveying unenumerated powers. Article II expressly grants the President the

26 CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 113 (2001). Cf. Prakash & Ramsey, supra note 13, at 236 (“Our framework reveals that there are no gaps in the allocation of foreign affairs powers.”).

27 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 177 (1997). As Currie notes, the “herein granted” language in Article I was added late in the Federal Convention by the Committee of Style, which was not supposed to make substantive changes (although it did so in some instances). See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 590 (Max Farrand ed., 1911). Of course, even if the drafters did not intend for the difference in wording to reflect a difference in meaning, the difference might be constitutionally significant if those involved in ratifying the Constitution would have perceived a difference in meaning. We address that historical question below in Part IVC.

28 See, e.g., Edward S. Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 Colum. L. Rev. 53, 53 (1953) (“The records of the Constitutional Convention make it clear that the purposes of [the Article II vesting clause] were simply to settle the question whether the executive branch should be plural or single and to give the executive a title.”); Lawrence Lessig & Cass Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 48 (1994) (“The [Article II] Vesting Clause does nothing more than show who . . . is to exercise the executive power, and not what that power is.”). As noted below, this interpretation appears to be consistent with the way in which the delegates at the Federal Convention used the word “vesting.” See, e.g., infra TAN 177.

29 See Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 22 (1993) (“This [language] seemed designed only to reflect the limits of federalism on national regulatory power, not to ratify or to recognize substantive executive power.”).

commander-in-chief power; the power to request written opinions from federal executive officers; the power to grant pardons; the power to make treaties; and the power to appoint a variety of officials. Article II also directs (and thereby presumably empowers) the President to receive ambassadors and take care that the laws are faithfully executed. Proponents of the Vesting Clause Thesis concede that many if not all of these specific grants and directives are encompassed within their construction of the phrase “executive Power” in the Article II Vesting Clause. Under their construction, however, the specific grants would appear to be superfluous, in contravention of the general presumption against redundancy.  

Furthermore, the Founders’ decision to list what they meant by “executive Power” would tend to suggest, pursuant to the expressio unius canon, that their list was complete, rather than merely illustrative.  

Proponents of the Vesting Clause Thesis attempt to address this textual problem by arguing that the delineation of some of the Article II powers, such as the treaty power and the appointments power, can be explained by the fact that the Constitution divides these powers with the Senate. It was necessary to list these powers despite the general grant of executive power in the Vesting Clause, the argument goes, in order to make clear that the President was not receiving exclusive control over these functions. Although not a divided power, a similar argument is made with respect to the commander-in-chief power: the Constitution gives Congress a number of powers relating to war, so the Founders needed to make clear that the President still had the commander-in-chief power.  

This divided powers response is problematic, for two reasons. First, proponents of the Vesting Clause Thesis also maintain that any executive powers not specifically delegated to other institutional actors should be presumed to rest with the President. As Prakash and Ramsey argue, “the Constitution has a simple default rule that we call the ‘residual principle’: Foreign affairs powers not assigned elsewhere belong to the President, by virtue of the President’s executive power; while foreign affairs powers specifically allocated elsewhere are not presidential powers, in spite of the President’s executive power.” In light of that purported default rule, it is not clear why delineation was needed even of divided powers, since whatever was not given to the Senate or to Congress would presumptively remain with the President. Second, and more significantly, the divided powers response does not explain all of the Article II grants. Most notably, the power to require written opinions, the pardon power, and the ambassadorial receipt power all rest exclusively with the President, and yet they too are specifically delineated.


32 See id. at 824-25 (discussing expressio unius canon). Professor Prakash has himself emphasized the expressio unius canon in another co-authored article about executive power. See Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 562-64 (1994). Although that article argues generally for applying the expressio unius canon to the Constitution, it does not take a firm position on whether the canon should be applied to the list of powers in Article II. See id. at 563-64 (stating that the canon “arguably may also apply to the list in Article II”).

33 Prakash & Ramsey, supra note 13, at 254.
Proponents of the Vesting Clause Thesis simply do not explain these specific grants. Furthermore, as discussed below, even though there was only one branch of government under the Articles of Confederation – and thus no need to list powers in order to divide them – the foreign affairs powers of the government (including powers claimed by the Vesting Clause Thesis proponents to be “executive” in nature) were specified.

The textual argument becomes only more complicated and uncertain when one looks at the Article III Vesting Clause. This clause provides that “[t]he Judicial Power of the United States, shall be vested” in the Supreme Court and whatever lower federal courts Congress creates. This clause appears to be similar to the Article II clause, in that it refers generally to a category of power instead of referring to powers “herein granted.” Nevertheless, it has long been settled that the specific categories of cases and controversies subsequently listed in Article III define the boundaries of the exercise of the federal judicial power. In other words, the list of cases and controversies is treated as exhaustive, not merely illustrative. As Alexander Hamilton noted in Federalist No. 80, after he recited Article III’s list of cases and controversies, “This constitutes the entire mass of the judicial authority of the Union.”

To be sure, the Article III list is preceded by the phrase, “The judicial Power shall extend to . . . .” whereas the list of powers in Article II is not preceded by the phrase, “The executive Power shall extend to . . . .” This difference might suggest that, despite the similarity of their Vesting Clauses, Articles II and III should be treated differently with respect to the issue of unspecified powers. But this response is not entirely satisfactory either. If the Article II and Article III Vesting Clauses by their terms convey a package of unspecified powers, it is not clear why the language “shall extend to” in Article III is treated as exhaustive. That language, unlike the “herein granted” language in Article I, could easily be read to be illustrative, especially if it does not fully encompass the package of powers being granted in the Article III Vesting Clause. If it is the very enumeration of

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34 Prakash and Ramsey do not address either the power to require written opinions or the pardon power. As for the ambassadorial receipt power, they simply call it a “small redundancy.” Prakash & Ramsey, supra note 13, at 260. It is quite possible, of course, that the Constitution contains redundancies. But if one is willing to accept imperfections of constitutional drafting in this respect, the textual argument for the Vesting Clause Thesis – which assumes precise drafting with respect to the differences in the Article I and Article II Vesting Clauses – is also undermined.

35 See infra Part III. In addition, essentially all of the foreign affairs powers listed in the Articles of Confederation are specifically assigned somewhere in the Constitution. The only slight exception is that there is no precise analogue in the Constitution to the congressional power under the Articles of Confederation of “determining on peace and war.” Of course, the Constitution does assign Congress, and not the President, the power to “declare War.” Whether Congress’s power to declare war also gives it the exclusive power to determine whether the United States will remain neutral in a military conflict was a central issue in the 1793 debate over the Neutrality Proclamation. See infra Part VD.


37 The Federalist Papers, supra note 2, No. 80 (Alexander Hamilton), at 479.
the cases and controversies that makes the Article III list exhaustive, that argument would obviously apply as well to the enumeration of executive powers in Article II.

Nevertheless, Steven Calabresi and Kevin Rhodes have argued at length that the phrase “shall extend to” in Article III is not a grant of power but rather is simply a description of the situations in which a particular power can be exercised. The Article III Vesting Clause must be a grant of power, they contend, because it is the “only explicit constitutional source of the federal judiciary’s authority to act.”

Professor Froomkin has contested this argument, arguing that the judiciary’s power to act can be derived either from the structure of the Constitution or from Article III’s list of cases and controversies. It is unnecessary for present purposes to resolve this debate because, even if Calabresi and Rhodes were correct, their argument would not provide support for the Vesting Clause Thesis. Under their analysis, the Article III Vesting Clause simply conveys a power to decide cases (with perhaps related powers to protect the process of decisionmaking), without defining the circumstances under which that power may be exercised. Extending that argument to Article II at most suggests that the Article II Vesting Clause conveys something like a “power to execute the laws” (with perhaps a related power to control executive subordinates), not that it conveys unspecified foreign relations powers, as maintained by the proponents of the Vesting Clause Thesis. Indeed, Calabresi and Rhodes themselves suggest skepticism about whether the Article II Vesting Clause conveys unspecified substantive powers.

In addition to these textual difficulties, the Vesting Clause Thesis is at least in tension with the enumerated powers structure of the Constitution. The Constitution lists the powers of the three federal branches in great detail, and the Founders emphasized that they were creating a national government with limited and defined powers. James Madison stated in the Federalist Papers, for example, that the national government “is limited to certain enumerated objects,” and that “[t]he powers delegated to the federal government are few and defined.”

The proponents of the Constitution thought this

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38 Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1155, 1176 (1992); see also Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 NW. U. L. Rev. 1377 (1994); Kansas v. Colorado, 206 U.S. 45, 81-82 (1907) (distinguishing between the Article I and Article III Vesting Clauses and stating that “the entire judicial power of the Nation” is granted by the Article III clause).

39 See Froomkin, supra note 30, at 1352-53.


41 See Calabresi & Rhodes, supra note 38, at 1177 n.119. But cf. Prakash & Ramsey, supra note 13, at 257 (citing the Calabresi & Rhodes article as support for their argument).

42 The Federalist Papers, supra note 2, No. 14 (James Madison), at 102.

43 Id., No. 45 (James Madison), at 292.
proposition so evident that it precluded the need for a Bill of Rights. Indeed, they argued that a Bill of Rights might be dangerous because it could be construed as implying governmental powers that had not in fact been granted. And, when the Bill of Rights was subsequently adopted, it contained the Tenth Amendment, which reaffirms that the national government has only the powers that have been delegated to it. The idea of an unspecified residuum of substantive powers in the President does not fit well with this structural feature of the Constitution.

Our claim here is not that these textual and structural points clearly refute the Vesting Clause Thesis. Rather, our claim is simply that the legitimacy of the Vesting Clause Thesis cannot be determined simply by looking at what the Constitution says. The case for the Vesting Clause Thesis, therefore, must lie elsewhere. According to its proponents, the Vesting Clause Thesis is confirmed by history. The meaning of the Article II Vesting Clause may not be obvious to us, it is argued, but to the Founding generation it was simply shorthand for an acknowledged array of powers. As we will show, this historical claim provides a far shakier foundation for the Vesting Clause Thesis than even the textual claim.

III. Theory and History Prior to the Federal Convention

A. Seventeenth and Eighteenth Century Political Theory

As noted, proponents of the Vesting Clause Thesis typically place significant weight on the views of seventeenth and eighteenth century political theorists, especially the writings of John Locke, William Blackstone, and Baron de Montesquieu. These writings, the proponents contend, show that foreign affairs powers were viewed by theorists as inherently executive in nature and thus as at least presumptively assigned to the executive


45 See, e.g., The Federalist Papers, supra note 2, No. 84 (Alexander Hamilton), at 513 (making this argument); Charles Pinckney, Speech in South Carolina House of Representatives, reprinted in 3 The Records of the Federal Convention, supra note 27, at 256 (same).

46 See U.S. Const. Amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). For a discussion of the tension between the Tenth Amendment and broad claims of executive war power, see D. A. Jeremy Telman, A Truism That Isn’t True? The Tenth Amendment and Executive War Power, 51 Cath. U.L. Rev. 135 (2001). The Ninth Amendment, which provides that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,” U.S. Const. Amend. IX, also was designed to address the concern that a specification of rights might be read as implying powers not otherwise granted by the Constitution.

47 For recent Supreme Court decisions emphasizing the enumerated powers structure of the Constitution, see, for example, City of Boerne v. Flores, 521 U.S. 507, 516 (1997); United States v. Lopez, 514 U.S. 549, 552 (1995); and New York v. United States, 505 U.S. 144, 155 (1992). Even Chief Justice Marshall’s famous national power decision, McCulloch v. Maryland, emphasized this structural feature. See 17 U.S. (4 Wheat.) 316, 415 (1819) (“This [federal] government is acknowledged by all to be one of enumerated powers.”).
branch of any government. The Founders would have been familiar with and likely
influenced by these writings, the argument goes, and thus the writings shed light on what
the Founders intended in the Article II Vesting Clause.

As we discuss later in this Article, the purported continuity between the views of
the seventeenth and eighteenth century theorists concerning the proper scope of executive
power and the intent of the constitutional Founders is highly questionable. Among other
things, when discussing executive power these theorists primarily used the British
monarchy as their model, a model self-consciously rejected by the constitutional Founders
when thinking about executive power. For now, we focus on what the theorists actually
said. It turns out that, even on their own terms, the theorists provide no more than weak
support for the idea that foreign relations powers are inherently executive in nature.

Locke, for example, far from claiming that foreign relations powers are inherently
executive, actually distinguishes executive power from foreign relations power. In a
chapter of the second book of his Two Treatises of Government, Locke describes three
classes of power – “legislative,” “executive,” and “federative.”48 Here he defines
“executive” power as simply the power of “the Execution of the Laws that are made, and
remain in force,” a power that he argues should be separated from the power to make
laws.49 Importantly, Locke distinguishes this executive power from the “federative”
power, which he says encompasses “the Power of War and Peace, Leagues and Alliances,
and all the Transactions, with all Persons and Communities without the Commonwealth.”50
He makes clear that these two classes of power – executive and federative – are “really
distinct in themselves.”51

Locke does observe that the executive and federative powers “are almost always
united,” and he argues that if the two powers are separated it “would be apt sometime or
other to cause disorder and ruin[].”52 But he bases his analysis here not on essentialist
reasoning about the nature of executive power, but rather on functional differences
between the legislative and executive branches. In particular, Locke contends that the
federative power, unlike the regulation of domestic affairs, “is much less capable to be
directed by antecedent, standing, positive[] laws.”53 In his view, the functional features of
the executive branch – for example, its ability to make case-by-case judgments in response
to changing circumstances – argue for assigning it the federative power.54 Assigning it

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49 Id. at 383.
50 Id.
51 Id.; see also id. at 384 (stating that “the Executive and Federative Power of every Community be
really distinct in themselves”).
52 Id. at 383.
53 Id. at 384.
54 See id. (“[W]hat is to be done in reference to Foreigners, depending much upon their actions, and
the variation of designs and interests, must be left in great part to the Prudence of those who have this Power
committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.”).
elsewhere, he contends, would be “almost impracticable.” As Professor Rakove has noted, Locke is clearly basing his argument about assigning the federative power to the executive “on considerations of prudence, convenience, and efficiency, not right.” Furthermore, Locke makes clear elsewhere in his treatise that the legislative power is supreme, even with respect to the federative power, a proposition at odds with the Vesting Clause Thesis.

Blackstone provides even less support than Locke for the proposition that foreign relations powers are inherently executive in nature. Principally an expositor of English law rather than a political theorist, Blackstone analyzed the English Constitution primarily in terms of Whig “mixed government” theory as opposed to separation of powers. Under the mixed government analysis, the English Constitution balanced governmental institutions associated with social orders rather than with basic governmental functions. Specifically, the Kings, Lords, and Commons respectively embodied monarchy, aristocracy, and democracy, and through mutual checks prevented the respective horribles of tyranny, oligarchy, and anarchy. This is not to say that aspects of the English Constitution could not also be understood through a separation of powers framework. It is to say, however, that the triad of Kings, Lords, and Commons did not obviously translate into the executive, judicial, and legislative categories. Accordingly, Blackstone’s focus on mixed government as an initial matter means that references to the powers of the monarch or to specific prerogative powers cannot automatically be translated as executive power.

Although Blackstone on occasion does refer generally to the Crown as exercising executive power, he makes no effort to define the meaning of executive power, and still less to delineate the boundaries between executive and legislative authority in systematic or categorical terms. Moreover, although Blackstone contends that “[t]he prerogatives of the crown” include particular foreign relations powers, he justifies these assignments of power by a combination of functional arguments and arguments relating to the nature of the British monarchy. As an example of the latter, he contends that the King’s prerogative includes the power to make treaties because under international law treaties are to be made by sovereign powers “and in England the sovereign power, quoad hoc, is vested in the

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55 Id.
57 See, e.g., id. at 374 (referring to the legislative power as the “suprem power of the Commonwealth”); id. at 387 (describing both the executive power and the federative power as “Ministerial and subordinate to the Legislative, which as has been shew’d in a Constituted Commonwealth, is the Supream”). Prakash and Ramsey are thus incorrect in suggesting that under Locke’s analysis the federative power is not subject to legislative constraint. See Prakash & Ramsey, supra note 13, at 267.
60 See Katz, supra note 58, at viii-ix.
61 See 1 Blackstone, supra note 58, at 183.
person of the king.” 62 Blackstone gives a similar sovereign power justification for the King’s “prerogative of making war and peace.” 63 As we discuss later, the constitutional Founders expressly rejected this sort of “royal prerogative” reasoning when thinking about the U.S. presidency. In any event, even Blackstone’s royal prerogative arguments are specific to the structure of the British government and are not global claims about the inherent meaning of executive power. 64

Montesquieu provides more support than Locke or Blackstone for the proposition that foreign relations powers are inherently executive, but even here the picture is complicated and uncertain. As a French theorist rather than an English empiricist, Montesquieu is certainly more inclined than Locke or Blackstone towards essentialist categories. But his essentialism concerns primarily the abstract classification of power rather than the proper institutional assignment of power. In addition, Montesquieu’s dominant focus is on the separation of categories of power in order to preserve liberty, and he gives only passing attention to the relationship between executive power and foreign relations power.

In purporting to describe the English constitution, Montesquieu notes that in every government there are three classes of power: “the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.” 65 By the first power, says Montesquieu, “the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted.” 66 By the second power, “he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.” 67 This category is thus similar to Locke’s category of federative power. By the third power, the prince or magistrate “punishes criminals, or determines the disputes that arise between individuals.” 68 Although initially labeling the third power as a type of executive power, Montesquieu quickly re-labels it “the judiciary power,” and he refers to the second power as “the executive power of the state.” 69

Montesquieu’s taxonomy is confusing, in part because he initially refers to two categories of executive power. His subsequent re-labeling of the third category as the judiciary power does not eliminate confusion because it seems to suggest that the second

62 Id. at 249.
63 Id.
64 Prakash and Ramsey quote some of Blackstone’s references to the foreign relations prerogatives of the King as if they were definitions by Blackstone of “executive power,” see Prakash & Ramsey, supra note 13, at 269, but Blackstone does not himself use that phrase when referring to the prerogatives.
66 Id.
67 Id.
68 Id.
69 Id.
category fully covers executive power, in which case executive power would be limited to foreign relations powers and would not include the most obvious executive power of all—executing domestic laws.  But it is clear from Montesquieu’s subsequent discussion (which focuses primarily on the need for separating legislative, executive, and judicial power) that this was not his intent. Thus, for example, he refers to the “three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”  Here Montesquieu equates executive power with executing the laws and makes no specific reference to foreign relations powers.

In Montesquieu’s subsequent discussion, there are only isolated references to foreign relations powers, and they do not shed much additional light on the relationship between executive power and foreign relations power. In the section of the book containing Montesquieu’s taxonomy, there is only one subsequent reference to a foreign relations power. In asserting that the executive should manage the army, Montesquieu argues that this follows “from the very nature of the thing, its business consisting more in action than in deliberation.”  The word “nature” here might suggest essentialism, but the core of the argument appears ultimately to be functional, grounded in the executive’s (i.e., monarch’s) ability to act with speed. In a later section of the book, in discussing the executive power in ancient Rome, Montesquieu observes that the Roman Senate exercised most of the executive power, and he includes within his description of the Senate’s powers various foreign relations functions such as determining on peace and war, regulating the army, and receiving and sending ambassadors.  Obviously, Montesquieu is here assigning foreign relations powers to his executive category, but even in this context he is referring to specific powers rather than globally equating executive authority with foreign relations authority.

Given Montesquieu’s limited (and confusing) treatment of the linkage between executive power and foreign relations powers, it is at least an overstatement to suggest, as proponents of the Vesting Clause Thesis have suggested, that his treatise provides substantial support for the proposition that foreign relations powers were conceived of in the late 1700s as inherently executive. In addition, proponents of the Vesting Clause Thesis have tended to ignore the functionalist strands of Montesquieu’s reasoning.


71 Montesquieu, supra note 65, at 152.

72 As William Gwyn notes, Montesquieu “gets off to a faltering start” with his initial taxonomy, since the taxonomy he “actually went on to employ is of a rather different nature.” William B. Gwyn, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 101 (1965); see also Rakove, supra note 56, at 262 (“In attempting to define legislative, executive, and judicial power . . . Montesquieu betrayed some confusion.”).

73 Montesquieu, supra note 65, at 161.

74 Id. at 173.

75 See, e.g., Prakash & Ramsay, supra note 13, at 268 (“The influential Charles Louis de Secondat, Baron de Montesquieu, confirmed that Locke’s federative power had become a branch of the executive power by the mid-eighteenth century.”).
more abstract than the arguments made by Locke and Blackstone, functionalist arguments nevertheless play an important role in Montesquieu’s discussion of the proper assignment of governmental powers. As noted above, this was evident in his brief reference to regulation of the army. In addition, when arguing that the executive power should be exercised by a monarch, Montesquieu contends that “this branch of government, having need of despatch, is better administered by one than by many.”

Montesquieu’s functionalism is also evident in his arguments in favor of dividing powers that otherwise would fall exclusively into a particular category. Perhaps most famously, he argues for giving the executive a veto power over legislation, even though this means mixing the executive and legislative categories, in order to avoid the accretion of too much power in the legislature. As will be seen below, the constitutional Founders were much more influenced by this sort of functionalist reasoning than by Montesquieu’s abstract essentialism.

Neither for the Founding generation nor for modern scholars do Locke, Montesquieu, and Blackstone exhaust the list of relevant theorists. Several other theorists, like their more prominent contemporaries, concentrated on describing the foundations of a domestic framework, especially with a view toward England. In this group fall such writers as Thomas Rutherforth and Jean De Lolme, to whom Prakash and Ramsay in particular devote more than a passing reference. Other, more eminent writers focused less on the relationships within governments than between them through the law of nations. Among the great international law publicists were Jean Jacques Burlamaqui, Emmerich de Vattel, Samuel Puffendorf, and Hugo Grotius. As many historians have concluded, the works of such thinkers took a back seat to the Founding generation’s own experience amidst radically new developments in government and political thought. What these thinkers actually asserted, however, bears closer examination, especially in light of the pro-executive claims some of their writings are said to support.

At first glance, the English legal theorist Thomas Rutherforth appears to expressly endorse the foreign affairs/executive power equation. It turns out, however, that Rutherforth’s support for the Vesting Clause Thesis is more apparent than real. As an initial matter, Rutherforth divides all government power into two rather than three categories and then does so in a unique fashion. In his typology, all government power is either “legislative” – basically the power, by common understanding, to define rights, duties, and membership in the community – and “executive” – society’s “power to act with its joint or common force for defense and security.”

Rutherford next divides the executive power into the “internal,” “external,” and “mixed.” The internal, or “civil,”

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76 Montesquieu, supra note 65, at 156.
77 Id. at 159.
78 See Prakash & Ramsay, supra note 13, at 269-72.
79 Thomas Rutherforth, 2 Institutes of Natural Law, ch. III, secs. 1-5, 43-50 (1754).
80 Id. at ch. III, secs. 6-9, 50-61.
executive power operates upon objects within a society.\textsuperscript{81} It follows that the external power, which includes most notably “military power,” applies to matters outside a society.\textsuperscript{82} Rutherforth’s unique dualist scheme, which appeared after the more familiar tripartite theses of Locke and Montesquieu, may call into question the extent of his influence in America. More generally, the emergence of yet another take on governmental structure belies the notion that a settled consensus on separation of powers theory prevailed in the years leading up to the American Revolution.

As to foreign affairs, moreover, Rutherforth makes clear that the executive wields external authority out of practical considerations, not because foreign affairs powers are by their nature executive. As a descriptive matter, Rutherforth observes that “where the legislative and executive power are lodged in different hands,” especially when the membership of the legislature is large, “the usual practice is to allow some discretionary power in respect of war and peace to him or them, who are intrusted with the right of putting military force in action.”\textsuperscript{83} This is especially so, he continues, “where the legislative body cannot act with such readiness and expedition, as the occasions of war require.”\textsuperscript{84} Nonetheless, Rutherforth concludes, though such an arrangement “may be convenient, it is not necessary.”\textsuperscript{85}

To the contrary, Rutherforth expressly asserts that most foreign affairs powers are in essence legislative and therefore subject to substantial legislative limitation. Rutherforth begins his account of external executive power with a conventional discussion of military defense.\textsuperscript{86} To this he adds a list of non-military foreign affairs powers, including the authority to make peace, grant rights to foreigners, make alliances, make treaties, and adjust navigation rights. But are any of these powers fundamentally executive? Rutherforth answers no:

However, though these several powers are usually connected with external executive power by being lodged in the same hands, they are not naturally essential parts of it. These several powers are rather acts of the common understanding, than of the common force; and therefore seem, in their own nature, to be parts rather of the legislative than the executive power.\textsuperscript{87}

\textsuperscript{81} Id. at ch. III, secs. 6-7, 50-54. Internal executive power, according to Rutherforth, included the “Judicial power,” which is “the internal or civil branch of executive power exerting itself under such checks and controls, as the legislative power has subjected it to, in order to prevent its deviating from the purposes, for which it was formed.” Id. at 51.

\textsuperscript{82} Id. at ch. III, sec. VIII, 50-56.

\textsuperscript{83} Id. at ch. III, sec. VIII, 56.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at ch. III, sec. VIII, 57.

\textsuperscript{86} Id. at ch. III, sec. VIII, 54-55.

\textsuperscript{87} Id. at ch. III, sec. VIII, 56 (emphasis added).
Despite the practical wisdom of lodging foreign affairs powers in the executive, Rutherforth remains careful to assert their legislative character, at times in surprising ways. Here, for example, the ostensible champion of executive foreign affairs authority argues that the legislative authorities can be within their rights to communicate with other countries on their own, to make war and peace, and to send deputies with a military “to control its operations even in war.”

Like Montesquieu, Jean De Lolme was a French theorist who examined the English Constitution for lessons about structuring a government of ordered liberty, though like Rutherforth, he was both subsequent and secondary to his more celebrated countryman. Also as with Montesquieu, De Lolme provides more support for the idea that foreign affairs are executive in nature than any of the Englishmen who lived under the framework he describes. Perhaps more importantly, De Lolme further echoes Montesquieu in considering the connection between the executive and foreign affairs in a manner that is at best cursory and at worst garbled. Appearing in English in 1775, De Lolme’s uncritical acceptance of broad royal prerogative power likely made this portion of his analysis less appealing to an American audience, however much he may have been quoted generally.

In the manner of Rutherforth, De Lolme divides government power between the legislative and the executive, rather than add either the judicial or federative as a coordinate building block. His main chapter examining executive power, however, quickly shifts to speaking in terms of “the prerogative of the King.” This move means that, in contrast to both Rutherforth and Blackstone, De Lolme in effect simply equates executive authority, a component of separation of powers analysis, with the royal prerogative, in many ways a unique set of powers retained by the English monarchy. What then follows is a standard, though broadly interpreted, list of English prerogative powers, including the King’s role as: the “source of all judicial power”; the “fountain of honor”; the “superintendent of Commerce”; the “Supreme head of the Church”; the “Generalissimo of all sea or land forces whatever”; and as a ruler who “CAN DO NO WRONG.” Tucked away in this enumeration comes De Lolme’s most extensive consideration of the monarch’s foreign affairs authorities:

He is, with respect to foreign nations, the representative and depository of all the power and collective majesty of the nation: he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.

