Article

Foreign Affairs and the Jeffersonian Executive: A Defense

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A superficial reading of the Constitution might lead to the conclusion that the President has relatively few foreign affairs powers and duties. The President is commander-in-chief of the armed forces, "shall" receive foreign ambassadors, and can make treaties and appoint ambassadors with the Senate's advice and consent.[1] The Constitution's text assigns no other specific foreign affairs authorities to the presidency. Yet from the Constitution's creation, Presidents have exercised far more extensive foreign affairs powers. With little or no controversy, Presidents have acted as the sole organ of foreign communication, formulated and enunciated nonbinding (yet nonetheless significant) foreign policy, and controlled the instruments of diplomacy.[2] It seems fair to say that Presidents typically have controlled those aspects of foreign affairs that the Constitution did not specifically allocate to Congress or require that he share with the Senate.

In *The Executive Power over Foreign Affairs*, we argued that the Constitution's grant of "executive Power" to the President provided a textual basis for the powers that Presidents have exercised for over two centuries.[3] The "executive Power" vested in the President by Article II, Section 1 encompassed

1. U.S. CONST. art. II, §§ 2–3.

2. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 34–45 (2d ed. 1996).

3. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

foreign affairs functions, because in eighteenth-century terminology foreign affairs powers were classified as part of the "executive" functions of government.[4] However, because the Constitution specifically allocated some executive powers to Congress and required that others be shared with the Senate, the President's executive power over foreign affairs is residual in nature; the President has unilateral control only of those executive foreign affairs powers that are not otherwise allocated or shared.[5] Our residual theory showed that the foreign affairs Constitution need not be seen as strangely laconic or remarkably incomplete. In advancing the residual theory, we relied upon, among others, Secretary of State Thomas Jefferson, who wrote in 1790:

> The Constitution . . . . has declared that "the Executive powers shall be vested in the President". . . . The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specifically submitted to the Senate. Exceptions are to be construed strictly.[6]

This Article considers the leading objections to the Jeffersonian or residual theory of executive power. In particular, we take as our principal counterpoint the engaging and wide-ranging article by Professors Curtis Bradley and Martin Flaherty, which is the most thoughtful, comprehensive, and ambitious effort to date.[7] Critics such as Bradley and Flaherty dispute the central proposition that the Article II Vesting Clause vests any executive power and the derivative proposition that the executive power encompasses a residual foreign

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4. *Id.* at 265–72.

5. *Id.* at 252–65.

6. Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 378, 378–79 (Julian P. Boyd ed., 1961) (emphasis omitted). The theory is perhaps more commonly identified with Alexander Hamilton, who articulated it in his 1793 *Pacificus* essays. *See* ALEXANDER HAMILTON, LETTERS OF PACIFICUS NO. 1 (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Syrett & Jacob E. Cooke eds., 1969) ("The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument." (emphasis omitted)). We emphasize its Jeffersonian articulation both because Jefferson said it first and because Jefferson is not thought to suffer from pro-executive bias. But as we discuss below, the theory is not truly Jeffersonian or Hamiltonian; its roots extend well before the founding and it was expressed by many other leaders (like Washington) in the post-ratification period. *See infra* Part II.E.

7. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

affairs power. These objections to the residual theory suffer from a series of conceptual and historical difficulties that greatly undermine their persuasiveness.

First, opponents of the Jeffersonian theory offer no competing view of the Constitution's text. Bradley and Flaherty spend over 100 pages disputing the residual theory of foreign affairs powers, but do not develop a coherent and plausible alternative. Instead, they flirt with mutually inconsistent theories without fully endorsing any of them.[8] Their article leaves the reader with no understanding of how (or even whether) the Constitution fully allocates foreign affairs authority. We did not (and do not) regard our earlier treatment as the final word, nor do we suppose that no alternative explanations can exist. But we do believe that a complete response to our theory must answer two basic questions: Did the Constitution completely allocate foreign affairs powers, and if so, how? It is telling that the most ambitious response to our proposal—that of Bradley and Flaherty—makes no effort to answer these questions.

Second, opponents of the Jeffersonian theory rhetorically inflate the powers it would give the President. The typical critique of executive power quickly degenerates into complaints that the Framers could not have meant to constitute the President as a king. Of course the Framers did not give the President despotic powers; the residual theory does not assert that they did. To the contrary, the eighteenth-century definition of executive power had reasonably clear boundaries, and the Constitution further tamed the executive power of foreign affairs by granting some important executive powers to Congress and sharing others with the Senate. The result is not an all-powerful autocrat, but a republican President with important, though constrained, independent powers. It is worth remembering that Jefferson was no advocate of an unconstrained executive. Yet Bradley and Flaherty, for example, persist in pummeling the bogeyman of executive supremacy, insisting that the residual theory yields broad and undefined presidential authority that defies the concept of enumerated and delegated powers.[9] Opponents of the residual theory would do better, we suggest, to abandon rhetorical excesses and acknowledge that the residual power theory envisions a division of foreign affairs power, not a presidential monopoly.

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8. *See, e.g., id.* at 551–52, 679–88.
9. *See id.* at 643.

Third, critics associate the Jeffersonian theory with claims of ill-defined historical or logical inevitability. By their very title, Bradley and Flaherty set themselves against "executive power essentialism," without explaining what this means. The implication, we suppose, is that champions of the residual theory believe that "executive power" naturally or inevitably encompasses foreign affairs power, and that the President "inherently" or "essentially" must have foreign affairs powers simply by virtue of being the nation's chief magistrate. This argument has been made elsewhere,[10] but it is not our argument. Nor was it Jefferson's. To the contrary, we reject claims of inherent and undefined executive power, and rest our argument upon the original meaning of the Constitution's text: that the text "vest[s]" the President with "executive Power"; that the phrase "executive power" in the late eighteenth century meant a set of governmental functions that included foreign affairs powers; and that the founding generation, before and after ratification, appeared to read the Constitution in this manner. This is not exotic "essentialism," but garden-variety constitutional interpretation.

To the extent critics engage the textual and historical claims we actually did make, their objections and arguments rest on faulty foundations. Bradley and Flaherty argue that the phrase "executive power" was not understood to encompass foreign affairs powers in late eighteenth-century political writing, and that the Continental Congress was not understood to exercise executive power.[11] Their stance gainsays an array of eighteenth-century writing, as well as the views of leading historians and political scientists who have studied the period.[12] It also contradicts Professor Flaherty himself, whose prior writings endorse the propositions that "executive power" was understood to encompass foreign affairs functions and that the English king and the Continental Congress both exercised the executive power over foreign affairs.[13] Bradley and Flaherty also avow that the President's specific foreign affairs powers

10. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

11. *See* Bradley & Flaherty, *supra* note 7, at 579.

12. *See infra* Part II.B.

13. *See, e.g.*, Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2112–15 (1999) [hereinafter Flaherty, *History Right?*]; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1771–82 (1996) [hereinafter Flaherty, *The Most Dangerous Branch*].

can better explain the Washington administration's foreign affairs practices than can the residual theory, and that contemporaries actually defended the Washington administration's control over foreign affairs by reference to the President's specific foreign affairs powers. Both claims are mistaken.

Our defense of the Jeffersonian Executive proceeds in two parts. In Part I, we highlight the conceptual difficulties common to much criticism of executive foreign affairs power, with special emphasis on Bradley and Flaherty's recent article. Specifically, we highlight three problems: the lack of a plausible alternative, the exaggeration of the President's residual power, and the misleading theme of essentialism. Part II addresses the specific textual and historical claims advanced in Bradley and Flaherty's critique—in particular, their reading of eighteenth-century political theory, their discussion of the Continental Congress, and their claims regarding the Washington administration's control of foreign affairs.

I. CONCEPTUAL DIFFICULTIES OF THE CASE AGAINST RESIDUAL EXECUTIVE POWER

A. THE LACK OF A PLAUSIBLE ALTERNATIVE THEORY

We begin with a simple yet surprising observation: no competing theory explains how the Constitution's text allocates foreign affairs power. Instead, there is a long-standing scholarly assumption that the Constitution's text does not allocate all foreign affairs powers, and that its significant gaps must be filled by reference to extratextual materials.[14] As we argued, that assumption is based on nothing more than a quick read of the text that finds many powers seemingly missing. A more careful approach yields a plausible reading of Article II, Section 1 that does fully allocate foreign affairs powers. Our opponents may still argue, of course, that the best reading of the historical record as a whole is that the Framers—intentionally or not—failed to allocate important foreign affairs powers. Such a claim must be sustained by historical evidence, however, and we are unaware of any support for such a proposition. In particular, there seems to be no evidence that anyone during either the ratification debates or the Washington administration understood the Constitution as incompletely vesting foreign affairs

14. *See* Prakash & Ramsey, *supra* note 3, at 236–52.

powers. The "strange, laconic" Constitution[15] is an invention of modern commentary.

Yet if the Constitution's text completely allocates foreign affairs powers, how does it do so? Perhaps its specific grants of power actually do vest a complete array of foreign affairs authorities. That is surely not evident from the face of the document, and generations of modern academics have assumed otherwise.[16] An argument may exist—we simply have not seen it. On the other hand, if the specific grants of power do not allocate key foreign affairs powers, there must be a residual grant to some branch, encompassing the foreign affairs powers not specifically allocated. We think Article II, Section 1 plays this role. Perhaps someone could argue that some other clause serves this function, but no one has tried their hand at developing an alternative residual theory.

Further, because our prior work asserted that Article II, Section 1's grant of the "executive Power" encompasses a foreign affairs power, an alternative theory must advance a competing explanation of Article II, Section 1. Two might be available. One is that Article II, Section 1 is merely decorative: it says that there will be one President, but does not convey any substantive powers. A second is that Article II, Section 1 conveys some substantive power—namely, the power to execute the law—but does not vest foreign affairs powers. Each claim has serious drawbacks (and they are, of course, mutually inconsistent).

Opponents of executive foreign affairs power tend not to choose among these competing theories or make a sustained argument for any of them. Rather, they assert pieces of them as convenient, as part of a purely negative strategy. This in turn allows them to avoid dealing with the key difficulties of each theory, and also with the central difficulty of all of them—that none has an adequate and historically grounded affirmative explanation for how the Framers allocated foreign affairs powers.

Our project is to find the best available original meaning of the Constitution's text in foreign affairs. Contrary to the intimations of some critics, such an inquiry does not claim absolute certainty, or perfect knowledge about historical events. We are

15. The phrase is from HENKIN, *supra* note 2, at 13.

16. *See id.*; EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 201–02 (Randall W. Bland et al. eds., 5th ed. 1984).

well aware that history is often obscure, contradictory, nuanced, and perhaps unknowable. The originalist interpretive project is not to find a perfect theory, but to select the best alternative available. Hence, the question is not whether the residual theory has blemishes—it certainly does—but whether the residual theory offers the best rendition of the Constitution's original meaning. That question cannot be answered except in comparison to other theories. We persist in the belief that our theory is the best available reading, in no small part because no one has advanced a complete alternative.

Bradley and Flaherty's recent work illustrates the foregoing general observations. Theirs is a prodigious undertaking, ranging across the entire textual and historical debate over executive foreign affairs powers. Yet at the end of it, the reader is left with no alternative theory of how the Constitution's text allocates foreign affairs authorities.

Bradley and Flaherty equivocate on all of the fundamental questions. With respect to the meaning of Article II, Section 1, much of the time Bradley and Flaherty follow a long academic tradition in suggesting that it does not vest any power independent of those powers specified in Sections 2 and 3 of Article II.[17] At other times, bowing to the serious textual and historical problems with that position, Bradley and Flaherty appear to admit that the Vesting Clause likely vested a power to execute the laws.[18] This seems to establish them as unenthusiastic proponents of the "Vesting Clause Thesis" that they disparage—i.e., the thesis that Article II, Section 1 vests powers independent of the rest of Article II, based on the eighteenth-century meaning of "executive power."[19] Thus, Bradley and Flaherty try to have it both ways, simultaneously arguing that the Vesting Clause vests nothing and that it vests a power to execute the laws.

Bradley and Flaherty are equally opaque on whether the President has only the limited and specific powers enumerated in Sections 2 and 3 of Article II. Sometimes they write as if the President only has specific powers[20] because state constitutions of the era supposedly granted only specific powers, and because a broader reading would concentrate too much power in the

17. Bradley & Flaherty, *supra* note 7, at 553–57, 589, 598, 600–01.
18. *Id.* at 552, 557, 560, 564–65, 573.
19. *Id.* at 546.
20. *Id.* at 554, 598, 630.

President.[21] This seems to suggest that the President can only appoint ambassadors, not instruct them; that he can receive ambassadors, but not send them home; and that he can only make treaties, not establish nonbinding foreign policy. Yet in their section on Washington's practices, Bradley and Flaherty champion readings of the supposedly limited and specific powers that would make even a non-interpretivist blush.[22] By stretching the specific powers, Bradley and Flaherty not only generate a theory of presidential authority that differs little from ours, they inadvertently cast doubt on the depth of their devotion to the notion that the President only has the foreign affairs powers specifically listed in the Constitution.

Finally, Bradley and Flaherty never say whether the Constitution fully allocates foreign affairs powers. In particular, they say little about whether the Constitution vests important foreign affairs powers, such as the powers to monopolize the communications of the United States, to terminate treaties, and to formulate nonbinding foreign policy. Sometimes they seem to suggest that Congress has residual foreign affairs powers.[23] But they never offer any textual hook for what would be a novel claim, let alone mount a sustained defense of it. Their reticence is understandable because the Constitution's supposedly unallocated powers, such as communication with foreign nations, formation and enunciation of foreign policy, and treaty termination authority, would be difficult to locate within any congressional power.[24]

At other points Bradley and Flaherty hint that the Constitution lacks a complete allocation of foreign affairs authorities.[25] This too seems implausible. One expects small mistakes in a Constitution resulting from many votes and composed over several months. Still, it seems highly unlikely that the Framers simply forgot to allocate key foreign affairs authorities. Foreign

21. *Id.* at 581–82, 584.

22. *See, e.g., id.* at 636–37, 666–67.

23. *Id.* at 585–86.

24. Had Bradley and Flaherty made a sustained argument for a residual power in Congress, they would have faced a difficult textual choice. As we discuss later, they charge that reading the Article II Vesting Clause as vesting power would make some clauses in Article II redundant. *See infra* Part II.A. We contest this claim. But even if they are right, the redundancy charge would apply even more sharply to any residual power that might be thought to be vested in Congress, for Congress has numerous specified foreign affairs powers.

25. *See* Bradley & Flaherty, *supra* note 7, at 678–79.

affairs matters were at the forefront of their thinking, and diplomacy would be crucial to the future of the grand enterprise on which they were embarking. Having fought a war of independence against England and secured the assistance of allies, we find it hard to believe that the Framers lost sight of the importance of complete foreign affairs authority. Bradley and Flaherty find no one in the ratification debates who complained or even observed that the Constitution failed to allocate crucial foreign affairs powers. Nor do they find anyone during the Washington years who judged the Constitution incomplete in its foreign affairs allocation, or who claimed that the allocation of foreign affairs authority would be worked out in practice, in a hit or miss fashion.[26]

In sum, Bradley and Flaherty's *Executive Power Essentialism* is the most thorough, comprehensive, and ambitious scholarly criticism of Jefferson's foreign affairs Executive. Yet despite all their admirable energy and research, they are unable to advance any competing theory of the Constitution's original meaning. The fact that they do not offer an alternative suggests to us that no good one is available.

To be sure, Bradley and Flaherty's announced aim is to tear down the Jeffersonian theory, not to build up an alternative.[27] This purely destructive approach makes sense only if they prove that the residual theory is implausible on its own terms, even in the absence of alternatives. Thus Bradley and Flaherty are driven to claim that the residual theory "lacks any substantial historical basis."[28] Yet Bradley and Flaherty fall far short of backing up (let alone proving) their assertion. As dis-

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26. Given their invocation of the enumerated powers doctrine, *id.* at 558, Bradley and Flaherty seem to reject *Curtiss-Wright*'s notion that the federal government simply must have certain powers by virtue of being the federal government. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936). Yet if they believe there are missing foreign affairs powers and if they believe the federal government can exercise them nonetheless, they would be in the unenviable position of simultaneously embracing the enumerated powers doctrine and *Curtiss-Wright*'s theory of inherent powers. In any event, we adhere to our prior view that *Curtiss-Wright* is wrong. *See* Prakash & Ramsey, *supra* note 3, at 238–39. The President's residual foreign affairs authorities cannot arise out of the supposedly inherent attributes of a national government—a result precluded, among other things, by the plain language of the Tenth Amendment. 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.").

27. *See* Bradley & Flaherty, *supra* note 7, at 551–52, 687–88.

28. *Id.* at 687.

cussed below, Montesquieu and Blackstone defined "executive power" to include foreign affairs powers, and statesmen such as Jefferson, Washington, and Hamilton (among others) embraced the residual theory. Hence it is well-nigh impossible to insist that the Jeffersonian theory "lacks *any* substantial historical basis." The relevant question must be whether any competing theory better explains constitutional text and history—a question Bradley and Flaherty simply do not address.

B. THE EXAGGERATION OF THE RESIDUAL POWER

Opponents of the Jeffersonian theory often raise the specter of unchecked, monarchical power. The picture painted is one of regal trappings and kingly excess, where the President would exercise unknown and unbridled power. Reading such arguments, one almost imagines that if the Vesting Clause is read as a power grant, we are but a few steps from laying a crown upon the President's brow.

Bradley and Flaherty are firmly in this tradition, greatly inflating the power that advocates of residual foreign affairs power say resides with the President under Article II, Section 1. Bradley and Flaherty say that residual power proponents claim a "broad and undefined" power for the President; they depict the residual theory as giving the President total or near-total control over foreign affairs, and assert that it is inconsistent with the textual grants of foreign affairs powers (particularly treaty power and war power) to other branches.[29]

The residual theory's claims are far more modest than its opponents suggest. As we explained, the President's foreign affairs powers are defined and limited in two important ways. First, the President has only those foreign affairs powers that were called "executive powers" in eighteenth-century discourse. This definition excludes key powers such as appropriations and lawmaking.[30] Second, the President lacks unilateral authority over all those crucial foreign affairs powers that the Constitution distributes to Congress or requires that he share with the Senate.[31] What remains with the President are modest, but still significant, residual foreign affairs powers, such as control of American diplomacy and a monopoly on foreign affairs communications.

29. *See id.* at 643, 546–48.
30. Prakash & Ramsey, *supra* note 3, at 254–55, 263–72.
31. *Id.* at 253–54.

Consider, for example, five key foreign affairs powers: making treaties, appointing diplomatic personnel, initiating hostilities, approving expenditures, and making law in support of foreign affairs objectives. The President cannot unilaterally exercise at least four and, depending on one's view, perhaps all five of these powers, despite the President's residual executive foreign affairs authority. Making treaties and diplomatic appointments—called "executive" powers in eighteenth-century terminology—are specifically shared between the President and Senate by the Constitution's text.[32] Depending on one's view of the much-debated power to declare war, the power to initiate hostilities—also called an executive power—is (or may be) assigned to Congress by the text.[33] The power to approve expenditures and the power to make foreign affairs–related law were, as a general matter, not "executive" functions in eighteenth-century theory or practice, and thus are not vested with the President.[34]

In contrast, the powers we identified as belonging to the President are, for the most part, ones that Presidents have long exercised, and that do not seem to give the President disproportionate control over foreign affairs.[35] As we pointed out, one of the principal merits of our theory is that it provides a textual basis for many of the powers that the President already *and non-controversially* exercises.[36] The ability to monopolize communications with foreign nations, to instruct and recall U.S. diplomats, to issue passports, to announce the foreign policy of the United States, to enter into executive agreements, and to terminate treaties—which we identified as examples of the President's executive power in foreign affairs—do not yield complete control over foreign affairs or a radical extension of presidential power.

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32. U.S. CONST. art. II, § 2; *see* Prakash & Ramsey, *supra* note 3, at 286–87.

33. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (rejecting presidential power over war initiation derived from the executive power in foreign affairs). For a broader view of presidential war powers based upon a narrow reading of the power to "declare war," see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

34. Prakash & Ramsey, *supra* note 3, at 254–55, 263–65.

35. *See* HENKIN, *supra* note 2, at 34–45 (discussing the conventional view of presidential foreign affairs powers).

36. Prakash & Ramsey, *supra* note 3, at 262–63.

Rather than acknowledging the residual theory's constraints on presidential foreign affairs power,[37] Bradley and Flaherty leap to the conclusion that the residual theory vests the President with "broad and undefined" power incompatible with a system of checks and balances.[38] Yet they never say which powers the residual theory ascribes to the executive give the President disproportionate control over foreign affairs. In fact, of the residual powers mentioned above, Bradley and Flaherty do not dispute that the President has the first four powers, and has exercised them since the very beginning of constitutional history.[39] They grumble about executive agreements and treaty termination,[40] but we think those are fairly minor powers that cannot compare to the war and treaty-making powers that the Constitution denies the President.[41] If

37. Bradley and Flaherty's discussion also ignores that we explicitly advanced our theory as a counterpoint to *two* textually unsupported positions in modern foreign affairs scholarship: the tendency to assign too little power to the President, *and* the tendency to assign too much. *See id.* at 236–41. Our theory exalts neither the President nor Congress (nor the Senate) as the "dominant" force in foreign affairs; rather, each branch has powers that balance the role of the others. *See id.* at 252–56. We agree with Bradley and Flaherty that abstract claims of presidential "supremacy" or "primacy" in foreign affairs have no foundation in the Constitution's text.

38. Bradley & Flaherty, *supra* note 7, at 642–43.

39. *See id.* at 626–55. Indeed, their discussion of practice seems to agree that the President has many of the powers that we assign to him. *See id.*

40. *See id.* at 550. Characteristically, Bradley and Flaherty do not mount a sustained critique of the President's power of treaty termination or executive agreements, nor say forthrightly that the President lacks these powers.

41. That is especially so because, as we explained, the executive power over foreign affairs only gives the President the power to make executive agreements without domestic legal effect and on subjects of minor importance, and to terminate treaties in accordance with their express or implied terms (that is, not to violate or abrogate treaties). Anything more would be to mistakenly regard the executive power as including the legislative power to make foreign affairs law. *See* Prakash & Ramsey, *supra* note 3, at 264–65; *see also* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) (arguing for a narrow reading of executive agreements consistent with our theory). Wider presidential powers in these areas might be claimed, but are hardly inevitable.

Among other exaggerations, Bradley and Flaherty suggest that our theory supports a presidential power to preempt state law. Bradley & Flaherty, *supra* note 7, at 551 n.23 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)). But as Professor Ramsey has expressly argued, our theory does not support giving this legislative power to the President. *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 906–15 (2004). Relatedly, Bradley and Flaherty imply that we disagree with the Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579

they agree with most of the allocations that result from the residual theory, one is left to wonder how they can regard it as generating "broad and undefined" power.

To be sure, we do not purport to have identified all of the President's executive powers in foreign affairs. Nor do we think that the question whether a particular power is or is not included will always be an easy one. It may be, as Bradley and Flaherty imply, that some of the powers claimed by the President in today's war on terror can be defended as part of the President's executive power over foreign affairs.[42] But if Bradley and Flaherty are worried about the residual theory's potential breadth, they ought to identify powers they think it might wrongly cede to the President, rather than proceeding by shadowy insinuation.

Bradley and Flaherty's misrepresentation of the scope of the Jeffersonian theory is important, for it enables them to draw support from several non-controversial and irrelevant propositions. First, they belabor the obvious point that various Founders opposed giving the war and treaty powers to the President.[43] This evidence is presented as if it somehow undercuts our theory, but plainly it does not. Once again, the President's executive foreign affairs power *does not extend* to matters assigned elsewhere by the Constitution, such as declaring war and making treaties. That is why we called the President's power "residual"—it is what remained after the Framers distributed to the other branches the executive foreign affairs powers they thought should not lie with the President. It is perfectly consistent with our theory that the Framers assigned war declarations and foreign commercial regulation to Congress and required that treaty making and diplomatic appointments be shared with the Senate.[44] In similar vein, Bradley and Flaherty dwell on quotes from Framers and ratifiers who said that the President's power should not be modeled on the prerogative powers of the king, or that the President should not have complete direction of foreign affairs.[45] Again, these

(1952). *See* Bradley & Flaherty, *supra* note 7, at 547–48. We do not. Prakash & Ramsey, *supra* note 3, at 263 n.125.

42. *See* Bradley & Flaherty, *supra* note 7, at 546, 548 n.13.

43. *See, e.g., id.* at 590–91, 598–600, 602–04, 608–09, 614–15.

44. As noted, this is exactly how Jefferson and Hamilton described the residual theory. *See supra* note 6 and accompanying text.

45. *See* Bradley & Flaherty, *supra* note 7, at 598–600, 602–04, 614–15, 620.

views are entirely consistent with our theory, and in our prior work we emphasized that the Constitution sharply departs from the unified model of executive foreign affairs powers found in English theory and practice.[46] Bradley and Flaherty can get mileage out of these founding-era statements only by distorting the residual theory.

In addition, much of Bradley and Flaherty's historical evidence is of the dog-did-not-bark variety. No one objected, they say, that the Constitution gave the President executive foreign affairs power.[47] They assign importance to this silence because they claim that the residual theory would convey open-ended authority inconsistent with the idea of delegated powers; surely, they say, Anti-Federalists would have objected if that had been the understanding, leading to the conclusion that it was not.[48] But this conclusion again depends on radically overstating the consequences of the residual theory. The President's foreign affairs powers, as we describe them, probably were not controversial. Most people of the time likely recognized, from the bad experiences of the Articles of Confederation,[49] that the nation needed a single individual to superintend at least some foreign affairs matters.[50]

Reading only Bradley and Flaherty's critique, one might suppose that we had advanced a nebulous idea of overarching presidential control over foreign affairs, a kind of scholarly defense of the *Curtiss-Wright* case.[51] In fact, our prior article sin-

46. Prakash & Ramsey, *supra* note 3, at 285–87.

47. *See* Bradley & Flaherty, *supra* note 7, at 608.

48. *See id.* at 608, 613–14, 625–26.

49. On the difficulties resulting from the lack of a unitary executive under the Articles of Confederation, see Prakash & Ramsey, *supra* note 3, at 272–78; FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52–95 (1973); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS 243–74 (1979).

50. After insisting that our theory, if correct, would have raised storms of protest in the ratifying conventions, Bradley and Flaherty then abruptly about-face in their final section, and more-or-less concede that many of the powers we locate within Article II, Section 1 can be explained as emanations from the President's specific textual powers. Bradley & Flaherty, *supra* note 7, at 626–55. But any dogs that should have barked at our theory should also have been disturbed about these penumbral powers as well. Again, Bradley and Flaherty are trying to have it both ways: our theory overstates presidential power *and* is superfluous because all of the powers it gives the President can be derived from specific powers. Their refusal to pick an alternative theory allows them to advance these two inconsistent propositions.

51. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

gled out *Curtiss-Wright* for criticism.[52] Mischaracterizing the Jeffersonian theory in this way allows Bradley and Flaherty to rely on historical and textual evidence and rhetorical excesses that may help refute *Curtiss-Wright*, but have nothing to do with the textually grounded residual theory.

C. THE ESSENTIALIST RED HERRING

One often hears that the idea of executive foreign affairs power (and the notion of a strong federal executive more generally) depends upon an inherent meaning of the word "executive," upon the natural and essential powers of a chief executive, or upon a historical continuity between the powers of the English king and the beliefs of the American Framers. In this vein, Bradley and Flaherty misunderstand the residual theory's actual foundations. If one only read their critique, one might suppose that the Jeffersonian theory rests on the following "essentialist" propositions: first, that the phrase executive power has a natural, essential, or inherent meaning that necessarily includes foreign affairs functions; second, that everyone in the eighteenth century assumed that "by definition" foreign affairs powers had to be exercised by a chief magistrate; third, that an unbroken line of continuity runs from eighteenth-century political writing and English practice through all of eighteenth-century American thought and practice, and hence the Constitution's Framers granted the President all the Crown's foreign affairs functions; fourth, that the Founders relied exclusively on "essentialist" propositions, never making "functional" or normative arguments about the proper allocation of foreign affairs powers; and finally, that as a result the Constitution inevitably granted the President all foreign affairs powers. This, we think, is what Bradley and Flaherty intend to capture with their unexplained shorthand "executive essentialism": a claim that the Constitution must have allocated all foreign affairs powers to the President because of a supposed universal mantra that a nation's chief magistrate simply had to have such power.

We agree with much, if not all, of Bradley and Flaherty's critique of these "essentialist claims." We agree that the Framers made functional allocations of foreign affairs power that

52. Prakash & Ramsey, *supra* note 3, at 238–39 (discussing *Curtiss-Wright*); *see* Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000) (providing a detailed critique of *Curtiss-Wright*).

departed from English practice and the recommendations of eighteenth-century political theorists. We agree that neither historical practices nor definitions bound the Framers to vest foreign affairs powers in the President, and that they considered many contrary allocations. This is why none of Bradley and Flaherty's "essentialist" account forms a part, let alone an "essential" part, of the residual theory.

From the Constitution's earliest days, the residual theory has rested on a few simple components. First, the phrase "executive power" was generally understood in the late eighteenth century to define a set of powers that included, among other things, foreign affairs functions. Second, because the Constitution "vest[s]" the "executive Power" with the President, the Constitution assigns foreign affairs functions to the President.[53] Third, the President may not exercise those executive foreign affairs functions that the Constitution allocates elsewhere. This exactly captures the structure of Jefferson's argument in 1790, and it is all that we claim for the executive residual.

Apart from misunderstanding the residual theory's foundations, Bradley and Flaherty's discussion suffers from a series of common mistakes. First, they conflate governmental powers with governmental branches. More precisely, they conflate the "the executive branch" with "executive functions." They also conflate the presence or absence of a "chief magistrate" with the presence or absence of an "executive." These missteps lead them to believe that in any system of government, there can be only one institution with executive powers. They also seem to believe that if a government lacks a chief magistrate, it lacks an executive institution, and that if a function is not vested with the chief magistrate, it cannot be considered an executive power.

None of this comports with common eighteenth-century understanding. As explained below, "executive" functions were a set of powers which were said to exist in every government, no matter what type of entity exercised them. The "executive branch" was a shorthand for the part of government, in a separated-power system, that exercised most (if not all) of the executive functions. Article II, Section 1's grant of executive power refers to executive functions, which in general it gives to a particular entity, the President. Because some executive

53. U.S. CONST. art. II, § 1.

functions are granted to the Senate and Congress, however, Congress and the Senate have some portions of the executive power even though they are not the executive branch. Consistent with how people in the eighteenth century spoke, because the President enjoys most of the executive powers, the President was understood to head the executive branch. Because the Senate had a share of certain executive powers, people of the era regarded the Senate as being partly executive.[54] Our Constitution has multiple executive institutions precisely because it split up the eighteenth-century category of executive power.

1. Inherent vs. Historical Definitions

By labeling us "essentialists," Bradley and Flaherty suggest that we believe that the executive power simply must include foreign affairs powers.[55] Yet the residual theory does not insist that the phrase "executive power" "naturally" or "essentially" includes foreign affairs powers. As we said, "[w]ords do not have inherent meanings, as words can come to mean what-

54. Similar claims could be made about other powers and branches. For example, Congress enjoys most of the Constitution's legislative power and thus is called the legislative branch even though it also has judicial powers with respect to impeachment. *Id.* art. I, § 3. Likewise, the President heads the executive branch and also has a share of the legislative power in the form of the veto. *Id.* art. II, § 7.

55. Bradley and Flaherty awkwardly disclaim that they are implying that advocates of the Vesting Clause Thesis are making a "Platonic claim about the meaning of executive power." Bradley & Flaherty, *supra* note 7, at 552 n.24. But one footnote cannot trump their entire article, which does caricature their opponents as adopting some kind of Platonic claim about the meaning of executive power. Indeed, their article's title itself suggests that we (and others) think that the phrase executive power *must* encompass foreign affairs powers. Moreover, the caricature re-emerges in the same footnote, when they claim that we believe that foreign affairs powers "naturally or essentially belong[ ] to the executive." *Id.*

Bradley and Flaherty may have derived the phrase "executive power essentialism" from another article by Professor Prakash, which argued that the "essential meaning" of executive power was the power to execute the laws. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 745. That article approvingly cited M.J.C. Vile for the proposition that the "executive" branch gets its name from "one of its major functions, that of putting the law[s] into effect." *Id.* (quoting M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 67 (2d ed. 1998) (emphasis omitted)). As is clear from that article, all it intended by the "essential meaning of executive power" is that an institution could not be called "executive" in the eighteenth-century sense of that term if it lacked law execution power. *See id.* at 752. Once again, this is not a claim about what executive power must "naturally" or "essentially" mean in the abstract. It is a claim about what a phrase meant at a particular time.

ever we would have them mean."[56] The question is what "executive power" actually did mean in the 1780s, not what it inherently or naturally means. We are not exotic executive power essentialists, but rather garden-variety originalists trying to discern the historical meaning of the words that appear in the Constitution.

Relatedly, we do not believe that the President has executive power (or foreign affairs power) inherently, by virtue of being the President. Other than perhaps the power to "preside," presidents have no inherent powers.[57] The "president" of Congress under the Articles of Confederation, for example, had no material powers.[58] The U.S. President only has the powers conveyed by the Constitution's text. Moreover, the fact that the President is a single person does not mean the President must be an "executive" or must have "executive power." The Articles' "president" was a single person, but did not have executive power. Indeed, *absolutely nothing* can be deduced about the President's powers in the abstract, without reading the Constitution's text.[59]

Nor does the residual theory rest on the claim that in eighteenth-century discourse foreign affairs powers had to be vested in a single magistrate, either for definitional reasons or because of the English experience with unified executive foreign affairs power. As we recounted, Americans described the Continental Congress, a multi-member body, as having executive power, though many thought this was a bad idea as a policy matter.[60] Americans also knew that Montesquieu had described the Roman Republic as allocating executive foreign affairs powers across three different institutions—the consuls, the senate, and the popular assembly.[61] Although Montesquieu

56. Prakash & Ramsey, *supra* note 3, at 253 n.91.

57. *See id.* (making this point specifically and stating that "[w]e emphatically reject the notion that our arguments amount to a claim that the President has inherent rights").

58. *See* ARTICLES OF CONFEDERATION art. IX, cl. 2 (U.S. 1781).

59. The same can be said of Congress: the mere fact that Congress, under the Constitution, is a multi-member body says nothing about the type of powers it can exercise. The Articles' "Congress" was also a multi-member institution, but it exercised executive and judicial powers while having little lawmaking authority. *See infra* Part II.B.2.

60. Prakash & Ramsey, *supra* note 3, at 272–78.

61. 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 172–74 (Thomas Nugent trans., rev. ed., The Colonial Press 1899) (1751).

thought this was bad policy,[62] the Constitution adopted an allocation that notably resembles it, and we never claimed that this allocation somehow violated the eighteenth-century definition of executive power.

Rather than making claims about the "natural" meaning of executive power, the President's "natural" powers, or the inherently proper and inevitable allocation of foreign affairs powers, we made concrete claims based on text and history. Our consistent claim is that writers in the eighteenth century gave the phrase "executive power" a definition that included foreign affairs powers.[63] We do not argue that this made it inevitable that the President would get foreign affairs power at the Federal Convention. Our claim depends upon Article II, Section 1, which gives the President "executive Power." If the President did not have the grant of power in Article II, Section 1 (as Madison proposed, and as was true for a good part of the Convention),[64] the President would have no claim to residual foreign affairs power, and could only claim the specific powers granted in the text. Since the final version of the Constitution's text *does* have a grant of executive power under Article II, Section 1, though, anyone who wants to know the original meaning of the text must work out what the phrase "executive power" meant in the eighteenth century.[65]

2. The Relevance (and Irrelevance) of Separation of Powers Theorists

In one sense the separation of powers theorists of the eighteenth century are central to our inquiry, while in another sense they are not. Bradley and Flaherty do not distinguish between the two, and thus misunderstand what we are trying to accomplish by appealing to the political writings of the eighteenth century. They dispute that there was, as they put it, "a consensus that the domestic executive by definition had to conduct foreign affairs," or a "continuity between the views of the

62. 1 *id.* at 156.