Precisely because De Lolme follows the royal prerogative, a careful reading of this passage indicates that he does not simply equate foreign affairs powers with executive authority.

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88 Id. at ch. III, secs. VIII, 57.
90 Id. at 73-73.
91 Id. at 73.
Rather, like Blackstone, De Lolme references the monarch’s functional role in discussing specific powers. As noted, however, Blackstone is careful to distinguish the pairings, so that the king’s role as sovereign, for example, accounts for the prerogative to make war, while his capacity as the nation’s representative explains the prerogative to receive ambassadors. De Lolme, by contrast, lumps them together, clouding the functional origins of his conclusions.

In any case, how much influence De Lolme actually wielded on the foreign affairs provisions of the Constitution remains unclear. Although he was among leading eighteenth century thinkers whom Americans frequently cited, we are aware of no instance in which De Lolme was cited for the proposition that foreign affairs authority was executive, much less cited with approval. Given De Lolme’s fulsome description of such prerogatives as head of the established church and doing no wrong, together with Americans’ rejection of British royal authority, the lack of such citations is perhaps not surprising.

The great international law publicists can be more briefly described because of their relative silence on the relevant issue. To the extent that European thinkers influenced the Founders, historians and legal scholars commonly reference Burlamaqui, Grotius, Puffendorf, and Vattel as comparable to Locke, Blackstone, and Montesquieu. On the relationship between the executive and foreign affairs, however, these writers had little to say. Instead, they generally distinguished between domestic law and the law of nations, declared that they would do no more than note the many different ways nations arranged their legal orders, including who conducted foreign affairs, and that they would devote their attention to international law. Foreign affairs powers, under their analysis, were simply linked generically to the “sovereigns” or “rulers” – that is, to the particular governments of the individual nations. With respect to the power to conduct war, for example, Vattel notes that, “as the various rights constituting that power, which ultimately resides in the body of the Nation, can be separated or limited, according to the will of the Nation, . . . it is in the individual constitution of each State that we must look to find where is located the authority to make war in the name of the State.”

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92 See supra TAN 62-64.
95 See, e.g., Vattel, supra note 94, at 69, 160, 235, 393. But see Prakash & Ramsey, supra note 13, at 269-71 (suggesting that the publicists assigned foreign affairs powers to the executive branch of governments).
96 Vattel, supra note 94, at 235-36 (emphasis added).
By itself, this agnosticism about domestic constitutional arrangements simply means that these international law publicists offer no support for the executive foreign affairs power thesis. In a larger context, however, this silence may work to undermine the thesis. These writers centrally concerned themselves with how governments should interact with one another in international affairs. If there existed a consensus that the domestic executive by definition had to conduct foreign affairs, one would expect some mention of this assumption. This expectation would go double given the eighteenth century tendency to attribute decisiveness to the executive and deliberation to the legislature. This expectation, however, goes unfulfilled, which in turn calls into question the idea that an executive foreign affairs baseline in fact existed.

B. State Constitutional Experience

In looking for guidance when drafting and debating the Constitution, the Founders would have looked most directly to the experience of the state governments during the revolutionary and “critical” periods. As Jack Rakove has explained, “[t]he states had served, in effect, as the great political laboratory upon whose experiments the framers of 1787 drew to revise the theory of republican government.” Thus, “[c]onscious as they were of the fate of other republics and confederacies, ancient and modern, the lessons of the past that [the framers] weighed most heavily were drawn from their own experience.” Hamilton famously adverted to this fact early in the Federalist Papers when he stated, “Let experience, the least fallible guide of human opinions, be appealed to for an answer to these inquiries.”

Advocates of the Vesting Clause Thesis suggest that, in designing the state constitutions, Americans simply applied the wisdom of the great contemporary jurists and thinkers without significant modification. Prakash and Ramsay, for example, while conceding the need for further research, “presume that the ordinary understanding of executive power established by Locke, Montesquieu, and Blackstone should be used to construe the analogous phrases in [the first] state constitutions” framed after independence. As we have shown, executive power essentialists have painted too simplistic a picture of the relevant eighteenth century political, constitutional, and legal

97 The term “critical period” was first coined by John Quincy Adams in a commencement address at Harvard College in 1787, in which he spoke of “this critical period” in which the nation was “groaning under the intolerable burden of accumulated evils.” ROBERT A. EAST, JOHN QUINTY ADAMS, THE CRITICAL YEARS, 1785-1794, at 85 (1962) (quoting Adams); see also WOOD, supra note 59, at 393. The term has come to refer to the period in the 1780s between the revolutionary war and the ratification of the Constitution. See, e.g., JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-89 (1916).

98 RAKOVE, supra note 44, at 31.

99 Id. at 21.

100 THE FEDERALIST PAPERS, supra note 2, No. 6 (Alexander Hamilton), at 57.

101 Prakash & Ramsay, supra note 13, at 278-79 n. 209. Somewhat surprisingly for an exhaustive historical account, Prakash and Ramsay devote only one long footnote to the early state constitutions even though these constitutions were the initial focus of constitutional thought in the United States, they sought to apply separation of powers theory, and they touched upon such matters relating to foreign affairs, such as embargoes and control of the military. See infra Part IIIB.
thought. But even were this portrait accurate, the essentialist account errs more dramatically in its presumption that America’s constitutional practitioners mechanically applied the ideas of Europe’s thinkers.

As an initial matter, the essentialist story of continuity and consensus is historically counterintuitive. Historians, in contrast to lawyers, assume change over time.\textsuperscript{102} This is especially true over extended periods characterized by upheaval, such as revolution and nation-building. A thoroughly worked out framework of executive power over foreign affairs that endured nearly unaltered for over a century, and survived periods of radical political change, may be possible, but it is hardly probable. More specifically, the essentialist thesis stands at odds with the prevailing professional narrative about the period, which stresses discontinuity and ferment. At the very least, there should be a presumption in favor of such a prevailing narrative. With sufficient historical evidence, such a presumption can of course be rebutted. For various reasons, however, legal scholars rarely have the time or resources available to historians to sustain an initially suspect claim successfully.\textsuperscript{103}

As noted, the leading historians of the period have emphasized the dramatic discontinuity and conflict in American constitutional thinking, as the British Empire gave way to independent state frameworks joined under the Articles of Confederation, which in turn gave way to the Constitution of the United States. This story conventionally begins with the English “Whig” or “mixed” Constitution that the colonists paradoxically internalized and venerated even as they resisted Britain’s attempts to establish its imperial authority over them. Within a decade, resistance led to independence, which forced the King’s former subjects to experiment with radically different, “republican” constitutions on the state level, and the \textit{sui generis} Articles at the national level. Perceived democratic excess at home and weakness abroad led to a reform movement that reflected a fundamental reevaluation of several first principles. This rethinking led to what Gordon Wood famously characterized as a new “American science of politics,”\textsuperscript{104} the chief legacy of which was the Federal Constitution. With the shift from the English “mixed” Constitution, to the republican state constitutions, to the United States Constitution, there has rarely in constitutional history been such a degree of transformation or innovation in such a concentrated period.\textsuperscript{105}

\textsuperscript{102} See Bernard Bailyn, \textit{On the Teaching and Writing of History} 50-51 (1994).

\textsuperscript{103} One of us has developed these themes at length. See Martin S. Flaherty, \textit{The Most Dangerous Branch}, 105 \textit{Yale L. J.} 1725, 1745-55 (1996); Martin S. Flaherty, \textit{History “Lite” in Modern American Constitutionalism}, 95 \textit{Columbia L. Rev.} 523, 551-24 (1995).

\textsuperscript{104} Wood, \textit{supra} note 59, at 593.

The most relevant break with the received constitutional wisdom followed closely upon independence. At the outset of the Revolutionary War, there was a widespread belief that legislatures were the guardians of liberty and that executives, at least as illustrated by the royal governors, were the embodiments of tyranny. By 1777, eleven of the thirteen states had adopted new constitutions, each of which abandoned the English “mixed” government in practice and theory. To appreciate the departure, recall that up to 1776 Americans celebrated the English Constitution for striking a unique balance between power and liberty. Under the prevailing analysis, it did so by insuring that each of the three principal components of government held the others in check. The “branches” of government in question, however, did not reflect governmental functions but instead embodied social orders. On this view, the King, Lords, and Commons prevented monarchy, aristocracy, or democracy from degenerating into tyranny, oligarchy, or anarchy. It was this conception, which separation of powers at best only partially tracks, that colonial Americans prized until surprisingly late in their resistance to imperial measures. The first state constitutions abandoned this scheme in part out of necessity. With few plausible candidates as state monarchs, and no titled nobility, Americans could replicate mixed government only with great difficulty. Nor were they inclined to make the attempt. Ten years of resistance and revolution had among other things confirmed many Americans’ deep suspicion of aristocrats. Moreover, and crucial to any account of executive power during this period, George III’s support for Parliament’s claims over the colonies, augmented by traditional American frustration with royal governors, fueled an even greater distrust for officials who might appear to play a monarchical role.

American constitution-makers embraced democratic – or more practically, republican – government as the leading alternative that classical theory had to offer. In purest form this would mean concentrating governmental authority in a single deliberative assembly that would remain accountable to the people, and so protect their liberty, by insuring that it would be as representative and responsive as practicable. At least two early constitutions, Pennsylvania and Vermont, came close to this ideal, and nearly all of the early republican frameworks would approach it in some degree. Yet even at this early stage, other considerations directed Americans away from republicanism in its most simple form. In particular, one additional consequence of mixed government passing from the scene was that separation of powers analysis could come out of its shadow and provide

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107 The classic account appears in Bailyn, supra note 93, at 55-93.
what would become a complementary framework for allocating governmental authority. Four of the initial state constitutions contained express separation of powers clauses, with three following suit several years later. Typical was the language of Maryland’s 1776 framework, which declared that, “the legislative, executive and judicial powers of government, ought to be forever and distinct from one another.”

The state commitment to separation of powers was largely rhetorical and very different from what modern essentialists assume. The reality of the first state constitutions was a concentration of extensive authority in the legislatures, in keeping with the republican ideal. Echoing a chorus of authorities, Willi Paul Adams has observed that after 1776 the state assemblies “became the most powerful institutions in the states. . . . In the metaphorical language of the day, the legislature was ‘the soul, the source of life and movement’ in the body of the state.” Typically, the first set of state constitutions did not merely vest legislative authority in the assembly, but provided that this power would be exclusive. Governors, where they existed, could not exercise a veto, nor could they adjourn or prorogue the legislature as could their royal predecessors. Moreover, the first state assemblies generally appointed most judges, could alter the state constitutions by statute, and in many states selected that governor himself.

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110 MD. CONST. OF 1776, art. VI, in 3 STATE CONSTITUTIONS, supra note 109, at 1686, 1687. The other states were North Carolina, N.C. CONST. OF 1776, art. IV, in 5 STATE CONSTITUTIONS, supra note 109, at 2787; Virginia, VA. CONST. OF 1776, sec. 5, in 7 STATE CONSTITUTIONS, supra note 109, at 3812, 3813; Georgia, GA. CONST. OF 1777, art. I, in 2 STATE CONSTITUTIONS, supra note 109, at 777, 778; and later Massachusetts, MA. CONST. OF 1780, art. XXX, in 3 STATE CONSTITUTIONS, supra note 109, at 1888, 1893; New Hampshire, N.H. CONST. OF 1784, art. XXXVII, in 4 STATE CONSTITUTIONS, supra note 109, at 2453, 2457; and the second Vermont constitution, VT. CONST. OF 1786, ch. II, art. VI, in 6 STATE CONSTITUTIONS, supra note 109, at 3749, 3755.

111 As Gordon Wood explains:

[W]hat more than anything else makes the use of Montesquieu’s maxim in 1776 perplexing is the great discrepancy between the affirmations of the need to separate the several governmental departments and the actual political practice that followed. It seems, as historians have noted, that Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions.

WOOD, supra note 59, at 153-54.


113 See, e.g., DEL. CONST. OF 1776, art. 10, in 1 STATE CONSTITUTIONS, supra note 109, at 562, 564; PA. CONST. OF 1776, sec. 20, in 5 STATE CONSTITUTIONS, supra note 109, at 3081, 3087-88; VA. CONST. OF 1776, para. 8, in 7 STATE CONSTITUTIONS, supra note 109, at 3812, 3817; VT. CONST. OF 1777, ch. 2, sec. XVIII, in 6 STATE CONSTITUTIONS, supra note 109, at 3737, 3745. See also BAILYN, ORIGINS OF AMERICAN POLITICS, supra note 105, at 66-70 (contrasting the power of royal and republican governors).

114 See WOOD, supra note 59, at 132-161.
The corollary of supreme legislatures was subordinate executives. As Edward Corwin observed, this result reflected not just the prevalent belief that “the legislative assembly [was] the natural friend of liberty,” but also “that ‘the executive magistracy’ was the natural enemy . . . a sentiment strengthened by the contemporary spectacle of George III’s domination of Parliament.”115 Thus, it was perceived, as John Adams wrote in his influential 1776 essay *Thoughts on Government*, that the executive must be “stripped of most of those badges of domination called prerogatives.”116 Two states, Virginia and Maryland, expressly rejected the British monarchy as a model for their executives, declaring that the governor in exercising executive powers “shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England or Great Britain.”117

Even when left unstated, the rejection of the royal model was plain nearly everywhere else. Thus, for example, the Pennsylvania and Vermont constitutions created a plural rather than unitary executive, and New Hampshire’s 1776 framework omitted an executive altogether.118 Furthermore, all of the constitutions that did provide for an executive during this period included some sort of “privy council,” selected by the legislature, to advise, or (in several states) make decisions with, the executive.119 More importantly, in all but two of the constitutions written immediately following independence that provided for an executive, the governor or executive body was chosen by the legislature.120

With respect to substantive powers, almost all the state constitutions either stripped the new executives of powers associated with their colonial predecessors or at least mandated that these powers be exercised in conjunction with the legislatures. As noted,

115 Corwin, supra note 16, at 5-6.


117 Md. Const. of 1776, art. XXXIII, in 3 State Constitutions, supra note 109, at 1686, 1696; Va. Const. of 1776, para. 7, in 7 State Constitutions, supra note 109, at 3812, 3816-17.


119 See, e.g., Del. Const. of 1776, art. 8, in 1 State Constitutions, supra note 109, at 562, 563-64; Va. Const. of 1776, para. 9, in 7 State Constitutions, supra note 109, at 3812, 3817.

120 The two exceptions were Vermont, which provided for public election of the governor to a one-year term, Vt. Const. of 1776, ch. II, sec. XVII, in 6 State Constitutions, supra note 109, at 3737, 3744; and New York, which provided for public election of the governor to a three-year term, N.Y. Const. of 1777, art. XVII, in 5 State Constitutions, supra note 109, at 2623, 2632. As has widely been noted, the New York Constitution was ahead of its time in terms of separation of powers and executive authority. In contrast to other constitutions adopted immediately after independence, New York provided for a substantially more powerful governor through such mechanisms as a qualified veto, the authority to convene and prorogue the assembly, and the authority to appoint judges. In its different realization of executive authority, New York anticipated the “second wave” of reform constitutions such as the Massachusetts and New Hampshire constitutions, as well as the Federal Constitution. For a discussion of the New York Constitution in the constitutional development of the period, see Flaherty, *Most Dangerous Branch*, supra note 103, at 1768-1770.
most of the state executives lacked the power to veto, prorogue, or adjourn. Furthermore, no governor had the exclusive power to appoint either judges or certain officials that today would be termed executive, such as the secretary of state, the comptroller, and military officers. In a number of states the power to make such appointments was vested exclusively in the legislature. 121

Contrary to what essentialist theory might predict, none of the frameworks adopted during this period simply granted the “executive power,” or, having done so, proceeded to specify what inherently executive powers would be shared with the other branches – the strategy that essentialist scholars attribute to Article II of the federal Constitution. A few states, such as Virginia and New York, did include general executive “vesting clauses” but these were always followed by specific grants of powers, such as the power to pardon and the commander-in-chief power, that would have been superfluous if the general clause was expected to encompass the universe of executive authority. 122 The most typical approach, however, was to grant a specified list of powers, attach a catch-all clause providing for the exercise of all other executive powers, and qualify the catch-all clause by requiring that the executive power be exercised consistently with the laws or constitution of the state. Representative in this regard was Maryland’s 1776 constitution, which stated:

That the Governor, by and with the advice and consent of the Council, may embody the militia; and, when embodied, shall alone have the direction thereof; and shall also have the direction of all the regular land and sea forces, under the laws of this State, (but he shall not command in person, unless advised thereto by the Council, and then, only so long as they shall approve thereof); and may alone exercise all other the [sic] executive powers of government, where the concurrence of the Council is not required, according to the laws of this State; and grant reprieves or pardons for any crime, except in such cases where the law shall otherwise direct. 123

121 Delaware illustrated several approaches at once in providing that the chief executive appoint judges jointly with the Assembly, see DEL. CONST. OF 1776, art. 12, in 1 STATE CONSTITUTIONS, supra note 109, at 562, 564-65; appoint civil officers unless otherwise directed by the Assembly, see art. 16, id. at 565; yet mandating that the Assembly itself appoint all military officers, see id. Several states emphasized the council as a check, with Maryland subjecting the governor’s appointments to council approval, Maryland, MD. CONST. OF 1776, art. XLVIII, in 3 STATE CONSTITUTIONS, supra note 109, at 1686, 1699, and Vermont vesting the power in the chief executive and council jointly, VT. CONST. OF 1776, ch. II, art. XVIII, in 6 STATE CONSTITUTIONS, supra note 109, at 3737, 3745. Somewhat surprisingly, New York placed most appointments in a council of appointment, a body in which the governor had only one vote, and vested selection of the state treasurer in the Assembly. N.Y. CONST. OF 1777, art. XXIII, in 5 State Constitutions, supra note 109, at 2623, 2633-34. A number of states went still further and vested either all, or at least significant, judicial, civil, and military appointments in the legislature. See, e.g., VA. CONST. OF 1776, para. 13, in 7 STATE CONSTITUTIONS, supra note 109, at 3812, 3817 (vesting appointment of Supreme Court, Chancery, and Admiralty judges, as well as the Attorney General, in the Assembly).

122 See VA. CONST. OF 1776, paras. 7, 12, in 7 STATE CONSTITUTIONS, supra note 109, at 3812, 3816-17; N.Y. CONST. OF 1777, arts. XVII, XVIII, in 5 STATE CONSTITUTIONS, supra note 109, at 2623, 2632-33.

123 MD. CONST. OF 1776, art. XXXIII, in 3 STATE CONSTITUTIONS, supra note 109, at 1686, 1696 (emphasis added). Also representative in this regard was North Carolina’s constitution, see N.C. CONST. OF 1776, art. XIX, in 5 STATE CONSTITUTIONS, supra note 109, at 2787, 2791-92.
The prevailing state approach, therefore, was to accord the executive a mix of specific powers rather than grant him a general package of “executive power.” Although some of the early state constitutions did refer generically to executive power, there is no reason to believe, given the predominant role of the legislatures and highly specific descriptions of executive power in these constitutions, that the generic references were intended to encompass unspecified substantive powers. The South Carolina constitution was particularly explicit in this regard, stating that “the executive authority be vested in the governor and commander-in-chief, in manner herein mentioned.” Most likely, in light of the typical qualification that executive power had to be exercised in accordance with the laws of the state, the passing references to executive power concerned the power to execute the laws, a power usually not mentioned specifically in the state constitutions.

This pattern – strong legislatures and limited and defined executive powers – extended even to foreign affairs. Contrary to popular perception, the first state constitutions necessarily had to address external powers, in part because they were drafted amidst the uncertainties of war and in part because the national government lacked a written framework until the Articles of Confederation were ratified in 1781. To the extent that the executives were granted foreign affairs powers, those powers were often shared with the advisory council or the legislature. Both the 1776 and 1778 South Carolina constitutions, for example, prohibited the governor from commencing war, concluding peace, or entering into treaties without the consent of the legislature. Furthermore, although the state constitutions typically made the executive the commander in chief of the state’s armed forces, a number of the constitutions required legislative or council consent to exercise the commander-in-chief power, even to point of restricting the governor’s ability to assume command in person. Other constitutions (most notably in Massachusetts and New Hampshire) defined the commander-in-chief power in elaborate detail. These constitutions apparently sought to control the governor’s potential misuse of military power through specificity, an approach that belies the notion that the general vesting of executive power sufficed to clarify a chief executive’s duties. In addition, the states typically either made the appointment of military officers subject to legislative approval, or mandated that the legislature alone make military appointments.

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124 S.C. CONST. OF 1778, art. XI, in 6 STATE CONSTITUTIONS, supra note 109, at 3248, 3250 (emphasis added). See also S.C. CONST. OF 1776, art. XXX, in 6 STATE CONSTITUTIONS, supra note 109, at 3241, 3247 (granting executive authority “limited and restrained as aforesaid”).

125 See, e.g., Prakash & Ramsay, supra note 13, at 278-79 n.209 (“For the most part, state constitutions said little specific about foreign affairs.”).


127 S.C. CONST. OF 1776, art. XXVI, in 6 STATE CONSTITUTIONS, supra note 109, at 3241, 3247; S.C. CONST. OF 1778, art. XXXIII, in 6 STATE CONSTITUTIONS, supra note 109, at 3248, 3255.

128 M.D. CONST. OF 1776, art. XXXIII, in 3 STATE CONSTITUTIONS, supra note 109, at 1686, 1696. For analogous provisions in other states, see DEL. CONST. OF 1776, art. 9, in 1 STATE CONSTITUTIONS, supra note 109, at 562, 564; N.C. CONST. OF 1776, art. XVIII, in 5 STATE CONSTITUTIONS, supra note 109, at 2787, 2791; PA. CONST. OF 1776, sec. 20, in 5 STATE CONSTITUTIONS, supra note 109, at 3081, 3087-88.

Significantly, these examples of ongoing supervision of the executive appeared in later constitutions that were adopted during the 1780s. Not long after independence, leading observers in every state came to conclude that the nation’s first experiments in framing government had been flawed. Rethinking separation of powers would prove to be a prominent feature of constitutional reform. Fundamental among the insights that experience under the state constitutions suggested was the sobering theory that the people could tyrannize themselves. Where classical theory indicated that republican government typically descended into anarchy, in effect too much liberty, state laws infringing rights of property, contract, and trial by jury appeared to demonstrate that concentrating power in the legislatures had instead resulted in the oxymoron that John Adams famously dubbed “democratic despotism.” Madison also referred to this phenomenon during the debates in the Federal Convention, when he noted that, “Experience has proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent.” It is this discovery and the ensuing return to the constitutional drawing board that remains perhaps the central episode in the narrative that constitutional historians have reconstructed over the past several generations.

In response to these perceived abuses by the legislatures, some states moved to make the executive more independent of the legislature. The 1780 Massachusetts’ Constitution, for example, made the governor subject to popular election and gave him, along with an advice council, powers of appointment and a veto power over legislation. His specific, substantive powers, however, were still limited and defined. For example, the Massachusetts Constitution goes into great detail about what exactly his commander-in-chief power entails, stating, for example, that the governor would have the power “to take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall, in a hostile manner, invade, or attempt the invading, conquering, or annoying this commonwealth.” It also states that the governor’s specifically enumerated commander-in-chief powers had to be “exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise.” So, even here, the legislature was given significant, and ultimately controlling, authority. The legislature also was given the power under the Massachusetts Constitution to make significant appointments, including appointment of the Secretary of State.

130 See Wood, supra note 59, at 404.
131 2 The Records of the Federal Convention, supra note 27, at 35.
132 See Rakove supra note 105, at 35-56; Morgan, supra note 105, at 238-62; McDonald, supra note 105, at 143-83; Wood, supra note 105, at 391-467.
135 Id.
In sum, the state constitutions reflected a sharp break from the royal prerogative model of executive power, even with respect to foreign affairs. As the Critical Period progressed, some states moved to enhance the independence and authority of the executive branch, but they did so in order to provide a check on the legislature, not because of some essentialist conception of executive power. Moreover, the actual allocation of executive power remained specific and functional rather than categorical and essentialist.

C. Lessons from the Continental Congress

The experience at the national level during this period further contradicts the story of continuity posited by executive power essentialists. The Continental Congress, made up of delegates from the colonies, first met in September 1774 to discuss and seek redress of American grievances against the British. Fighting subsequently broke out between American and British forces at Lexington and Concord in the spring of 1775, and a second Continental Congress met in May 1775. At that point, Congress began to manage American foreign affairs, including, most notably, the conduct of the revolutionary war. 136

For its first seven years, Congress operated without a constitutive document. To justify the separation of the thirteen states from England, Congress did of course issue the Declaration of Independence. The Declaration observed that, with their separation, the states had “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do.” 137 The Declaration did not tie these foreign relations powers to any particular governmental structure, and it certainly did not suggest that these powers inherently had to be exercised by an executive branch, which did not even exist at the national level. Nor, as explained above, did the state constitutions being developed at this point reflect an understanding that foreign affairs powers had to be assigned to the executive.

Congress agreed on the Articles of Confederation and Perpetual Union in 1777, but the Articles did not take effect until 1781, after they had been ratified by all the states. There is nothing in Congress’s experience, either before or after the adoption of the Articles, that suggests an understanding that foreign affairs powers had to be vested in an executive branch. As an initial matter, it is worth noting the obvious: the national government did not have an executive branch prior to the Constitution, and thus exercised its foreign affairs powers only through Congress. Furthermore, under the Articles, the exercise of many important foreign affairs powers, including going to war, entering into treaties, and appointing military commanders, required the concurrence of at least nine of the thirteen states, and the appointment of state representatives in Congress was determined by the state legislatures. 138 These facts, by themselves, would seem to


138 See ARTICLES OF CONFEDERATION art. V, para. 1; art. IX, para. 6.
substantially undermine the claim that foreign affairs powers were viewed as inherently associated with an executive.

The Continental Congress did handle many foreign issues through committees, and subsequently through departments. For example, in November 1775, Congress established a Committee of Secret Correspondence to communicate with and seek support from sympathizers in Europe. This committee was eventually succeeded by a more general Committee for Foreign Affairs. These committees, however, reported back to the full Congress and were subject to Congress’s direction and control.\textsuperscript{139} Furthermore, as Bradford Perkins notes, the foreign affairs committee “never gained full control of diplomacy, had no staff to manage correspondence and records, and met only intermittently.”\textsuperscript{140} In the early 1780s, Congress moved to establish departments, including a Department of Foreign Affairs, that would be headed by a single secretary. The duties of the Secretary for Foreign Affairs, however, were largely ministerial, and “all matters of great importance were referred to Congress.”\textsuperscript{141} In any event, the foreign affairs responsibilities of the Secretary were spelled out in detail, without any reference to “executive power.”\textsuperscript{142}

The list of powers in the Articles of Confederation is also revealing. Like the later Constitution, the Articles assigned specific foreign affairs powers to the national government, and expressly prohibited the states from engaging in specified foreign affairs activities. Thus, for example, the national government was assigned the powers of “determining on peace and war,” sending and receiving ambassadors, and entering into treaties.\textsuperscript{143} The states were, correspondingly, prohibited from entering into treaties, sending and receiving ambassadors, and engaging in war, unless they obtained Congress’s consent.\textsuperscript{144}

The Articles never used the word “executive” to refer to foreign affairs powers, and they certainly did not use that word as a shorthand for an unspecified package of foreign affairs powers. Instead, they listed and defined the foreign affairs powers of the Continental Congress with great specificity. Prakash and Ramsey seek to explain away this feature of the Articles by suggesting that “the drafters of the Articles did not employ the most economical phrasing.”\textsuperscript{145} The phrasing is perfectly economical, however, once one rejects the Vesting Clause Thesis. Furthermore, it is important to note that essentially

\textsuperscript{139} See, e.g., Sanders, supra note 136, at 40-41, 45-46.