63. *See* Prakash & Ramsey, *supra* note 3, at 265–95.

64. *See id.* at 282–84 (discussing the development of the draft Constitution at the Convention).

65. Again, our approach parallels Jefferson's. According to Jefferson, the "transaction of business with foreign nations" is "executive" (a definition), and "executive" power is given to the President by the Constitution subject to certain exceptions (a normative allocation). *See* Jefferson, *supra* note 6, at 378–79.

seventeenth- and eighteenth-century theorists concerning the proper scope of executive power and the intent of the constitutional Founders."[66] This conflates two distinct aspects of separation of powers theory, one of which we rely on and one we do not.[67]

As scholars of the period have explained,[68] eighteenth-century writing on separation of powers had at least two key elements, one descriptive (or definitional) and the other prescriptive. The descriptive element sought to classify or categorize the different powers or "functions"[69] of government. The prescriptive or normative element made claims about how these functions should be allocated among the various governmental institutions. Of course, these two projects were related, for it was an axiom of separation of powers theory that the functions of government should be "separated"—meaning that they should, at least to some extent, be exercised by separate institutions.

As a descriptive matter, the project ultimately settled on the now-familiar trinity of executive, legislative, and judicial power. This descriptive division was not obvious, as it was uncommon before the end of the seventeenth century (when writers tended to speak only of legislative and executive powers), and later modern versions have proposed adding a fourth "ad-

66. Bradley & Flaherty, *supra* note 7, at 560, 571.

67. As explained below, we do not claim, and indeed emphatically reject, that there was "continuity" in terms of the allocation of powers, although we do think there was continuity in definition. *See infra* notes 79–80 and accompanying text. Relatedly, Bradley and Flaherty say that the question is whether "foreign relations powers are inherently executive in nature." Bradley & Flaherty, *supra* note 7, at 560. Again, this could mean either that foreign affairs powers were defined as "executive" functions (our point) or that foreign affairs powers inherently had to be assigned to a single "executive" magistrate (not our point).

68. We rely in large part upon the writings of W.B. Gwyn and M.J.C. Vile, whose studies of the evolution of separation of powers theory are vital to understanding its eighteenth-century versions, but which gain only glancing and unhelpful references in Bradley and Flaherty's critique. *See* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGINS TO THE ADOPTION OF THE UNITED STATES CONSTITUTION (1965); VILE, *supra* note 55; *cf.* Bradley & Flaherty, *supra* note 7, at 563 n.79, 564 n.81.

69. Both Vile and Gwyn use the word "functions" in this context and, for reasons explained below, we think it may convey the concept more clearly than "powers," which is the word we have used. We do not intend any substance behind the different phrases.

ministrative" power.[70] Even within the time on which we focus, there was some instability. Locke, as we described, identified a "federative" power, while other writers spoke of the judicial power as a subset of the executive.[71] But the mid-eighteenth century stood firmly in favor of a three-part division. Montesquieu wrote that "[i]n every government there are three sorts of power"—meaning legislative, executive, and judicial.[72] John Adams agreed that "[a] legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government."[73]

As the comments of Montesquieu and Adams suggest, these categories of power did not refer, in the first instance, to what type of institution exercised the power in question. Modern American discourse often speaks in terms of branches, sometimes calling everything the President does "executive," everything Congress does "legislative," and everything courts do "judicial." But as Montesquieu said, *every* government exercised the three types of powers, even if they were all exercised by a single person (as in a dictatorship).[74] The description of the power (or "function"), therefore, did not depend upon the qualities of the institution that happened to exercise it: The "legislative" function, for example, consisted of establishing the rights and duties of members of the community through general laws.[75] Acting in this way was exercising "legislative" power, regardless of what body did it—it could be done, for example, by a prince (ruling by decree), by an oligarchy (like the Roman senate), or by a popular assembly.[76] Classification depended on what was done, not on what type of entity did it.[77]

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70. VILE, *supra* note 55, at 23–82, 289–322.

71. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382–83 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690) (describing the functions of government as executive, legislative, and federative); 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 54 (Cambridge, J. Bentham 1756) (describing the functions of government as executive and legislative, with judicial functions included within executive functions).

72. 1 MONTESQUIEU, *supra* note 61, at 151.

73. John Adams, Letter to Richard Henry Lee (Nov. 15, 1775), *in* 4 THE WORKS OF ADAMS 185, 186 (Charles C. Little & James Brown eds., 1851).

74. 1 MONTESQUIEU, *supra* note 61, at 151.

75. *See generally* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (advancing this definition of legislative power).

76. *See id.* at 1305–06.

77. Of course, the discourse did not always agree on how a particular power should be classified—the classifications were, as Vile says, "extremely

Bradley and Flaherty conflate this classification vocabulary with a second part of separation of powers theory that was not (or at least not necessarily) categorical in this sense. Having identified the different functions of government, political theory sought to allocate them among different institutions of government to produce the best structure for securing rights and maintaining an effective government. This was the normative aspect of eighteenth-century political theory. Here again there was a fair degree of consensus, at least at the broadest level, that there should be branches of government that tracked, at least roughly, the categories of functions. Lawmaking, for example, should be done by an assembly, which could represent the people and which could deliberate. Law execution should be handled by a single magistrate, who could act swiftly, decisively, and consistently. And dispute resolution should be done by independent courts. This second aspect was not "essentialist," since it did not follow from any definitions. Rather, it depended on what allocations would create the best government, which is, we suppose, what Bradley and Flaherty mean by "functionalist."

These two aspects of eighteenth-century thought are captured succinctly by the great separation of powers scholar M.J.C. Vile:

> The second element in the doctrine [of separation of powers] is the assertion that there are three specific "functions" of government. Unlike the first element, which *recommends* that there should be three branches of government, this second part of the doctrine asserts a sociological truth or "law," that there are in all governmental situations three necessary functions to be performed, whether or not they are in fact all performed by one person or group, or whether there is a division among two or more agencies of government. *All* governmental acts, it is claimed, can be classified as an exercise of the legislative, executive, or judicial functions.[78]

abstract" and could pose definitional problems in specific application. VILE, *supra* note 55, at 18. The discourse was also complicated by a related tendency to refer to an institution by the name of the powers it predominantly exercised. Thus, for example, the king was called "the executive" because he principally exercised executive powers (although he also exercised some legislative and judicial powers). *See id.* at 147. This usage should not obscure the fact that "executive power" referred to a set of functions, not to a type of institution.

78. *Id.* at 17.

As Vile says elsewhere, separation of powers theory "depended heavily upon an abstract formulation of the powers of government *and* the allocation of these functions."[79]

It is absolutely crucial to separate these two strands of separation of powers theory, to see what we are relying on and what we are not. Our claim is that in *defining* executive power, legislative power, and judicial power, the common eighteenth-century view was that foreign affairs functions were *considered part of* the "executive power." Our further claim is that when someone in the eighteenth century maintained that a particular entity should exercise the "executive power," they believed that the entity should exercise (among other things) foreign affairs power.

In contrast, the residual theory does not rely upon the allocational strains of eighteenth-century separation of powers theory. Hence we do not rely upon some supposed continuity between the actual or recommended structures of government in mid-eighteenth-century theory or practice and the choices made by the Founders. It does not matter to us that executive power was allocated in various ways in the decades leading up to the Constitution, because we draw no conclusions about the Constitution from the theorists' normative views. Americans never embraced a single magistrate with all of the Crown's powers. Instead, using the *vocabulary* of the political theorists, Americans made normative ("functional") arguments about how to best allocate executive and other powers that did not always mirror English practice or the theorists' recommendations. Early on they gave almost all-encompassing power to multimember institutions. By 1787, however, Americans came to believe that good governmental structure demanded a magistrate with somewhat greater powers than they had at first supposed, though still well short of the powers of the king.[80] None of this renders it inevitable that the Constitution would or would not vest the President with foreign affairs functions.

It is true that in the mid-eighteenth century the king, as England's single magistrate, exercised almost complete control over the diplomatic and military aspects of foreign affairs, and that as a prescriptive matter, the leading theoretical writers of

79. *Id.* at 43 (emphasis added).

80. Leading accounts of these developments include FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 80–82 (1985); VILE, *supra* note 55, at 131–92; and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (2d ed. 1998).

the time—Montesquieu, Blackstone, etc.—argued that a chief magistrate *should* have this control, in the interest of effective government.[81] The Founders' failure to adopt the allocational advice of the theorists, however, does not show that the Founders thought foreign affairs powers were not "executive." Instead, it only suggests that many Founders believed these executive functions should be divided among many institutions. Hence the Constitution allocates some executive foreign affairs powers, such as war declarations, to Congress, and requires the President to share others, such as treaty making, with the Senate.[82]

It is also true that some people, especially in the seventeenth century, saw an absolute prescriptive identity between the *type* of powers exercised and the *branch* that should exercise them. In this vision of what M.J.C. Vile calls "pure" separation of powers, a well-functioning and just government should have an executive branch that exercised only executive powers, and a legislative branch that exercised only legislative powers—that is, "each of these functions should be entrusted *solely* to the appropriate, or 'proper,' branch of the government."[83] Such a view would, for example, likely reject the presidential veto, because this would involve the executive branch exercising a legislative function,[84] and would reject the idea of a popular lawmaking assembly (or part of a popular lawmaking assembly) also acting as a council to restrain the President, since this would involve the legislative branch exercising executive functions.[85]

But this "pure" view of separation of powers lost favor among eighteenth-century theorists and constitution makers. The principal institutions of English government—the king, lords, and commons—did not map precisely onto the three functions of government, partly because each had a role in legislation. This suggested a different prescriptive version, in which each branch generally exercised its respective functions, but with some overlap to assure what came to be called checks and balances.[86] The combination of separation of powers and checks

81. *See infra* Part II.B.

82. U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 2.

83. VILE, *supra* note 55, at 17 (emphasis added); *see also id.* at 13–14 (defining "pure" doctrine of separation of powers).

84. *See id.* at 47.

85. *See id.* at 48–49.

86. As Vile explains, *see id.* at 83–168, and as we later discuss, *see infra*

and balances proved highly influential on the Framers, who embraced some mixing of different types of power in the same branch, and some distribution of types of power across several branches.[87] How these allocations would be made was a question of constitutional architecture, combining considerations of efficiency (which branch could best exercise the function) and balance (what allocation would provide an adequate check). These developments left the Framers with a vocabulary of governmental functions derived from separation of powers theory, and a general three-part structure of government, but considerable prescriptive flexibility as to how particular powers should be allocated.

Because they do not fully explore these developments, Bradley and Flaherty spend most of their time contesting propositions we do not advance. We do not say that defining a power as "executive" meant (to either the political theorists or the Founders) that "by definition" it had to be exercised by a single magistrate.[88] We do not say that the Framers must have

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Part II.B, Montesquieu and Blackstone are important parts of this shift.

87. As Vile observes, "[b]y the time the Convention met, important sections of opinion among its members had already accepted the two central positions of modern American constitutional thought," namely separation of powers and the idea of checks and balances, which was "considered an essential constitutional weapon to keep all branches of government, and especially the legislature, within bounds." VILE, *supra* note 55, at 168. This was the point of Madison's *Federalist 47–48*, in which he famously defended the Constitution against charges that it violated the doctrine of separation of powers. Madison agreed that "[t]he accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987). Thus, he accepts the definitional part of separation of powers theory—that "all powers" can be classified, not according to what branch exercises them, but abstractly, as legislative, executive, or judicial. *Id.* He also accepts part of the prescriptive element of separation of powers—that is, that these functions should not all be exercised by one body. But Madison goes on to reject the "pure" separation of powers position that there must be absolute identity between the branches and the powers. *Id.* Rather, he says that the branches may have "a partial agency" in the functions of the others. *Id.* at 304. Indeed, he says, "unless these departments be so far connected and blended as to give to each a constitutional control over the others," boundaries between the branches "can never in practice be duly maintained." THE FEDERALIST NO. 48, *supra*, at 308 (James Madison). As he points out, this view was entirely consistent with the eighteenth-century English constitution, as Montesquieu explained it, and with the post-revolution state constitutions. THE FEDERALIST NO. 47, *supra*, at 304–05 (James Madison).

88. Bradley and Flaherty argue against the proposition that theorists such as Montesquieu thought that foreign affairs power "by definition" (Bradley and Flaherty's phrase) had to be exercised by a single magistrate called

adopted the system of unified foreign affairs powers advocated by the political writers as a prescriptive matter; we agree with Bradley and Flaherty that they did not. We do say that the Framers used the same *vocabulary* as the great political writers on whom they relied, and we have traced evidence of that usage through the discourse of the early republic. Clearly, adopting the same vocabulary does not mean adopting the same allocational prescriptions. The Framers might have said, for example, that the "executive power" should be exercised by a rotating council of ten members of the Senate. That would be an allocation quite contrary to the suggestions of the political writers. But we think that a council empowered in such a way would have foreign affairs powers, because that is what it meant to say that the council had executive power.[89]

At the heart of Bradley and Flaherty's article is a modernist and functionalist disdain for what they call "essentialist" reasoning, which we take to mean, at least in part, the classification of different functions of government into these three abstract categories—legislative, executive, and judicial. But whether or not they are right to be disdainful, their views on the matter are beside the point. This categorical approach was at the heart of eighteenth-century political theory; its vocabulary was embraced by eighteenth-century Americans, and it was written into the first sections of Articles I, II, and III. Whether we like it or not, this is part of the Constitution's linguistic background, and to understand the Constitution as it was written, we must work within it.

We think there are two coherent (though ultimately unpersuasive) responses: one might deny that eighteenth-century

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"the executive." *See* Bradley & Flaherty, *supra* note 7, at 571. That is not what Montesquieu meant, and we do not claim otherwise. Montesquieu knew that in many governments "executive" foreign affairs power was exercised, at least in part, by assemblies or councils. (The most obvious example is the Roman senate, which Montesquieu discussed at some length.) *See* 1 MONTESQUIEU, *supra* note 61, at 172–74. Montesquieu did think that as a policy matter, foreign affairs power *should be* exercised by a single magistrate, *see id.* at 156, but the only thing he thought true "by definition" was that whatever body exercised foreign affairs power had at least part of the "executive power." When we say that the Framers adopted Montesquieu's definitions, the latter point is all that we mean.

89. Similarly, if the Constitution had not said that the President had executive power, or had said that the President had executive power but that all foreign affairs powers were lodged in Congress, then the President would not have foreign affairs power even though the President was the chief magistrate.

discourse engaged in a classification of governmental functions along the lines we have suggested, or one might deny that it assigned foreign affairs power to the executive category. Bradley and Flaherty do neither. Their principal claim in this regard is that not everyone thought foreign affairs power should be exercised by a single magistrate.[90] We agree, but this has nothing to do with making sense of the vocabulary of the eighteenth century. The key is how speakers used the phrase "executive power," not what allocations of executive power they preferred as a policy matter.

II. TEXTUAL AND HISTORICAL DIFFICULTIES OF THE CASE AGAINST RESIDUAL EXECUTIVE POWER

This section addresses specific textual and historical claims made by those who disparage the Jeffersonian theory. We again focus on the extensive arguments made by Bradley and Flaherty. Because they do not advocate a consistent reading of constitutional text as an alternative to the residual theory, their argument must be that the residual theory is untenable no matter the alternatives. To succeed, they must have concrete evidence contravening the residual theory (or at least evidence that the sources we claim in support do not in fact support it). We think they entirely fail in this endeavor. Their discussion of the Constitution's text confirms that the critical question is what the phrase "executive power" meant in the eighteenth century. As we elaborate, they ignore the conclusions of leading historians and separation of powers scholars who agree that in the eighteenth century "executive power" was understood to include foreign affairs functions, both in the writings of theorists such as Montesquieu and Blackstone and in the discourse in America during the confederation period. Bradley and Flaherty's descriptions of the Federal Convention and the ratification debates, while largely accurate, do little to advance their argument because they are unable to identify anyone who claimed that the Vesting Clause meant nothing. Finally, while they argue that the discourse and practice of the Washington administration supports a theory of specific presidential powers rather than the residual theory, here they are simply mistaken.

90. *See* Bradley & Flaherty, *supra* note 7, at 560–71.

A. TEXTUAL CONFUSION

Our textual claim is simple. Article II, Section 1 "vest[s]" the President with "the executive Power."[91] If the "executive Power" referred to a set of functions, Article II, Section 1 would seem to assign these functions to the President (subject, of course, to other provisions in the document). This is all we claim for the text standing alone. To dispute it, one might deny that the Vesting Clause grants the President *any* power (that is, that the "executive power" does *not* refer to a set of functions), or one might say that whatever power it does vest does not include foreign affairs power. In modern discourse, most opponents of presidential power take the first course, claiming that the Vesting Clause only establishes that there shall be one executive with the title of "President."[92]

Bradley and Flaherty seem unable to decide which line of attack to pursue. They begin their textual discussion with an admission that the Vesting Clause may convey a power to execute the law.[93] They try to use this common understanding as a shield against a broader conception of executive power that includes foreign affairs powers.[94] Yet in spite of this seeming concession, most of their textual and historical discussion is premised on the claim that the President has "specific" powers only, and that the Vesting Clause vests nothing.[95] Indeed, they declare that they mean to "challenge" the Vesting Clause Thesis,[96] i.e., the thesis that the Vesting Clause "grants the President a broad array of residual powers not specified in the remainder of Article II."[97]

We grasp the basis of their discomfort. If they agreed that the Vesting Clause grants law execution power, they would have to forfeit many of their textual and historical arguments. In particular, this would make them executive power "essentialists" and proponents of the Vesting Clause Thesis, at least in the sense of admitting that "executive power" referred to a set of functions that the Framers intended to vest with the President. As a result they would all but admit that *if* the

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91. U.S. CONST. art. II, § 1.

92. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

93. Bradley & Flaherty, *supra* note 7, at 553.

94. *See id.* at 557–71.

95. *See id.* at 553–59.

96. *Id.* at 551.