\textsuperscript{141} Sanders, supra note 136, at 114.; see also Perkins, supra note 140, at 55 (noting that Congress kept the Department “on a very short leash”); Elmer Plischke, U.S Department of State 11 (1999) (explaining that the Secretary of Foreign Affairs was a mere “congressional clerk”).

\textsuperscript{142} See 4 The Revolutionary Diplomatic Correspondence of the United States 230 (Francis Wharton ed., 1889).

\textsuperscript{143} Articles of Confederation art. IX, para. 1.

\textsuperscript{144} Id. art. VI.

\textsuperscript{145} Prakash & Ramsey, supra note 13, at 275 n.191.
all of the foreign affairs powers referred to in the Articles are also referred to in the Constitution. The fact that the Constitution specifically carries forward the foreign affairs powers listed under the Articles of Confederation, and adds to them, further undercuts the assertion that there was some undefined package of foreign affairs powers that had to be encompassed by the Article II Vesting Clause.

Prakash and Ramsey note correctly, although vaguely, that the national government had difficulty managing foreign affairs under the Articles. The Federalist Papers begin, in fact, by noting the “inefficacy of the subsisting federal government,” and it is clear from subsequent essays that Publius had foreign affairs concerns prominently in mind. Similarly, early in the Federal Convention, Edmund Randolph began by listing the defects of the Confederation, many of which concerned the conduct of foreign affairs. These defects, suggest Prakash and Ramsey, persuaded the Founders to incorporate the purported Locke/Blackstone/Montesquieu conception of executive power essentialism into the Constitution, through the Article II Vesting Clause.

The difficulties under the Articles, however, and the efforts by the constitutional Founders to respond to them, are at best unconnected to the Vesting Clause Thesis, and at worst substantially in tension with it. By the time of the Federal Convention, it was perceived that the Articles were deficient in at least three respects concerning the management of foreign affairs. First, there was no clear indication in the Articles that treaties operated as supreme law of the land. This omission, combined with the lack of a national court system, meant that the national government had difficulty preventing states from violating treaty provisions, especially the peace treaty with Great Britain. In turn, Great Britain used the state violations as an excuse for continuing to occupy its northern forts in the United States, which also served as a base for fomenting Indian hostilities. This experience obviously was on the minds of the constitutional Founders, and they addressed it directly by including a Supremacy Clause in the Constitution that refers to treaties, and also by providing for the creation of a national court system. This federalism problem, however, has nothing to do with the Vesting Clause Thesis.

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146 Unlike the Articles of Confederation, however, the Constitution does not specifically refer to a power of “determining on peace.” The lack of such a specific reference became an issue in the Neutrality Controversy of 1793, discussed below in Part VD.

147 See id. at 278-79.

148 THE FEDERALIST PAPERS, supra note 2, No. 1 (Hamilton).

149 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 19.

150 See Jack N. Rakove, Making Foreign Policy – The View from 1787, in FOREIGN POLICY AND THE CONSTITUTION 2-4 (Robert A. Goldwin & Robert A. Licht eds., 1990); see also FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973); PERKINS, supra note 140, ch. 2. There were other deficiencies in the Articles that did not directly concern foreign affairs but that nevertheless implicated foreign affairs, such as the lack of a power to regulate directly on the people, see THE FEDERALIST PAPERS, supra note 2, No. 15 (Hamilton), and the lack of a taxing power, see id., No. 30 (Hamilton).

151 See THE FEDERALIST PAPERS, supra note 2, No. 3 (Jay).
A second foreign affairs problem under the Articles was that the Continental Congress had not been given the power to regulate commerce, including foreign commerce. As a result, it lacked leverage in negotiating trade concessions from other countries, especially from the British. Threats by the Continental Congress to restrict access to U.S. markets were ineffectual, since each state could set its own foreign trade policy, and at least some states would tend to deviate from the purported national policy. The constitutional Founders addressed this problem as well in the Constitution – by assigning to Congress the power to regulate commerce. This experience – which showed the need to increase Congress's foreign affairs powers – hardly shows that foreign affairs authority inherently was associated with an executive branch.

The third foreign affairs problem has at least some connection to the U.S. presidency, but it still unsupportive of the Vesting Clause Thesis. The problem was that the United States had trouble negotiating with foreign nations through a legislative body rather than through an independent executive branch. John Jay’s efforts to negotiate with Spain over navigation rights on the lower Mississippi were the most prominent example of this problem. Jay’s efforts were repeatedly hampered by the fact that Congress, as a plural body, had difficulty agreeing on the U.S. negotiating position, and by the fact that, when it could agree, it often micromanaged Jay’s efforts. Thus, Jay complained to Congress that he found “exceedingly embarrassing” its directive that, in negotiating with Spain, he was required to communicate in advance to Congress every proposition he would make to the Spanish representative, and also to report back to Congress on every proposition that the representative made to him during the negotiations. Jay also wrote to Jefferson, complaining that he would “often experience unreasonable delays and successive obstacles in obtaining the decision and sentiments of Congress, even on points which require despatch.”

Once again, the constitutional Founders addressed this problem with specific text: they assigned the treaty power to an independent President who could negotiate more effectively than a legislative body. Even on this issue, however, the Founders limited the power by requiring the President to obtain the advice and consent of the Senate, the smaller of the two houses of the new national legislature. That the Founders decided

152 See id., Nos. 11 (Hamilton), 22 (Hamilton).
153 See SANDERS, supra note 141, at 124.
154 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 628 (1933) (letter from John Jay to the President of Congress dated August 15, 1785).
155 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 210 (Henry P. Johnston ed., 1890), Jay also noted here and in other correspondence that, in order for the government to operate effectively, the legislative, executive, and judicial functions of the government should be separated, albeit with checks on each other. As he explained in a subsequent letter to Washington, “Let Congress legislate—let others execute—let others judge.” Id. at 227. This separation, he further explained, would not itself answer the question of which powers should be assigned to the government, “a question which deserves much thought.” Id. at 227-28. Jay thus appeared to conceive of “executive power” as the power to execute the laws.
156 As discussed below, the delegates at the Federal Convention initially contemplated that the Senate alone would have the treaty power, and only late in the Convention decided to divide the treaty power between the Senate and President. See infra Part IVA.
that, for functional reasons, it would be better to have an independent executive rather than
the legislature negotiate U.S. treaties hardly shows that they intended to delegate to the
President a package of unspecified additional powers out of some notion of executive
power essentialism. What we see instead is that, in designing the new government, the
Founders looked to the lessons of experience to fill in the details of their general views
about separation of powers.

There are statements during this period, as Prakash and Ramsey emphasize,
referring to the foreign affairs department and other congressional departments as
“executive.” This label, however, appears to have been used simply to refer to the role
of the departments in executing congressional policy. There is no evidence that it referred
to an understood bundle of foreign affairs or other substantive powers. Indeed, as noted
above, the key foreign relations powers granted by the Articles of Confederation were
retained and exercised by Congress as a whole even after the establishment of the
“executive” departments.

IV. The Constitutional Founding

A. The Federal Convention

Far from supporting the Vesting Clause Thesis, the records of the Federal
Convention all but devastate it. What the records show is that, as the delegates drafted and
negotiated the constitutional text, they attempted to specify the powers being granted to the
executive branch. Although there were occasional references to the concept of executive
power in the abstract, the records make clear that there was no consensus on what was
encompassed by that concept, with delegates disagreeing, for example, over whether
powers relating to war, peace, and treatymaking were executive in nature. Furthermore,
although one should always be cautious about making inferences from silence, it is telling
that there is not a single reference to the Vesting Clause Thesis in all of the records of the

157 See Prakash & Ramsey, supra note 13, at 274-76. Prakash and Ramsey also rely on the 1778
pamphlet, The Essex Result. Apparently written by Theophilus Parsons, this pamphlet called for rejection of
a draft Massachusetts constitution because, among other things, the executive was given insufficient power.
See THE ESSEX RESULT (1778), reprinted in THEOPHILUS PARSONS, MEMOIRS OF THEOPHILUS PARSONS 359
(1859); see also THACH, supra note 106, at 44-49 (discussing this pamphlet). The pamphlet thus proposed,
for example, that the executive be given a veto power over legislation and full command over the state’s
military forces, proposals that were subsequently included in the constitution adopted by Massachusetts in
1780. As discussed above, however, the 1780 constitution also defined the governor’s commander-in-chief
powers in great detail, and stated that these powers had to be “exercised agreeably to the rules and
regulations of the constitution, and the laws of the land, and not otherwise.” See supra Part IIIB. In
discussing executive power, The Essex Result notes that this power “is sometimes divided into the external
executive, and internal executive,” and that “[t]he former comprehends war, peace, the sending and receiving
ambassadors, and whatever concerns the transactions of the state with any other independent state.” The
U.S. confederation, explained the pamphlet, had “lopped off this branch of the executive, and placed it in
Congress.” Id. Although these statements do appear to borrow from the taxonomy developed by some of the
European theorists, it is notable that the pamphlet also recognizes that the “external executive power” can be
divided from the “internal executive power” and can be exercised by a legislative body, such as the
Continental Congress.
Federal Convention. The oft-expressed opposition of many delegates to creating an executive that resembled the British monarch further weighs against the Thesis.

The story begins on May 29, 1787. On that date, Edmund Randolph presented the Virginia Plan, which consisted of fifteen resolutions. The seventh resolution called for the establishment of a national executive, to be chosen by the national legislature. The resolution also stated that "besides a general authority to execute the National laws, [the national executive] ought to enjoy the Executive rights vested in Congress by the Confederation." If this resolution had been adopted by the Convention, it might support the Vesting Clause Thesis, because it suggests a conception of “executive power” as a defined category that can be distinguished from legislative powers, albeit one limited by reference to the Articles of Confederation. Even this is not entirely clear, though, since the Virginia Plan was proposing general ideas, not constitutional language. As a result, it would not have been inconsistent with this plan to specify the foreign affairs powers of the Executive, just as the Articles of Confederation had specified the foreign affairs powers of the Continental Congress. In any event, this resolution was not adopted by the Convention. In fact, the conception of executive power reflected in this resolution was quickly rejected by the delegates, and all subsequent discussions of executive power by the delegates were in terms of specific grants of executive power rather than in terms of a collection of powers.

On June 1, the delegates began considering Randolph’s seventh resolution. There was general agreement with the idea of establishing a national executive. There was significant concern, however, about vesting too much power in the executive, and about using the British model as a benchmark for executive power. Charles Pinckney stated that he “was for a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarch, of the worst kind, towit an elective one.” John Rutledge similarly stated that “he was for vesting the Executive power in a single person, tho’ he was not for giving him the power of war and peace.” Roger Sherman stated even more strongly that “he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.” And James Wilson emphasized the impropriety of using the British monarchy as a model for executive power:

He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws,

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158 See 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 21.
159 Id.
160 Id. at 65.
161 Id.
162 Id.
and appointing officers, not <appertaining to and> appointed by the Legislature.\textsuperscript{163}

Among other things, it is clear from these statements that the speakers did not equate the concept of executive power with an accepted bundle of foreign relations powers.

This concern about creating an executive that resembled the British monarch was part of the reason for some delegates’ opposition to a singular, as opposed to a plural, executive. Randolph, for example, expressed the view that a singular executive would be the “fetus of monarchy.”\textsuperscript{164} Supporters of a singular executive denied that it would be similar to the British monarchy. Thus, Wilson “repeated that he was not governed by the British Model which was inapplicable to the situation of this Country.”\textsuperscript{165}

At this point in the debate, Madison suggested that the delegates “fix the extent of the Executive authority” because “as certain powers were in their nature Executive, a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer.”\textsuperscript{166} Madison agreed with Wilson that executive powers “do not include the Rights of war & peace &c.” and that “the powers should be confined and defined” because “if large we shall have the Evils of elective Monarchies.”\textsuperscript{167} He therefore moved that the national executive be vested with three powers – to “carry into execution the national laws,” to “appoint to offices in cases not otherwise provided for,” and to “execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature.”\textsuperscript{168} The Committee of the Whole agreed to the motion but deleted the third listed power as “unnecessary, the object of them being included in the ‘power to carry into effect the national laws.’”\textsuperscript{169}

Thus, in their first consideration of the issue, the delegates sharply rejected the purported Locke/Montesquieu/Blackstone assignment of powers. They disagreed, for example, that the powers over war and peace should be vested with the executive. As Professor Rakove has noted, “the remarks of June 1 demonstrate that the framers believed that questions of war and peace – that is, the most critical subjects of foreign policy – were appropriate subjects for legislative determination rather than an inherent prerogative of executive power.”\textsuperscript{170} Moreover, instead of relying on the British model or even the Continental Congress as a categorical reference, the delegates moved to, in Madison’s

\textsuperscript{163} \textit{Id.} at 65-66.

\textsuperscript{164} \textit{Id.} at 66; \textit{see also id.} at 88 (statement by Randolph on June 2 that “the permanent temper of the people was adverse to the very semblance of Monarchy”).

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.} at 66-67. John Dickinson similarly stated that “the powers of the Executive ought to be defined before we say in whom the power shall vest.” \textit{Id.} at 74.

\textsuperscript{167} \textit{Id.} at 70 (emphasis added).

\textsuperscript{168} \textit{Id.} at 63.

\textsuperscript{169} \textit{Id.} at 67.

\textsuperscript{170} Rakove, \textit{supra} note 56, at 239.
words, “confine[] and define[]” the executive’s powers. All subsequent discussions in the Federal Convention are consistent with this theme: the delegates continued to define the executive’s powers, including his foreign affairs powers, and they never suggested that they were vesting him with unspecified residual powers. Moreover, to the extent that this discussion reveals any consensus about what is inherently part of executive power, it was simply that executive power entailed the power to execute the laws.

After the June 1 deliberations, there were a number of discussions concerning the manner of electing the executive, whether the executive should be plural or singular, whether the executive should have a veto power over legislation, and the executive’s term of office. These discussions were complicated and contentious. As George Mason noted at one point, “In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared.” In these discussions, however, there was repeated agreement that the only powers being granted to the executive were those of executing the laws, making certain appointments, and (after additional discussion) vetoing legislation. This agreement is also reflected in the Report of the Committee of the Whole on June 13, which delineates these, and only these, executive powers. There were also repeated, uncontested statements in these discussions that the U.S. executive should not resemble a monarchy.

The alternative constitutional plans presented to the delegates were fully consistent with this approach. On June 15, William Paterson presented the New Jersey Plan. Under this plan, the executive would be elected by Congress, would be plural rather than singular, and would have “general authority to execute the federal acts” as well as the power “to appoint all federal officers not otherwise provided for, & to direct all military operations.” Like Madison’s amendment of the Virginia Plan, the New Jersey Plan spelled out the powers that would be vested in the executive. As for other foreign affairs powers, the Plan stated that Congress would have the powers specified in the Articles of

171 In discussing the Federal Convention, Prakash and Ramsey move immediately from Madison’s motion on June 1 to the considerations of the Committee of Detail, in late July, noting that “[a]fter the modification of the Virginia Plan, there was no sustained consideration of foreign affairs until the Committee of Detail.” Prakash & Ramsey, supra note 13, at 283. In doing so, Prakash and Ramsey fail to give sufficient attention to a number of relevant discussions and proposals that occurred during this period.

172 2 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 118. In a letter to Thomas Jefferson in October 1787, James Madison recounted that “[o]n the question whether [the executive] should consist of a single person, or a plurality of co-ordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place.” 3 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 132.

173 See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 101; 2 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 32-33, 116. But cf. 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 113 (comment by George Mason on June 4 that “[w]e have not yet been able to define the powers of the Executive”).

174 See 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 236.

175 Id. at 244. Given the Plan’s reference to directing military operations, Prakash and Ramsey are incorrect in describing the executive under this Plan as “bereft of foreign affairs authority.” Prakash & Ramsey, supra note 13, at 281 n.214.
Confederation, as well as a number of additional powers, such as the power to regulate international trade. Under this plan, therefore, the executive’s foreign affairs powers were to be very limited and defined, and most foreign affairs were to be granted to Congress.

The obviously limited nature of executive power under the Virginia and New Jersey Plans helps shed light on what the delegates understood when they referred to the “vesting” of executive power. On June 16, in contrasting the Committee of the Whole’s modified Virginia Plan with the New Jersey Plan, James Wilson noted that the Committee’s plan “vested the Executive powers in a single Magistrate” whereas “[t]he plan of N. Jersey, vested them in a plurality.” In other words, constitutional plans that clearly did not incorporate the Vesting Clause Thesis were nevertheless viewed as “vesting the executive powers.” Vesting, under this conception, simply meant assigning the specified powers, not granting unspecified residual powers. To put it differently, a general vesting clause described where powers were being vested, not what those powers were.

On June 18, Alexander Hamilton presented his own constitutional plan. Already displaying a pro-executive inclination for which he would later become famous, Hamilton proposed:

The supreme Executive authority of the United States to be vested in a Governour to be elected to serve during good behaviour – the election to be made by Electors chosen by the people in the Election Districts aforesaid – The authorities & functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed, to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers or the departments of Finance, War and Foreign Affairs; to have the nomination of all officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.

Hamilton’s plan obviously proposed a broader package of executive power than what was reflected in either the modified Virginia Plan or the New Jersey Plan. But even under Hamilton’s more expansive proposal, the powers of the executive, including powers relating to foreign affairs, were spelled out in detail. Hamilton does not appear to have been relying on some undefined residuum of executive power. Prakash and Ramsey assert the contrary, claiming (without explanation) that the beginning of the first sentence quoted above – “The supreme Executive authority of the United States to be vested in a Governour to be elected during good behaviour” – was implicitly a grant of “residual

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176 See 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 243.
177 Id. at 254.
178 Id. at 292.
foreign affairs powers not vested elsewhere." 179 But this is pure assertion, and it is contradicted by the language that immediately precedes Hamilton’s list of executive powers – “The authorities & functions of the Executive to be as follows.” It is also undermined by the fact that Hamilton used similar language with respect to the vesting of legislative power, 180 yet Prakash and Ramsey do not contend that he was proposing to grant unspecified residual powers to Congress. Finally, their claim is undermined by Hamilton’s assignment to the Senate, rather than to the Governor, of “the sole power of declaring war” and “the power of advising and approving all Treaties,” 181 significant foreign relations powers that Prakash and Ramsey claim are executive in nature.

Still another constitutional proposal was the Pinckney Plan, proposed by Charles Pinckney of South Carolina and evidently considered by the Committee of Detail. This plan provides that “the executive Authority of the U.S. shall be vested” in the President, and it then lists a variety of presidential duties and powers, including duties and powers relating to foreign affairs. 182 Prakash and Ramsey assert that the vesting clause in the Pinckney Plan implied that the executive would have residual foreign affairs powers. 183 Again, this begs the question, since the meaning of such a vesting clause is precisely what is at issue. Moreover, as Prakash and Ramsey acknowledge, Pinckney’s comments in response to the Virginia Plan (described above), in which he opposed assigning the foreign affairs powers exercised by the Continental Congress to the executive, suggest that he did not believe that the executive should have residual foreign affairs powers. Prakash and Ramsey simply note that Pinckney’s comments “contradicted his own plan.” 184 There is no contradiction, however, if the vesting clause is not read as granting residual powers. 185

The Committee of Detail was appointed on July 23. 186 The Committee’s drafts show that it attempted to enumerate the executive’s powers, including ultimately some

179 Prakash & Ramsey, supra note 13, at 280.
180 See 1 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 291 (“The Supreme Legislative power of the United States of America to be vested . . . .”).
181 Id. at 292.
182 See 3 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 606.
183 See Prakash & Ramsey, supra note 13, at 281 n.215. Pinckney’s plan stated that, “In the President ‘the executive Authority of the U.S. shall be vested.’” 3 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 606.
184 Prakash & Ramsey, supra note 13, at 281 n.215.
185 As discussed below, Pinckney also stated at the Pennsylvania ratifying convention that the Senate and President “form together a body in whom can be best and most safely vested the diplomatic power of the United States.” See infra TAN 366. In an 1818 letter to John Quincy Adams, Pinckney recalled that his constitutional plan was “substantially adopted except as to the Senate & giving more power to the Executive than I intended.” 3 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 427. With respect to the enhancement of executive power, Pinckney gives the example of the decision late in the Convention to divide the treaty power between the Senate and President rather than assign it exclusively to the Senate. Id.
186 See 2 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 95.
foreign affairs powers, just as the various plans had attempted to do.\(^{187}\) As Prakash and Ramsey concede, “At this stage, the executive lacked the residual executive power.”\(^{188}\) Prakash and Ramsey assert, however, that the Committee’s final report, presented on August 6, included such a residual power. In other words, they claim that the Committee of Detail substantially modified the nature of the executive’s power in a way inconsistent with all of the Convention’s discussions up to that point. The only evidence they provide for this assertion is that the portion of the report addressing executive power begins with the clause, “The Executive Power of the United States shall be vested in a single person.”\(^{189}\) The language of this clause, however, can easily be read just as addressing the issue of whether the executive power that is specified will be vested in a single person or a plural body, an issue discussed at length in earlier stages of the Convention. And this is exactly how Madison’s record of the Convention describes the clause when it was voted on by the Committee of the Whole on August 24.\(^{190}\) Furthermore, the Committee of Detail’s report spells out in great detail the executive’s powers and duties, including those relating to foreign affairs, and it expressly gives other foreign affairs powers to the Senate or to Congress.\(^{191}\) Indeed, all of the foreign affairs powers that had been discussed in the Convention are mentioned expressly somewhere in the Committee’s report, making it even less likely that the Committee intended the executive Vesting Clause to convey additional foreign affairs powers.\(^{192}\)

It is also worth noting that Committee of Detail’s report envisioned that the Senate would have the dominant power over U.S. foreign relations. Accordingly, it assigned to the Senate the sole power of making treaties, as well as the power of appointing


\(^{188}\) Prakash & Ramsey, supra note 13, at 283.

\(^{189}\) 2 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 185.

\(^{190}\) See id. at 401 (“On the question for vesting the power in a single person – It was agreed to nem: con: So also on the Stile and title.”) (emphasis in original).

\(^{191}\) For additional discussion of this point, see Arthur Bestor, Respective Roles of the Senate and President in the Making and Abrogation of Treaties – The Original Intent of the Framers of the Constitution Historically Examined, 55 WASH. L. REV. 1, 87 (1979) (“The [vesting clause] could not possibly have had [residual power] meaning in the report of the Committee of Detail, for the essential powers in the realm of diplomacy were specifically bestowed elsewhere – that is to say, on the Senate exclusively. In their use of general terms like ‘Executive Power,’ the framers obviously intended that the meaning should be arrived at by observing the particular powers actually enumerated in the relevant article of the Constitution.”); Rakove, supra note 56, at 264 (“Given the evidence that a doctrine of inherent executive power over war and peace was not influential at the outset of the Convention – as the proceedings of June 1 conclusively prove – it hardly seems likely that it would have become more attractive as the debates wore on.”).

\(^{192}\) Prakash and Ramsey’s discussion of this point – the linchpin of their argument about the Federal Convention – is entirely conclusory. They assert that the Committee of Detail’s use of the Vesting Clause was a reintroduction of the idea of residual executive power, and they remark that “no one sought to strike the language or complained.” Prakash & Ramsey, supra note 13, at 286. It would be important – and, indeed, surprising – that no one would comment on the reintroduction of an idea that had generated substantial opposition at the beginning of the Convention. Of course, the most likely reason why no one commented on it is that Prakash and Ramsey’s assertion about the Vesting Clause is incorrect.
ambassadors.\textsuperscript{193} In commenting on the report, Pinckney noted that, “As the Senate is to have the power of making treaties & managing our foreign affairs . . . ”\textsuperscript{194} In the closing weeks of the Convention, some of the Senate’s foreign affairs power was shifted to the President. But, again, the story is one of assignment of particular powers to particular institutional actors, not one of an essentialist conception of executive power or of granting unspecified powers. More specifically, the debates strongly suggest that power was being shifted to the President not because of some sort of executive power essentialism, but rather because of mistrust of the Senate.\textsuperscript{195}

Consider, for example, the power to make treaties. When the Committee of the Whole addressed the proposal to assign the treaty power to the Senate, Madison “observed that the Senate represented the States alone, and for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”\textsuperscript{196} Gouverneur Morris also expressed concern about giving the Senate the treaty power, and he proposed an amendment whereby treaties would not be binding on the United States until ratified by federal legislation.\textsuperscript{197} Madison and others disagreed with that amendment, however, on the grounds that it would be too inconvenient and would put the United States at a disadvantage in international negotiations, and the amendment was defeated.\textsuperscript{198} This debate was resumed on September 7, with James Wilson moving to amend the treaty clause to require the consent of the House of Representatives.\textsuperscript{199} Sherman responded that “the power could be safely trusted to the Senate” and that “the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.”\textsuperscript{200} Wilson’s motion was defeated. Madison subsequently moved, unsuccessfully, to allow two-thirds of the Senate to make peace treaties without the President’s consent.\textsuperscript{201} What is noteworthy about these discussions is that at no point was there a claim that the treaty power inherently belonged to the executive. The only issues were whether, for functional reasons, the power should be divided between the Senate and some other institutional body, and, if so, which institutional body would be best.

The Convention finally turned to the executive branch part of the Committee of Detail’s report on August 24. The discussion here is, once again, revealing for what it does not show. Delegates quibbled with the specific grants of authority and responsibility and thus, for example, modified the language of the appointments provision and the provision

\textsuperscript{193} See 2 \textit{The Records of the Federal Convention}, supra note 27, at 183.  
\textsuperscript{194} Id. at 235.  
\textsuperscript{195} For a detailed explanation of this point, see RAKOVE, supra note 44, at 263-67.  
\textsuperscript{196} 2 \textit{The Records of the Federal Convention}, supra note 27, at 392.  
\textsuperscript{197} Id.  
\textsuperscript{198} Id. at 392-94.  
\textsuperscript{199} See id. at 538.  
\textsuperscript{200} Id.  
\textsuperscript{201} See id. at 540-41.
They also added in certain presidential powers and responsibilities, such as the responsibility for receiving ambassadors. But there was no discussion of whether the list of powers and responsibilities matched some preconception of what should be executive, and there was no suggestion that the Vesting Clause was granting unspecified powers. Indeed, if the delegates had been assuming the Vesting Clause Thesis, much of their quibbling about specific executive powers would have been beside the point.

The Convention’s brief discussion of Congress’s power relating to war is not to the contrary. The Committee of Detail had proposed to give Congress the power “[t]o make war.” Pinckney objected to that proposal, arguing that the House of Representatives would be “too numerous for such deliberations,” and that the power should rest with the Senate alone because it would be “more acquainted with foreign affairs.” Pierce Butler, by contrast, thought that the Senate would have the same institutional problems as the full Congress, and he proposed that the power to make war be given to the President. A number of delegates expressed concern, however, about giving the President the power to commence war. Madison moved to amend the Committee of Detail’s proposal to give Congress the power to “declare” rather than “make” war, which he said would “leav[e] to the Executive the power to repel sudden attacks.” Roger Sherman did not think this amendment necessary, since he believed that the President would already have the power to repel attacks. The delegates apparently agreed, initially voting against the motion. Rufus King, however, noted that the word “make” could be understood to include conducting the war, “which was an Executive function,” and at that point the delegates voted in favor of the motion.

There are obviously statements in this discussion suggesting that certain war-related powers belong to the executive – namely the power to repel attacks and the power to conduct the operations of war. The basis for this assumption is not entirely clear, but it easily could have been based on the President’s assigned power as Commander in Chief.

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202 See id. at 405-06, 422.
203 Id. at 419.
204 See id. at 182.
205 Id. at 318.
206 Id.
207 Id.
208 Id.
209 The New Jersey Plan, for example, specifically referred to a presidential power to “direct all military operations.” 1 The Records of the Federal Convention, supra note 27, at 244; see also The Federalist Papers, supra note 2, No. 69 (Hamilton), at 418 (stating that the President, as Commander in Chief, has “the Supreme command and direction of the military and naval forces”). And the Hamilton Plan gave the President the power of “direction of the war when authorized or begun.” 1 The Records of the Federal Convention, supra note 27, at 292 (emphasis added). The phrase “or begun” in Hamilton’s Plan presumably included situations in which a war was initiated against the United States and it acted to repel the attack. See John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath 142 n.22 (1993); see also Michael D. Ramsey, Textualism and War Powers, 69 Chi. L. Rev.
What is clear is that, when considering where to assign the foreign relations power of declaring war, the delegates agreed not to vest it with the President, and no one claimed that this violated some sort of essentialist conception of executive power.

B. The Federalist Papers

The *Federalist Papers* likewise repudiate the Vesting Clause Thesis. As in the Federal Convention debates, the discussions of executive power in the *Federalist Papers* are premised on the assumption that the President is being granted only the powers specified in Article II. This assumption is evident, for example, in the comparisons between the proposed U.S. executive and the British monarch. In *Federalist No. 48*, Madison acknowledges that, “In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger . . . .” But he contrasts that situation from “a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power . . . .”

Similarly, in *Federalist No. 67*, Hamilton acknowledges the “aversion of the people to monarchy.” and he proceeds to go through the President’s enumerated Article II powers to show that they are much less extensive than those of the British monarch. Nowhere in this essay does he suggest that the Vesting Clause is an independent source of power. Moreover, the structure of his discussion – going through the enumerated powers in Article II to show that they are sufficiently limited – would make little sense if there were also an unspecified residuum of “executive Power.” Hamilton repeats this approach in *Federalist No. 69*, again going through the President’s enumerated powers, and arguing that the limitation of the President to these powers means that “there is no pretense for the parallel which have been attempted between him and the king of Great Britain.”

The *Federalist Papers* also repeatedly suggest that Congress’s powers will be much greater than those of the President. In doing so, the Papers point to the limited list of powers in Article II, Section 2. These statements, like those contrasting the President with the British monarch, would not seem to make sense if there were an unspecified residuum of presidential power. For example, in *Federalist No. 48*, Madison states that Congress’s powers are “more extensive, and less susceptible of precise limits” than those of the

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1543 (2002) (explaining that the Founders understood that war could be “declared” by an attack on the United States and that this would trigger the President’s Commander in Chief powers). But see Prakash & Ramsey, *supra* note 13, at 285 (arguing that the reference in the Convention debate to a power to repel attacks proves that the delegates assumed that the President would have residual foreign affairs powers).

210 *The Federalist Papers*, *supra* note 2, No. 48 (Madison), at 309.

211 *Id.*

212 *Id.*, No. 67 (Hamilton), at 407.

213 *Id.*, No. 69 (Hamilton), at 422. *See also id.*, No. 73 (Hamilton), at 442 (considering the powers “which are proposed to be vested in the President of the United States”).
President, and he describes the executive power as “being restrained with a narrower compass and being more simple in its nature.”

Another inconsistency between the Federalist Papers and the Vesting Clause Thesis is that the Papers generally employ functional arguments for the assignment of powers, not essentialist labels like “legislative” or “executive.” In Federalist No. 64, for example, Jay argues that, even though the treaty power could be viewed as legislative in nature, it nevertheless made sense to vest it in the President and Senate. He suggests that one should not place too much emphasis on formal labels: “whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial.” When the Federalist Papers do invoke essentialist labels, they tend to eschew the traditional categories used by Locke, Blackstone, and Montesquieu. In Federalist No. 75, for example, Hamilton acknowledges that treatise writers had classified the treaty power as properly belonging to the executive, but he calls this “an arbitrary disposition” and rejects it.

The Federalist Papers also emphasize a more general background point that, as noted in Part II, is in tension with the Vesting Clause Thesis. Specially, they emphasize that the Constitution is establishing a government of limited and defined powers. Most famously, Madison states in Federalist No. 45 that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined.” An unspecified residuum of executive power does not sit comfortably with this general structural feature of the Constitution.

Another background point made in the Federalist Papers is that there is nothing inherently problematic, from a separation of powers standpoint, with mixing powers among branches of government. Madison makes this point most clearly in Federalist No. 47, where he responds to the Anti-Federalist charge that “the Constitution is in supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.” Turning to Montesquieu (upon whom the Anti-Federalists frequently relied), Madison explains that the relevant political maxim is instead that government power should not be concentrated in the same hands lest tyranny result, and that the Constitution respects this rule however much it mixes powers in novel ways. Even under the British Constitution – “to Montesquieu what Homer has been to the didactic writers on epic poetry” – Madison notes that there was a mixing of powers.

214 Id., No. 48 (Madison), at 310. See also id., No. 51 (Madison), at 322 (“In a republican government, the legislative authority necessarily predominates.”)
215 Id., No. 64 (Jay), at 394.
216 Id., No. 75 (Hamilton), at 450.
217 Id., No. 45 (Madison), at 292.
218 Id., No. 47 (Madison) at 301.
219 Id.
220 Id. at 301-02.
Madison also looks in detail at the state constitutions in the Critical Period and finds that “there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.”

The only Federalist Paper that offers even superficial support to the Vesting Clause Thesis is Federalist No. 72. There, Hamilton notes that the “administration of government . . . falls peculiarly within the province of the executive department.” Hamilton makes this observation in order to justify giving the President the power to nominate appointments. He does not appear to be arguing that “administration” is a separate, unspecified executive power; rather, he seems to think that it is part of the President’s role in executing the laws and carrying out his specified powers. In any event, the foreign affairs administrative functions he mentions – negotiating with foreign governments, the arrangement of the armed forces, and the direction of war – can all be justified from the specific grants of power, such as the treaty power and the Commander in Chief power.

C. State Ratification Debates

With the state ratification debates – the final component of the usual originalist trinity – the Vesting Clause Thesis continues down the path from historical claim to presentist wishful thinking. At least for originalists, the constitutional understanding reflected in the state conventions merits particular weight. As Chief Justice Marshall famously asserted in one of his own, if infrequent, originalist forays, the Constitution “was a mere proposal,” which “the people were at perfect liberty to accept or reject.” It followed that “[f]rom the [ratifying] Conventions the Constitution derives its whole authority.” Similarly, James Madison noted, many years after the Constitution’s ratification, that it was in the “respective State Constitutions, where [the Constitution] received all the authority which it possesses.”

It is puzzling, therefore, that proponents of the Vesting Clause Thesis have devoted relatively little attention to the state ratification debates. Prakash and Ramsay’s ostensibly

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221 Id. at 304.
222 Id., No. 72 (Hamilton), at 435.
223 See also id., No. 84 (Hamilton), at 519 (noting that the “management of foreign negotiations will naturally devolve” on the President, subject to the consent of the Senate).
225 Id. at 403. For a reassessment of Marshall’s historical understanding of ratification, see Martin S. Flaherty, John Marshall, McCulloch v. Maryland, and We the People(s), 43 WM. & MARY L. REV. 1339 (2002).
226 Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (J.B. Lippincott ed., 1865); see also 3 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 374 (Madison stating in the House of Representatives on April 6, 1796, that “If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”).
originalist account, for example, devotes only a few short pages to the subject. 227 Powell’s more complex thesis nonetheless also moves quickly past the ratification debates, jumping from the Federalist Papers almost immediately to the practices of the Washington Administration. 228 A possible reason for this omission is that the state ratification debates offer little evidence for executive power essentialism with regard to foreign affairs and no instances that articulate the Vesting Clause Thesis. Such silence is particularly striking in light of the sheer volume of the state debates. 229 Instead of assuming the Vesting Clause Thesis, the state ratification debates, like the Federal Convention debates and the Federalist Papers, proceed on the assumption that the President is being granted only the powers specified in Article II. To support this claim, we consider in detail the six most significant convention debates – Virginia, Pennsylvania, Massachusetts, New York, North Carolina, and South Carolina.

Virginia. Virginia produced arguably the most significant ratification debates for several reasons. First, Virginia was in many ways the most important state in terms of size and leadership. Even though the requisite nine states had ratified the Constitution before Virginia did so, few thought the Union could succeed without the Old Dominion. Second, Virginia unquestionably produced the most comprehensive debates in terms of quality and quantity. The Virginia ratification materials account for over 1,700 pages in the authoritative Documentary History of the Ratification of the Constitution, and more than 600 of those pages reflect the convention debates. 230 The caliber of debate, moreover, was exceptionally high, featuring James Madison, Edmund Randolph, George Mason, John Marshall, Patrick Henry, James Monroe, among other notables. Perhaps most important of all, for present purposes, the Virginia Convention addressed foreign affairs issues in greater detail than any other state, in part out of its paternalistic concern for the fate of Kentucky and the Southwest, especially with regard to the treaty power and U.S. navigation rights on the Mississippi. For these reasons, foreign affairs scholars have typically, and rightly, focused upon the discussions that Virginia produced. The telling exception proving this rule is the work of Vesting Clause Thesis proponents, where the Virginia debates are conspicuous by their absence. 231

The Virginia convention from the outset dispelled any notion that conceptions of government that may have been celebrated in Europe carried over without alteration to

227 See Prakash & Ramsey, supra note 13, at 287-95.
228 See POWELL, supra note 15, at 34.
229 The Documentary History is approaching twenty volumes. That said, it should be noted that the quality of the documentary record varies wildly, and that the accounts of many of the convention debates were plagued by partisanship and poor recording. See James L. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1 (1986). The unevenness of the record should caution those who seek to discern constitutional meaning from the debates without more. Poor parliamentary reporting, however, does not explain the relative absence of a position central to issues in which a wide array of other positions were documented.
230 The Virginia debates take up volumes 8, 9, and 10 of The Documentary History of Ratification of the Constitution (John P. Kaminski & Gaspare J. Saladino, eds.) (1988-90).
231 See, e.g., Prakash & Ramsey, supra note 13, at 291-92 & n. 261; id. at 293 & nn. 271-72.
America. The convention opened with the Anti-Federalists, led by Patrick Henry, seeking to portray the Constitution as the reincarnation of the British imperial government that Virginians had rejected in 1776. Prominent in this strategy were attempts to equate the President with the British monarch. “[T]here is to be,” Henry declaimed, “a great and mighty President, with very extensive powers, the powers of a King.” Henry pressed the analogy by invoking the old Whig fear concerning the misuse of troops ostensibly mustered to protect the nation from foreign enemies: “Away with your President, we shall have a King. The army will salute him Monarch; your militia will leave you and assist in making him a King, and fight against you: And what have you to oppose this force?” Federalists, such as Edmund Randolph and John Marshall, dismissed both the Anti-Federalists’ horribles as well as the royal comparison. Even before the convention, “An Impartial Citizen” contrasted the U.S. and British Constitutions, citing the President’s merely contingent veto and commenting that “[t]he President in many important cases, must have the concurrence of the Senate, wherein his sole decision might be dangerous.”

In debating the war power, the comparison between King and President merged into a discussion of the Constitution’s assignment of foreign affairs authority. Here the debate reflected a general pattern whereby the participants concentrated on the allocation of specific powers and the likely consequences of the allocation, rather than on essentialist claims about what was truly “executive” or “legislative.” Specifically, Anti-Federalists objected to the combination in Congress of the power to declare war with the authority to finance it, while Federalists responded that the republic could only be safe with the power to declare war vested in the legislative branch. As Henry put it, “I find fault with the paper before you, because the same power that declares war, has the power to carry it on.”

Note that Henry, not one to leave any argument unspoken, does not object that according Congress the declare war function violates a general understanding that such a power is “executive.” Rather, he attacks the combination of powers in light of the results it will produce.

232 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 230, at 961. Note that even here, Henry does not speak in terms of executive or royal power as a unitary abstraction, but instead refers to “powers” in the plural.

233 Id. at 964.
234 See, e.g., id. at 1019.
235 See, e.g., id. at 1125.
238 Id.
239 Id.
Federalists defended the war power in the same functionalist terms. Randolph countered Henry, arguing that America compared favorably to England because it imposed more of a popular check on the exercise of the war power: “In England the King declares war. In America, Congress must be consulted.– In England, Parliament gives money. In America, Congress does it. There are consequently more powers in the hands of the people, and greater checks upon the Executive here, than in England.”\textsuperscript{240} Marshall echoed Randolph in the same functionalist terms, asking, “Are the people of England more secure, if the Commons have no voice in declaring war, or are we less secure, by having the Senate joined with the President?”\textsuperscript{241} By contrast, no Federalist asserted that the declare war power was legislative in nature, or that Constitution’s allocation of the declare war power to Congress was an exception to a general rule.

The single most sustained foreign affairs debate in Virginia concerned the treatymaking power, and that discussion produced almost no essentialist rhetoric. This relative silence is striking given the important role accorded the Senate in this purported executive function. Instead of essentialism, the overwhelming majority of the debate centered on whether the requirement that two-thirds of the senators present give their advice and consent to a treaty would be a sufficient check against regions bent on using the treaty authority to undermine the interests of other regions, in particular, the South’s interest in maintaining free navigation of the Mississippi. When the President does make an appearance, the issue is not whether the executive should or should not be the exclusive repository of this important foreign affairs power, but whether the characteristics of the office would make it an additional check against a regional sell-out.

Especially noteworthy is the Anti-Federalist failure to make the obvious objection that Senate approval, let alone by a supermajority, is an infringement of executive foreign affairs authority. Instead, Anti-Federalists objected to the allocation of treatymaking authority on the ground that it would not protect regional interests. In this context, William Grayson argued that “[t]he consent of the President is considered as a trivial check.”\textsuperscript{242} James Monroe concurred on the ground that the President likely would not prevent a betrayal of Southern interests since he probably would be elected by, and beholden to, the Northeast.\textsuperscript{243} The Anti-Federalists further argued that the Senate would not provide a sufficient safeguard. This critique dominated the convention’s two main discussions of treaties,\textsuperscript{244} and it was rigorously explored in a table that George Mason provided predicting likely Senate voting patterns.\textsuperscript{245}

\textsuperscript{240} Id. at 1098.
\textsuperscript{241} Id. at 1125. Unless he was referring to the treaty power, Marshall should have referred to the full Congress rather than the Senate, since the full Congress was given the power under the proposed Constitution to declare war.
\textsuperscript{242} Id. at 1383.
\textsuperscript{243} Id. at 1371-73.
\textsuperscript{244} The Convention took up treatymaking from June 12-14, and again on June 18 and 19. See id. at 1184-1297, 1371-1412.
\textsuperscript{245} Id. at 1375.
Federalists defended the treatymaking power primarily on the ground that it would protect the interests of Virginia and the region to which Virginians were likely to emigrate. At least one delegate, Francis Corbin, addressed the possibility of vesting the power in the President alone, and rejected it on solely functional grounds. Even then, he did not make the point to justify a departure from an abstract baseline, although he did note that it made U.S. practice diverge from most governments elsewhere:

It would be dangerous to give this power to the President alone—as the concession of such a power to one individual, is repugnant to Republican principles.—It is therefore given to the President and the Senate (who represent the states in their individual capacities) conjointly.—In this it differs from every Government we know.—It steers with admirable dexterity between the two extremes—neither leaving it to the Executive, as in most other Governments, nor to the Legislature, which would too much retard such negotiations.246

Virginia’s emphasis on specific powers and likely results also prevailed in considering Article II itself. If any topic should have prompted discussion of what “executive” authority entailed as a general, residual, or baseline matter, Article II would have been it. But even though the debate was extensive, there was neither a considered analysis of the Vesting Clause nor any assertion that the text reflected a grant of unspecified powers. Instead, the delegates repeatedly moved to consider the implications of the particular powers specified in Article II. Even before the convention formally took up Article II, James Monroe set the tone when he sought to demonstrate that the President would be too powerful, but he did so with reference only to specific textual grants rather than residual powers.247 This would have been an odd punch to pull if the goal was to show that the office was too powerful. Other speakers followed Monroe by also decrying the President’s power, again only with reference to particular grants. Mason, for example, “animadverting on the magnitude of the powers of the President, was alarmed at the additional power of commanding the army in person.”248 While he admitted that the President should have the power to “give orders, and have a general superintendency” over the army, he feared that the Commander in Chief grant – not some general ideal of executive power – further entailed command in the field and that this could be abused. Likewise, Mason objected to the pardon power on the ground that it might easily be abused and clear the way for a monarchy.249

In theory, the Federalists could have defended against such objections on the ground that personal command or the pardon power were essentially executive in nature.

246 Id. at 1391.
247 See 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 230, at 1115 (referring to the specific powers listed in Article II).
249 Id. at 1379.
They did not. Madison, for instance, contended that it would be improper to vest the pardon power in the House or Senate, “because numerous bodies were actuated more or less by passion, and might in a moment of vengeance forget humanity.” Looking back, he also turned not to Montesquieu but to the experience of Massachusetts, where the legislature’s exercise of the pardon power had resulted in inconsistent decisions. More generally, Edmund Randolph answered the Anti-Federalist attacks on the presidency by emphasizing the limited and divided nature of the powers conferred on the President in Article II:

What are his powers? To see the laws executed. Every Executive in America has that power. He is also to command the army – That power also is enjoyed by the Executives of the different States. He can handle no part of the public money except what is given him by law. . . . I cannot conceive how his powers can be called formidable. Both Houses are a check upon him. He can do no important act without the concurrence of the Senate.

By contrast, the essentialist arguments that the Virginia convention did produce were few and fleeting, especially with respect to foreign affairs. As noted, no one asserted that “foreign affairs” authority was “executive,” and no one claimed that the Article II Vesting Clause accorded the President general foreign affairs authority. In a handful of instances some Virginians did employ essentialist rhetoric when analyzing specific foreign affairs powers. Outside the Convention, “Cassius,” defended the Constitution by arguing that, “though the power of making treaties [has] been, always, considered a part of the executive,” the Senate provides an important check. “A Native of Virginia” likewise commented that the powers vested in Article II, sections 2 and 3, including the Commander in Chief Clause, “belong from the nature of them, to the Executive branch of government; and could be placed in no other hands with propriety.” Mason in passing referred to the President as “[t]his very executive officer,” en route to suggesting that he might receive pensions from European potentates. If there are other examples, they are difficult to find and all but eclipsed by the focus on powers and functions already recounted.

Only a few essentialist comments crop up even when the frame is expanded to encompass executive power in general. Arthur Lee, for example, complained to John Adams that the Constitution vested “legislative, executive & judicial Powers in the

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250 Id. at 1379-80.
251 Id. at 1380.
252 Id. at 1098.
254 Id. at 681.
“Republicus” from Kentucky appeared to make a Vesting Clause argument when stating that “supreme continental executive power” is granted to the President, but then went on to discuss only those powers that are specified. Mason at the convention asserted that the President and Senate were united as “man and wife,” and that “the Executive and Legislative powers thus connected, will destroy all balances.” Given the voluminous records, the paucity of essentialist language, let alone sustained argument, is striking.

A number of express denials of separation of powers essentialism, moreover, offset the rhetoric to the contrary. Two of these came from the prominent Federalist Edmund Pendleton. Writing to Madison, Pendleton declared that “[t]he President is indeed to be a great man, but it is only in shew to represent the Federal dignity & Power, having no latent Prerogatives, nor any Powers but such as are defined and given him by law.” To Richard Henry Lee he also wrote that the President’s “powers are defined, & not left to latent Prerogatives—they none of them appear too large,” with the possible exceptions of pardoning treason before conviction and giving force to treaties. A more complex and intriguing denial of essentialism came from Randolph in a rejoinder to Madison’s claim that the Necessary and Proper Clause would simply permit Congress to enact necessarily implied powers. Stating that Madison’s narrow construction would make the clause “superfluous,” he continued:

Let us take an example of a single department: For instance that of the President, who has certain things annexed to his office. Does it not reasonably follow, that he must have some incidental powers? The principle of incidental powers extends to all parts of the system. If you then say, that the President has incidental powers, you reduce [the Necessary and Proper Clause] to tautology.

Randolph’s discussion itself would have been superfluous if there had been a general understanding that the Vesting Clause accorded all executive authority unless otherwise specified. Of course, it might be argued that Randolph was referring to incidental powers that the President might have that were not executive in nature, whatever these might be. The more natural reading, however, is simply that Randolph looked to

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256 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 230, at 34. Joseph Jones made the same general point in a letter to Madison. See id. at 129.

257 Id. at 448.


259 Moreover, the mere use of essentialist rhetoric did not mean that agreement existed as to whether specific powers—such as appointment or removal of government officials—were essentially legislative, executive, or judicial. In fact, substantial disagreement and confusion about such particulars frequently characterized the era’s thinking. See Flaherty, The Most Dangerous Branch, supra note 103, at 1755-1810.

260 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 230, at 47.


262 Id. at 1348.
Article II’s specific grants of power as the starting point, and then assumed that the President would possess additional implied powers for the system to be workable even absent the Necessary and Proper Clause.

Randolph at one point went further and, if not asserting that foreign affairs power is essentially legislative, then at least suggesting that Congress should be the primary repository of foreign affairs authority. He began by noting that, under the Articles of Confederation, Congress “had nominally powers, powers on paper, which it could not use.” He recounted, for example, that “[t]he power of making peace and war is expressly delegated to Congress; yet the power of granting passports, though within that of making peace and war, was considered by Virginia as belonging to herself.” To strengthen the national government’s foreign affairs powers, Randolph explained, Congress’s powers had to be enhanced: “Without adequate powers vested in Congress,” he argued, “America cannot be respectable in the eyes of other nations. Congress, Sir, ought to be fully vested with the power to support the Union—protect the interest of the United States—,” including the authority “to defend them from external invasions and insults.”

If such an approach would have amounted to a revolution in settled understandings of foreign affairs power as executive, Randolph, no more than other Virginians, seems to have discerned it.

Pennsylvania. Virginia’s unparalleled foreign affairs discussion earns it pride of place, but the Constitution’s first significant test and resulting debates occurred in Pennsylvania. Unlike Delaware and New Jersey, the first two conventions to ratify, Pennsylvania boasted a substantial and vigorous Anti-Federalist opposition that ensured thorough consideration. With the exception of James Wilson, Pennsylvania’s delegates did not rival Virginia’s, but the leaders were able, including Thomas McKean among the Constitution’s defenders, and William Findley and John Smilie among the adversaries.

Unfortunately, poor and even politicized recording undermines the usefulness of the exchanges that resulted. With the significant exception of speeches by McKean and Wilson, the account of proceedings within the Convention are terse and only partially enhanced by outside articles and commentaries. Moreover, the scope of the President’s proposed powers under the Constitution was not a significant component of the debate in Pennsylvania. The debate focused instead on the lack of a bill of rights and on the scope of Congress’s and the Senate’s proposed powers.

Despite these limitations, the Pennsylvania debates serve to further undermine the Vesting Clause Thesis. In particular, when the President’s powers were discussed in Pennsylvania, both the Federalists and the Anti-Federalists appeared to assume that the President was being granted only the powers specified in Article II. Moreover, in

\[263\] 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 230, at 985.

\[264\] Id.

\[265\] Id. at 985-86.

\[266\] RAKOVE, supra note 44, at 116-18.
defending against the charge that the Constitution impermissibly mixed categories of power, the supporters of the Constitution commonly resorted to functionalist rather than essentialist explanations, further confirming that they were not thinking of the Constitution’s assignment of powers in the manner that is assumed by the Vesting Clause Thesis.

In a widely circulated defense of the proposed Constitution, published soon after the end of the Federal Convention, Tench Coxe anticipated that there would be objections to the scope of the President’s powers. In his first “American Citizen” essay, he carefully contrasted the proposed President with the British monarch, arguing that the President would be much less powerful. For example, he noted that the President “will have no authority to make a treaty without two-thirds of the Senate, nor can he appoint ambassadors or other great officers without their approbation . . . .” Coxe concluded by stating that, “[f]rom such a servant with powers so limited and transitory, there can be no danger.” This description, with its focus on limited and defined powers, at least implicitly suggests that the President was not being granted some general residuum of executive power.

The sort of objection anticipated by Coxe was not in fact pressed vigorously by opponents of the Constitution in Pennsylvania. It was mentioned, however, in the essay, “An Officer of the Late Continental Army,” apparently written by William Findley. In his fifteenth objection to the Constitution, Findley states: “The most important branches of the EXECUTIVE DEPARTMENT are to be put in the hands of a single magistrate, who will be in fact an ELECTIVE KING.” In response, a Federalist essay denied this charge, noting, among other things, that “the new Constitution provides that [the President] shall act ‘by and with the advice and consent of the senate’ (Article 2, Section 2), and can in no instance act alone, except in the cause of humanity by granting reprieves or pardons.” This response, like Coxe’s earlier remarks, seems to envision that the President is receiving only the powers specified in Article II, a number of which are shared with the Senate.