97. *Id.* at 546.

common eighteenth-century understanding of "executive power" included foreign affairs power (as it did include the law execution power), the Vesting Clause would vest this power with the President. In sum, their textual discussion would have ended with the observation that to discern whether "executive power" had a foreign affairs component requires resort to its historical definition—which is exactly our point.[98]

On the other hand, if they consistently assumed the role of executive power nihilists, denying that the Vesting Clause vests substantive powers, they would have to confront powerful arguments that the clause, at minimum, vests law execution power. First, there is much historical evidence that the Framers understood executive power to encompass a law execution power, and that the President was not merely supposed to take care that the laws be faithfully executed but was to superintend all those who execute the laws.[99] As Bradley and Flaherty seem to admit, one can justify these understandings only by reference to the Vesting Clause. Second, the structure of the Constitution's first three Articles indicates that the Vesting Clause vests substantive power. Article III's Vesting Clause, which vests the judicial power in the Supreme Court and any inferior courts that Congress might create,[100] has always been read as granting power to the Article III judiciary, in particular the power to decide cases and controversies.[101] In contrast, Article I's Vesting Clause makes clear that it vests only those powers "herein granted."[102] This has always been understood to mean that Congress lacked general legislative powers of the

98. Prakash & Ramsey, *supra* note 3, at 234 n.1 (arguing that the meaning of executive power could not be resolved merely by citing the Constitution's text and that resort to history was absolutely necessary).

99. *See generally* Prakash, *supra* note 55 (examining the historical meaning of executive power).

100. U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish.").

101. Though the rest of Article III spells out the cases and controversies to which the judicial power extends, *see id.* art. III, § 2 (stating that the "judicial power shall extend to" numerous classes of cases), it does not grant any power. To say that the judicial power extends to cases involving the Constitution, laws, and treaties of the United States is not to grant any power, but to make clear the judicial power already granted. If the Article III Vesting Clause does not grant any powers, Article III courts lack constitutional power, for no other provision grants them authority.

102. *Id.* art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress . . . .").

type granted to state legislatures under the state constitutions. Instead, Congress was limited to its specific enumeration. The Article II Vesting Clause reads like a fraternal twin of the Article III Vesting Clause and is in contradistinction to its Article I counterpart. The Article II Vesting Clause provides that "[t]he executive Power shall be vested in a President."[103] To "vest" a power is to convey that power.[104] Indeed, that is the way the verb is understood in every other place in the original Constitution,[105] including Article III.

Bradley and Flaherty avoid dealing with these difficulties by declining to endorse either alternative theory. As a result, they must show that the Jeffersonian theory is simply implausible. Their textual discussion falls well short of this goal.

1. The Claim that the Vesting Clause Vests No Power

Bradley and Flaherty carefully disclaim any fixed view of the Vesting Clause, but try to raise doubts about whether the Vesting Clause conveys substantive powers. Most of their points are not new,[106] and have been adequately addressed elsewhere—mostly outside of the foreign affairs context.[107] We

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103. *Id.* art. II, § 1, cl. 1.

104. *See generally* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994) (arguing that the Vesting Clauses are power grants that gain content from later provisions in Articles II and III).

105. *See* U.S. CONST. art. I, § 8, cl. 18 ("[Congress may] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers *vested* by this Constitution in the Government of the United States, or in any Department or Officer thereof." (emphasis added)); *id.* art. II, § 2, cl. 2 ("Congress may by Law *vest* the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (emphasis added)).

106. Bradley and Flaherty draw upon a rich tradition of criticism of the view that the Article II Vesting Clause vests power. *See, e.g.*, Flaherty, *The Most Dangerous Branch*, *supra* note 13, at 1778; Lessig & Sunstein, *supra* note 92, at 47–48; A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994).

107. *See generally* Prakash, *supra* note 55 (offering an overview of the Vesting Clause's impact on the scope of executive power); *see also* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 572–74 (1994).

In a forthcoming piece in the *University of Illinois Law Review*, Gary Lawson and Guy Seidman add powerful arguments in favor of reading the Vesting Clause as if it actually vested power. They assert that all presidential powers flow from the Article II Vesting Clause, with the remainder of Article II merely qualifying or elaborating on the broad Vesting Clause grant. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV.

address a few points that they add to the prior debate.

Bradley and Flaherty offer three readings of Article II: that the omission of "herein granted" from Article II could have been an accident; that "herein granted" was understood to be implicit in Articles II and III for the new executive and judicial branches, but needed to be made explicit in Article I to deny Congress any carryover powers from the Articles of Confederation; and that the Vesting Clause delineated where the executive power lies but did not establish its scope.[108] All of these readings are unsound. As to the first, of course the Constitution contains scrivener's errors. But Bradley and Flaherty contend that the Constitution contains the conspicuous blunder of incorporating a key phrase in the Article I Vesting Clause while accidentally omitting the same phrase in Articles II and III. If this was a slip-up, it was one of major proportions, not one of those tucked away in some nook or cranny. These introductory clauses inaugurate the three great Articles; it is unlikely that the Constitution's drafters made so conspicuous an error.[109]

Bradley and Flaherty's second reading seeks to show why the phrase "herein granted" was necessary in one clause but unnecessary in the other two Vesting Clauses. But their claim based on the Continental Congress is infirm. When the Framers meant to vest Congress with a power granted to the Continental Congress, the Constitution specifically grants that power.[110] By listing some powers of the Continental Congress in Article I, Section 8 and omitting others, the Framers made clear that the new Congress would not enjoy all of the Continental Congress's powers.

Their third argument—that the Vesting Clause merely makes clear "where the executive power is being vested"[111] but does not specify the scope of the "executive power"—is odd. If this reading is just another way of claiming that "herein granted" is implicit, it is subject to the objections listed above.

(forthcoming).

108. Bradley & Flaherty, *supra* note 7, at 554–55.

109. In any event, even if we were to concede that the Framers mistakenly granted the executive power to the President, the falsity of the residual theory of foreign affairs certainly does not follow, as Bradley and Flaherty recognize. As they concede, it is not obvious why a "mistake" at the Convention matters. *Id.* Most people believe the Constitution is the supreme law of the land not because of who wrote it, but because of how it was ratified.

110. Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1972 (1993).

111. Bradley & Flaherty, *supra* note 7, at 555 (emphasis omitted).

If instead Bradley and Flaherty mean that the Vesting Clause does not, by itself, delineate the scope of executive power, this is true. To say that someone has the "executive power" does not, in itself, convey what "executive power" encompasses. But this is true of *all* constitutional provisions. One could similarly say that the First Amendment does not define its own scope. Constitutional provisions use certain words and not others because they convey certain meanings and not others. Our claim is not that the Vesting Clause helps define itself, for no clause does this. Instead, our claim is that the scope of executive power comes from the common usage of that phrase in the eighteenth century, as does the scope of every other constitutional clause.[112]

Apart from their doubtful readings of Article II's Vesting Clause, Bradley and Flaherty invoke two interpretive canons meant to show that Jefferson's residual thesis has "significant textual problems": they claim that the thesis violates the expressio unius canon because it suggests that the Article II's list of powers is illustrative rather than complete, and they claim the thesis makes the rest of Article II redundant, contrary to the "general presumption against redundancy."[113]

Bradley and Flaherty's invocation of the expressio unius canon is misplaced because they suppose that it somehow counsels that the listing of powers in Article II, Sections 2 and 3 must be "complete."[114] The expressio unius canon cannot be applied to enumerated powers, including the enumerated "executive power," because these are *express* powers. It can be applied only to claims about implied or inherent powers where one can say that the enumeration of certain powers excludes those *not enumerated*.[115] Arguing that the expressio unius canon suggests that the Vesting Clause must lack meaning is like assert-

112. If "executive power" did not have a common meaning, or if it did not refer to a set of powers, we agree this would raise difficulties for our argument. But as we previously discussed, and reiterate in subsequent sections, it did. Bradley and Flaherty concede as much by admitting that executive power may have referred, at minimum, to law execution power. *Id.* at 558.

113. *Id.* at 555.

114. *Id.*

115. Bradley and Flaherty might respond that our claim about executive power does involve recourse to implied or inherent powers. But as we have explained, we are making a claim about an express clause, the Vesting Clause. Though they disagree with our reading of this clause and though they may regard the clause as not granting any power at all, they are not entitled to invoke a canon about implied powers and thereby assume that our argument is based on an implied presidential power.

ing that the power to lay and collect taxes[116] cannot grant any power, because application of the expressio unius canon to the remainder of the Article I, Section 8 powers somehow means that the remainder must be read as a complete enumeration of congressional power. The granting of *other* powers in other portions of Article II is no argument against reading the Vesting Clause as a grant of power.[117]

The second canon invoked by Bradley and Flaherty, the presumption against redundant readings, actually cuts against the theory that the Vesting Clause merely establishes where the executive powers granted by the specific clauses will rest. This reading makes part of the Vesting Clause redundant and renders other portions meaningless. Every clause granting power to the President in Article II or elsewhere already makes clear who has those powers.[118] There was no need to repeat that in the Article II Vesting Clause. Moreover, Bradley and Flaherty would read the introductory clause as providing merely that "[t]here shall be a President." This reading omits the words "[t]he executive Power shall be vested in,"[119] thus supposing that they are superfluous and do not mean to vest any power.

In contrast, any redundancies of reading the Vesting Clause as vesting power are inconsequential and exaggerated. We have already shown that much of the language in Article II can be explained as necessary to share powers that would have been granted to the executive in toto had specific exceptions been lacking.[120] Other language was necessary to make clear

116. U.S. CONST. art. I, § 8, cl. 1.

117. Bradley and Flaherty's reliance on the expressio unius canon is also inconsistent with their own arguments. Their alternative readings of Articles I, II, and III ignore the selective placement of "herein granted." Though that phrase is present only in Article I and absent elsewhere, they seem to favor reading this limitation into the other two Articles. *See* Bradley & Flaherty, *supra* note 7, at 554–55.

118. Prakash, *supra* note 55, at 716 n.61.

119. U.S. CONST. art. II, § 1, cl. 1.

120. Bradley and Flaherty complain that we do not provide nonredundant readings of several specific powers vested with the President, such as the pardon power or the Opinions Clause. *See* Bradley & Flaherty, *supra* note 7, at 555. But they have conceded the possibility that the executive power grants a law execution power, a reading that also raises the specter of redundant clauses. *See id.* at 558. Moreover, our prior article only sought to advance our residual theory of foreign affairs. *See generally* Prakash & Ramsey, *supra* note 3. Though we mentioned that the Vesting Clause also granted law execution powers, *id.* at 253, our article was not meant to provide a comprehensive account of all the meanings of executive power. Professor Prakash elsewhere

the scope of powers that presumably were part of the executive power.[121] And still other language likely was redundant or perhaps included out of abundance of caution.[122]

This all seems too messy and implausible for Bradley and Flaherty. What a bizarre way to construct Article II, they seem to exclaim—to grant a general power and explain, qualify, and constrain it in the remainder. Yet there is nothing odd or unfamiliar with this draftsmanship. Writing as *Publius*, Madison said "[n]othing is more natural [ ]or common than first to use a general phrase, and then to explain and qualify it by a recital of particulars."[123] Hamilton wrote of Article II that it would be inconsistent "with the rules of sound construction to consider [its] enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause."[124]

Bradley and Flaherty also maintain that the Vesting Clause Thesis is "in tension with the enumerated powers" doctrine.[125] Contrary to their suggestion, the enumerated powers doctrine does not provide that the federal government only has powers with clear boundaries. Instead, the enumerated powers doctrine holds that the federal government only has the powers enumerated in the Constitution. Our theory is entirely consistent with the actual enumerated powers doctrine. We claim that the Constitution contains an enumerated grant of power to the President—the executive power. We reject arguments about inherent or unenumerated foreign affairs power—indeed, this was one of our principal complaints about existing theories of the allocation of foreign affairs authority. While there may be uncertainty at the fringes of the clause, that is true for almost every clause. Few would dispute that the Commerce Clause grants powers to Congress merely because there are controver-

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supplied nonredundant readings for many of the other non–foreign affairs powers in Article II, Sections 2 and 3. *See* Prakash, *supra* note 55, at 720–40 (analyzing the meanings of, inter alia, the Faithful Execution Clause, the Opinions Clause, and the Commander-in-Chief Clause).

121. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 ("The President shall be 'Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States,' when called into [federal] Service."). Hence, the Constitution makes clear that the President does not head the state militias at all times.

122. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments.").

123. THE FEDERALIST NO. 41, *supra* note 87, at 272 (James Madison).

124. HAMILTON, *supra* note 6, at 39.

125. Bradley & Flaherty, *supra* note 7, at 558–59.

sies about that clause's peripheries. We do not see how disagreements about the scope of executive power become a reason to deny that the Vesting Clause vests power.

Finally, Bradley and Flaherty do not even begin to address the most serious problem of the vesting-clause-vests-nothing hypothesis—the historical evidence that the Founders understood the clause to vest law execution power. In any event, their discussion surely does not show that it is implausible to read the Vesting Clause as vesting substantive power, especially since they do not identify any viable alternatives to the Vesting Clause Thesis.

2. The Claim that the Vesting Clause Does Not Vest Foreign Affairs Power

Whatever one thinks of Bradley and Flaherty's elaborate arguments about the emptiness of the Vesting Clause, the crucial point is that Bradley and Flaherty themselves do not find them persuasive. Although they devote much space to arguing against a substantive reading of the Vesting Clause, Bradley and Flaherty end up admitting that the clause may vest law execution power.[126] Their ultimate argument, therefore, is that even if the clause vests law execution power, it does not vest foreign affairs power. Textual support for this proposition is almost nonexistent.

Bradley and Flaherty try to trade on the common modern association of the phrase "executive power" with the power to execute the law, thus implying that it likely did not mean more than this to the Framers. But surely "executive power" meant to the Framers what it meant in ordinary eighteenth-century discourse, whatever that was. Modern intuitions are completely unhelpful in resolving this question. It can be answered only by looking at how the phrase was used in writings of the time.

Beyond intuitive appeals, Bradley and Flaherty have only one serious textual argument to limit "executive power" to the power to execute the laws. Extending it to foreign affairs, they say, would create redundancies, because some foreign affairs powers are specifically assigned to the President in Article II, Sections 2 and 3, and yet would also be included in the Vesting Clause if it included foreign affairs powers.[127]

126. *See id.* at 558.
127. *See id.* at 555.

We think only one of these powers—the power to receive ambassadors—merits discussion. The other powers in Sections 2 and 3 are obviously allocations of power between the President and another branch of government.[128] The role of the Ambassadors Clause seems more troublesome, but we think it can be explained on three grounds, none of which Bradley and Flaherty consider. First, it could indeed be redundant, included by mistake. The Constitution surely has mistakes and redundancies. In the Convention, the delegates began with the idea of a general grant of executive power; they then shifted to a drafting strategy of trying to enumerate foreign affairs powers. They added the Ambassadors Clause during this phase. Then, in the Committee of Detail, they shifted back to a general grant of executive power (albeit greatly qualified by specific grants to other branches).[129] Thus, the Framers might simply have neglected to delete the formerly non-redundant Ambassadors Clause when they returned to the idea of a general grant of executive power.

Alternatively, the clause may have served two other purposes. It may have imposed a duty on the President: he "shall" receive ambassadors—that is, he must formally greet foreign officials and receive their credentials, a tedious duty necessi-

128. Bradley and Flaherty claim that the Senate's treaty and appointments roles were not written as if they were exceptions to the executive power. *See id.* But the fact that the Founders choose to reiterate the executive nature of these powers, while also qualifying them, does not help their argument. They also claim that "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." *Id.* This argument entirely misses the point. Delineation was necessary *precisely* because the Framers wanted the President's executive power qualified and because language was necessary to accomplish the Senate check. Without delineation, these powers would have rested solely with the President by virtue of the Vesting Clause.

Bradley and Flaherty also claim that the residual theory makes the commander-in-chief power redundant. *Id.* But as discussed earlier, the Vesting Clause makes it clear that the President's power over the militia only exists when it is called into service, and as discussed in our prior article, the clause makes clear that despite Congress's broad powers over the creation and disciplining of the armed forces, Congress cannot decide who shall command the nation's armed forces. *See* Prakash & Ramsey, *supra* note 3, at 259–60.

129. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65–67 (Max Farrand ed., 1966) (shifting away from a general grant); 2 *id.* at 145–46 (including reception of ambassadors as a presidential power along with other specific enumerations and without a general grant of executive powers in the Randolph draft of the Committee of Detail report); 2 *id.* at 171 (adding grant of executive power but retaining power to receive ambassadors in the Wilson draft of the Committee of Detail report).

tated by international customs.[130] The clause's presence in Section 3 supports this interpretation, for while Section 2 generally lists powers,[131] Section 3 is sometimes understood to list duties.[132] In addition, the clause may have been intended to preclude states from receiving ambassadors and other public ministers. Absent this clause, it would be less clear that the states lacked this power. States could not receive ambassadors on behalf of the United States (since that was an aspect of the executive power of the United States), but states might have otherwise thought that they could receive ambassadors on their own behalf—and might be particularly tempted to do so (or even feel an obligation to do so) since the ambassadors might be physically present in the state. Thus the clause might emphasize that the President has an exclusive duty to receive ambassadors. This reading is supported by the Constitution's omission of the Articles of Confederation's prohibition on states receiving ambassadors.[133] This clause may have been omitted precisely because the Ambassadors Clause made it unnecessary. The exclusive duty reading is also supported by the omission of consuls from the Ambassadors Clause, even though the Constitution includes consuls on every other occasion that it refers to ambassadors.[134] It makes sense that the President would not be obligated to receive minor officials like consuls, and that the states would be able to interact with them.

Whatever the correct reading, we think that the Ambassadors Clause is too uncertain to decide the meaning of the Vesting Clause. We do not deny that the clause raises issues about the residual theory, but we think the better approach is to examine what the phrase "executive power" actually meant in eighteenth-century writings, rather than to guess what it

130. U.S. CONST. art. II, § 3.

131. *Id.* art. II, § 2 (listing the commander-in-chief, pardon, treaty, and appointment powers).

132. *Id.* art. II, § 3 (requiring the President to faithfully execute the laws and to commission all officers of the United States).

133. ARTICLES OF CONFEDERATION art. VI, cl. 1 (U.S. 1781) ("No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from . . . any king, prince or State.").

134. *Compare* U.S. CONST. art. II, § 3 ("[The President] shall receive Ambassadors and other public Ministers."), *with id.* art. II, § 2, cl. 2 ("[The President can appoint] Ambassadors, other public Ministers and Consuls."), *id.* art. III, § 2, cl. 1 ("[Judicial power extends to all cases concerning] Ambassadors, other public Ministers and Consuls."), *and id.* art. III, § 2, cl. 2 ("[The Supreme Court has original jurisdiction over cases concerning] Ambassadors, other public Ministers and Consuls.").

meant based on a fairly obscure clause capable of multiple meanings.

In any event, we think that Bradley and Flaherty have given up the entire textual game by conceding that the Vesting Clause may vest the President with law execution power.[135] The only way the clause could do that is if the ordinary eighteenth-century understanding of "executive power" included the power to execute the law, and if the clause was intended to convey to the President the powers ordinarily termed executive (subject, of course, to constraints and exceptions found in other provisions).[136] This is all we claim for the text standing alone. It remains to ask what else the "executive power" might have meant in the eighteenth century. That question can be answered only by looking at the phrase's historical definition. Bradley and Flaherty's arguments about the text fail to undermine the possibility that the Vesting Clause conveys the executive power of foreign affairs.

B. THE SEPARATION OF POWERS THEORISTS AND THE MEANING OF EXECUTIVE POWER

We now turn to the historical meaning of the phrase "executive power," beginning with the eighteenth-century separation of powers theorists. We briefly reiterate the claims underlying the residual theory. First, eighteenth-century political theory classified the powers of all governments as legislative,

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135. Bradley & Flaherty, *supra* note 7, at 558.

136. Ironically, elements of Bradley and Flaherty's textual arguments are "essentialist." Specifically, the phantom "herein granted" theory seems essentialist, for it contemplates that the President's specific powers are "executive." Rather than merely vesting "the power herein granted," their reconstructed clause must provide that the "executive powers herein granted shall be vested in a President." *Id.* at 554. The only reason to refer to the Article II list of powers as "executive" is because one believes that these powers share something in common—they, unlike other powers, are *executive* powers. Bradley and Flaherty might respond that these powers are regarded as part of the "executive power" under the Vesting Clause because they are given to a single chief magistrate and, under their conception, a single chief magistrate is necessarily an "executive." But since they admit that councils could be "executive" as well, *id.* at 582, the adjective "executive" cannot turn on the presence or absence of a chief magistrate. As we explained, the concept of executive power refers to a category of powers, a category independent of the type of institution that might exercise those powers. *See supra* Part I.C.2. In our view, executive powers can be exercised by a small council, an assembly, or a single magistrate. Unless Bradley and Flaherty are willing to add (the phrase "herein granted") and subtract (the adjective "executive") words, the "herein granted" theory makes them unwitting proponents of executive essentialism.

executive, and judicial. This classification was a matter of abstract definition that referred to types of powers (functions), not to the types of institutions that exercised them. Second, eighteenth-century political theory classified the diplomatic and military aspects of foreign affairs as part of the "executive" functions of government, even though these functions were distinct from the principal "executive" power of law execution. Third, as a matter of policy, many eighteenth-century theorists claimed that in a sound government executive functions, including the foreign affairs power, were assigned to a single magistrate and legislative powers were exercised by an assembly. Nonetheless, theorists recognized that the functions were often assigned in other ways in actual practice. Fourth, the Framers of the Constitution used the vocabulary of eighteenth-century theory, referring to legislative, executive, and judicial powers; but to some extent they rejected the prescriptive elements of that theory because they thought some "executive" foreign affairs functions should be allocated across various institutions rather than concentrated in a single magistrate.[137]

According to Bradley and Flaherty, the eighteenth-century separation of powers theorists "provide no more than weak support" for the residual theory.[138] Yet in reviewing the political theorists, Bradley and Flaherty never spell out their aims. Without explaining their terms, they set up a supposed contrast between an "essentialist" view and a "functional" view, claim that the residual theory requires "essentialist" evidence, and purport to find little such evidence. This does little either to explain eighteenth-century discourse or to test the residual theory. The simple question is whether the theorists classified foreign affairs powers as "executive" functions of government. Once the matter is put this way, we think it plain that they did.

1. Locke

We agree with Bradley and Flaherty's description of John Locke, which parallels our own.[139] But Bradley and Flaherty do not see why Locke is important. Our point is not that Locke called foreign affairs powers "executive powers"—for the most part, he did not. The key is that Locke recognized government's

137. *See supra* Part I.C.

138. Bradley & Flaherty, *supra* note 7, at 560.

139. LOCKE, *supra* note 71, at 364–66; *cf.* Prakash & Ramsey, *supra* note 3, at 267–68; Bradley & Flaherty, *supra* note 7, at 560–61.

foreign affairs functions as something other than pure lawmaking or pure law execution. These functions involved neither establishing rights and duties within the society nor carrying into effect "antecedent, standing, positive laws," but rather resolving "[c]ontroversies that happen between any Man of the Society with those that are out of it."[140] Much of foreign affairs, Locke said, could not be regulated by antecedent law, since "what 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."[141] This was neither lawmaking nor law execution; as M.J.C. Vile notes, Locke insisted that conducting foreign affairs "is carrying out quite a distinct function."[142]

Locke's discussion is important in two ways. First, it illustrates the project of dividing governmental functions into abstract categories, independent of which institution(s) exercised them.[143] Second, it called attention to the question of how foreign affairs functions fit into the classification scheme, in a way not previously appreciated. Prior writing had addressed mostly domestic matters, with the familiar division between lawmaking and law execution functions. When writers did mention foreign affairs, they tended to identify it with the executive monarch (not surprisingly, given the practicalities of the English system), without much explanation.[144] Locke pointed out that foreign affairs functions stood somewhat apart from the usual idea of law execution, such that (in his view) it constituted a separate category. He called these functions "federative powers," a term that did not survive into the eighteenth century. But he closely associated federative powers with law execution powers—so closely, in fact, that he sometimes wrote impre-

140. LOCKE, *supra* note 71, at 383–84.

141. *Id.* at 384 (emphasis omitted).

142. VILE, *supra* note 55, at 67.

143. As a matter of definition, Locke calls foreign affairs powers "federative powers"; as a matter of prescription, he says that those powers should be lodged with whomever has the executive power. *See* LOCKE, *supra* note 71, at 382–84. Contra Bradley and Flaherty, this is neither "essentialist" *nor* "functional"; it is a definition followed by a policy argument. *See* Bradley & Flaherty, *supra* note 7, at 561.

144. *See* VILE, *supra* note 55, at 23–63; *id.* at 60–62 (discussing the seventeenth-century writings of George Lawson, who identified an internal and external component to "executive power").

cisely and conflated the two.[145] This "set the stage" (as we said) for the eighteenth-century idea that foreign affairs functions did not depend on antecedent law but still should be classified as executive.

2. Montesquieu

Our historical argument centers not on Locke, but on Montesquieu and Blackstone,[146] theorists who dominated American political thought during the founding period.[147] Bradley and Flaherty concede that Montesquieu called foreign relations powers "executive," but they caution that "even here the picture is complicated and uncertain."[148] They go on to claim that Montesquieu was "confusing"[149] and that he only made isolated references to foreign affairs as an executive power.[150]

Leading separation of powers scholars such as W.B. Gwyn and M.J.C. Vile are not confused by Montesquieu's treatment of foreign affairs powers. According to Gwyn, "Montesquieu did not . . . adopt Locke's terminology but decided to call the conduct of foreign affairs 'executive power' and the execution of domestic law 'judicial power.'"[151] Later, Gwyn states, "[t]he meaning Montesquieu attributed to 'executive power' in the opening paragraphs of Book XI, Chapter Six, is broadened in the rest of the chapter to include both domestic and foreign affairs," although "Montesquieu, like most writers of his time, was inclined to think of the executive branch of government as

145. *See* LOCKE, *supra* note 71, at 343, 371.

146. Prakash & Ramsey, *supra* note 3, at 265–72.

147. *See* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 136–49 (1988) (demonstrating that Montesquieu and Blackstone were the most commonly cited political theorists in America during the founding period).

148. Bradley & Flaherty, *supra* note 7, at 563.

149. *Id.* Bradley and Flaherty's claim seems to rest in large part on the fact that Montesquieu early in his discussion could be read to use "executive power" *only* to mean foreign affairs powers, while later he broadened it to include internal law execution as well. *Id.* This may appear to be a superficial oddity, but we do not see how it undermines our conclusion that Montesquieu defined executive power to include foreign affairs power.

150. Bradley and Flaherty also say that Montesquieu's "essentialism primarily concerns the abstract classification of power rather than the proper institutional assignment of power." *Id.* That is precisely correct—and precisely our point. That Bradley and Flaherty fail to see this shows their misunderstanding of our theory.

151. GWYN, *supra* note 68, at 101.

being concerned nearly entirely with foreign affairs."[152] Likewise, Vile writes:

> Montesquieu . . . affirms [at the outset of his discussion] that he intends to use the term "executive power" exclusively to cover the function of the magistrates to make peace or war, send or receive embassies, establish the public security, and provide against invasions. He now seems to wish to confine the term "executive power" to foreign affairs, for he does not make it at all clear that the power to "establish the public security" has any internal connotation—in other words, for Locke's "federative power" read "executive power."[153]

Nonetheless, says Vile, Montesquieu's later usage "clearly includ[es] internal as well as external affairs in the executive power. It is in this final sense that Montesquieu discusses the relationships between the powers of government . . . ."[154]

Although Bradley and Flaherty cite Vile and Gwyn in passing,[155] they do not acknowledge that our reading of Montesquieu tracks Vile and Gwyn while theirs does not.[156] Moreover, if there was any doubt about Montesquieu's association of executive power and foreign affairs power in his opening discussion, it seems wholly laid to rest—as even Bradley and Flaherty appear to concede[157]—by Montesquieu's description of Rome. In his chapter "Of the executive Power in the [Roman] Republic," Montesquieu begins:

> Jealous as the people were of their legislative power, they had no great uneasiness about the executive. This they left almost entirely to the senate and to the consuls, reserving scarcely anything more to themselves than the right of choosing the magistrates, and of confirming the acts of the senate and of the generals.[158]

He then makes clear that the "executive power" exercised by the senate and the consuls was principally foreign affairs power—the senate "determined war or peace," "fixed the number of the Roman and of the allied troops," "received and sent embassies," and "nominated, rewarded, punished, and were judges of kings, declared them allies of the Roman people, or

152. *Id.* at 103.

153. VILE, *supra* note 55, at 95.

154. *Id.*

155. *See* Bradley & Flaherty, *supra* note 7, at 563 n.79, 564 n.81.

156. Bradley and Flaherty do not cite any historian or political scientist who shares their view of Montesquieu (or Blackstone). *See id.* at 560–65.

157. *See id.* at 564 ("Obviously, Montesquieu is here assigning foreign relations powers to his executive category . . . .").

158. 1 MONTESQUIEU, *supra* note 61, at 172.

stripped them of that title."[159] The consuls' executive powers also had, in Montesquieu's description, foreign affairs aspects:

> The consuls levied the troops which they were to carry into the field; had the command of the forces by sea and by land; disposed of the forces of the allies; were invested with the whole power of the republic in the provinces; gave peace to the vanquished nations, imposed conditions on them, or referred them to the senate.[160]

And the "people" (by which Montesquieu presumably meant the popular assembly), "growing wanton in their prosperity, . . . increased their executive power. Thus they created the military tribunes, the nomination of whom till then had belonged to the generals; and . . . they decreed that only their own body should have the right of declaring war."[161]

Like many writers on complicated subjects, Montesquieu was not entirely clear in every detail. But as numerous sources confirm, Montesquieu was clear enough in his fundamental points to become the most important theoretical work on the structure of government during the founding era.[162] And scholars of separation of powers have had little difficulty reaching the same conclusion we do with respect to foreign affairs powers. In fact, to the extent their accounts identify "confusion," it is that Montesquieu at times seems to focus *too much* on the

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159. 1 *id.* at 173.

160. 1 *id.*

161. 1 *id.* at 173–74. Montesquieu's description of Rome illustrates a misconception that pervades Bradley and Flaherty's discussion. As a descriptive matter, Montesquieu thought that in Rome the *category* of executive power was allocated across several different institutions (the senate, consuls, and assembly). As a normative matter, he thought this was a mistake: "[t]he executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many." 1 *id.* at 156. It is critical to see this underlying structure to Montesquieu's argument, for it shows how the Framers adopted Montesquieu's vocabulary without adopting all of his policy prescriptions. As we have described, the Framers embraced Montesquieu's definitional category "executive power" as including foreign affairs powers; they did not embrace Montesquieu's prescription that all executive powers be concentrated in a single magistrate; to the contrary, they preferred an allocation akin to the Roman system, with executive foreign affairs powers fragmented across several institutions. *See supra* Part I.C.

162. As Madison said, Montesquieu was "the oracle who is always consulted and cited" on separation of powers. THE FEDERALIST NO. 47, *supra* note 87, at 303 (James Madison). On Montesquieu's influence, see, for example, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967); LUTZ, *supra* note 147, at 136–49; MCDONALD, *supra* note 80, at 80–82.

foreign affairs aspects of executive power, at the expense of its domestic components.[163]

In an earlier article, Professor Flaherty succinctly described Montesquieu and his influence in America:

> Perhaps the best that can be said is that by the 1770s, Americans who invoked the separation of powers doctrine generally agreed that it turned on three now-familiar types of governmental power: legislative, executive, and judicial. According to Montesquieu, to whom such Americans usually turned, legislative power comprised the enactment, amendment, or abrogation of permanent or temporary laws; executive authority included the power to make peace or war and to establish public security; judicial power entailed punishing criminals and resolving disputes between individuals.[164]

We agree with this assessment.

3. Blackstone

Bradley and Flaherty also try to diminish the importance of Blackstone. Blackstone, they say, spoke of the royal "prerogative," a phrase common in the theory of mixed government, and while he "on occasion refers generally to the Crown as exercising executive power, he makes no effort to define the meaning of executive power."[165] Moreover, in their view, Blackstone does not support our reading of executive power because he was not really a separation of powers theorist, but instead an expositor of the English system of "mixed government."[166]

Contrary to Bradley and Flaherty's claim, Blackstone repeatedly and centrally says that the Crown exercises executive power. The first sentence of his chapter on the monarch declares that "[t]he supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen."[167] Bradley and Flaherty argue that Blackstone uses the term "prerogative" to describe royal powers. But Blackstone associates "prerogative," at least in part, with Montesquieu's executive power, as shown in his opening sentence of his discussion of royal power: "We are next to consider those branches of the royal prerogative, which invest this our sovereign lord . . . with a number of authorities and powers; in the exertion whereof

163. *See* GWYN, *supra* note 68, at 101–03; VILE, *supra* note 55, at 95.

164. Flaherty, *The Most Dangerous Branch*, *supra* note 13, at 1764–65 (citations omitted).

165. Bradley & Flaherty, *supra* note 7, at 562.

166. *Id.* at 561–62.

167. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 183 (photo. reprint, Univ. of Chi. Press 1979) (1765).

consists the executive part of government."[168] Discussing these parts of the royal prerogative—that is, the parts that are the "executive part of government"—Blackstone next says that "[t]he prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with foreign nations, or it's own domestic government and civil polity."[169] There follows the long discussion of the monarch's foreign affairs powers, quoted in our prior article.[170] Plainly, then, Blackstone means that *these foreign affairs powers* are part of the "royal prerogative . . . in the exertion whereof consists the executive part of government."[171]

According to Bradley and Flaherty, our previous article "quote[s] some of Blackstone's references to the foreign relations prerogatives of the King as if they were definitions by Blackstone of 'executive power'. . . but Blackstone does not himself use that phrase when referring to the prerogatives."[172] To the contrary, Blackstone does use the phrase "executive power" when referring to the king's foreign affairs prerogatives, at the outset of his discussion. He does not use the phrase "executive power" *on the same page* that lists the king's foreign affairs prerogatives, but it should be clear from the chapter as a whole that Blackstone begins by saying that he will list aspects of the prerogative that constitute the executive powers, and then lists (among other things) the foreign affairs powers. As Professor Flaherty rightly said in a previous article, "Blackstone saw foreign affairs authority as quintessentially executive."[173]

Blackstone's view is not at all surprising if one considers (as Bradley and Flaherty do not) Blackstone's immense debt to

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168. 1 *id.* at 242.

169. 1 *id.* at 245.

170. 1 *id.* at 245–53.

171. 1 *id.* at 242.

172. Bradley & Flaherty, *supra* note 7, at 562–63 n.73.

173. Flaherty, *History Right?*, *supra* note 13, at 2106. *Contra* Bradley & Flaherty, *supra* note 7, at 561 ("Blackstone provides even less support than Locke for the proposition that foreign relations powers are inherently executive in nature.").

Professor Arthur Bestor, a historian upon whom Bradley and Flaherty rely in their discussion of the ratification debates and the Washington administration, similarly understood that Blackstone discussed "the conduct of foreign affairs" as an aspect of "the executive part of government." Arthur Bestor, *Respective Roles of 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, 76 (1979).

Montesquieu. As discussed, Montesquieu categorized foreign affairs powers as executive powers. Blackstone, who on constitutional matters followed Montesquieu so closely as to be called "a disciple and plagiarist,"[174] adopted that classification, and looking at the English system thought it plain that executive powers equated to royal powers. One might think Blackstone called these powers executive *because* they were exercised by the monarch. Blackstone, however, thought other powers of the monarch (such as the veto) were legislative, exercised by the king in his capacity as one "branch" of the legislature.[175] Something else made him think that foreign affairs powers were executive—presumably because that is how Montesquieu, and other writers, had previously defined them.[176]

Thus, Bradley and Flaherty's discussion of Blackstone, like their discussion of Montesquieu, ends up being mostly cheap shots: Montesquieu is a poor source because he is "confusing"; Blackstone is a poor source because he is not really a separation of powers theorist. Neither description accords with what those writers actually said, nor with what subsequent scholars have said about them. Bradley and Flaherty do not undermine the basic proposition that Blackstone and Montesquieu—probably the two most important separation of powers sources relied upon by the Framers—called foreign affairs powers "executive" powers.

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174. VILE, *supra* note 55, at 115.

175. 1 BLACKSTONE, *supra* note 167, at 143.