From then on in the Pennsylvania debates, the Anti-Federalist objections concerning the President’s powers, although sometimes framed in essentialist terms, were primarily that the President would be too weak, not that he would resemble a monarch. During the Pennsylvania convention, John Smilie contended that the Senate had “an alarming share of the executive” power. Similarly, he stated: “The balance of power is in the Senate. Their share in the executive department will corrupt the legislature, and detracts from the proper power of the President, and will make the President merely a tool

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268 Id. at 141.
269 Id. at 142.
270 Id. at 212.
271 Id. at 221.
272 Id. at 466.
to the Senate.” 273 And William Findley objected that, “Only a part of the executive power is vested in the President. The most influential part is in the Senate, and he only acts as primus inter pares of the Senate; only he has the sole right of nomination.” 274 As James Wilson subsequently observed in describing the Anti-Federalist position in Pennsylvania, “[t]he objection against the powers of the President is not that they are too many or too great, but to state it in the gentleman’s own language [referring to John Smilie’s comments], they are so trifling that the President is no more than the tool of the Senate.” 275

In responding to this criticism, defenders of the Constitution did not suggest that the President would have powers not specified in Article II, and they (unlike the critics) did not typically resort to essentialist labels. Rather, they defended the Constitution’s assignment of powers in functional terms. In defending the Senate’s role in the treaty process, for example, Thomas McKean stated: “Is it an objection that the President is bound to consult the Senate? This is contending for his monarchy. But he clearly is responsible to the people.” 276 Similarly, James Wilson argued that, even though treaties “are to have the force of laws,” it was proper to assign the treaty power to the Senate and President rather than to Congress because “sometimes secrecy may be necessary during negotiations” and because Congress would not be able to be in session during a “long series of negotiation.” 277 Wilson also famously defended the assignment of the declare war power to Congress on the ground that more numerous bodies would be slower to go to war than individuals. 278

The Federalists, in other words, acknowledged the President’s limited powers and defended the limitations on functional grounds. There are a couple of statements by Wilson that are a slight, but only slight, exception to this pattern. In denying that the President would be the tool of the Senate, Wilson observed that he could “see that [the President] may do a great many things independent of the Senate; and with respect to the executive powers of government in which the Senate participate, they can do nothing without him.” 279 The “great many things” referred to by Wilson presumably would have included the President’s powers as Commander in Chief, his role in receiving ambassadors, and his Take Care Clause responsibilities in executing federal law, and Wilson need not be read here as referring to unspecified powers. Wilson further stated that the President “holds the helm, and the vessel can proceed in neither one direction nor another, without his concurrence.” 280 The reference to the President’s “concurrence” presumably was a reference to the President’s veto power and the requirement of his agreement to treaties, not a reference to some residuum of unilateral presidential powers.

273 Id. at 508
274 Id. at 512.
275 Id. at 566.
276 Id. at 544.
277 Id. at 562.
278 See id. at 583.
279 Id. at 566.
280 Id.
Although Prakash and Ramsey do not consider the Pennsylvania debates in detail, they do quote comments by John Smilie and others complaining about the Senate’s role in the treaty process, an activity that the complainants described as “executive” in nature.\textsuperscript{281} Statements like these, argue Prakash and Ramsey, show that the participants in the Pennsylvania debates had a conception of executive power, something that Prakash and Ramsey assert “[i]n a roundabout way . . . confirms the conventional view that the President enjoyed a residual executive power over foreign affairs.”\textsuperscript{282}

That some of the participants in these debates referred to executive power in the abstract does not in fact show – in either a straightforward or roundabout way – that they believed that the Constitution was granting the President a residuum of unspecified foreign affairs powers. There is no evidence, for example, that the participants who made these statements believed that there were executive powers, let alone foreign affairs powers, that had not already been specified in the Constitution. Nor do these abstract references, by critics of the Constitution, demonstrate that there was a consensus about what was properly encompassed within the category of executive power. Moreover, as noted above, these references were in the context of complaints that the Constitution’s grants of power to the President were too limited, and that the President would be the tool of the Senate. Neither the complainants nor the defenders of the proposed Constitution suggested that the President would have powers not specified in Article II, even though such residual power might have alleviated the concerns about the weakness of the President.

\textbf{Massachusetts.} Although comprising an extensive set of materials, the Massachusetts ratification debates, like the Pennsylvania debates, were of relatively low quality, especially when compared with those of Virginia.\textsuperscript{283} Many of the state’s most able leaders were missing in action: John Adams was in Europe; Samuel Adams was still recovering from the loss of his son; John Hancock chose to straddle the fence until the eleventh hour.\textsuperscript{284} In addition, prominent in the debates were Anti-Federalists from the West who did not compare to the Southern gentry in regard to learned political analysis.\textsuperscript{285} Relatedly, the specter of Shays’ Rebellion still hung over the state, and led to a preoccupation with internal affairs. Furthermore, the delegates spent most of their time debating Article I and rushed through the rest of the Constitution.

Also as in Pennsylvania, the Massachusetts convention proceedings were poorly recorded. The scanty materials that result reveal a bit of everything. A number of delegates and outside writers did indulge in passing essentialist language. As in Virginia and Pennsylvania, however, no one asserted the Vesting Clause Thesis or asserted a

\begin{itemize}
  \item \textsuperscript{281} See Prakash & Ramsey, supra note 13, at 291.
  \item \textsuperscript{282} Id. at 290.
  \item \textsuperscript{283} The Massachusetts debates take up volumes 4-7 of The Documentary History of the Ratification of the Constitution (John P. Kaminski & Gaspare J. Saladino eds.) (1997-2001).
  \item \textsuperscript{284} See Rakove, supra note 44, at 119-20.
  \item \textsuperscript{285} Id. at 118-20.
\end{itemize}
general foreign affairs executive authority. Instead, the debates in Massachusetts tended to focus on specific grants of authority. A recurring theme in these debates was that all constitutional grants, including those to the President, were specific, limited, and enumerated. And at least a few writers once more turned the essentialist tables and asserted that if foreign affairs power was anything, it was legislative.

A number of participants in the Massachusetts debate appeared to assume that all the branches enjoyed only particular and limited grants of power. William Cushing, a leading Federalist, made the point most clearly in a lengthy draft of a speech that, in the end, he did not deliver. As he expressed it, “Tis a clear & simple Idea that the general govt is to have certain powers, as to general objects and interests, particularly set forth & described —: the powers of ye president & Senate are specified—the power of Congress are all named & related to such matters as must be committed to the general guardians of the Union.”

Lest it be thought that Cushing failed to give the speech for fear that his views were aberrant, Governor James Bowdoin stated during the convention debates that “the two capital departments of government, the legislative and executive” are those “in which the delegated power resides.” Bowdoin further made it clear that by “delegated power” he did not mean a general Vesting Clause grant in the name of the President. “The executive powers of the President,” the Governor declared, “are very similar to those of the several States, except in those points, which relate more particularly to the union; and respect ambassadours, publick ministers, and consuls.” In other words, Bowdoin acknowledged some variation in the bundles of powers that the several states assigned to their executives, and sounded the frequently expressed theme that the Federal Constitution’s own delegations were both specific and novel. In this Bowdoin echoed such writers outside the Convention as “Cornelieus,” who reviewed the specific grants of power in Articles I, II, and III, and stated that the President is “vested with the powers prescribed in the Constitution.”

Although Massachusetts did feature some essentialist rhetoric, such statements were few, in passing, and served more as labels than as justifications for the allocation of given powers. And, as elsewhere, what no one in Massachusetts appears to have thought to argue was that “executive power” encompassed the authority to regulate foreign affairs unless otherwise indicated. One of the few, if only, statements equating the executive with any aspect of foreign affairs came from Daniel Taylor, who remarked that “When the Senate act as legislators they are countroulable at all times by the [House of

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287 Id. at 1321 (emphasis added).
288 Id. at 1392.
Representatives; and in their executive capacity, in making treaties and conducting negotiations, the consent of two thirds is necessary.”  

Apart from this are merely general and conclusory statements such as John DeWitt’s point that, “The Legislative is divided between the People, who are the Democratic, and the Senate, who are the Aristocratical part, and the Executive between the same Senate and the President who represents the Monarchical branch.” Note here the melding of “newer” separation of powers rhetoric with older “mixed” government thinking, a melding that generally indicates flux and evolution rather than a static carryover of ideas.  

A further essentialist comment came from Bowdoin, who defended the Senate by noting that it resembled the upper house in most states in “having not only legislative, but executive powers.” One might be tempted to read this as a veiled reference to executive foreign affairs power insofar as the Senate shared a role in treatymaking. This passing reference cannot be what Bowdoin meant, however, given his longer comments focusing on particular powers, and given the simple fact that the upper houses in the states lacked the authority to make treaties even under the Articles of Confederation. Rather, he appears to have meant simply that the Senate, as he went on to explain, would act as “an advising body” to the President.

Conversely, a few commentators once again pointed to the other extreme to argue that foreign affairs authority most naturally belonged to the legislative branch. According to “Agrippa,” for example, “the intercourse between us and foreign nations, properly forms the department of Congress,” including not just the authority to regulate trade, but also “the right of war and peace.” These stray statements no more establish legislative foreign affairs essentialism than their counterparts prove the executive variety. That, however, is exactly our point.

New York. Although New York held its convention debates relatively late and was the eleventh state to ratify the Constitution, its debates were important for several reasons. New York City had been serving as the national capital, and the state was geographically central to the new nation. The state also had growing commercial importance, and was the source of the Federalist Papers. Its debates also featured prominent figures such as Alexander Hamilton and John Jay.

There was, however, little discussion of the presidency in the New York ratifying convention. By the time the convention had turned to Article II, the delegates became.

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290 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 283, at 1326.
292 Cf. Flaherty, supra note 259, at 1774-77.
293 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 283, at 1391.
294 Id.
aware that the Constitution had received its ninth ratification (by New Hampshire) and therefore was approved. The scope and nature of the subsequent discussions were likely affected by this news.

Much of the initial debates focused on the process provisions of Article I, such as the provisions relating to the apportionment of representatives and the frequency of congressional elections. There was also debate over whether the Senate would be too powerful. Gilbert Livingston complained, for example, that “too much is put in their hands” and that there was “little or no check” on the Senate.296 In addition, there was some debate over Congress’s Necessary and Proper power,297 and there was substantial discussion of Congress’s power to tax.298 But, as the records themselves state, there was “little or no debate” about Article II of the Constitution.299

Not surprisingly, therefore, the statements in the New York debates relating to foreign affairs primarily concerned the Senate. These statements suggest an understanding that the Senate would have substantial foreign relations power, perhaps equal to or greater than the President’s foreign relations power. For example, Robert Livingston, in defending the Constitution’s assignment of a long term of office for senators, observed that the Senate is “to form treaties with foreign nations,” and that this “requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate with.”300 Similarly, Alexander Hamilton, in arguing against a proposal that would give state legislatures the power to recall senators and limit the ability of senators to be reelected, stated that the Senate, “together with the President, are to manage all our concerns with foreign nations.”301 Robert Livingston went on to state, even more broadly, that the Senate is “to transact all foreign business.”302

These statements about the Senate are difficult to reconcile with the Vesting Clause Thesis, which hypothesizes that the President will manage foreign affairs by virtue of having the “executive Power.” Prakash and Ramsey’s only answer to these statements is to assert that the speakers were mistaken.303 It is noteworthy, however, that these statements went uncontested in the recorded debates. By contrast, when John Lansing suggested that the Senate also had the power to declare war,304 Robert Livingston quickly

297 Id. at 330-31.
298 See, e.g., id. at 332-33.
299 Id. at 406.
300 Id. at 291.
301 Id. at 306.
302 Id. at 323.
303 See Prakash & Ramsey, supra note 13, at 289 & nn.253-54.
304 Id. at 295.
corrected him, noting that “[t]he power could not be exercised except by the whole legislature.”

When the New York convention proceeded to have its limited discussion of Article II, Melancton Smith and Gilbert Sullivan made several unsuccessful motions to amend the Constitution to limit the power of the presidency. Smith moved to change the President’s term to a single term of seven years. Sullivan moved that the President “shall never command the army, militia, or navy of the United States, in person, without the consent of the Congress; and that he should not have the power to grant pardons for treason, without the consent of the Congress.” And Smith moved to have the convention express the view that Congress could appoint a council of advice to assist the President. Given their concerns about the presidency, it seems likely that Smith and Sullivan would have complained about unspecified presidential powers, if they had believed that such powers were encompassed by the Article II Vesting Clause. But neither they nor anyone else in the New York ratifying convention mentioned that possibility.

North Carolina. The views expressed in the North Carolina convention might be entitled to less weight due to the fact that the convention voted against the Constitution. Nevertheless, the statements made during the debates shed further light on how the supporters and opponents of the Constitution understood Article II. Almost all of the relevant comments in the North Carolina debates suggest that the President’s powers were specified in Article II. In addition, the proponents of the Constitution typically relied on functional rather than essentialist arguments to explain the Constitution’s assignment of powers. Although there are a few statements in the debates that suggest essentialist thinking with respect to the assignment of the treaty power, these statements are specific to that power and, in any event, were contested and contradictory.

The convention discussed the Constitution section by section. Early in the debate, in discussing the first section of Article I, William Lenoir objected to giving the President the treaty power because, in his view, that power is legislative in nature, and the Constitution says in Article I that the legislative power is being vested in Congress. Richard Spaight, Archibald Maclaine, and James Iredell denied that the power was legislative. In this regard, Maclaine argued that, unlike legislation, treaties act upon states

305 Id. at 296. Other comments in the debates appear to confirm the understanding that Congress would have power over war. For example, in arguing that there would be a sufficient number of representatives in Congress, John Jay noted that the critics of the apportionment provisions did not think a larger number of representatives was necessary for “the important powers of war and peace;” even though these powers “reach[] objects the most dear to the people; and every man is concerned in them.” Id. at 282-83. And both Hamilton and Jay argued that the new Congress would be less susceptible to corruption than the Continental Congress in making decisions concerning war and peace. See id. at 263, 284.

306 Id. at 407.

307 Id. at 408.

308 Id.

rather than individuals, such that the President acts “in his executive capacity” when making treaties. Iredell explained, somewhat differently, that there is nothing inherently objectionable about the President making law, since every exercise of power operates as the law of the land, and he gave the example of a pardon. Lenoir remained unpersuaded by these responses.

Prakash and Ramsey rely heavily on this exchange, but it is not clear that it helps them. First, Lenoir was relying on the statement in the Constitution that the legislative power was being assigned to Congress, not on some pre-constitutional baseline. Second, to the extent that the exchange shows essentialist thinking about what is legislative and what is executive, it does so only with respect to a power specifically listed in Article II, not some unspecified power or foreign affairs powers more generally. No one in this exchange said, for example, that foreign affairs powers must be vested with the executive. Third, even for the specified power that was discussed, the exchange demonstrates that there was substantial debate and uncertainty concerning the proper categorization.

When the convention reached Article II, and the first section of that Article was read, there apparently was silence. William Davie, a supporter of the Constitution, expressed “astonishment at the precipitancy with which we go through this business.” He thought it “highly improper to pass over in silence any part of the Constitution which has been loudly objected to.” Although the first section of Article II met his “entire approbation,” he knew that some people objected to having a separate Executive Branch and to the election provisions in this section. Importantly, Davie made no mention of any objection concerning the assignment of substantive power, suggesting that neither he nor the opponents of the Constitution viewed the Clause as conferring substantive power.

When the convention proceeded to discuss the second section of Article II, Iredell noted that “[i]t conveys very important powers, and ought not to be passed by.” This was the first time in the debate that any portion of Article II was referred to as conveying substantive power. Furthermore, Iredell’s statement suggests that this section was not viewed as merely illustrative of a more general grant of power in the Vesting Clause.

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310 See id. at 28.
311 Id.
312 See Prakash & Ramsey, supra note 13, at 292 n.262, 294-95.
313 Lenoir’s reading of the Article I vesting clause also contradicts Prakash and Ramsey’s textual argument about the distinction between the Article I and Article II vesting clauses. Lenoir appeared to read Article I’s clause as signifying that all legislative power had to be vested in Congress, a construction at odds with the “herein granted” language as construed by proponents of the Vesting Clause Thesis. See supra Part II.
314 Id. at 102.
315 Id.
316 Id. at 107.
Iredell then proceeded to defend the Commander in Chief power. He noted that “[i]n almost every country, the executive has the command of the military forces.” 317 He then argued that this is a proper assignment, based on functional reasons, such as the need for secrecy and dispatch. He further argued that the President’s power is properly guarded by Congress’s power to declare war. 318 Again, there is no hint of executive power essentialism.

Essentialism did creep in, however, in the convention’s discussion of the treaty power. Samuel Spencer, an opponent of the Constitution, objected to giving the Senate a role in the treaty process, because “by this clause they possess the chief of the executive power.” 319 Spencer thus obviously thought that the treaty power was something that should properly be vested with the Executive Branch, and his statement could be read as reflecting essentialist thinking with respect to this point. 320 In response, Davie agreed that the treaty power “has, in all countries and governments, been placed in the executive departments.” 321 This assignment, explained Davie, had been based on functional considerations: the need for “secrecy, design, and despatch, which is always necessary in negotiations between nations,” and the danger of “violence, animosity, and heat of parties, which too often infect numerous bodies.” 322 Davie further explained that the Constitution included the Senate in the treaty process as a compromise to take account of the interests of the small states. 323 In addition, Davie contended that Montesquieu had been misconstrued as arguing against any blending of powers; in fact, explained Davie, Montesquieu did not advocate “[a]n absolute and complete separation.” 324 Iredell further defended the inclusion of state interests, through the Senate, in the treaty process. 325

At most, this exchange shows that the treaty power was considered by the speakers to be an executive power, and that there was some debate over whether this was justified by essentialist reasoning or functional considerations. Interestingly, an earlier exchange in the convention (between Lenoir and others, recounted above) was based on the opposite claim that the treaty power was legislative rather than executive, showing the uncertain nature of these categories. In any event, Spencer’s essentialist objection, like North Carolina’s initial decision not to ratify the Constitution, did not prevail. Rather, the Constitution deviated from strict categorization even with respect to what Spencer referred

317 Id.
318 Id. at 107-08.
319 Id. at 116.
320 See Prakash & Ramsey, supra note 13, at 291 n.257.
321 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 309, at 119.
322 Id. at 119-20.
323 Id. at 120.
324 Id. at 121.
325 Id. at 125.
to as the “chief” of the executive power, which would seem to undercut the claim that the Vesting Clause incorporated some sort of well-understood package of executive power. 326

In the convention’s discussion of the impeachment check on the President, Iredell stated that the President “is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives.” 327 Prakash and Ramsay rely on this statement as implying a dominant role for the President in foreign relations. 328 On its face, however, this statement appears merely to be referring to the President’s expected role as a medium for communications with other nations. Moreover, Iredell made no effort to tie his statement to the Vesting Clause, and it could just as well have been based on implications from the President’s specified powers (such as the treaty power and the powers to appoint and receive ambassadors). This narrower construction would be consistent with a more general statement Iredell made later in the convention, that “[t]he powers of the government are particularly enumerated and defined: they can claim no others but such as are so enumerated.” 329

Near the end of the convention, there were some general speeches for and against the Constitution. In describing some of the objections to the Constitution, Lenoir complained about various presidential powers, including the pardon power, the appointment power, and the veto power. 330 He made no mention of unspecified presidential powers, although one would have expected Lenoir and other constitutional opponents to have objected to that idea if they thought it was encompassed within the Vesting Clause. Again, the silence is striking.

**South Carolina.** The debates in South Carolina similarly reflected the view that the President would have only the powers specified in Article II. For example, Charles Pinckney, in commenting on the proposed executive branch, noted that, “Though many objections had been made to this part of the system, he was always at a loss to account for them.” 331 He explained that there was “nothing dangerous in its powers,” something “easily discerned from reviewing them.” 332 Pinckney then proceeded to discuss only powers enumerated in Article II. Given the Constitution’s assignments of power, Pinckney explained, the only danger would come from a combination of the President and Senate

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326 It is not clear that Spencer’s objection prevailed even at the North Carolina convention. None of North Carolina’s proposed amendments, even the ones relating to the treaty power, addressed his objection concerning the Senate’s role in the treaty process. See *id.* at 244-46.

327 *Id.* at 127.


330 *Id.* at 204-05.

331 *Id.* at 258.

332 *Id.* (emphasis added).
acting together. These comments suggest that the Executive Branch was being granted only the powers enumerated in Article II.

In subsequent remarks, Pinckney explained that some people had argued for vesting the treaty power with Congress. But the need for secrecy and dispatch, he explained, weighed against vesting it there.\footnote{Id. at 264.} He also argued that, even though it may have been proper for the British king to have the treaty power, there were potential dangers with vesting the treaty power solely with the President.\footnote{Id. at 264-65.} His discussion of the proper placement of the treaty power is entirely functional rather than essentialist, and, like other participants in state ratification debates, Pinckney rejects the British model of executive power. At one point, Pinckney stated more generally that, for functional reasons, foreign relations authority is properly shared between the Senate and President.\footnote{Id. at 280-81. Prakash and Ramsey simply assert that Pinckney was mistaken on this point. See Prakash & Ramsey, supra note 13, at 289 n.253.}

Critics of the Constitution in South Carolina also of course rejected the British model. Rawlins Lowndes, for example, repeatedly asserted in the debates that the President’s powers would be too great – resembling a monarchy.\footnote{See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 309, at 266, 287, 311.} To the extent this objection was explained, or answered, the reference always was to powers enumerated in the Constitution, such as the treaty power.\footnote{In responding to Lowndes’ concern about vesting the treaty power with the President, John Pringle argued: “The making of treaties is justly a part of their prerogative: it properly belongs to the executive part of government, because [treaties] must be conducted with dispatch and secrecy not to be expected in larger assemblies.” Id. at 269. Prakash and Ramsey rely on the first part of this statement as confirming an understanding that the treaty power was executive in nature, see Prakash & Ramsey, supra note 13, at 293, but they ignore the fact that Pringle’s explanation is entirely functional rather than essentialist. It is telling that Prakash and Ramsey stop their quotation of Pringle right before the word “because” and simply summarize the functional language.}

Conclusions. The state ratification debates confirm the lack of Founding support for the Vesting Clause Thesis. In the thousands of pages of records of these debates, the argument that the Vesting Clause grants the President a general foreign affairs power simply does not appear. Rather, the arguments for and against executive authority consistently focus on the specific powers listed in Article II. Moreover, many statements in these debates expressly or impliedly assume that these specific powers are the only ones being granted to the President. Furthermore, the Constitution’s supporters repeatedly made clear that, in establishing the Executive, the Constitution had rejected the model offered by the British monarch. Instead of relying on essentialist categories, the supporters, and to a significant extent the Constitution’s opponents as well, emphasized the functional reasons for granting, withholding, or dividing discrete powers among the President, Senate, and Congress. Other than as rhetorical embellishment, essentialist assertions did little or no work in any of these debates.
V. The Washington Administration

A. The Senate’s Role in Treatymaking

We begin our discussion of the Washington Administration somewhat out of chronological order. The foreign affairs law development that we discuss here – a change in the Senate’s role in the treaty process – was not the earliest foreign affairs law development, but it was one of the most significant. It also provides a vivid illustration of discontinuity, since it is likely that the change in the Senate’s role was inconsistent with the Founders’ original understanding of the Constitution. Furthermore, it offers a cautionary lesson against too easily drawing inferences about the understanding of the Founders from post-ratification practices.\

In a nutshell, the Founders appeared to assume that the Senate’s power of “advice and consent” in the treaty process entailed not only a veto power but also some sort of role in the formulation and negotiation of treaties. Although the Washington Administration initially shared this understanding, the Administration soon deviated from it, often formulating and negotiating treaties without Senate input and simply presenting the treaties to the Senate for an affirmative or negative vote. This deviation from original understanding became common practice and remains the practice today.\1\

The text of the Article II treaty clause, in referring to both “advice” and “consent,” appears to contemplate more than just a veto role for the Senate, since such a role presumably would be encompassed by the word “consent.” Research concerning the historic meaning of the phrase “advice and consent” provides further support for this construction. As Howard Sklamberg has noted, the phrase had been used in English statutes to signify Parliament’s dominant role vis-à-vis the King in the legislative process. It also had been used in state constitutions to signify a formal advice role for the state legislatures, typically in situations in which the legislatures dominated the executive. Thus, as Sklamberg explains, “at the time of the Constitutional Convention, the term ‘advice and consent’ denoted a Parliament that exercised nearly plenary lawmaking power and state councils that played a substantial role in the exercise of power.”

338 Strangely, Prakash and Ramsey’s otherwise quite detailed account of the Washington Administration makes no mention of this development. Professor Powell does briefly refer to this development and simply notes that “[m]odern treatymaking practice thus originated in the Washington administration.” POWELL, supra note 15, at 133.

339 For detailed descriptions of this development, see Bestor, supra note 191; and Rakove, supra note 56; see also LEONARD W. Levy, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, ch.2 (1988).


341 Id. at 449.
executive power. This historical context suggests that the Constitution assigns the Senate some active function in treatymaking and does not limit it to the role of a ratifier.”

The records of the Federal Convention support this conclusion. Until late in the Convention, the proposed Constitution would have given the entire treaty power to the Senate. Thus, for example, the draft of the Constitution issued by the Committee of Detail on August 6 provided that “The Senate of the United States shall have power to make treaties” and made no mention of treaties in its list of the President’s powers. The Committee of Detail’s draft also would have given the Senate the sole power of appointing ambassadors and judges. Although Hamilton had proposed in his plan on June 18 that the “Governor” was “to have with the advice and approbation of the Senate the power of making all treaties,” his plan was not discussed. Furthermore, even his plan would have given the Senate “the power of advising and approving all Treaties,” thus extending the Senate’s role beyond mere approval.

When the proposed treaty clause was considered in late August, concerns were expressed about giving the treaty power exclusively to the Senate. By this point, it had been agreed at the Convention (in what has been called the “Great Compromise”) that the states would have equal representation in the Senate. Madison thus “observed that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.” Other delegates expressed the view that there should be a check against abuses of the treaty power. Gouverneur Morris proposed an amendment whereby treaties would not be binding on the United States until ratified by Congress. James Wilson expressed concern that, “without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port.” Along somewhat similar lines, George Mason, in commenting in an earlier discussion about senatorial powers, had observed that the Senate “could already

342 Id. at 450.
343 See 2 The Records of the Federal Convention, supra note 27, at 183, 185.
344 See id. at 183. As noted above in Part IVA, the Committee of Detail’s draft assigned these powers to the Senate even though the draft also stated that the “Executive Power of the United States shall be vested” in the President. See id. at 185. Thus, the Committee of Detail apparently did not understand the Vesting Clause as encompassing the powers of making treaties, appointing ambassadors, or appointing judges.
345 1 The Records of the Federal Convention, supra note 27, at 292.
346 Id.
347 2 The Records of the Federal Convention, supra note 27, at 392. As Arthur Bestor notes, in suggesting that the President should be an “agent” of the Senate, Madison may have had in mind the agency relationship that existed for treaties between the Continental Congress and the Secretary for Foreign Affairs, pursuant to which Congress exercised ultimate control over the treaty process. See Bestor, supra note 191, at 109.
348 Id.
349 Id. at 393.
sell the whole Country by means of Treaties.” Madison concluded the discussion by “hint[ing] for consideration, whether a distinction might not be made between different sorts of Treaties – Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms – and requiring the concurrence of the whole Legislature in other Treaties.”

In light of these objections, the treaty clause, along with certain other provisions, was eventually sent to what has come to be called the Committee of Postponed Parts. We do not have a record of the Committee’s deliberations. But in its report on September 4, the Committee proposed that the President “by and with the advice and Consent of the Senate, shall have power to make Treaties.” It also proposed that the President “by and with the advice and consent of the Senate” would have the power of appointing ambassadors and judges. Obviously, there had been a shift at this point towards sharing some of the Senate’s powers with the executive.

The modified treaty clause was considered on September 7. As noted, James Wilson at this point moved to include the House of Representatives in the treaty process, observing that “[a]s treaties . . . are to have the operation of laws, they ought to have the sanction of laws also.” Sherman responded that the “necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.” Wilson’s motion was subsequently defeated, and the first portion of the treaty clause (mentioning the role of the President and Senate) was approved. As Rakove has explained, it is difficult to understand the concerns of secrecy expressed in this discussion unless the Senate was envisioned as having a role beyond merely approving or disapproving finished treaties. Furthermore, as Arthur Bestor has argued, there probably would have been more concerns raised about assigning the treaty power to the President if it were believed that the Senate’s role were limited in this way.

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350 *Id.* at 297. At this point, John Mercer expressed the view that “the Senate ought not to have the power of treaties” because “[t]his power belonged to the Executive department.” 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 27, at 297. As others have noted, it is unlikely that Mercer’s views were representative of the views of the other delegates. *See* Bestor, *supra* note 191, at 103-06; Rakove, *supra* note 27, at 240 n.12. Moreover, Mercer also believed that treaties “would not be final so as to alter the laws of the land, till ratified by legislative authority,” a proposition expressly rejected by the Convention. *See supra* TAN 197.

351 *Id.* at 394.


353 *Id.*

354 As Rakove explains, this shift appears to have been driven by concerns about the Senate rather than an essentialist view about the powers of the executive. *See* Rakove, *supra* note 56, at 249.


356 *Id.*

357 *Id.*

358 *See* Rakove, *supra* note 56, at 246-47.

359 *See* Bestor, *supra* note 191, at 93. After approval of the first part of the treaty clause, there was discussion of the two-thirds senatorial consent requirement. Wilson and King objected to this requirement
The *Federalist Papers* that discuss the treaty power similarly suggest that the Senate’s role would be broader than voting on finished treaties. In *Federalist No. 64*, Jay emphasized the need for secrecy and dispatch in the negotiation of treaties and noted that “although 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.” 360 Jay went on to explain that the “preparatory and auxiliary measures” in treaty negotiations often require the most secrecy and that “should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them.” 361 These statements appear to assume that the President will be consulting with the Senate when negotiating treaties and not simply presenting the Senate with finished treaties that have already been negotiated.

In *Federalist No. 75*, Hamilton argued that the power of making treaties was neither wholly executive nor wholly legislative in nature and thus should be shared between the legislative and executive branches: “The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.” 362 In arguing against giving the treaty power to the Senate alone, he emphasized “the benefits of the constitutional agency of the President in the conduct of foreign negotiations” and the “additional security which would result from the cooperation of the Executive.” 363 In arguing against inclusion of the House of Representatives in the treaty process, Hamilton noted, among other things, the need for secrecy and dispatch and refers to problems associated with “obtain[ing] the House’s sanction in the progressive stages of a treaty.” 364 Hamilton’s statements seem to envision that the President will consult with the Senate in negotiating treaties. These statements can also be read to suggest that the President would act as the Senate’s agent in the treaty process, something that Madison had suggested at the Federal Convention.

The evidence from the state ratification conventions is less clear but on the whole is consistent with the foregoing discussion. There are statements in some of the conventions suggesting that the President would have a dominant role in the treaty process. There are

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360 *The Federalist Papers*, supra note 2, No. 64 (Jay), at 393.
361 Id.
362 *The Federalist Papers*, supra note 2, No. 75 (Hamilton), at 451.
363 Id. at 452.
364 Id. at 453 (emphasis added).
also statements, however, suggesting that the Senate’s role would not be limited to mere approval or disapproval of finished treaties. In the South Carolina convention, for example, although Charles Pinckney refers at one point to the Senate’s role in the treaty process as a “power of agreeing or disagreeing to the terms proposed,” he later explains that it is better to have the Senate rather than the House involved in the treaty process because it is functionally better suited for 

\textit{negotiation:}

Can secrecy be expected in sixty-five members [of the House of Representatives]? The idea is absurd. Besides, their sessions will probably last only two or three months in the year; therefore, on that account, they would be a very unfit body for negotiation whereas the Senate, from the smallness of its numbers, from the equality of power which each state has in it, from the length of time for which its members are elected, from the long sessions they may have without any great inconvenience to themselves or constituents, jointed with the president, who is the federal head of the United States, form together a body in whom can be best and most safely vested the diplomatic power of the United States.\textsuperscript{366}

James Wilson made similar statements at the Pennsylvania convention. While remarking that “[t]he Senate can make no treaties” and referring to Senators as “only auxiliaries to the President,” Wilson observed that “the Senate and President possess the power of making [treaties]” and defended the exclusion of the House of Representatives from the treaty process on the ground that “sometimes secrecy may be necessary, and therefore it becomes an argument against committing the knowledge of these transactions to too many persons.”\textsuperscript{368} Similarly, as noted above in Part IVC, Robert Livingston stated in the New York ratifying convention that the Senate is “to form treaties with foreign nations,” and that this “requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate with.”\textsuperscript{369}

In sum, although the precise role envisioned for the Senate in the treaty process is not entirely clear, the Founders appear to have understood that the Senate would have an advice role that went beyond a mere affirmative or negative vote. Initially, both the Washington Administration and the Senate shared this understanding. The first treaties received by the Senate for its consideration – two Indian treaties and a consular convention with France – had been negotiated before the Senate began operating and thus did not

\textsuperscript{365} 4 \textsc{THE DEBATES ON THE ADOPTION OF THE FEDERAL CONVENTION}, \textit{supra} note 309, at 265.

\textsuperscript{366} \textit{Id.} at 286-87.

\textsuperscript{367} 2 \textsc{THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION}, \textit{supra} note 267, at 480, 491.

\textsuperscript{368} \textit{Id.} at 562. Wilson also noted that the Senate and the President “are checks upon each other and are so balanced, as to produce security to the people.” \textit{Id.} at 563. \textit{See also supra TAN 277} (statement by Wilson preferring the Senate to the House in the treaty process because it is more suited to a “long series of negotiation”).

\textsuperscript{369} 2 \textsc{DEBATES IN THE SEVERAL STATE CONVENTIONS}, \textit{supra} note 296, at 291.
squarely present the issue of the Senate’s role in the negotiation process. 370 Nevertheless, in approving the consular convention, the Senate “explicitly gave advice as well as consent, imparting not only its own imprimatur but also an unequivocal suggestion as to how the President should exercise his authority to perform the distinct act of final ratification.” 371

On August 6, 1789, the Senate appointed a committee to confer with the President “on the mode of communication proper to be pursued between him and the Senate, in the formation of Treaties, and making appointments to Offices.” 372 Two days later, Washington conveyed his sentiments to the committee, stating that, “[i]n all matters respecting Treaties,” oral communications “seem indispensably necessary.” 373 In a subsequent meeting with the committee, Washington expressed the view that the Senate acts as the President’s council when considering treaties and that therefore the President should determine the time, place, and manner of the consultation. 374 He noted, for example, that “in Treaties of a complicated nature, it may happen that [the President] will send his propositions in writing and consult the Senate in person after time shall have been allowed for consideration.” 375 He therefore suggested that “the Senate should accommodate their rules to the uncertainty of the particular mode and place that may be preferred; providing for the reception of either oral [or] written propositions, and for giving their consent and advice in either the presence or absence of the President, leaving him free to use the mode and place that may be found most eligible and accordant with other business which may be before him at the time.” 376

In late August, the Senate considered the committee’s report of its discussions with the President. 377 After considering the report, the Senate passed a resolution governing the procedures to be followed when meeting with the President. 378 At this point, Washington delivered a message to the Senate announcing his intent of meeting with them “to advise with them on the terms of the Treaty to be negotiated with the Southern Indians.” 379 Washington and his Secretary of War Henry Knox came to the Senate chamber the following day and presented the Senate with a report and a list of seven questions

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370 See CURRIE, supra note 27, at 21-23.
371 Id. at 22.
374 Id. at 378.
375 Id.
376 Id. at 378-79.
377 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 372, at 29 n.54.
378 Id. at 29.
(concerning instructions to be given to the commissioners appointed to negotiate the treaty). 380

Senator Maclay notes in his diary that it was difficult to hear the presentation of the President’s report (which was delivered by Vice-President Adams), due to carriages driving past the Senate chamber. 381 At the request of Senator Robert Morris, the report was read a second time. Adams then immediately asked for the Senate’s advice and consent on the questions. After a pause, Maclay rose and stated that “[t]he business is new to the Senate, it is of importance, it is our duty to inform ourselves as well as possible on the Subject.” 382 As a result, he asked for a “reading of the Treaties and other documents alluded to in the paper now before Us.” 383 According to Maclay’s diary, Washington at this point “wore an aspect of Stern displeasure.” 384 Various documents were then read and discussed. The Senate ultimately decided to postpone a decision on all but one of the questions until the following Monday. Senator Morris also proposed that the papers communicated by the President be committed to a five-person committee that would report back to the full Senate. Senator Butler objected, noting that the Senate was “acting as a Council” and that “no Councils ever committed anything.” 385

Washington apparently was unhappy with the proposal to commit the matter to a committee. According to Maclay, Washington “started up in a Violent fret,” stating that “[t]his defeats every purpose of my coming here.” 386 Although Maclay reports that Washington subsequently calmed down and indicated that he did not object to reconvening on Monday, Maclay also states that Washington left the Senate chamber “with a discontented Air.” 387 In his memoirs, John Quincy Adams reports that he had heard that “when Washington left the Senate chamber he said he would be damned if he ever went there again.” 388 Maclay’s otherwise colorful diary does not report such a statement, however, and it may have been apocryphal. 389 The Senate met again with the President on Monday, at which point, according to Maclay, the President was “placid and Serene and manifested a Spirit of Accomodation.” 390 After discussion, the Senate proceeded to

380 Id. at 31-34; see also 30 Writings of Washington, supra note 373, at 385-390.
382 Id.
383 Id. at 128-29.
384 Id. at 129.
385 Id. at 130.
386 Id. at 130.
387 Id.
answer the President’s questions. The instructions that Washington subsequently gave to the treaty commissioners conformed to the Senate’s answers.

These early events suggest that both the Senate and the President understood that the Senate would consult with the President and give the President advice before treaties were finalized. As Professor Currie notes, both the Senate and President in the encounter over the Southern Indians treaty “plainly interpreted the power to advise and consent to include not merely approval of the finished product but also discussion in advance of the course of action to be pursued.” Other early examples confirm this understanding.

The Washington Administration, however, consciously moved away from this understanding. Washington’s two meetings with the Senate concerning the Southern Indians treaty were the first and last times he consulted with the Senate in person. To be sure, even after this episode Washington frequently sought the Senate’s advice on treaties through written communications. But he did not do so consistently. In connection with four Indian treaties, for example, Washington did not consult with the Senate before the treaties were negotiated. With respect to one of these treaties in 1793, Washington asked his cabinet whether he should consult with the Senate, and, for secrecy reasons, they advised him not to do so.

Perhaps most famously, the Washington Administration did not consult with the Senate before negotiating the 1794 Jay Treaty with Great Britain. The Administration informed the Senate in April 1794 that there would be negotiations when it sought Senate approval of Jay’s appointment, but it did not submit Jay’s treaty instructions to the Senate. There was a motion in the Senate to request that the Administration “inform the Senate of the whole business with which the proposed Envoy is to be charged,” but the motion was defeated. More than a year later, in June 1795, Washington submitted the

391 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 372, at 35; id. at 131-32.
392 See 1 AMERICAN STATE PAPERS, INDIAN AFFAIRS 65-68 (Gales & Seaton, 1832).
393 CURRIE, supra note 27, at 24.
394 See id. at 25.
396 See SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 68-70 (2d ed. 1916).
397 See HAYDEN, supra note 389, at 37-38.
398 See 32 THE WRITINGS OF GEORGE WASHINGTON 348-49 (John C. Fitzpatrick ed., 1939); HAYDEN, supra note 389, at 37-38.
399 See 33 THE WRITINGS OF GEORGE WASHINGTON 332-33 (John C. Fitzpatrick ed., 1940); HAYDEN, supra note 389, at 70-71.
400 See 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 151 (April 17, 1794) (Duff Green, 1828). There were, however, informal discussions between the Administration and Senate leaders concerning Jay’s instructions. See HAYDEN, supra note 389, at 73.
completed treaty to the Senate for its approval. The treaty generated substantial controversy in the United States, even after the Senate approved it and Washington signed it. After much debate, the House of Representatives demanded that Washington turn over to it copies of Jay’s negotiating instructions and other materials relating to the treaty, but Washington declined to do so.

By the end of the Washington Administration, it was clear that, despite the original understanding, the Senate had ceased to have a substantial advice role in the treaty process. Since then, presidents have consulted with the Senate prior to treaty negotiations only in isolated instances. The shift away from original understanding may well have been functionally sensible and, perhaps for this reason, the Senate did not actively resist it. This development provides a useful reminder, however, that one should not lightly assume that post-ratification practices and statements implemented some sort of Founding consensus. It also provides a vivid illustration of how, in the early years of this nation, important separation of powers issues were worked out at the operational level in the light of practical experience rather than by reference to essentialist categories.

B. The Removal Debate

Congress’s establishment of the executive departments in 1789 occasioned a sustained and important debate in the House of Representatives over the President’s power to remove executive officers. This debate is relevant to foreign affairs authority, both because it concerned the scope of executive power in general, and because it specifically concerned executive power to remove the Secretary of State. On May 19, 1789, Madison proposed that Congress establish three executive departments – a department of foreign affairs, a department of the treasury, and a department of war. He also proposed that the

401 See 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, supra note 400, at 178 (June 8, 1795).

402 See CURRIE, supra note 27, at 209-17; STANLEY ELKINS & ERIC McKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 415-49 (1993). In approving the Jay Treaty (by a bare two-thirds majority), the Senate conditioned its consent on suspension of the twelfth article of the treaty limiting trade between the United States and the British West Indies, a condition accepted by Washington and Great Britain. This was the first time that the Senate attached a reservation to its consent to a treaty, something that is today common practice. See Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. PA. L. REV. 399, 405-07 (2000).

403 See 5 ANNALS OF CONGRESS 759-60 (March 25, 1796).

404 See HAYDEN, supra note 389, at 104-05.

405 See CRANDALL, supra note 396, at 70-72.

406 For detailed accounts of this debate, see JAMES HART, THE AMERICAN PRESIDENCY IN ACTION 1789, at 155-89 (1948); THACH, supra note 106, at 140-65; and 1 CORWIN ON THE CONSTITUTION 317-71 (Richard Loss ed., 1981); see also CURRIE, supra note 27, at 36-41. This debate is also discussed in the majority and dissenting opinions in Myers v. United States, 272 U.S. 52 (1926). Strangely, Prakash and Ramsey make only passing reference to the debate. See Prakash & Ramsey, supra note 13, at 302.

heads of these departments should be “removable by the President.”\textsuperscript{408} There was substantial debate over the removal provision, after which a vote was taken and a “considerable majority” in the House (sitting as a Committee of the Whole) favored retaining the provision.\textsuperscript{409} The House revisited the issue on June 16, in considering the proposed bill for the Department of Foreign Affairs. At this point, Alexander White of Virginia moved to strike the presidential removal provision, and a week-long debate ensued over this issue.\textsuperscript{410} The House subsequently voted 34 to 20 not to strike the provision. A few days later, however, the provision was deleted in a complicated vote described below.

Both in the May 19 debate and in the debate in mid-June, a substantial number of House members argued that the heads of departments could constitutionally be removed only in the same way that they were appointed – that is, with the advice and consent of the Senate. Thedorick Bland of Virginia argued, for example, that “[t]he constitution declares, that the president and the senate shall appoint, and it naturally follows, that the power which appoints shall remove also.”\textsuperscript{411} Similarly, Alexander White of Virginia stated that “[t]he constitution had given the power of appointment to the senate, and most certainly it gave them the power to dismiss.”\textsuperscript{412} William Smith of South Carolina went further, arguing that the only constitutional basis for removing heads of departments was through the impeachment process.\textsuperscript{413}

In response to these arguments, some of the supporters of the removal provision – including eventually Madison – did invoke the Article II Vesting Clause. In the May 19 debate, John Vining of Delaware argued that “there was a strong presumption that [the President] was invested with [the removal power]; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified.”\textsuperscript{414} And George Clymer of Pennsylvania stated that “the power of removal was an executive power, and as such belonged to the president alone, by the express words of the constitution, ‘the executive power shall be vested in a president of the United States of America.’”\textsuperscript{415} At this point in the debate, Madison, in contrast, relied primarily on

\begin{footnotesize}
\begin{enumerate}
\item Id. at 727.
\item Id. at 410, 407.
\item 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 861.
\item See, e.g., 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 861.
\item 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 407, at 727.
\item 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 407, at 728.
\item Id. at 738.
\end{enumerate}
\end{footnotesize}
functional arguments. He noted, for example, that a requirement of senatorial advice and consent for removal “would be found very inconvenient in practice” and would “tend[] to lessen [the] responsibility” of the President over his subordinates.\footnote{Id. at 735.}

When the debate resumed in June, Madison added his voice to those invoking the Vesting Clause. On June 16, he noted that the Constitution states that the executive power shall be vested in the President and that, although it contains an exception for senatorial involvement in appointments, he did not think Congress had the right to “extend this exception.”\footnote{11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 868.} And, on June 17, Madison referred to the Vesting Clause and argued that the requirement of senatorial advice and consent for appointments was “an exception to this general principle; and exceptions to general rules are ever taken strictly.”\footnote{Id. at 896; see also id. at 922 (invoking the Vesting Clause).} Fisher Ames of Massachusetts also invoked the Vesting Clause in the June debate, noting that the Constitution declares “that the executive power shall be vested in the president” and that “[u]nder these terms all the powers properly belonging to the executive department of the government are given, and such only taken away as are expressly excepted.”\footnote{Id. at 979; see also id. at 960 (arguable reference to the Vesting Clause by Theodore Sedgwick of Massachusetts).}

Despite these invocations of the Vesting Clause, it is impossible to find in the removal debates any consensus in favor – or even majority support for – the Vesting Clause Thesis. This is so for a number of reasons. First, more than a dozen House members spoke on behalf of the removal provision in the May and June debates, and most of them did not invoke the Clause. Instead, they relied on specific textual grants, such as the Appointments Clause and the Take Care Clause, and on functional arguments. Indeed, Madison himself often relied on these alternative arguments, even after having invoked the Vesting Clause. Immediately after invoking the Vesting Clause on June 17, for example, Madison noted that “there is still another part of the constitution, which in my judgment, clearly favors the construction I give. The President is required, sir, to take care that the laws be faithfully executed.”\footnote{Id. at 896.}

Second, at least some of the proponents of the removal provision appear to have believed that the Constitution did not even address the power of removal, let alone assign this power to the President. These proponents supported the removal provision not because it followed from the Article II Vesting Clause, but rather because they thought it was a functionally desirable legislative measure. John Laurance of New York, for example, thought that the “constitution was silent with respect to the time the secretary of foreign affairs shall remain in office” and that the “only question” was “could the legislature safely trust the president with this power.”\footnote{10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 407, at 733; see also 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 908-09 (statement by John Laurance that the Constitution “is silent” on the issue of removal and that Congress can address this
York argued that “there was a power in the legislature of supplying the omission in the constitution.” And Fisher Ames, despite having invoked the Vesting Clause, expressed the view that the power of removal “not being distributed by the constitution, it will come before the legislature, and like every other omitted case, must be supplied by law.”

At times, Madison also suggested this view. He acknowledged that “[p]erhaps this is an omitted case” in the Constitution and he argued that “there was no impropriety in the legislature settling this question.” In a letter to Edmund Randolph, he noted that, “The Constitution has omitted to declare expressly by what authority removals from office are to be made. Out of this silence four constructive doctrines have arisen . . . .” Moreover, Madison confessed that his view regarding a presidential power of removal “does not perfectly correspond with the ideas I entertained of [the Constitution] from the first glance.” These statements suggest that Madison was not necessarily claiming that the constitutional Founders had resolved the removal issue in favor of the President. Indeed, Smith pointed out during the debate that Federalist No. 77 had stated that constitutional omission); id. at 911 (reference by Laurance to “declaring a legislative opinion in cases where the constitution is silent”).

11 Documentary History of the First Federal Congress, supra note 410, at 902.

Id. at 882. See also id. at 886 (argument by Thomas Hartley of Pennsylvania that if the Constitution was “silent” on the issue of removal, Congress had the power under the Necessary and Proper Clause to address it); id. at 873 (statement by Elias Boudinot of New Jersey referring to the removal provision as “a legislative construction of the constitution necessary to be settled for the direction of your officers”); id. at 939 (suggestion by Vining that Congress has the power to give the President the power of removal by virtue of the Necessary and Proper Clause); id. at 963 (suggestion by Richard Lee of Virginia to the same effect); id. at 983 (statement by Sedgwick that “the legislature were at liberty to determine that an officer should be removable by the president, or whom they pleased”).

Id. at 927.

Id. at 845.

Letter from James Madison to Edmund Randolph (June 21, 1789), in 12 The Papers of James Madison 251, 252 (Charles F. Hobson et al. eds., 1979). Madison also described Congress’s decision on this matter as a “legislative construction” of the Constitution, see id. at 987, and expressed the view that Congress’s resolution of this issue would become “the permanent exposition of the constitution.” Id. at 921. As Professor Caleb Nelson explains, Madison believed that the meaning of uncertain provisions of the Constitution could be “liquidated” or “fixed” by the post-Founding practices and interpretations of the federal branches. See Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. (forthcoming 2003); see also H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985).

11 Documentary History of the First Federal Congress, supra note 410, at 867; see also id. at 846; id. at 896; 10 Documentary History of the First Federal Congress, supra note 407, at 735 (stating that “[t]he constitution at the first view, may seem to favor” the requirement of senatorial advice and consent for removal).

At least this is true during much of the debate. At the end of the debate, in arguing for Benson’s motion (described below), Madison claimed: “Gentlemen have all along proceeded on the idea that the constitution vests the power in the president; and what arguments were brought forward respecting the convenience or inconvenience of such a disposition of the power, were intended only to throw light upon what was meant by the compilers of the constitution.” 11 Documentary History of the First Federal Congress, supra note 410, at 1029.
senatorial advice and consent would be required for removal, and neither Madison nor anyone else disagreed. This idea – that Congress was addressing something not resolved at the Founding – helps explain the frequent reliance by Madison and other proponents of the removal provision on functional rather than textual arguments. As Smith accurately observed, many supporters of the removal provision “have gone mostly on the point of expediency.”

Third, a number of the opponents of the removal provision directly contested the Vesting Clause Thesis. Alexander White, for example, argued that, although the executive power is vested in the President, “the executive powers so vested, are those enumerated in the constitution.” Similarly, Smith argued that the Vesting Clause argument “proves too much, and therefore proves nothing; because it implies that powers which are expressly given by this constitution would have been in the president without the express grant.” And James Jackson of Georgia argued that even if it could be proved that the power of removal was executive in nature, “it does not follow that it vests in the president alone” because “[the President] alone does not possess all executive powers.”

Fourth, the House members who invoked the Vesting Clause did so in a limited way. None of them suggested that the Article II Vesting Clause gave the President a package of unenumerated foreign affairs powers, even though the mid-June debate occurred in the context of discussing the proposed Department of Foreign Affairs. In

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429 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 861. Federalist No. 77, written by Hamilton, states that the consent of the Senate “would be necessary to displace as well as to appoint.” The FEDERALIST PAPERS, supra note 2, No. 77 (Alexander Hamilton), at 459.

430 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 985; see also id. at 849 (Smith notes that the supporters of the removal provision were “inconsistent with themselves,” with some arguing that the Constitution gave the President the power of removal and others arguing that Congress should give the President this power). Not surprisingly, Smith and other opponents of the removal provision denied that Congress had the power to fill in a constitutional omission in this way. See, e.g., id. at 850 (statement by Elbridge Gerry of Massachusetts that he “feared that the House were about making a breach in the constitution, by treating the subject as a mere question of expediency”); id. at 943 (statement by Smith that, “Some gentlemen have supposed that the constitution has made no provision for the removal of officers; and they have called it an omitted case, and a defect. They ask, if we may not supply that defect. I answer, No.”); id. at 901 (statement by Samuel Livermore of New Hampshire that, “An attempt to supply such a case might appear an attempt at an amendment to the constitution.”). They also argued that the removal provision was unnecessary if the Constitution in fact already gave the President the power of removal. See, e.g., id. at 986 (Smith).

431 Id. at 872; see also id. at 952-53 (statements by White contesting the Vesting Clause Thesis).

432 Id. at 937; see also id. at 843 (statement by Smith that “[i]f one reads the [Constitution] with attention, one would see that the powers of the different departments of the government were defined expressly”).

433 Id. at 912; see also id. at 1013-14 (statements by Michael Stone of Maryland contesting the Vesting Clause argument). White and Gerry also pointed out that a number of state constitutions had not given the governors the powers of appointment and removal, which shows, they argued, that these powers were not viewed as inherently executive in nature. See id. at 877, 878, 930.

434 Professor Powell relies on a reference to foreign affairs by Vining, see POWELL, supra note 15, at 39, but the reference is vague and does not claim that the Vesting Clause grants foreign affairs powers to the President. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 870.
fact, one of the opponents of the removal provision – Samuel Livermore of New Hampshire – stated that he did not think anyone would claim that the President had the implied power to terminate treaties, and no one did. Instead of seeing the Vesting Clause as conveying a package of foreign affairs powers, the House members who invoked the Clause may have simply believed that the Clause gave the President a general power to execute the laws, and that removal of subordinate executive officers was included within such a power. Fisher Ames, for example, closely tied his views regarding the vesting of executive power to the President’s responsibility for executing the laws, stating:

The constitution places all executive power in the hands of the president, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demands the aid of others. . . . He must therefore have assistants. But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.

This strong functional argument does not depend on the acceptance of unenumerated foreign affairs powers.

Madison also appears to have been invoking the Vesting Clause in this limited, “execution of the laws,” way. Unlike the typical formulation of the Vesting Clause Thesis, Madison made no distinction in his statements between the three Vesting Clauses, instead referring to the legislative, executive, and judicial Vesting Clauses as if they had similar effect. He stated, for example, that “[t]he legislative power was vested in a Congress consisting of the Senate and House of Representatives, and the executive in a President.” In addition, Madison made no reference to an executive power over foreign affairs, and the only textual exception Madison mentioned with respect to the Constitution’s vesting of executive power in the President is the requirement of senatorial advice and consent for appointments. Thus, to the extent that Madison viewed the Article II Vesting Clause as a grant of power, the power he appears to have had in mind was something like a power to execute the laws – not a package of substantive foreign affairs powers. This reading of his statements is consistent with the Helvidius essays he wrote several years later regarding the constitutionality of the 1793 Neutrality Proclamation (discussed below in Section D). In those essays, he distinguished the Proclamation from the President’s power of removal, arguing that “the powers of war and treaties” implicated by the Proclamation cannot be

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435 See id. at 884.
436 Id. at 880.
437 See id. at 896.
438 Id.
classified “within a grant of executive power.” No analogy, Madison argued, “can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties, and to declare war, such as these have been found to be in their nature, their operation, and their consequences.”