176. Bradley and Flaherty also dwell on a red herring, discussing whether Blackstone was a true separation of powers theorist. Bradley & Flaherty, *supra* note 7, at 561–62. For our purposes, it is irrelevant what type of theorist Blackstone was. Blackstone was immensely influential in America and he confirmed Montesquieu's definition that executive power included foreign affairs authority. Yet we cannot help noting that Bradley and Flaherty misstate Blackstone's importance as a writer on separation of powers. Vile says that "Blackstone was not a very original thinker" and owed a great debt to Montesquieu, but he also cautions against taking this view too far, as "it would be quite wrong to suggest that Blackstone's exposition of the [English] constitution differed in no important respects from that of Montesquieu." VILE, *supra* note 55, at 111–12. Blackstone's key contribution, Vile argues, was reconciling Montesquieu's idea of separation of powers with the English idea of mixed government. *Id.* at 112. As a result, Bradley and Flaherty shortchange Blackstone in treating him only as a theorist of mixed government and ignoring his contribution to separation of powers theory. He discussed both and as such was a vital influence on the American Framers, who embraced both separation of powers and a version of mixed government that came to be called checks and balances. *Id.*

4. Other Theorists

Bradley and Flaherty discuss several other eighteenth-century theorists, some of whom we relied on and some we did not, without showing any reason to doubt the basic categorization established by Blackstone and Montesquieu. They direct some insults at Jean de Lolme, describing him as "at best cursory and at worst garbled," "uncritical," and "cloud[ed]."[177] Like Blackstone, de Lolme used "executive power" and "prerogative" somewhat interchangeably, but (as we explained with respect to Blackstone) that does not undermine our point.[178] Bradley and Flaherty concede that de Lolme called the king's foreign affairs powers "executive powers" and are reduced to speculating that de Lolme, despite being "among leading eighteenth-century thinkers whom Americans frequently cited," had doubtful influence upon the Framers because his vision of royal authority was too expansive.[179] We do not claim that de Lolme's view of royal power was persuasive, as a prescriptive matter, to the Framers—obviously in many respects it was not. All we claim is that de Lolme is further evidence of a general tendency among eighteenth-century writers to define executive power as including foreign affairs power.

Bradley and Flaherty claim a little more for the "unique" Thomas Rutherforth.[180] What Bradley and Flaherty find "unique" in Rutherforth is actually quite conventional: he classifies power as "legislative" (defining rights and duties, i.e., lawmaking) or "executive" (acting for defense and security), and classifies the principal branches of executive power as "external" (foreign affairs) and "internal" (law enforcement, including "judicial power").[181] This is only a slight variation on Montesquieu, and is an echo of earlier systems that had seen adjudicative functions not as a separate set of powers but as part of the executive.[182] Rutherforth thus confirms the conventional description of powers, and the conventional definition of foreign affairs powers as executive. Rutherforth went a bit further than others in emphasizing the propriety of the legislature controlling foreign affairs functions and in doubting that some for-

177. Bradley & Flaherty, *supra* note 7, at 567–68.

178. J.L. DE LOLME, THE CONSTITUTION OF ENGLAND 50 (revised ed. 1816, Gaunt, Inc. reprint 1998) (1775).

179. Bradley & Flaherty, *supra* note 7, at 568.

180. *Id.* at 565.

181. 2 RUTHERFORTH, *supra* note 71, at 54–61.

182. *See* VILE, *supra* note 55, at 55.

eign affairs powers were, despite the conventional classification, truly executive.[183] None of this undermines the basic point that Rutherforth confirms the conventional definition.

Bradley and Flaherty finally point to "great international law publicists" such as Grotius, Vattel, and Burlamaqui, whom they say with some hyperbole were "comparable" in influence to Locke, Blackstone, and Montesquieu.[184] As Bradley and Flaherty acknowledge, however, these writers said little about the internal classifications or allocations of the functions of government. Bradley and Flaherty say this silence is significant, because "if there existed a consensus that the domestic executive by definition had to conduct foreign affairs, one would expect some mention of this assumption."[185] We think that one would expect little mention of any aspect of *domestic* separation of powers in works that mostly discussed the relationships *between nations* rather than the structure of government within particular nations. Neither Grotius, Vattel, nor Burlamaqui has much to say about *any* aspect of separation of powers—it simply was not their subject.[186] There is, for example, no mention in these works of even the most fundamental principle of separation of powers—that the legislative and executive powers should be in different hands. The Framers cited them on the

183. 2 RUTHERFORTH, *supra* note 71, at 54–57; *see* Bradley & Flaherty, *supra* note 7, at 556. We noted Rutherforth's focus on ultimate legislative control. *See* Prakash & Ramsey, *supra* note 3, at 270 n.166.

184. Bradley & Flaherty, *supra* note 7, at 570. Bernard Bailyn, whom Bradley and Flaherty cite for this point, says that Locke, Blackstone, and Montesquieu were influential on the structure of government and Grotius et al. were influential on the law of nations, but he does not say their influence was comparable. BAILYN, *supra* note 162, at 27; *see* LUTZ, *supra* note 147, at 140 (identifying Blackstone and Montesquieu as the most cited sources by the Framers).

185. Bradley & Flaherty, *supra* note 7, at 226.

186. Burlamaqui spoke of a single "sovereign" power without suggesting any divisions of it, and without using the phrase executive power. *See* 1 J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 110–20 (Thomas Nugent trans., 5th ed. 1807, Arno Press reprint 1972) (1748). Vattel said that the question of separation of powers was not part of his subject but instead "belongs to . . . public law and politics." 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, *reprinted in* 4 THE CLASSICS OF INTERNATIONAL LAW 17 (Charles G. Fenwick trans., James Brown Scott ed., 1916) (1758). Grotius published his principal work in 1625, before separation of powers became a well-articulated theory in the mid-seventeenth century, and said little about it. *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, *reprinted in* 3 THE CLASSICS OF INTERNATIONAL LAW (Francis W. Kelsey trans., James Brown Scott ed., 1925) (1646).

law of nations (that is, international law), not separation of powers.[187]

Bradley and Flaherty's key statement here again betrays a fundamental misunderstanding of our thesis. We do not claim that there was a "consensus that the domestic executive by definition had to conduct foreign affairs."[188] We do think, and have endeavored to demonstrate, that there was a consensus that foreign affairs functions were, as a matter of definition, part of the executive functions of government. That does not mean that foreign affairs powers "by definition" had to be conducted by a single magistrate—to the contrary, everyone knew from the Roman Republic that executive foreign affairs functions could be fragmented across several branches, each of which was described as having "a share of" the executive power.[189] Standing alone, the definition said nothing about how

187. Bradley and Flaherty mention only one writer on the law of nations who had any material discussion of internal structures of government—Samuel Pufendorf, a seventeenth-century German. Pufendorf followed the usual practice in separation of powers theory of identifying "functions" of government (what he called "parts of supreme sovereignty"), but instead of three, he proposed seven. In addition to legislative, vindicative (meaning law execution), and judicial, he added a foreign affairs function, appointments, revenue, and power over religion. *See* 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO, *reprinted in* 3 THE CLASSICS OF INTERNATIONAL LAW 1010–22 (C.H. Oldfather & W.A. Oldfather trans., James Brown Scott ed., 1934) (1688). But Pufendorf denied the very core of separation of powers theory: "[S]o close is the union between all the parts of supreme sovereignty, that one cannot be torn from another without destroying the regular form of a state . . . ." *Id.* at 1017. As he continued by way of example: "[T]o enact laws which you cannot enforce is arrant folly. And it partakes of the character of a mere minister and executor to have strength with which you may compel others, but which can be exerted actually only upon another's decision." *Id.* "Therefore," he concluded, "each power must necessarily depend upon one and the same will." *Id.* Pufendorf, in short, was entirely out of the mainstream of Anglo-French thought, both in identifying seven functions of government instead of three and in denying that they should be allocated to different branches. While the Framers may have looked to other parts of Pufendorf's work on the relationships among nations, it seems most unlikely that they paid much attention to his comments on internal structures of government, since by 1787 they had, in the Framers' minds, been conclusively rejected.

188. Bradley & Flaherty, *supra* note 7, at 571.

189. To be sure, there was also a consensus among many of the most important writers that the executive functions of government, including foreign affairs powers, should *as a policy matter* (not "by definition") be located in a single magistrate, because of the capacity of a single person to take decisive action. We note in passing that Bradley and Flaherty wholly obscure this consensus. Blackstone, de Lolme, Locke, and Montesquieu argued unequivocally that a single magistrate was best suited to exercise executive foreign affairs functions, and Rutherforth agreed that this was the usual arrangement. 1

executive powers had to be allocated. They could be given to a single magistrate (as in England), given to an assembly (as in America under the Articles of Confederation), or distributed across several branches (as in the Roman Republic). It is only when combined with the Constitution's text that the abstract definition is meaningful.

Bradley and Flaherty do not identify any eighteenth-century political theorist who denied that foreign affairs power should be classified as part of the "executive" functions of government. We did not claim that the definition of executive power was universal (and we are a little surprised by Bradley and Flaherty's inability to identify even one counterexample). We do maintain, however, that the political theorists most familiar to the Framers—Blackstone and Montesquieu—classified foreign affairs power in this way, and that their classification was part of a broader usage among writers on separation of powers. Bradley and Flaherty do nothing to undermine these conclusions.[190]

C. THE ROAD TO PHILADELPHIA AND THE EXECUTIVE POWER

We now turn to the period leading up to the Convention. Bradley and Flaherty argue that because the Articles of Confederation allocated foreign affairs authority to the Continental Congress, Americans must not have thought that foreign affairs functions were "inherently associated with an executive."[191] They also say that "the state constitutions reflect a sharp break from the royal prerogative model" after the Revo-

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BLACKSTONE, *supra* note 167, at 249; DE LOLME, *supra* note 178, at 72–73; LOCKE, *supra* note 71, at 384; 1 MONTESQUIEU, *supra* note 61, at 156; 2 RUTHERFORTH, *supra* note 71, at 54–57.

190. Bradley and Flaherty also include a long description of the mechanics of eighteenth-century English government, explaining how royal power came to be exercised through a council of ministers (the forerunner of the modern system of parliamentary government). As with many of Bradley and Flaherty's erudite and well-phrased detours, we are at a loss to see how this affects our theory. We do not doubt that royal power was exercised through ministers. We also do not doubt that, when exercised in this way, it was called an exercise of executive power. And, whether as a practical matter the ministers controlled the king or the king controlled the ministers, it surely was considered an exercise of royal power. *See* Flaherty, *History Right?*, *supra* note 13, at 2109 (speaking of eighteenth-century practice and concluding that "[p]assing references do not fully convey the extent to which foreign affairs remained a last bastion of the royal authority"); *id.* at 2112 (referring to "the Crown's 'executive' foreign affairs monopoly").

191. Bradley & Flaherty, *supra* note 7, at 586.

lution.[192] We do not dispute these propositions, but they have no bearing upon our view of the eighteenth-century meaning of executive power. For us, the central question is whether Americans adopted the Montesquieu/Blackstone foreign affairs definition of executive power. We think the evidence shows that they did, and Bradley and Flaherty provide little reason to think otherwise.

1. The Executive Congress

Bradley and Flaherty think that the Continental Congress's exercise of foreign affairs authority counts as evidence against the Montesquieu/Blackstone definition of executive power. The Congress, they claim, was a legislative body which lacked an express grant of executive power.[193] Because the "national government did not have an executive branch prior to the Constitution,"[194] and this "legislative" body exercised foreign affairs authority, they conclude that foreign affairs power must not have been regarded as "inherently associated with an executive."[195] Finally, they assert that the Articles of Confederation did not confer general powers, only specific ones.[196]

Bradley and Flaherty's discussion of the Continental Congress is a microcosm of the problems with their entire article, for they fail to understand that the Congress, despite being a large group of delegates, exercised executive power and thus was, in part, an executive institution. Modern Americans identify the word "Congress" with a legislative body. Bradley and Flaherty implicitly trade on this understanding in making their claim. But modern usage says nothing about how "Congress" was viewed in the 1770s and 1780s. Instead, we must look to historical evidence of how phrases were actually used at that time. Consistent with our theory, contemporaries regarded the Continental Congress as having legislative, judicial, and *executive* powers. Among others, James Madison,[197] James Wilson,[198]

192. *Id.* at 584.

193. *Id.* at 585–87.

194. *Id.* at 585.

195. *Id.* at 586.

196. *Id.* at 584–85.

197. 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 104 (Jonathan Elliott ed., 1845) [hereinafter THE DEBATES] (citing Madison as noting that Congress had executive councils, "which are involved in the constitution of Congress, and particularly in military operations and negotiations"); James Madison, Notes of Debates (Feb. 21, 1783), *in* 19 LETTERS OF DELEGATES TO CONGRESS, 1774–

John Jay,[199] Edmund Randolph,[200] George Washington,[201] and Thomas Jefferson[202] regarded the Continental Congress as an executive institution and/or as having executive powers. Indeed, the famous Virginia Plan presented at the Federal Convention provided that a national executive would "enjoy the Executive rights" of the Continental Congress.[203]

Our explanation for why Congress was thought to have executive powers is simple. Though the Articles did not use the words "legislative," "judicial," or "executive," Congress had authorities that fell within each of the general categories. Because Congress could pass laws in a handful of areas, it had some legislative power. Because Congress could decide certain interstate disputes, it had some judicial power. And because Congress could control foreign affairs and the execution of its laws, it had some executive power.

That Americans had adopted a foreign affairs meaning for the phrase "executive power" and that the Continental Congress was, in part, an executive institution is apparent from the *Essex Result*, an influential 1778 tract which Bradley and

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1789, at 720–23 (Paul H. Smith ed., 1992) (showing Madison denying that Congress was merely an executive body).

198. 2 THE DEBATES, *supra* note 197, at 458 (Jonathan Elliott ed., 1836).

199. Letter from John Jay to Thomas Jefferson (Dec. 14, 1786), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782–1793, at 222, 223 (Henry P. Johnston ed., 1891) (stating that "government should be divided into executive, legislative, and judicial departments"); Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), *in* 10 THE PAPERS OF THOMAS JEFFERSON 271, 272 (Julian P. Boyd ed., 1954) (criticizing the Articles and saying that "[t]o vest legislative, judicial and executive Powers in one and the same Body of Men . . . can never be wise").

200. 3 THE DEBATES, *supra* note 197, at 83 (Jonathan Elliott ed., 1836) (listing three existing powers of Congress).

201. Letter from George Washington to Henry Knox (Feb. 3, 1787), *in* 29 THE WRITINGS OF GEORGE WASHINGTON 151, 153 (John C. Fitzpatrick ed., 1939) (claiming that legislative, executive, and judicial departments were "concentered" in the Articles); Letter from George Washington to James Duane (Dec. 26, 1780), *in* 21 THE WRITINGS OF GEORGE WASHINGTON 13, 14 (John C. Fitzpatrick ed., 1937) (claiming that Congress needed more permanency in its executive bodies); Letter from George Washington to Robert Livingston (Jan. 31, 1781), *in* 21 THE WRITINGS OF GEORGE WASHINGTON, *supra*, at 163, 164 (claiming that Congress's executive business must be placed with responsible and able men).

202. Thomas Jefferson, *Autobiography*, *in* 1 THE WORKS OF THOMAS JEFFERSON (H.A. Washington ed., 1884) (claiming that Congress took care of executive business and that the Articles never separated executive, judicial, and legislative functions).

203. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 129, at 21.

Flaherty all but ignore. The *Result* argued against adoption of the proposed Massachusetts Constitution, in part on separation of powers grounds.[204] As we explained in our prior article, the *Result* noted that law execution was one type of executive power and also observed that the Articles had vested "external" executive power over foreign affairs in the Continental Congress.[205] This shows that Americans adopted the vocabulary of Montesquieu and Blackstone, using "executive power" to refer to a set of powers, including foreign affairs powers; it also confirms that Congress exercised executive power because of its foreign affairs authority. Bradley and Flaherty relegate this seminal pamphlet to a footnote, and claim that it supports their thesis because it confirms that the "external executive power" could be "exercised by a legislature" such as the Continental Congress.[206] Their claim again reflects the mistaken view that because the Congress was a multi-member institution, it could only be a legislative institution and not an executive one as well.

Similarly, in 1785 James Madison wrote that the state executives were of lesser importance because "all the great powers which are properly executive [were] transfer[red] to the Federal Government" by the Articles of Confederation.[207] Historian Jack Rakove confirms that Madison was referring here to "the matters of war and diplomacy which were prerogatives of the British Crown."[208] Professor Rakove further illustrates that Americans called the Continental Congress a "deliberating Executive assembly," the "Supreme Executive," or the "Supreme Executive Council"; as he explains, "[t]he idea that Congress was essentially an executive body persisted because its principal functions, war and diplomacy, were traditionally associated with the crown, 'whose executive, political prerogatives, b[ore] a very striking resemblance to the powers of Con-

204. THEOPHILIUS PARSONS, THE ESSEX RESULT (1778), *reprinted in* 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA, 1760–1805, at 489–96 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

205. *Id.* at 494.

206. Bradley & Flaherty, *supra* note 7, at 591 n.191.

207. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON 352 (Robert A. Rutland et al. eds., 1973).

208. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 253 (1996). Madison must have meant foreign affairs powers, because the Articles of Confederation did not vest the Congress with much law execution power; that power remained primarily with the state executives.

gress.'"[209] Indeed, historians generally refer to the Continental Congress as an "executive" body, as has Professor Flaherty in a prior article.[210]

In their quest to deny that the executive power referred to a set of functions, Bradley and Flaherty conjoin the concept of executive power with the idea of a single chief magistrate. Because the Articles had no chief magistrate, they think the Articles had no executive institutions. But that is not how contemporaries viewed the Articles. As these statesmen understood, the presence or absence of executive power did not turn on the presence or absence of a chief magistrate. Rather, executive power referred to a set of functions. Institutions (such as the Congress) that controlled these functions had executive power and were, in part, executive institutions.