Finally, the ultimate vote on the removal provision was too complicated and uncertain to show even a consensus in favor of an Article II power of removal, let alone a consensus in favor of the Vesting Clause Thesis. On June 19, the question was called, and the vote was 34-19 to retain the removal provision. Three days later, however, Benson, who had voted for the removal provision, made two motions – first, to add a provision in the bill stating that the duties of the Secretary for Foreign Affairs would be assumed by his assistant “whenever the secretary shall be removed from office by the president of the United States”; and, second, to delete the removal provision that had occasioned so much debate. Benson explained that the removal provision might look too much like a grant of power from Congress, whereas his new proposed language “would evade that point, and establish a legislative construction of the constitution.” In two separate votes, Benson’s motions were approved. As Professor Currie explains, however, different House members voted for the two motions, making it impossible to infer majority support for an Article II power of removal:

The members first voted thirty to eighteen to add Benson’s “whenever” language. All those who voted in favor of presidential removal voted aye, whether they thought that Article II settled the question or left the matter to Congress. The House then voted thirty-one to nineteen to drop the phrase “to be removable by the President.” The numbers were virtually identical, but it was a different majority. For on this question the proponents of Article II power prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether.

A fortiori, one cannot infer majority support from this vote for the Vesting Clause Thesis, even in the limited form it was presented during the debates.

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439 15 PAPERS OF JAMES MADISON, supra note 2, at 72.
440 Id.
441 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 410, at 1024.
442 Id. at 1028. In support of Benson’s motions, Vining expressed the view that the substitution made it “more likely [that they would] obtain the acquiescence of the senate.” Id. at 1036.
443 CURRIE, supra note 27, at 40-41. See also Myers v. United States, 272 U.S. 52, 284-85 (1926) (Brandeis, J., dissenting) (noting this uncertainty in the votes); Calabresi & Prakash, supra note 32, at 645 (describing the “sea of conflicting congressional views”).
444 See also CORWIN, supra note 406, at 332 (noting that “a mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative”).
Although the bill for the Department of Foreign Affairs was then sent to the Senate, there is unfortunately no official record of the Senate discussions. It is clear from Senator Maclay’s diary that there was a debate in the Senate over the “whenever” clause that had been added pursuant to Benson’s motion, and that Maclay and certain other Senators spoke out against it. 445 We also know from the Senate Journal that the clause narrowly survived defeat, when there was a 10-9 vote on July 18 to retain it, with Vice-President Adams casting the tie-breaking vote. 446 Although it appears from Maclay’s diary and from Adams’ (very sketchy) notes that there was disagreement over the implications of the Vesting Clause – between Oliver Ellsworth and William Johnson, for example 447 – it is impossible to reconstruct the precise nature of the Senate’s discussion from the materials we have. As a result, the same ambiguities that exist with respect to the House vote exist with respect to the Senate vote. As Professor Currie notes, “It was the considered judgment of a majority in both Houses of Congress that the President could remove the Secretary of Foreign Affairs, but there was no consensus as to whether he got that authority from Congress or the Constitution itself.” 448

In sum, what we find in the first major debate in Congress over executive power is uncertainty and disagreement, not consensus. The idea that the Article II Vesting Clause conveys unenumerated power, far from being an understood feature of the recently-ratified Constitution, was instead simply one of many contested arguments in the debate, and not the dominant one. If any approach could fairly be said to claim preeminence in this debate, it was the focus on functional consequences that had been so evident earlier in the Federal Convention, the Federalist Papers, and the state ratification debates. Moreover, even those who invoked the Vesting Clause did so in the limited context of a presidential power to execute the laws and made no claim that the Vesting Clause conveys unenumerated foreign affairs powers.

C. Reception and Recall of Genet

Proponents of the Vesting Clause Thesis invoke the Washington Administration’s handling in 1793 of the controversial ambassador from revolutionary France, Edmond Genet, as support for the Thesis. On their view, only a general foreign affairs power understood as executive can explain the Administration’s dealings with this reckless emissary. In fact, the Administration’s actions with respect to Genet can all reasonably be tied to the President’s enumerated powers to receive ambassadors and to execute the laws.


446 See 1 Documentary History of the First Federal Congress 1789-1791, at 86 (Linda Grant De Pauw et al. eds., 1972). An earlier vote apparently had been taken on July 16, and it was 11-10, with the Vice-President breaking a tie. See 9 Documentary History of the First Federal Congress, supra note 381, at 115. “Two days later (July 18) those who were against the bill asked for the yeas and nays in the same form as originally voted, with the casting vote of the Vice President. Butler had been for striking out, but was now absent. So Ellsworth withdrew to preserve the tie.” Hart, supra note 406, at 188.


448 Currie, supra note 27, at 41.
Moreover, although the handling of Genet generated significant debates within the Administration and in the country, it is noteworthy that the Article II Vesting Clause was never invoked during these debates.

The Genet episode concerned, in part, two treaties between the United States and France concluded during the Revolutionary War. Among other things, these treaties required the United States to help protect French possessions in the Americas (such as the French West Indies), allowed French warships and privateers to bring prizes into U.S. ports, and disallowed the use by France’s enemies of U.S. ports for outfitting privateers and selling prizes. In 1789, the same year that the United States began operating under its new Constitution, a violent revolution was initiated in France. The monarchy was subsequently abolished in September 1792, and King Louis XVI was executed in January 1793. The French government was controlled by a National Convention, dominated until the spring of 1793 by the Girondins, and thereafter by the Jacobins. In conjunction with its abolition of the monarchy, France began declaring war on various countries. In April 1792, it declared war on Austria and soon found itself also at war with Prussia (which had earlier formed an alliance with Austria). In early 1793, France declared war on Great Britain and Holland, and then against Spain. The French-U.S. treaties raised the prospect that the United States might be drawn into the European war on the side of the French.

In November 1792, the National Convention appointed Genet to serve as the new French Minister to the United States. Genet set sail for the United States on the Embuscade in late February 1793 and arrived in Charleston, South Carolina, on April 8, 1793, where he was greeted by enthusiastic crowds. Soon thereafter, before he had even been officially received by the U.S. government, he began commissioning and arming privateers, manned largely by American sailors, to prey on British ships. He also began establishing French prize courts on U.S. soil to oversee the condemnation and sale of captured prize vessels, planning raids into Spanish-controlled Florida, and planning the “liberation” of Louisiana and Canada.

President Washington wanted to keep the United States out of the European war. As he explained in a letter to Gouverneur Morris, the U.S. Minister to France, “unwise should we be in the extreme to involve ourselves in the contests of European Nations, where our weight could be but small; tho’ the loss to ourselves would be certain.” Upon hearing of France’s declaration of war on Great Britain and Holland, Washington cut short his stay at Mount Vernon and returned to Philadelphia (then the national capital) to discuss the matter with his cabinet.

On April 18, Washington gave his four cabinet officers (Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox) a list of thirteen questions he

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450 32 WRITINGS OF GEORGE WASHINGTON, supra note 398, at 402.
wanted to discuss with them the following day. The questions included whether to issue a neutrality proclamation, whether to receive the new French minister, whether to renounce the 1778 treaties, and whether to call Congress into special session. That same day, Genet left Charleston by land en route to Philadelphia. Genet made frequent stops, such that the trip took almost a month.

In the meantime, Washington met with the cabinet on April 19. At that meeting, it was agreed unanimously that Congress should not be called into special session, that a neutrality proclamation should be issued, and that the minister from the Republic of France should be received. In letters to Madison and Monroe, Jefferson stated that he had initially opposed the issuance of the proclamation because he believed that, given the Constitution’s assignment of the power to declare war to Congress, the Executive Branch did not have the power to declare neutrality. In response to this concern, Jefferson said that it was agreed in the cabinet meeting that the word “neutrality” would not be used in the proclamation.

There was debate in the meeting, however, over whether to receive the French minister with or without qualifications. If he were received without qualifications, it might signify that the United States accepted the continuing effect of the 1778 treaties between the United States and France, notwithstanding the change in France’s government. A receipt with qualifications, by contrast, might allow the United States the option of suspending or renouncing the treaties. Hamilton and Knox thought the minister should be received with qualifications, whereas Jefferson and Randolph thought he should be received without qualifications. Washington asked his cabinet members to prepare written opinions on this issue. There is no indication that the constitutional powers of the Executive Branch were discussed at the April 19 meeting.

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452 See 32 WRITINGS OF GEORGE WASHINGTON, supra note 398, at 419-21.
453 Jefferson, apparently for good reason, believed that the thirteen questions had been formulated by Hamilton. See 25 THE PAPERS OF THOMAS JEFFERSON 569-70, 665-66 (John Catanzariti ed., 1992); see also DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 68 (1962) (stating that the questions “almost certainly” were drafted by Hamilton). It is clear that Hamilton had already been discussing similar questions with John Jay. See 14 PAPERS OF ALEXANDER HAMILTON, supra note 451, at 297-300 (letters from Hamilton to Jay). Indeed, at Hamilton’s request, Jay had drafted a sample neutrality proclamation prior to the April 18 meeting. See id. at 307-10; see also CHARLES M. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 43-45 (1931).
455 See 26 THE PAPERS OF THOMAS JEFFERSON 346 (John Catanzariti ed., 1995) (letter to Madison dated June 23, 1793); id. at 403 (letter to Madison dated June 29, 1793); id. at 501 (letter to Monroe dated July 14, 1793).
457 Even before the meeting, Washington had decided to receive Genet. See MALONE, supra note 453, at 69; 25 PAPERS OF THOMAS JEFFERSON, supra, at 469-70.
While the cabinet officials were preparing their written opinions, Randolph drafted the Neutrality Proclamation, which was issued on April 22, 1793. Copies of it were sent to the foreign ministers from France, Great Britain, and Holland. The Executive Branch’s power to issue this Proclamation became the subject of the Pacificus-Helvidius debate between Hamilton and Madison, discussed below in Section D.

Jefferson submitted his written opinion to the President on April 28. He argued that, under the law of nations, the 1778 treaties between the United States and France were still in effect, notwithstanding the intervening change in the French government. As he explained, “the treaties between the U.S. and France, were not treaties between the U.S. & Louis Capet, but between the two nations of America and France, and the nations remaining in existence, tho’ both of them have since changed their forms of government, the treaties are not annulled by these changes.” Jefferson also argued that compliance with the treaties would not unduly threaten U.S. neutrality. In addition, he argued that the reception of Genet was, in any event, a separate matter from the continuing effect of the treaties: “There is not a word, in either of them, about sending ministers. This has been done between us under the common usage of nations, & can have no effect either to continue or annul the treaties.” There is no discussion in Jefferson’s opinion of constitutional issues. Rather, the focus is on international law, with references to the leading international law commentators of the time, such as Vattel, Grotius, and Puffendorf—each of whom, it will be recalled, had little or nothing to say concerning how nations constituted those parts of their governments responsible for conducting foreign affairs.

Hamilton and Knox submitted their opinion on May 2. They argued that, in light of the substantial changes in the French government, the United States had a right to suspend the 1778 treaties and consider whether the changes in the government warranted a renunciation of the treaties. Like Jefferson’s opinion, the Hamilton/Knox opinion contains an extensive discussion of the law of nations, with references to Vattel, Grotius, and Puffendorf. Hamilton apparently gave Washington another opinion on May 2 concerning whether, under international law, the war in which France was engaged was offensive or defensive. There is no discussion of executive power in either opinion.

Randolph submitted his own opinion on May 6. In this opinion (which is quoted at length in the footnotes to the Hamilton/Knox opinion in the Hamilton papers), Randolph

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458 See 25 PAPERS OF THOMAS JEFFERSON, supra note 453, at 583-84.
459 See id. at 607-18.
460 Id. at 220.
461 Id. at 224.
462 See supra Part IIIA.
463 See 14 PAPERS OF ALEXANDER HAMILTON, supra note 451, at 367-96.
464 Id. at 372.
465 See id. at 398-408.
agreed with Jefferson that Genet should be received without qualifications.\footnote{See id. at 368 n.4, 374 n.12, 375-76 n.13, 388-89 n.22, 396 n.26.} Once again, there was no discussion of executive power.

Washington agreed with Jefferson and Randolph and decided, on May 6, to receive Genet without qualifications. Genet arrived in Philadelphia on May 16, and Washington met with him on May 18. Initially, Jefferson was very supportive of Genet, telling Madison that “he offers every thing, and asks nothing.”\footnote{26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 62 (letter from Jefferson to Madison dated May 19, 1793).}

Despite the Neutrality Proclamation, Genet continued with his privateering and other activities. This prompted vigorous complaints from the British Minister to the United States, George Hammond, starting with complaints in May about the capture of the British ship \textit{Grange} in U.S. waters.\footnote{See 25 PAPERS OF THOMAS JEFFERSON, supra note 453, at 637-38 (memorial from Hammond to Jefferson dated May 2, 1793); 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 38-40 (letter from Jefferson to Hammond dated May 15, 1793); see also id. at 31-35 (Randolph’s opinion concerning the capture of the \textit{Grange}, concluding that it “has been seized on neutral ground” and thus should be restored to the British).}

Genet’s activities were the subject of numerous cabinet meetings, and the Administration repeatedly, through Jefferson, asked Genet to cease his activities, to no avail.\footnote{Jefferson’s initial letters were addressed to the outgoing French minister, Jean Baptiste Ternant. See, e.g., 25 PAPERS OF THOMAS JEFFERSON, supra note 453, at 649 (letter from Jefferson to Ternant dated May 3, 1793); \textit{id.} at 676 (letter from Jefferson to Ternant dated May 6, 1793); 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 42-44 (letter from Jefferson to Ternant dated May 15, 1793).} At times, Genet suggested that if the Administration continued to thwart his activities, he would appeal to Congress and the American people. Not surprisingly, Washington became increasingly frustrated with Genet. For example, Washington wrote a letter to Jefferson on July 11, 1793, asking, “Is the Minister of the French Republic to set the Acts of this Government at defiance, with impunity? and then threaten the Executive with an appeal to the People?”\footnote{33 WRITINGS OF GEORGE WASHINGTON, supra note 399, at 4.}

Jefferson, despite his initial support for Genet, became disenchanted with him. For example, in a letter to Madison dated July 7, 1793, he stated: “Never in my opinion, was so calamitous an appointment made, as that of the present minister of F[rance] here. Hot headed, all imagination, no judgment, passionate, disrespectful and even indecent towards the P[resident] in his written as well as verbal communications, talking of appeals from him to Congress, from them to the people, urging the most unreasonable & groundless propositions, and in the most dictatorial style . . . .”\footnote{26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 444. For a lively account of Jefferson’s initial support for Genet and eventual disenchantment with him, see CONOR CRUISE O’BRIEN, THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION, 1785-1800, ch. 5 (1996).}

The Genet episode reached a boiling point in July, when word reached the cabinet that Genet’s ship, the \textit{Embuscade}, had captured a British merchant ship, \textit{Little Sarah}, and
had fitted her out in the port of Philadelphia as a privateer, under the new name *Petite Democrate*. Governor Thomas Mifflin of Pennsylvania reported that the ship now had fourteen guns and appeared ready to sail. Despite the Neutrality Proclamation, and despite requests by both Mifflin and Jefferson that the *Petite Democrate* stay in port, Genet allowed the ship to sail. He informed Jefferson that, “When treaties speak, the agents of nations have but to obey.”

As a result of these events, the cabinet began considering in July whether and how to have Genet recalled. In early August, it was decided that a letter would be sent to Gouverneur Morris detailing Genet’s conduct and asking Morris to lay this information before the French government and ask for Genet’s recall. Jefferson drafted the proposed letter to Morris, and, after revisions by the cabinet, the letter was sent on August 23. Morris delivered the recall request to the French government on October 8, and they made a decision to recall him three days later, on October 11. News of this decision did not reach Philadelphia, however, until January 1794.

Also in July, the Administration sent 29 questions to the Justices of the Supreme Court concerning, among other things, the meaning of the 1778 treaties with France. Jefferson’s letter to the Justices explained that the war in Europe had generated questions “of considerable difficulty, and of greater importance to the peace of the US,” and that “their decision is so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment and difficulty to them.” Washington’s cabinet also agreed to inform the British and French ministers that “the Executive of the US., desirous of having done what shall be strictly conformable to the treaties of the US. and the laws respecting the said cases has determined to refer the questions arising therein to persons learned in the laws.” A letter to this effect was sent to Genet and Hammond. The Supreme Court subsequently declined to answer the questions, on the ground that the

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472 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 163 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) (letter from Genet to Jefferson dated July 9, 1793).

473 See 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 553-55, 601-03.

474 See id. at 598; see also id. at 606 (letter to Madison dated August 3, 1793, stating that “We have decided unanimously to require the recall of Genet.”). The cabinet also considered again whether to call Congress into early session. Jefferson was the only cabinet member who favored doing so, and Washington decided not to take this action. See 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 608 (meeting on August 3); id. at 615 (Jefferson’s opinion suggesting that Congress be called). Washington eventually did agree with Jefferson that Congress should be called into special session, but he allowed himself to be voted down by Hamilton, Knox, and Randoloph. See JAMES THOMAS FLEXNER, GEORGE WASHINGTON: ANGUISH AND FAREWELL, 1793-1799, at 85 (1975).

475 See 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 745, 747-50.

476 See HARRY AMMON, THE GENET MISSION 155-56 (1973); ELKINS & McKITRICK, supra note 402, at 369.

477 See 33 WRITINGS OF WASHINGTON, supra note 399, at 15-19.

478 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 520.

479 Id. at 484.

480 See id. at 487.
As a result, the cabinet formulated its own rules of neutrality, addressing, among other things, the arming and equipping of foreign vessels in U.S. ports.

As he became increasingly frustrated with the Administration’s neutrality policy, Genet began to raise the issue of executive power in his correspondence and discussions with Jefferson. For example, in a letter dated June 8, Genet objected that “every obstruction by the Government of the United States, to the arming of French vessels, must be an attempt on the rights of man, upon which repose the independence and laws of the United States” and was contrary to “the intention of the people of America.” Similarly, Jefferson describes in his diary a conversation he had with Genet in July about the respective powers of Congress and the President. In response to a suggestion by Genet that U.S. policy towards France should be decided by Congress rather than by the President, Jefferson “explained our constitution to him, as having divided the functions of government among three different authorities, the Executive, Legislative, and Judiciary, each of which were supreme in all questions belonging to their departments and independent of the others: that all the questions which had arisen between him and us, belonged to the Executive department, and if Congress were sitting could not be carried to them, nor would they take notice of them.” Jefferson further explained that Congress was “sovereign in making laws only, the Executive was sovereign in executing them, and the Judiciary in construing them where they related to their department.” When Genet asserted that Congress should at least decide the proper interpretation of the 1778 treaties, Jefferson “told him No, there were very few cases indeed arising out of treaties which they could take notice of; that the President is to see that treaties are observed” and that “the constitution had made the President the last appeal.”

Genet continued along these lines in a vitriolic letter dated June 22, complaining that the Washington Administration had acted without waiting for Congress, and asserting

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482 See 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 608-09. The rules adopted by the cabinet were largely embodied, in the spring of the following year, in the Neutrality Act of 1794.

483 Genet also was frustrated by the Administration’s decision not to accede to his request to pay off the entire U.S. debt to France. See, e.g., 26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 252 (letter from Jefferson to Genet dated June 11, 1793).

484 1 AMERICAN STATE PAPERS, supra note 472, at 151.

485 See 26 PAPERS OF JEFFERSON, supra note 455, at 463-67.

486 Id. at 465.

487 Id.

488 Id.
that the Administration’s actions were contrary to the will of the American people.\footnote{See 1 AMERICAN STATE PAPERS, supra note 472, at 155. Hamilton later referred to Genet’s June 22 letter as “the most offensive paper, perhaps, that ever was offered by a foreign Minister to a friendly power, with which he resided.” 15 PAPERS OF ALEXANDER HAMILTON, supra note 5, at 75.} Jefferson drafted a response, which he showed to Washington but never sent to Genet:

> When you shall have had time to become better acquainted with the constitution of the US. you will become sensible that this question can only arise between him and the legislature: that the Executive is the sole organ of our communications with foreign governments; that the Agents of those governments are not authorized to judge what cases are to be decided by this or that department; but to consider the declarations of the President conclusive as to them, and sufficient evidence that the proper department has pronounced on the case.\footnote{26 PAPERS OF THOMAS JEFFERSON, supra note 455, at 513 (unsent letter from Jefferson to Genet dated July 16, 1793); see also 27 THE PAPERS OF THOMAS JEFFERSON 378-79 (John Catanzariti ed., 1997) (unsent letter from Jefferson to Genet in November 1793) (explaining that the Constitution assigns the power of corresponding with foreign nations to the executive, not to the states).}

Genet apparently did not accept Jefferson’s views about executive power. In mid-September, for example, upon receiving a copy of the letter that had been sent to Morris, Genet sent Jefferson an angry letter asserting, among other things, that “the Executive power is the only one which has been confided to the President of the United States” and that the President does not have “the power to bend existing treaties to circumstances, and to change their sense.”\footnote{1 AMERICAN STATE PAPERS, supra note 472, at 172.} In December, Genet asked the Administration to present to Congress a translation of his instructions and other papers. Jefferson replied that “the communications, which are to pass between the Executive and Legislative branches, cannot be a subject for your interference, and that the President must be left to judge for himself what matters his duty or the public good may require him to propose to the deliberations of Congress.”\footnote{27 PAPERS OF THOMAS JEFFERSON, supra note 490, at 649 (letter from Jefferson to Genet dated December 31, 1793). As Harry Ammon explains, neither the National Convention nor Genet fully understood the role of the President in the U.S. constitutional system. See AMMON, supra note 476, at 25-26, 129.}

One specific issue that came up concerning executive power was the proper organ of government for approving and revoking the commissions of foreign consuls. In a letter on October 2, Jefferson informed Genet that, “by our constitution, all foreign agents are to be addressed to the President of the US. no other branch of the government being charged with the foreign communications.”\footnote{27 PAPERS OF THOMAS JEFFERSON, supra note 490, at 176.} Genet responded on November 14 that the French government “will adopt the alterations of which this matter appears susceptible, agreeably to the text, spirit, and basis, of your constitution” and that, in his view, the Constitution appeared to give the President only the ministerial duty “to verify purely and simply the
powers of foreign agents accredited to their masters."\textsuperscript{494} Jefferson responded in a letter dated November 22 that he was “not authorized to enter into any discussions with you on the meaning of our constitution in any part of it, or to prove to you that it has ascribed to him alone the admission or interdiction of foreign agents. I inform you of the fact by authority from the President.”\textsuperscript{495} Genet then sent Jefferson a letter on December 3 questioning the requirement that consular commissions be addressed to the President and arguing that the U.S. government did not have a right to revoke consular commissions.\textsuperscript{496} This letter was considered by the cabinet on December 7, where it was agreed that consular commissions could be addressed “either to the United States or to the President of the United States, but that one of these should be insisted on.”\textsuperscript{497} Jefferson subsequently wrote Genet arguing that governments have the right to determine whether to accept particular consular officials and whether to permit them to continue exercising consular functions.\textsuperscript{498} Jefferson also stated: “By what member of the government the right of giving or withdrawing permission, is to be exercised here, is a question on which no foreign Agent can be permitted to make himself the Umpire. It is sufficient for him, under our government that he is informed of it by the Executive.”\textsuperscript{499}

On at least a couple of occasions, Jefferson had to point out that the President lacked power over a particular matter. Thus, in a letter dated June 1, 1793, Jefferson informed Genet that Gideon Henfield, who was charged with violating U.S. neutrality, “appears to be in the custody of the civil magistrate, over whose proceedings the Executive has no controll.”\textsuperscript{500} Similarly, in a letter dated June 17, 1793, Jefferson explained that the President could not interfere with judicial decisions exercising jurisdiction over certain vessels and cargoes taken by a French vessel as prizes. Jefferson stated that, “The functions of the Executive are not competent to the decision of Questions of property between Individuals.”\textsuperscript{501} And, in responding to complaints by Genet of threats to French consuls and other concerns, Jefferson informed him that most of his complaints, “being beyond the powers of the Executive, they can only manifest their dispositions by acting on those which are within their powers.”\textsuperscript{502}

\textsuperscript{494} 1 American State Papers, supra note 472, at 184.
\textsuperscript{495} 27 Papers of Thomas Jefferson, supra note 490, at 414.
\textsuperscript{496} Id. at 481-82.
\textsuperscript{497} Id. at 489.
\textsuperscript{498} Id. at 500-01 (letter from Jefferson to Genet dated December 9, 1793).
\textsuperscript{499} Id.
\textsuperscript{500} 26 Papers of Thomas Jefferson, supra note 455, at 160.
\textsuperscript{501} Id. at 301.
\textsuperscript{502} 27 Papers of Thomas Jefferson, supra note 490, at 458. See also id. at 67-68 (letter from Jefferson to Genet dated September 9, 1793) (“The Courts of Justice exercise the sovereignty of this country in judiciary matters, are supreme in these, and liable neither to controul nor opposition from any other branch of the Government.”).
In November 1793, while awaiting word back from France concerning Genet’s recall, the Administration considered dismissing Genet on its own authority. This proposal was opposed by Jefferson and was never implemented. Nor was there any discussion of the source of the President’s authority, if any, to dismiss a foreign ambassador.

On December 5, 1793, Washington presented Congress with a report concerning Genet’s conduct, attaching much of the correspondence and other papers relating to what had occurred since Genet’s arrival. Washington stated the following at the outset of the report: “As the present situation of the several nations of Europe, and especially those with which the United States have important relations, cannot but render the state of things between them and us a matter of interesting inquiry to the Legislature, and may indeed give rise to deliberations to which they alone are competent, I have thought it my duty to communicate to them certain correspondences which have taken place.”

Genet continued to engage in problematic conduct to the very end. For example, on December 16, he wrote to Randolph demanding that Chief Justice Jay and Senator Rufus King be prosecuted for libel, based on their published allegation that he had threatened to appeal to the people of the United States to override the actions of the President. In mid-January 1794, news of Genet’s recall by France reached Philadelphia. On January 20, Washington informed Congress that Genet’s conduct had “been unequivocally disapproved” by the French government and that the French Government had given “the strongest assurances that [Genet’s] recall should be expedited without delay.” Genet’s successor, Jean Fauchet, arrived in the United States on February 20. Genet did not wish to return to France (where he might have been executed by the now-Jacobin controlled government), and Washington decided to grant him political asylum in the United States. Genet settled down as a gentleman farmer in New York and married Governor Clinton’s daughter.