Bradley and Flaherty also have problems making sense of the executive Department of Foreign Affairs. In our earlier article, we noted that the original Department of Foreign Affairs was widely regarded as an executive department, supporting our notion that executive power had a foreign affairs component.[211] Bradley and Flaherty respond that it (along with the other departments of the Continental Congress) was called executive merely because the department's personnel executed congressional directions, and thus its executive label had nothing to do with the fact that the department handled foreign affairs.[212]

First, we note the "essentialist" overtones in this claim—a department is executive if it carries out congressional directives (laws). What makes this an "executive" function is the common eighteenth-century definition of "executive." Bradley and Flaherty try to claim at various points that "executive" did not refer to a defined set of functions, but this usage was so ingrained that they are forced to adopt it. More importantly, their response cannot account for the creation of an "executive" Department of Foreign Affairs under the Constitution. The second

209. RAKOVE, *supra* note 49, at 383.

210. *See, e.g.*, JERRILYN GREENE MARSTON, KING AND CONGRESS 8, 205 (1987) (describing Congress as primarily executive); CHARLES C. THACH JR., THE CREATION OF THE AMERICAN PRESIDENCY, 1775–1789, at 56 (1923) (calling the Continental Congress a "plural . . . executive body"); *see also* Flaherty, *History Right?*, *supra* note 13, at 2117 (calling Congress a "plural executive" and noting that historians of the period agree that Congress had all three powers of government).

211. Prakash & Ramsey, *supra* note 3, at 275–76.

212. Bradley & Flaherty, *supra* note 7, at 591.

Foreign Affairs Department was labeled "executive" *even though it carried out no congressional directives.* Rather than spell out functions by law, the Secretary of Foreign Affairs was supposed to handle only those foreign affairs tasks the President delegated to him.[213] For Bradley and Flaherty's theory to be correct, the two Departments of Foreign Affairs had to be labeled executive for entirely different reasons; the reason they supply for the first label cannot account for the second. We doubt that people regarded the two departments as executive for two different reasons. Instead, both versions were regarded as executive because they handled the executive power of foreign affairs—one under a plural executive, Congress, and the other under a single executive, the President.

Finally, Bradley and Flaherty are wrong to say that the Articles reflect their theory of specification.[214] The specification theory is correct as a general matter, they say, because fundamental documents (like the state constitutions and the Articles) adopted it. The Articles, we are told, explicitly adopted the theory because the Articles reserved all powers to the states that were not expressly granted to the Congress.[215] They insist that the Articles "specified" all the foreign affairs powers, "including powers claimed by the Vesting Clause Thesis proponents to be 'executive' in nature."[216]

They are mistaken. Contrary to their claim, several significant foreign affairs powers were not "specified" in the Articles. The power to abrogate treaties was not "specified"; nor was the power to formulate nonbinding foreign policy or the power to serve as the sole organ of communication for the nation.[217] Bradley and Flaherty assume a level of specificity in the Articles that the Articles clearly lacked.

This poses no problem for us because we find a residual executive power in the power to "manag[e] the general affairs of the United States under" the Congress's direction.[218] All the unallocated foreign affairs powers resided with the Continental Congress under this power.[219] Because Bradley and Flaherty

213. An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

214. Bradley & Flaherty, *supra* note 7, at 587–89.

215. *Id.* at 587.

216. *Id.* at 557.

217. *See* ARTICLES OF CONFEDERATION (U.S. 1781).

218. *Id.* art. IX, cl. 5.

219. If we are correct that the grant of the power to manage all the general

reject our residual claim and the residual theory more generally,[220] however, the lack of foreign affairs specification poses severe problems for them. They must either admit that the Articles failed to grant many significant powers or offer an alternative residual theory. But no contemporary ever argued that the Continental Congress lacked these (or other) foreign affairs authorities. To make sense of the Articles, Bradley and Flaherty must abandon the specification theory.[221]

In sum, Bradley and Flaherty's long discussion of the Continental Congress is premised on a historical error—the idea that Americans of the time viewed the Congress solely as a legislative body. To the contrary, Americans recognized Congress as having (among other powers) the executive power over foreign affairs. This usage is solid evidence that Americans had adopted the Montesquieu/Blackstone vocabulary—which is all we claim for the confederation period.

2. The Executive Power in the State Constitutions

Opponents of the residual theory typically make much of the weakness of the state executives during the confederation period. Bradley and Flaherty continue that tradition.[222] Yet the notorious frailty of these executives has little to do with whether the state constitutions granted them foreign affairs authority. Almost all of them had grants of "executive power" or the parallel "executive authority."[223] The relevant question is

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affairs of the United States included a residual foreign affairs power, then this was a power "expressly" conveyed to the Congress and thus not disallowed by the notorious reservation to the states. Contrary to Bradley and Flaherty's claim, a power that is granted in general terms is still granted "expressly."

220. Bradley & Flaherty, *supra* note 7, at 587–88 & n.173.

221. Contrary to their claims, the Articles' reservation of authority for the states does not preclude grants of general authority. That provision requires that grants of authority be express, not that they be specific or narrow. General grants of authority are express even though they are not specific. Hence this provision of the Articles did not prevent the Articles from containing general grants of power.

222. *See, e.g.*, *id.* at 615–16.

223. *See* DEL. CONST. of 1776, art. 7, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 562, 563 (Francis Newton Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS] (granting the president "all the other executive powers of government"); GA. CONST. of 1777, art. XIX, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 777, 781 ("The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this State and the constitution thereof . . . ."); MD. CONST. of 1776,

whether in granting the executive power, the state constitutions granted foreign affairs authority. On this crucial subject, Bradley and Flaherty say little that is germane.

Bradley and Flaherty argue that "nothing in the state constitutions indicates that American constitution makers sought to vest executive officials with broad powers that were not otherwise specified."[224] Hence, they say, it follows that the grants of executive power did not encompass foreign affairs authority. Indeed, they insist that "none of the constitutions . . . simply granted the 'executive power'. . . [and] proceeded to specify what inherently executive powers would be shared with other branches."[225] State constitutions, in their view, had adopted a "republican" understanding of executive authority[226] that included at most a power over law execution.[227]

There are at least four problems with these claims. First, as in other areas, Bradley and Flaherty shift between inconsistent positions. They admit that "[g]eneral language was used to

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art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra*, at 1686, 1696 ("[T]he Governor . . . may alone exercise all the other executive powers of government . . . ."); N.C. CONST. of 1776, art. XIX, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 2787, 2791–92 ("[T]he Governor . . . may exercise all the other executive powers of government . . . ."); N.J. CONST. of 1776, art. VIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 2594, 2596 ("[T]he Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power . . . ."); N.Y. CONST. of 1777, art. XVII, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 2623, 2632 ("[T]he supreme executive power and authority of this State shall be vested in a governor . . . ."); PA. CONST. of 1776, § 3, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 3081, 3084 ("The supreme executive power shall be vested in a president and council."); S.C. CONST. of 1778, art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra*, at 3248, 3250 ("[T]he executive authority be vested in the governor and commander-in-chief, in [the] manner herein mentioned."); S.C. CONST. of 1776, art. XXX, *reprinted in* 6 STATE CONSTITUTIONS, *supra*, at 3241, 3247 ("[T]he executive authority be vested in the president and commander-in-chief, limited and restrained as aforesaid."); VA. CONST. of 1776, para. 29, *reprinted in* 7 STATE CONSTITUTIONS, *supra*, at 3812, 3816 ("A Governor, or chief magistrate . . . shall, with the advice of a Council of State, exercise the executive powers of government according to the laws of this Commonwealth . . . ."); VT. CONST. of 1786, ch. 2, § III, *reprinted in* 6 STATE CONSTITUTIONS, *supra*, at 3749, 3754 ("The supreme executive power shall be vested in a Governor, (or, in his absence, a Lieutenant-Governor) and Council."); VT. CONST. of 1777, ch. 2, § III, *reprinted in* 6 STATE CONSTITUTIONS, *supra*, at 3737, 3742 ("The supreme executive power shall be vested in a Governor and Council.").

224. Bradley & Flaherty, *supra* note 7, at 581.

225. *Id.* at 579.

226. *Id.* at 578.

227. *Id.* at 579–80.

delegate only the power to implement the laws"[228] and yet simultaneously claim that the state constitutions never granted broad powers but only ceded specific ones.[229]

Second, Bradley and Flaherty declare that the state constitutional grants of executive power did not grant foreign affairs powers. But the question whether the phrase "executive power" or its analogues included foreign affairs authority cannot be answered by reference to the texts of the state constitutions alone. To discern the meaning of "executive power" in the state constitutions, one must examine the events leading up to the ratification, the actual practices under the state constitutions, and the writings of European and American political theorists.

Bradley and Flaherty provide no evidence on this point. All they can muster in favor of executive power nihilism are recycled textual arguments supporting the view that vesting clauses must vest nothing. To read the executive power clauses in the state constitutions as granting authority is to make these constitutions' specific grants of executive authority superfluous, we are told.[230] Whereas before such arguments only showed textual *uncertainty* in the federal Constitution, now they and other unadorned textual assertions somehow *prove* that the state constitutions did not grant foreign affairs authority to the state executives. Given their claim's lack of historical foundation, Bradley and Flaherty's argument in favor of executive power nihilism at the state level is pure assertion. And, of course, their claim on this point is at odds with their admission elsewhere that the state executive power grants vested the power to execute the law.

Third, Bradley and Flaherty are wrong about the texts of the state constitutions. Several state constitutions list specific powers and then provide that the executive "may exercise all the *other* executive powers of government, limited and restrained as by this constitution is mentioned, and according to

228. *Id.* at 580.

229. *Id.* at 580–81 (claiming that nothing indicates that American constitution makers sought to grant broad powers not otherwise specified).

230. *Id.* at 579. This redundancy argument is subject to the same criticisms we outlined above. *See supra* Part II.A. Alternative readings of the executive power clauses yield even worse redundancies. And, once again, neither Madison nor Hamilton thought it odd to grant a general power and then qualify it. *See* text accompanying notes 123–24. Furthermore, since most executives had few specific foreign affairs powers, *see infra* text accompanying notes 234–38, the redundancy argument cannot carry much weight in the foreign affairs realm.

the laws of the State."[231] In referring to "other executive powers," these constitutions contemplate that the enumeration is *not* exhaustive; otherwise, there was no need to speak of "other" executive powers.[232] Although Bradley and Flaherty cite these constitutions, they do not see how these constitutions devastate their claims. Why speak of "other" powers if all the powers that were granted were already specified? Unless Bradley and Flaherty believe that each of these constitutions contain the same mistake, they must admit that at least some state constitutions *did not* limit the state executives to specified authorities.[233]

Finally, Bradley and Flaherty's discussion of the state constitutions suffers from another textual embarrassment: they cannot explain how the state constitutions vested foreign affairs authority. In complaining that we say little about the state constitutions, they argue that the states must have been assumed to have at least some foreign affairs powers.[234] We agree. The Declaration of Independence claimed as much for the "free and independent states,"[235] and the Articles of Con-

231. DEL. CONST. of 1776, art. 7, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 223, at 562, 563 (granting other executive power); *see also* MD. CONST. of 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 223, at 1686, 1696 (same); N.C. CONST. of 1776, art. XIX, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 223, at 2787, 2791–92 (same).

232. Perhaps recognizing that these constitutions pose grave difficulties for their preference for specified powers, Bradley and Flaherty emphasize that under most state constitutions executive authority had to be exercised consistent with the constitution and laws. Bradley & Flaherty, *supra* note 7, at 580–81. While this is correct, it does not detract from the clear import of these constitutions that the list of specified executive powers was not complete. This language only meant that whatever other executive powers were granted had to be exercised consistent with the constitution and the laws; it does not negate the clear grant of other executive powers.

233. Bradley and Flaherty are also flatly wrong about the relevant structure of the state constitutions, for these constitutions contain many power-sharing provisions. State constitutions contained many provisions that qualified and divided powers considered executive by the political theorists. Indeed, Bradley and Flaherty's article is replete with examples of state constitutions that specified that executive powers would be shared with other institutions. They note with approval that the commander-in-chief authority was sometimes constrained by the need to seek approval of an executive council or the state legislatures. Bradley & Flaherty, *supra* note 7, at 582. They also cite state constitutional provisions granting the chief executives the power to lay embargoes with the consent of executive councils. *Id.* at 582 n.150. In sum, Bradley and Flaherty emphatically deny what they affirm elsewhere.

234. *Id.* at 581–82.

235. DECLARATION OF INDEPENDENCE (1776) (asserting that the "Free and Independent States . . . have full Power to levy War, conclude Peace, contract

federation at minimum assumed that the states possessed foreign affairs authorities that could be exercised subject to congressional approval.[236] Yet because Bradley and Flaherty insist that all powers must be specified (rather than being granted in general terms and then qualified, as Madison and Hamilton said was appropriate), they cannot explain how the state constitutions vested foreign affairs authority. The Articles of Confederation, for example, allowed states to make treaties and send and receive emissaries with the approval of the Continental Congress.[237] Who exercised these authorities at the state level? Under Bradley and Flaherty's specification theory, the vast majority of state governments did not enjoy these (and other foreign affairs) authorities because they were not "specified."[238]

In contrast, the residual theory suggests, at least with respect to constitutions that granted a general executive power, that these powers likely resided with the state executives. A definitive conclusion must await more detailed research into practice, but we draw support from various sources. First, we rely upon the definition of executive power used by the American and European political theorists.[239] Second, we rely on the example of the South Carolina Constitution, which after granting the state President the executive authority, also specifically denied him the power to make war or peace, or enter into any final treaty without the consent of the general assembly and legislative council.[240] Had it been understood that the President only enjoyed specific powers, this language would have been superfluous. Instead, this language suggests that the South Carolina President could take foreign affairs actions short of

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Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do").

236. ARTICLES OF CONFEDERATION art. IX, cls. 1–2 (U.S. 1781) (providing that states may make treaties and send and receive ambassadors with congressional approval).

237. *Id.* art. VI, cl. 1.

238. The one exception was South Carolina, which provided that the executive could make treaties with the legislature's consent. S.C. CONST. of 1778, art. XXXIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 223, at 3248, 3255 (requiring legislative consent for final treaties); *see also* S.C. CONST. of 1776, art. XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 223, at 3241, 3247 (providing the same). No other state constitution specifically assigned the treaty-making power.

239. *See supra* Part II.B.

240. S.C. CONST. of 1776, art. XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 223, at 3241, 3247.

peace and war, including negotiating treaties. Third, we note that Alexander Hamilton suggested that in the absence of a federal treaty-making power, that power would devolve to the state executives.[241] Hamilton apparently understood that the grant of executive authority to the state executives meant that they could engage in treaty making on behalf of their states. Finally, Jefferson's proposed Virginia Constitution supports our view that the executive power included foreign affairs authority.[242] Though Jefferson wished to withhold such powers from his "Administrator," the fact that he granted the Administrator the "executive powers" of government and then proceeded to prohibit the exercise of a long list of functions indicates that Jefferson understood that "executive powers" would ordinarily be understood to include, among other things, foreign affairs authority.[243] To believe that Jefferson rejected a broad and general understanding of executive power, Bradley and Flaherty must believe that Jefferson's extended list of nineteen excepted powers was unnecessary. Yet Jefferson embraced the residual theory when he served as Secretary of State.[244] Accordingly, it is much more likely that in drafting the Virginia Constitution he had the same idea in mind, and wished to limit the Virginia executive in the same way that he later understood the U.S. Constitution to limit the federal executive: the federal Constitution contains specific exceptions from a general grant.

In sum, nothing in Bradley and Flaherty's long discussion of state constitutions undermines the residual theory. Again, all that matters to us is whether the phrase "executive power" included foreign affairs functions. Bradley and Flaherty identify no discussions or practice in the context of the states contrary to common understanding of executive power. We reiterate what we said about the state constitutions: "Although more research and a careful reading of the state constitutions would be necessary in order to reach firm conclusions, we presume that the ordinary understanding of executive power established by Locke, Montesquieu, and Blackstone should be used to construe the analogous phrases in state constitutions . . . ."[245]

241. THE FEDERALIST NO. 69, *supra* note 87, at 400 (Alexander Hamilton).

242. *See* Thomas Jefferson, Draft Constitution for Virginia (June, 1776), *in* THOMAS JEFFERSON, WRITINGS 340 (Merrill D. Peterson ed., 1984).

243. *See id.* at 340–41.

244. *See supra* note 6 and accompanying text.

245. Prakash & Ramsey, *supra* note 3, at 279 n.209.

While the fruits of such research might cast doubt upon the residual theory, Bradley and Flaherty's arguments do not.

D. DRAFTING AND RATIFYING THE CONSTITUTION'S EXECUTIVE POWER

When it came to the Constitution, Americans did not invent and adopt a newfangled vocabulary of government. Rather, they continued to rely upon the tripartite classification of governmental functions as legislative, executive, and judicial. In particular, they continued to employ Montesquieu's definition of executive power, a power with domestic law enforcement and foreign affairs strands. At the same time, not all shared Montesquieu's prescription that all executive powers over foreign affairs should be vested in a chief magistrate. Opponents of the residual theory erroneously treat the Constitution's rejection of the traditional allocation of executive power as a simultaneous rejection of the traditional definition of executive power.

Bradley and Flaherty contend, for example, that the Philadelphia "delegates sharply rejected the purported Locke/Montesquieu/Blackstone assignment of powers."[246] We agree.[247] Rather than granting a chief magistrate unilateral control over all foreign affairs powers, as the English system did, the Constitution divides foreign affairs powers in a number of ways. Bradley and Flaherty err, though, in claiming that as a result, the "records of the Federal Convention all but devastate [the Vesting Clause Thesis]."[248] That delegates allocated some executive powers to Congress and gave a share of others to the Senate says nothing about whether they intended other unallocated executive powers to remain with the President by virtue of the executive power. While the Convention records, standing alone, do not prove our theory, they are supportive when taken together with the other evidence we adduce. In any event, Bradley and Flaherty point to nothing in the debates that is inconsistent with the residual theory.

Bradley and Flaherty agree that the Virginia Plan, offered at the outset of the Federal Convention, incorporated the Montesquieu/Blackstone/*Essex Result* definition of executive power, and that if adopted it likely would have had the effect we

246. Bradley & Flaherty, *supra* note 7, at 594.
247. Prakash & Ramsey, *supra* note 3, at 286.
248. Bradley & Flaherty, *supra* note 7, at 592.

claim—that is, giving the President foreign affairs power.[249] This is a key concession. The Virginia Plan sought the creation of an executive who, "besides a general authority to execute the National laws, . . . ought to enjoy the Executive rights vested in Congress by the Confederation."[250] This language confirms, contrary to Bradley and Flaherty's earlier claims, that Americans thought the Continental Congress had executive power. And because the Virginia Plan already provided the power to execute the law, the reference to "executive rights" must have meant the Continental Congress's foreign affairs authorities. Bradley and Flaherty do not dispute any of this.