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While there is nothing in the Genet episode that contradicts the Vesting Clause Thesis, there is also nothing there that provides substantial support for it. First, the assumptions and assertions concerning executive power during this episode were all made by Executive Branch officials, at a time when Congress was out of session and the Administration was understandably trying to prevent Genet’s conduct from drawing the United States into war. There is no reason to believe that these officials were objectively

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503 See 27 PAPERS OF THOMAS JEFFERSON, supra note 490, at 399-401.
504 See 1 AMERICAN STATE PAPERS, supra note 472, at 141-243.
505 Id. at 141; see also 3 ANNALS OF CONGRESS 136-37.
507 33 WRITINGS OF WASHINGTON, supra note 399, at 245-46.
trying to apply Founding intent. Second, although the scope of executive power came up in the discussions between Genet and Jefferson, there was almost no internal discussion by Washington’s cabinet of this topic, so it is difficult to draw inferences from this episode about the constitutional theory underlying the Administration’s actions. Third, the Administration’s effort to obtain answers from the Supreme Court on the treaty questions, and its presentation of the Genet materials to Congress once Congress was in session, undermine the strong executive control story presented by Prakash and Ramsey. Fourth, notwithstanding Jefferson’s broad statements about the executive in his discussions with Genet, there is no documented reference in any of the correspondence or cabinet meetings relating to the Genet episode that refers to the Vesting Clause. Finally, and perhaps most importantly, all of the Executive Branch actions during this episode could reasonably have been based on specific constitutional provisions rather than on the Vesting Clause. Thus, the assumption that the Executive Branch could decide whether and how to receive Genet, and then could decide to ask for his recall, could reasonably have been based on the President’s power to “receive Ambassadors and other Public Ministers.” And the Administration’s belief that it had the power in the absence of a judicial decision to interpret the 1778 treaties could reasonably have been based on the President’s power to “take Care that the Laws be faithfully executed.”

Prakash and Ramsey argue, however, that the Ambassador Receipt Clause cannot explain the Washington Administration’s practice of issuing and revoking “exequatures” to consuls, i.e., the formal permission to set up consular functions. Consuls are mentioned in the Ambassador Appointment Clause and in the Article III jurisdictional provisions, but not in the Ambassador Receipt Clause. At best, this appears to be a minor point. If one accepts the proposition that the Ambassador Receipt Clause includes a power to determine which foreign diplomats to receive (which is at least plausible), then the exequatur practice was at most a modest extension of that power to a class of diplomats not specifically included within the Clause. In other words, Prakash and Ramsey have at most identified a

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508 See also Flexner, supra note 474, at 26 (“Washington undoubtedly would have consulted the Senate in the [neutrality] crisis had Congress been in session.”).

509 U.S. Const. art. II, § 3. Courts have long construed the Ambassador Receipt Clause as giving the President the power to determine whether to accredit foreign diplomats. See, e.g., United States v. Ortega, 27 F. Cas. 359, 361 (E.D. Pa. Cir. 1825) (“The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received . . .”). Courts also have relied on the Ambassador Receipt Clause as support for a presidential power to determine whether the United States should recognize particular foreign governments. See, e.g., Matimak Trading Co. v. Khalily, 118 F.3d 76, 79 (2d Cir. 1997) (“Because the Constitution empowers only the President to ‘receive Ambassadors and other public Ministers,’ the courts have deferred to the executive branch when determining what entities shall be considered foreign states.”). However, although not noted by Prakash and Ramsey, Hamilton in Federalist No. 69 suggested a narrow reading of the Ambassador Receipt Clause, stating that the President’s power to receive ambassadors “is more a matter of dignity than of authority” and would be “a circumstance which will be without consequence in the administration of the government.” The Federalist Papers, supra note 2, No. 69 (Hamilton), at 420.

510 U.S. Const. art. II, § 3.

511 See Prakash & Ramsey, supra note 13, at 316.
minor example of where the Administration’s practice may have strained the constitutional text, not any confirmation or acceptance of the Vesting Clause Thesis.

In any event, it is possible that the Founders intended the Ambassador Receipt Clause to encompass consuls but inadvertently left out an express reference to those officials. This conclusion is supported by Federalist No. 42. There, Madison explains that, although the Articles of Confederation gave the national government “the sole and exclusive right and power of . . . sending and receiving ambassadors,” the Constitution improves upon the Articles by adding “a power of appointing and receiving ‘other public ministers and consuls.’”512 Thus, Madison seemed to believe that the Ambassador Receipt Clause, unlike the equivalent clause in the Articles of Confederation, encompassed consuls. He went on to explain that, “The term ambassador, if taken strictly, as seems to be required by the Second of the Articles of Confederation, comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer, where foreign embassies may be necessary. And under no latitude of construction will the term comprehend consuls.”513 Importantly, Madison also noted that, despite this textual problem, “it has been found expedient, and has been the practice of Congress, to employ the inferior grades of public ministers and to send and receive consuls.”514 Thus, the Washington Administration’s practice, even if not encompassed by the Ambassador Receipt Clause, was a less dramatic extension of this Clause than what had already occurred under the Articles of Confederation, likewise on grounds of expediency.

On the other hand, although Prakash and Ramsey do not examine the Founding history on this point, a close reading of the Federal Convention proceedings suggests that the omission of consuls from the Ambassador Receipt Clause might have been intentional. The Committee of Detail’s draft of the Constitution assigned the power to appoint ambassadors to the Senate and the power to receive ambassadors to the President.515 Neither of these clauses mentioned other public ministers or consuls, although those diplomats were mentioned in the federal court jurisdiction provision.516 On August 23, 1787, the Ambassador Appointment Clause was modified to include a reference to “other public Ministers.”517 On August 25, the same change was made to the Ambassador Receipt Clause.518 On September 7, the Ambassador Appointment Clause was further modified to include a reference to consuls.519 Somewhere along the way, a similar

512 THE FEDERALIST PAPERS, supra note 2, No. 42 (Madison), at 264.
513 Id. at 264-65. Article 2 of the Articles of Confederation provided: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”
514 THE FEDERALIST PAPERS, supra note 2, No. 42 (Madison), at 265.
515 See 2 THE RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 183, 185.
516 See id. at 186.
517 See id. at 394.
518 See id. at 411, 419.
519 See id. at 533, 539.
modification must have been made to the Ambassador Receipt Clause, because both clauses contained a reference to consuls in the draft sent to the Committee of Style.\footnote{See id. at 574, 575.} The draft reported out of the Committee, however, did not contain a reference to consuls in the Ambassador Receipt Clause, although consuls were still referenced in the Ambassador Appointment Clause (and in the federal court jurisdiction provision).\footnote{See id. at 599-600.}

The Committee of Style’s deletion of the reference to consuls in the Ambassador Receipt Clause, but not in the Ambassador Appointments Clause, makes it harder to argue that the lack of a reference to consuls in that Clause was accidental. That said, it is not clear why the deletion was made. The disparity between the two clauses could still have been inadvertent, especially since the Committee of Style was not charged with making substantive changes. Alternatively, the Framers may have wanted to give the President the power to appoint all U.S. representatives abroad, but may not have wanted to burden him with the duty of receiving low-level foreign diplomats. Of course, if that was the reason for the deletion, the Framers would not necessarily have wanted to deny to the President the power over exequatur, so Washington’s practice still might have been consistent with the thrust of the Founding intent. The key point, however, is that the Administration’s practice concerning consuls was at most a minor deviation from the constitutional text, and one that was never linked to the Vesting Clause.

\textit{D. The Pacificus-Helvidius Debate}

In contrast to the Genet affair, the Neutrality Proclamation did famously produce what in many ways was the first sustained articulation of the Vesting Clause Thesis, from no less than the pen of Alexander Hamilton. In late June 1793, Hamilton began publishing newspaper essays, under the pseudonym “Pacificus,” to defend the Proclamation against Republican criticisms. He ultimately wrote seven Pacificus essays, but only the first one focuses on the constitutionality of the Proclamation.\footnote{The other essays address the validity of the Proclamation under international law and the Proclamation’s policy implications.} In late August and early September, James Madison published five essays, under the pseudonym “Helvidius,” responding to Hamilton’s constitutional arguments.

Proponents of the Vesting Clause Thesis sometimes describe Hamilton’s constitutional defense of the Proclamation as if it rested entirely on the Vesting Clause Thesis.\footnote{See Prakash & Ramsey, \textit{supra} note 13, at 329-30.} Prakash and Ramsey emphasize, for example, that “the leading contemporaneous defense of Washington’s Proclamation, that of Hamilton as Pacificus, directly identified Article II, Section 1 as its constitutional basis.”\footnote{Id. at 330.} Indeed, Prakash and Ramsey go so far as to suggest that the Vesting Clause Thesis was the only possible constitutional argument that could have been made in support of the Proclamation and that
“the only alternative explanation is that Washington simply seized powers not granted to him by the Constitution.” In fact, although Hamilton does invoke the Vesting Clause Thesis, he begins and ends his constitutional analysis by relying on specific textual grants of power rather than on the Vesting Clause. Furthermore, Hamilton expressly notes that resort to the Vesting Clause may not have been necessary in order for the Proclamation to be constitutionally valid.

Hamilton begins his analysis by noting that, “It will not be disputed that the management of the affairs of this country with foreign nations is confided to the Government of the [United States].” He then goes on to argue that, within the national government, the Executive Branch is the “organ of intercourse between the [United States] and foreign Nations.” As support for this claim, he notes that it is the Executive Branch, not the Legislative or Judicial Branch, that is charged under the Constitution with making treaties and executing the laws. Hamilton thus begins his constitutional analysis by referring to two enumerated powers in Article II.

At this point in his essay, Hamilton does advocate a version of the Vesting Clause Thesis. He contends that the Vesting Clause is a comprehensive grant of executive power to the President and that this grant is not limited by Article II’s specific grants of power, except to the extent that those grants are themselves specifically limited. As support for this claim, he notes the difference in wording between the Article I vesting clause and the Article II vesting clause. According to Hamilton, the specific grants of power in Article II merely “specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts of the constitution and to the principles of free government.” Since issuing the Neutrality Proclamation was an “Executive Act,” says Hamilton, it fell within the powers granted in the Vesting Clause.

Immediately after making this Vesting Clause argument, however, Hamilton returns to the specific textual grants of power. He acknowledges that Congress has the power to declare war, and that this power may include the power to determine whether the United States “is under obligations to make war or not.” But he contends that, in the absence of a declaration of war by Congress, the Executive Branch has a concurrent power to make this determination. As support for this claim, Hamilton relies on the Take Care Clause. His explanation is worth quoting at length:

If the Legislature have a right to make war on the one hand – it is on the other the duty of the Executive to preserve Peace till war is declared; and in

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525 Id. at 331.
526 15 PAPERS OF ALEXANDER HAMILTON, supra note 5, at 36
527 Id. at 38.
528 Id. at 37-38.
529 Id. at 39.
530 Id. at 40.
fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of this right it has concluded that there is nothing in them inconsistent with a state of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the Nation. The Executive is charged with the execution of all laws, the laws of Nations and well as the Municipal law, which recognizes and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war to foreign Powers.531

Thus, according to Hamilton, Washington had the power to issue the Neutrality Proclamation by virtue of his Article II responsibility to execute “the Laws,” which, Hamilton argued, included U.S. treaty commitments and the customary international laws of neutrality.532 Hamilton goes on to argue that this power is confirmed by the Ambassadorial Receipt Clause, which, Hamilton contends, necessarily entails the power of interpreting U.S. treaty commitments.533 Importantly, Hamilton concludes his essay by suggesting that the Take Care Clause may by itself be enough to support the Neutrality Proclamation: “That clause of the constitution which makes it his duty to ‘take care that the laws be faithfully executed’ might alone have been relied upon, and this simple process of argument pursued.”534

A close reading of the Pacificus essay shows, therefore, that the Vesting Clause Thesis was less central to Hamilton’s analysis than proponents of the Thesis typically acknowledge. Moreover, it is important to keep in mind the limited proposition that Hamilton was defending. His argument was simply that the President had the power to declare the default position of the United States under international law in the absence of congressional or judicial action.535 Hamilton was not defending any of the presidential powers sometimes linked by modern commentators to the Vesting Clause, such as treaty termination, offensive war powers, or sole executive agreements. Although the

531 Id.
532 See also id. at 41.
533 Id. at 41-42.
534 Id. at 43. See also CURRIE, supra note 27, at 178 (noting Hamilton’s reliance on the Take Care Clause).
535 As reported in Jefferson’s diary, President Washington himself viewed the Proclamation in these narrow terms: “The [President] declared he never had any idea that he could bind Congress against declaring war, or that anything contained in his [proclamation] could look beyond the first day of [Congress’s] meeting.” Notes on Cabinet Meetings on Edmond Charles Genet and the President’s Address to Congress, 27 PAPERS OF THOMAS JEFFERSON, supra note 490, at 400 (Nov. 18, 1793). In a speech to Congress on December 3, 1793, Washington explained that, in light of the war in Europe, he had issued the Proclamation “to admonish our Citizens of the consequences of a contraband trade, and of hostile Acts to any of the parties; and to obtain by a declaration of the existing legal state of things, an easier admission of our right to immunities, belonging to our situation.” 33 WRITINGS OF WASHINGTON, supra note 399, at 164. In describing the specific acts he had taken to give effect to U.S. neutrality, he further noted that “[i]t rests with the wisdom of Congress to correct, improve or enforce this plan of procedure.” Id.
Washington Administration controversially sought to prosecute individuals who violated U.S. neutrality; Hamilton’s essay does not defend the constitutionality of that practice (which, among other things, might have violated Congress’s power to define and punish offenses against the law of nations), let alone link the practice to the Vesting Clause. And it is doubtful that others in the Administration thought that the Neutrality Proclamation itself (as opposed to the common law, treaties, or the law of nations) could serve as the basis for the prosecutions.

In any event, it is difficult to see how the Pacificus essay can serve as evidence of the original understanding of the Article II Vesting Clause. The essay was an advocacy piece, written four years after the Constitution took effect, by a particularly pro-executive member of the Founding generation. The Pacificus essay was also sharply contested by another leading Founder, James Madison, and it was also contested by Thomas Jefferson, who urged Madison to write the Helvidius essays. In addition, Hamilton’s reliance on the Vesting Clause Thesis in Pacificus contradicted his own statements about executive power made during the Founding. If one is attempting to discern the Constitution’s original meaning, surely Hamilton’s Founding statements should be given more weight than what he later said in Pacificus.

Seeking to assign broader historical significance to the Pacificus essay, proponents of the Vesting Clause Thesis typically suggest that Hamilton “won” the debate with Madison. Prakash and Ramsey state, for example, that Madison’s arguments were “incoherent” and that “Helvidius was no match for Pacificus.” The implication apparently is that Hamilton’s arguments were so overpowering that they must have reflected Founding intent.

As others have noted, there are certainly weaknesses in Madison’s Helvidius essays. Logically, however, the fact that Madison’s response may have been less than

536 See Currie, supra note 27, at 178-79.
537 See Prakash & Ramsey, supra note 13, at 343-45 (documenting this point). At President Washington’s request, Congress enacted a neutrality statute in 1794 that provided a statutory basis for prosecuting violations of the law of nations concerning neutrality. See 1 Stat. 381 (1794).
538 The constitutional plan that Hamilton presented at the Federal Convention would have limited the President to certain enumerated powers. See supra Part IVA. In The Federalist, Hamilton repeatedly implied that the President would have only the powers recited in Article II. See supra Part I VB. And in the New York ratifying convention, Hamilton stated that the Constitution entrusted the management of foreign relations to the Senate and President together. See supra Part IVC. See also Raoul Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1, 18 (1972-73) (“The magic of Hamilton’s name should not obscure the fact that he had executed a volte-face [in Pacificus], repudiating assurances he had made both in The Federalist and in the New York Ratification Convention to procure adoption of the Constitution.”).
539 Prakash & Ramsey, supra note 13, at 336, 339.
540 See, e.g., Edward S. Corwin, The President’s Control of Foreign Relations 28 (1917); Elkins & Mckitrick, supra note 402, at 362; Schlesinger, supra note 16, at 20; Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power 114-15 (1976). But cf. Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic 527 n.18 (1995) (stating that Helvidius “decimates the logic of Hamilton’s argument that the executive possesses something like a concurrent right with the legislature to determine whether treaty obligations compel war or peace”);
convincing does not show that Hamilton’s views were correct, since Madison may have simply failed to make the best arguments. This would not be surprising, given that he wrote the Helvidius essays quite reluctantly, while he was preoccupied with other business, and he apparently was dissatisfied with his performance.\textsuperscript{541} Moreover, even if Hamilton was right about the constitutionality of the Neutrality Proclamation, it may have been because of his specific textual arguments rather than his Vesting Clause argument. Finally, and perhaps most importantly, an examination of Madison’s argument shows that its weaknesses are similar to weaknesses shared by the Vesting Clause Thesis itself.

Madison’s argument has two principal components. First, he contends that the powers of declaring war and making treaties are inherently “legislative” in nature and thus “can never fall within a proper definition of executive powers.”\textsuperscript{542} The exercise of executive power, rather, “must pre-suppose the existence of the laws to be executed.”\textsuperscript{543} Hamilton’s suggestion to the contrary, Madison contends, is improperly borrowed from the example of British monarchy.\textsuperscript{544} Consequently, Madison argues that the Constitution’s grant of the war declaration power and the treaty power should not, as Hamilton argues, be construed strictly to preserve the maximum scope for presidential power. Here, Madison argues that the Constitution did not adopt the purported Locke/Montesquieu conception of executive power, noting: “Both of [these writers] too are evidently warped by a regard for

\textbf{LEVY, \textit{supra} note 339, at 52 (“Madison demolished [Hamilton’s] argument by showing that the Constitution had rejected the British theory of executive prerogative and by quoting \textit{The Federalist} against Hamilton.”).}

\textsuperscript{541} Madison wrote the Helvidius essays after being urged to do so by Jefferson. In a June 30 postscript to a June 29 letter, Jefferson complained that “heresies” in the first Pacificus essay might “pass unnoticed & unanswered.” \textit{26 PAPERS OF THOMAS JEFFERSON, \textit{supra} note 455, at 403-04}. On July 7, Jefferson told Madison, “Nobody answers [Hamilton], and his doctrine will therefore be taken for confessed. For god’s sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in the face of the public.” \textit{Id. at 444} (Letter from Thomas Jefferson to James Madison, July 7, 1793). For a number of reasons, Madison was reluctant to take on this task. He agreed with Jefferson that Hamilton’s argument “ought certainly to be taken notice of by some one who can do it justice.” \textit{15 PAPERS OF JAMES MADISON, \textit{supra} note 2, at 44} (Letter from James Madison to Thomas Jefferson, July 18, 1793). But he felt that he did not have either the necessary factual information or the requisite legal materials, and he hoped to find out “that some one else has undertaken it.” \textit{Id.} Madison also was in a difficult political situation, given the need by this time to distance the Republicans from Genet and the importance of not challenging Washington directly. On the latter point, he expressed concern to Jefferson that he did not know “how far the [President] considers himself as actually committed with respect to some doctrines.” \textit{Id. at 46} (Letter from James Madison to Thomas Jefferson, July 22, 1793). Nevertheless, Madison “forced [himself] into the task of a reply,” a task that he described as “the most grating one I ever experienced.” \textit{Id. at 48} (Letter from James Madison to Thomas Jefferson, July 30, 1793). Years later, Madison expressed dissatisfaction with his essays, describing them as a “polemic tract.” He continued to be critical of the Pacificus essays, however, noting that they represented “a perverted view of [President] Washington’s proclamation of neutrality, and [were] calculated to put a dangerous gloss on the Constitution of the U.S.” James Madison, Detached Memoranda, in Elizabeth Fleet ed., Madison’s “Detached Memoranda,” \textit{3 WM. & MARY Q.} (3d Series) 534, 567-68 (1946).

\textsuperscript{542} \textit{15 PAPERS OF JAMES MADISON, \textit{supra} note 2, at 69}. Given the expressions of legislative foreign affairs essentialism that appeared during the state ratification debates, see \textit{supra} Part IVC, this tack was neither new nor unique to Madison.

\textsuperscript{543} \textit{Id.}

\textsuperscript{544} \textit{Id. at 72.}
the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.”

Once it is concluded that the war power and the treaty power are legislative in nature, argues Madison, it becomes clear that the Constitution could not have assigned them to the President, since “the constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments.”

Second, Madison contends that the Constitution does not allow for the concurrent exercise of powers that are purely legislative or purely executive. He notes that Hamilton has acknowledged that Congress’s power of declaring war, even when strictly construed, includes the power of judging whether the United States is under an obligation to make war. This acknowledgment, Madison argues, means that the President cannot also have such a power, since concurrent powers are “contrary to one of the first and best maxims of a well organized government, and ought never to be founded in a forced construction, much less in opposition to a fair one.”

As for Hamilton’s argument that the executive has the power under specific textual grants, such as the Take Care Clause, to act in the absence of a congressional declaration of war, Madison contends that: “Whenever then a question occurs whether war shall be declared, or whether public stipulations require it, the question necessarily belongs to the department to which these functions belong – And no other department can be in the execution of its proper functions, if it should undertake to decide such a question.”

Madison also denies that the President’s power to execute the laws gives him any discretion in interpreting and applying those laws, stating that “[t]he executive has no other discretion than to convene and give information to the legislature on occasions that may demand it; and whilst this discretion is duly exercised the trust of the executive is satisfied, and that department is not responsible for the consequences.”

There are a number of weaknesses in Madison’s analysis. These weaknesses, however, do not confirm the persuasiveness of the Vesting Clause Thesis. Indeed, these weaknesses are similar to weaknesses in the Vesting Clause Thesis itself. First, Madison, atypically for him, relies on essentialist reasoning instead of functional arguments. Madison talks as if there are pure categories of executive and legislative power, and he simply disagrees with Hamilton about what those categories should look like. Madison’s argument is also unpersuasive in rejecting the possibility of concurrent powers. In doing so, Madison (again, atypically for him) espouses a formal, categorical approach to the separation of powers. Yet, like the Vesting Clause Thesis, Madison’s approach appears to be at odds with the mixing of powers so evident in the Constitution, a feature defended by

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545 Id. at 68.
546 Id. at 70.
547 Id. at 83.
548 Id. at 82.
549 Id. at 86.
Madison himself in *Federalist No. 47.* Madison’s approach also has the problem of being unworkable in practice, since it ignores the interpretive role necessarily entailed in executing the laws. Finally, his approach is functionally problematic, since it might mean that the national government would be unable to respond to many foreign relations problems when Congress was out of session. Of course, the answer to this functional concern may be a more flexible and realistic interpretation of the President’s enumerated powers, not the Vesting Clause Thesis.

In sum, the Pacificus-Helvidius debate neither provides Founding support for the Vesting Clause Thesis, nor demonstrates its inherent persuasiveness. Instead, the debate serves to highlight the fact that there were disagreements in the 1790s over the nature and scope of executive power. It also tends to confirm the possibility (as Hamilton himself acknowledged with respect to the Neutrality Proclamation) that the specific textual grants of power in Article II may give the Executive Branch sufficient authority over foreign affairs without the need for the Vesting Clause Thesis. To the extent that one can read anything into the lack of persuasiveness in the Helvidius essays, it is simply that essentialist reasoning about categories of power does not do much to advance the constitutional analysis. The constitutional Founders (including Hamilton, at least before Pacificus) were aware of this problem, which is why they spelled out the President’s powers in Article II.

VI. Conclusion

Elegant theories can often obscure shaky foundations, especially in constitutional law. Among the most venerable constitutional theories is the Vesting Clause Thesis, which is also among the most newly popular. This view posits that the Founders, in vesting the “executive Power” in the President, delegated an unspecified but well-understood bundle of foreign affairs powers, so well understood that the label served as mere shorthand for what everyone knew to be the essential attributes of an executive department. The Thesis further holds that by virtue of this delegation the President properly wields all foreign affairs authority not expressly granted to the other branches.

The Vesting Clause Thesis has a number of attractions. It offers a straightforward textual solution to a number of vexing questions about foreign affairs authority. It also helps reconcile the spare list of powers in Article II with the reality of vast presidential

550 *See supra* TAN 218-221.

551 Although Madison’s response to Pacificus suffered from some of the same analytical problems as the Vesting Clause Thesis, it is not accurate to suggest that Madison’ response implicitly accepted the Thesis. *See Powell, supra* note 15, at 50; Prakash & Ramsey, *supra* note 13, at 335; *see also* William R. Casto, *Pacificus and Helvidius Reconsidered,* 28 N. Ky. L. Rev. 612 (2001). Madison appeared to conceive of the category of “executive power” as simply a power to execute the laws, not as a package of independent substantive powers, and he construed the President’s enumerated foreign affairs powers narrowly vis-à-vis Congress – an approach directly at odds with the Vesting Clause Thesis. It is possible, however, that Madison shied away from a direct assault on the Vesting Clause Thesis because of earlier statements he had made in connection with the 1789 removal debate. *See supra* Part VB.
authority in foreign relations. And it hearkens back to a purported age when the boundaries separating the executive, legislative, and judicial were clear and precise. For many, of course, the Thesis has the added attraction of justifying a broad view of unilateral presidential power in foreign affairs. This aspect of the doctrine has helped attract adherents going back at least to Alexander Hamilton. It is perhaps no coincidence that this presidentialist orientation currently attracts advocates in an era in which the nation’s security faces threats that create pressure for sure and swift response.

History, especially constitutional history, may at times be elegant as well, but it is rarely so simple. As a description of what the Founding generation intended, understood, or meant, both the Vesting Clause Thesis and the broad view of executive power essentialism on which it rests are untenable. European political theory offers support for these views that is at best vague and overstated. A closer examination reveals that the leading theorists wrestled with specifics, disagreed among themselves, and in some cases reached what to modern expectations are surprising conclusions. The practices of the Washington Administration likewise offer some support, if not so much for the Vesting Clause Thesis expressly, at least for the idea of broad presidential power in foreign affairs. Yet it was precisely when such practices ventured beyond a plausible basis in specific text that they ran into substantial opposition, both in Congress and outside. Most of all, neither the Vesting Clause Thesis nor executive power essentialism find any significant basis in specific text – and indeed, barely any plausible mention – in the materials on which originalists typically rely – that is, materials from the Founding and from the experience of the national and state governments in the years leading to the Founding. To the contrary, these materials make clear what the Constitution’s text suggests: the Founders settled upon a specific, and in certain regards unprecedented, set of executive powers by listing them in Article II. To the extent that the phrase “executive Power” conveyed any widely understood independent meaning, it encompassed simply a power to execute the laws.

Neither the Vesting Clause Thesis, nor executive power essentialism, provide the only arguments that can be made for broad presidential power in foreign relations. It is arguable, for example, that the President has acquired constitutional powers not specified in Article II by virtue of the longstanding practices and interactions of the political branches. Indeed, it may be difficult to justify some features of modern foreign relations law, such as congressional-executive agreements or certain presidential authorizations of military force, on any other basis. We do not, therefore, take a position here on the scope of the President’s modern foreign affairs authority. Our goal, rather, is to put to rest one especially sweeping claim that typically appeals to history, but in fact lacks any substantial historical basis. In this way we hope to have cleared the path for a more nuanced and constitutionally defensible approach to the topic of presidential power, whether the approach rests on text, structure, custom, political theory, or indeed, history.