Discussion of the Virginia Plan confirms that executive rights or powers referred to foreign affairs powers. Charles Pinkney objected that the "Executive powers of [the existing] Congress might extend to peace [and] war [and] which would render the Executive a Monarchy."[251] John Rutledge said "he was not for giving him the power of war and peace."[252] And James Wilson did not "consider the [p]rerogatives 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 [and] peace . . . ."[253] Oddly, Bradley and Flaherty believe it "clear" that these speakers "did not equate . . . executive power with an accepted bundle of foreign relations powers."[254] But these delegates would not have objected to granting "executive rights" *unless* that language was understood as granting the foreign affairs powers such as war and treaty making. If Bradley and Flaherty are right, this discussion should never have taken place, for the phrases "executive powers" and "executive rights" referred to nothing (or, at least, did not refer to foreign affairs power). There is little doubt that these delegates did not wish the President to have unilateral control over some of the most important foreign affairs powers, as Bradley and Flaherty emphasize. There is also little doubt that these delegates equated the "executive rights" and the "executive powers" of the Continental Congress with

249. *Id.*

250. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 129, at 21.

251. 1 *id.* at 64–65.

252. 1 *id.*

253. 1 *id.* at 65–66.

254. Bradley & Flaherty, *supra* note 7, at 593.

foreign affairs powers. That is precisely why they objected to this portion of the Virginia Plan.

For Bradley and Flaherty, the key point is that the delegates never adopted the "executive rights" language from the Virginia Plan, and they initially approved a narrow description of the President's authority.[255] We agree with their account of events, but think they draw the wrong conclusions. Bradley and Flaherty argue that these developments demonstrate that when the delegates restored the "executive power" language to Article II later in the Convention, they could not have intended it to convey foreign affairs power.[256] No one at the time made any statements supporting Bradley and Flaherty's reading of the Vesting Clause, though, and we think there is a better explanation of what happened.

Given their initial decision, why did the delegates approve the executive power language towards the end of the Convention?[257] There is nothing mysterious about it. The delegates had not rejected the *definition* of executive power—they objected to the *allocation* of *some* of these powers to a chief magistrate (or chief magistrates). The Framers put to rest their allocational fears by granting some executive powers to Congress and requiring that the Senate have a share of others. Unlike the British monarch, the President would not have a unilateral right to declare war or commit the nation by treaty. The executive powers left to the President's sole control (such as the power to serve as the sole organ of communication), while significant, were not as momentous in the life of a nation. Hence, the delegates did not revive the allocation of powers found in the Virginia Plan or embrace the Locke/Montesquieu/Blackstone assignment of powers; they adopted the idea of granting a chief

255. *Id.* at 594.

256. *See id.* at 550, 597–99.

257. Much of Bradley and Flaherty's discussion of the Convention concerns the period before the delegates adopted the Vesting Clause. We agree that some of these discussions contemplated granting foreign affairs authority to the Senate, although the plans presented by Hamilton and Charles Pinkney would have granted the executive power or authority to the President. Consistent with their concession that "executive rights" referred to foreign affairs powers, we do not see how Bradley and Flaherty can regard these discussions as excluding foreign affairs powers. In any event, our point is that these plans were rejected in favor of granting important foreign affairs powers to Congress, sharing others with the Senate, and granting the President unilateral control of a third residual category.

magistrate the executive power, subject to the Constitution's numerous exceptions and constraints.

Bradley and Flaherty mistakenly treat the earlier failure to adopt the Virginia Plan's reference to executive rights as a rejection of the foreign affairs meaning of executive power. But since they admit that the Virginia Plan adopted the traditional reading of executive power and since they know that the executive rights language was opposed by some on the ground that it would vest foreign affairs authority,[258] the Constitution's return to the executive power language poses grave difficulties for them.[259] It is hard to concede that "executive rights" in the Virginia Plan referred to foreign affairs powers but insist that "executive power" in the Constitution does not.

Bradley and Flaherty also find little support in the ratification debates, despite heavy reliance upon them. For example, they point to the Federalist Papers as demonstrating that the President would only have specified foreign affairs powers.[260] These references, though, only support unremarkable, uncontroverted propositions: that the President's powers are limited; that the President has less executive power than the king; and that Congress has greater powers than the President and is to be feared more.[261] None of these conclusions bears on the question whether the President has a residual, limited foreign af-

258. Bradley & Flaherty, *supra* note 7, at 594.

259. James Wilson appears to have been the only person who, in the course of denying that the national executive ought to have foreign affairs authorities, simultaneously rejected the executive power as encompassing foreign affairs authority. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 129, at 65–69. But one must remember that Wilson made his comments in the context of the Virginia Plan. Hence, he seemed to understand that most others would regard the "executive rights" of the Continental Congress as encompassing foreign affairs authority. *See id.* In other words, Wilson's comments indicate that his view was a minority position, else there was no need to reject the Virginia language. Had Wilson's view been the majority understanding, he ought not to have objected to the Virginia Plan.

260. Bradley & Flaherty, *supra* note 7, at 602.

261. Bradley and Flaherty attempt to make hay out of inconclusive statements from Madison and Hamilton. *See id.* at 602–04. In *Federalist 48*, Madison said that the "executive magistracy is carefully limited" in a representative republic. THE FEDERALIST NO. 48, *supra* note 87, at 309 (James Madison). In *Federalist 67*, Hamilton denied that the President's powers approached the English Crown's. THE FEDERALIST NO. 67, *supra* note 87, at 392 (Alexander Hamilton). These statements are fully consistent with our views. As we repeatedly emphasized, the President's foreign affairs powers are carefully limited and do not approach those of the Crown—the President cannot declare war and cannot unilaterally make treaties.

fairs power by virtue of the Constitution's enumeration of executive power. Similar problems plague their treatment of the state conventions. Again, the vast majority of their discussion concerns points not in dispute: the President would be weaker than either the king or Congress, the federal government is one of enumerated powers, etc.[262]

At the same time, Bradley and Flaherty admit that many people during the ratification period spoke of the "executive power" as if it were something more than just the specific powers listed in Article II. They note that in almost every convention they discuss, there were those who said that the President had executive power and/or complained that the Constitution improperly vested the Senate with an unwarranted share of the executive power by virtue of its treaty role.[263] We think they have underestimated the instances in which the "executive power" was regarded as a distinct set of powers. In any event, it is hard to escape the conclusion that the ratification materials confirm that "executive power" was understood as a general power. As Professor Prakash has documented elsewhere, the Federalist Papers and the ratification records are replete with references to law execution power, a power not derivable from the specific grants and one that can be explained only by the

262. Unfortunately, a few of their arguments are just tendentious. For instance, they point out that Pennsylvania Anti-Federalists claimed that the President would be weak rather than a "monarch" and somehow believe that this undermines the claim that the Vesting Clause granted power. Bradley & Flaherty, *supra* note 7, at 592–93, 602. However, the fact that a small section of Anti-Federalists complained about the lack of presidential power does not harm the residual theory. As we have tried to make clear, the residual theory is not a normative theory about the benefits of monarchy. It is a positive theory about the meaning of executive power as applied to the federal Constitution and as supported by historical materials. As Bradley and Flaherty well know, many Anti-Federalists complained that the President *would be* a monarch. Later, when discussing Massachusetts, they note that nothing in that state's ratification debates supports the notion that foreign affairs powers "inherently had" to be vested with the executive. *Id.* at 618. Once again, though there were clearly some people who believed that foreign affairs powers were executive in nature, our only claim is that foreign affairs authorities were regarded as part of the executive power as a matter of historical fact, not as a matter of linguistic or historical necessity.

263. In Virginia, they cite "Cassius," "A Native of Virginia," "Republicus," Joseph Jones, Arthur Lee, and George Mason. *Id.* at 605–12. In Pennsylvania, they cite William Findley, John Smilie, and James Wilson. *Id.* at 612–16. In Massachusetts, they cite Elbridge Gerry, John DeWitt, James Bowdoin, and Daniel Taylor. *Id.* at 616–18. In North Carolina, they cite Richard Spaight, Archibald McClaine, James Iredell, and Samuel Spender. *Id.* at 621–24.

Vesting Clause.[264] As we discussed in our earlier article, there are references to foreign affairs powers being executive, such as the power to direct foreign negotiations.[265]

Bradley and Flaherty also do not explain why numerous participants in the ratification debates said that the Senate had a portion of the executive power due to its treaty role. For instance, the minority of the Pennsylvania Convention complained that "the senate has, moreover, various and great executive powers, viz. in concurrence with the president-general, they form treaties with foreign nations, that may controul and abrogate the constitutions and laws of the several states."[266] These arguments were so powerful that Hamilton responded in the Federalist Papers.[267] We argued that these complaints confirmed the definition of executive power as including foreign affairs powers, because to regard the Senate's role in treaties as a division of the executive power was to adhere to Montesquieu's classification of the treaty power as one of the "executive" functions of government.[268] Bradley and Flaherty's failure to explain why the Senate was regarded as vested with important *executive* powers strongly suggests that this usage is a problem for their claim.

Seeking to blunt the sting of the "essentialist" comments in the ratification debates (that is, comments that ascribed meaning to the phrase "executive power"), Bradley and Flaherty claim that some Federalists expressly rejected "executive power essentialism," and that some of the "essentialist" comments also had functionalist elements.[269] As to the first point, despite

264. *See* Prakash, *supra* note 55, at 728, 741, 758.

265. For instance, in *Federalist 72*, Hamilton declared that "actual conduct of foreign negotiations" lies "peculiarly within the province of the executive." THE FEDERALIST NO. 72, *supra* note 87, at 412 (Alexander Hamilton). Hamilton also noted that the state executives would have the power to negotiate treaties in the absence of the Articles of Confederation. THE FEDERALIST NO. 69, *supra* note 87, at 400 (Alexander Hamilton).

266. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PENNSYLVANIA PACKET & DAILY ADVERTISER, Dec. 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 161 (Herbert Storing ed., 1981).

267. *See* THE FEDERALIST NO. 75, *supra* note 87, at 425–26 (Alexander Hamilton).

268. Prakash & Ramsey, *supra* note 3, at 290.

269. Bradley & Flaherty, *supra* note 7, at 611 (citing 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 47 (John P. Kaminski & Gaspare J. Saladino eds., 1988–90) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION]).

what Bradley and Flaherty say, we are not aware of anyone in the ratification debates who denied that the Vesting Clause granted authority to the President. Their only authorities for the contrary conclusion are two statements made by Edmund Pendleton in private letters. Pendleton noted that the President had no "latent prerogatives," but instead had only such powers "as are defined and given him by law."[270] We agree that the President lacks latent or hidden powers. Our claim is not that the President has a latent power, but that the President has an express power, the executive power. Moreover, our claim is that the Constitution—a law—grants the President residual foreign affairs powers. Finally, the Constitution defines the "executive power" the same way it defines "commerce" or "bankruptcy": by adopting the common meaning of those words.

In contrast to their claims about Pendleton, Bradley and Flaherty generally are far more tentative in claiming support for their vesting-clause-vests-nothing theory. Various discussions "at least implicitly suggest[ ],"[271] "seem[ ] to envision,"[272] or were "premised on the assumption"[273] that the President lacks a general, residual executive power. The continuous hedging betrays the infirmity of the claims. In over thirty pages discussing founding material, they lack any clear authority for the proposition that the President has no powers by virtue of the Vesting Clause. Rather, they think that any discussion of the President's specific powers implies that the President has no power arising out of the Vesting Clause. Routine discussions about the veto somehow end up confirming their vesting-clause-vests-nothing theory because the speaker or writer did not discuss the meaning of the Vesting Clause. Failures to dis-

270. *See* 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 269, at 1627. Bradley and Flaherty also cite a speech by Edmund Randolph about incidental powers of the President, charging that if he had them, the Necessary and Proper Clause would be a "tautology." Bradley & Flaherty, *supra* note 7, at 611 (citing 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 269, at 1348). We do not see how Randolph's discussion of *incidental* presidential powers affects our claim that an *express* grant of authority (the executive power) includes foreign affairs authority. Assuming that we are correct that the executive power includes foreign affairs powers, there would still be an open question about whether the President had incidental powers, such as executive privilege.

271. Bradley & Flaherty, *supra* note 7, at 613.

272. *Id.*

273. *Id.* at 602.

cuss the Vesting Clause, by themselves, neither confirm nor refute our theory.[274]

Bradley and Flaherty also attempt to undercut the various "essentialist" statements with functionalist red herrings. They repeatedly mention that some of the people who recognized that foreign affairs powers were executive powers also made functionalist arguments about the proper allocation of power.[275] We agree that participants made normative claims about how to best allocate executive powers. But we do not see the relevance of these claims. For our purposes, it does not matter why people thought the President (or the Senate) ought to have some executive power. All that matters is how participants used the phrase "executive power" in discussing the allocation of foreign affairs power. Indeed, it would have been surprising if people had not made normative claims about the best allocation of executive power. Those who argued that the Senate ought not have any role in treaties merely because the function was part of the executive power (and there were a few) committed the same conceptual mistake that trips up Bradley and Flaherty (albeit a mistake that confirms the meaning of executive power). These participants conflated the definition of executive power with what type of institution should exercise it. As we have made clear, the residual theory says nothing about what type of institution ought to exercise the executive power. Nor does the residual theory assert that people never made normative claims in the course of the Constitution's creation. The residual theory merely posits that for various "functional" reasons, the Founders drafted a Constitution that grants the President a residual executive power over foreign affairs.[276]

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274. As we said in our prior article, we think that the ratification debates had relatively little to say on the specific subject of the President's residual foreign affairs powers. Prakash & Ramsey, *supra* note 3, at 288–95. We believe this is because those powers were not controversial or seriously disputed. We do think the debates confirm our theory, because speakers consistently thought that the Vesting Clause conveyed some power to the President, that the President would have a material role in foreign affairs that seemed to go beyond his specific powers, and that executive power, in the abstract, referred in part to foreign affairs powers such as treaty making. *See id.* Bradley and Flaherty's arguments do not undermine any of these propositions.

275. Bradley & Flaherty, *supra* note 7, at 607, 613, 617.

276. Bradley and Flaherty also seem to advance a dog-did-not-bark claim: the Anti-Federalists never complained about any residual power, *id.* at 619, 621, yet they should have if our theory were correct. If the residual power were as they describe it—amorphous, vast, and controversial—then there would have been much cause for complaint. *See id.* at 598, 616. But the residual

Bradley and Flaherty complain that we say little about the foreign affairs discussions during the drafting and ratification phases of the Constitution.[277] But the criticism is unwarranted, for despite saying so much, they say little about matters in actual dispute. We sympathize because we share their plight. The truth is that little was said during these phases about supposedly "unallocated" foreign affairs powers. The Founders did not seem focused on powers such as treaty termination, control of American diplomats, or the formation of nonbinding foreign policy. This silence does not undermine our theory, because a constitutional provision can grant a particular power even when there was no specific discussion of that particular power.[278]

Thus, while Bradley and Flaherty devote much energy to the Constitution's creation, most of their discussion has little relevance to the residual theory. On the most important points they either concede our view, make only conclusory statements, or say nothing. They admit that the Virginia Plan adopted the Montesquieu/*Essex Result* understanding of executive power (and by extension that the Continental Congress was understood to exercise the executive power over foreign affairs); they admit that there were numerous participants who made "essentialist" comments—i.e., ascribed meaning to the phrase executive power; they offer no concrete support for their view that the drafters of the Vesting Clause thought it lacked foreign affairs substance; they do not address the fact that participants in the ratification struggle believed that the Senate had a share

power we defend does not have such features. Congress has important foreign affairs powers, and others are shared by the President and the Senate. What is left is not some unknown, enormous grant of power but an altogether tolerable and constrained, though significant, residual. The Anti-Federalists' failure to criticize the constrained grant of residual power likely reflects nothing more than a judgment that the residual executive powers left to the President were simply not worth criticizing.

277. *Id.* at 605.

278. Those who believe that the Constitution does not completely allocate all foreign affairs authorities might cite the apparent lack of discussion of supposedly unallocated powers as bolstering their claims. But this theory has far worse evidentiary problems. If one regards the "unallocated" powers as significant but uncontroversial powers, as we do, one would not expect people to discuss them at length. People were just not alarmed by the President's limited residual executive power. On the other hand, if one thinks the Constitution failed to allocate these significant powers, one would expect that the Constitution's many opponents would have objected to the Constitution's gaping holes. No one during the pre- or post-Constitutional era ever argued that the Constitution failed to allocate all foreign affairs authority.

of the executive power due to its role in treaties; and they cannot find anyone from the Convention or the ratification fight who denied that the Vesting Clause vests power or voiced the vesting-clause-vests-nothing theory.[279]

E. THE WASHINGTON ADMINISTRATION AND THE EXECUTIVE POWER

In our prior article, we made two central claims about the Washington administration. First, we argued that Washington exercised a number of foreign affairs powers not granted by the specific powers of Article II, Sections 2 and 3. The residual theory, we concluded, provided these powers a solid textual foundation. Second, we showed that key statesmen of the time, including Jefferson, Hamilton, and Washington, explained the President's exercise of foreign affairs powers as an aspect of the executive power granted by the Constitution.[280]

On our first point, Bradley and Flaherty neither materially challenge our description of the foreign affairs powers Washington exercised nor appreciably contest our view of the correct allocation of powers. They agree that Washington exercised control over U.S. diplomats, expelled foreign representatives, and established foreign policy (and they seem to feel this was mostly appropriate); their main strategy is to stretch the Constitution's specific textual grants to cover the array of foreign affairs powers they agree Washington exercised.[281] Bradley and Flaherty vigorously dispute our second point, claiming that statesmen of the period relied on the Article II Vesting Clause "almost not at all"[282] in defending the President's broad foreign

279. Bradley and Flaherty try to enlist Madison's notes in their cause of reading the Vesting Clause as containing a "herein granted," Bradley & Flaherty, *supra* note 7, at 611, but Madison's notes reveal that there was unanimous support for "vesting the [executive] power in a *single person*." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 129, at 401. These notes are entirely consistent with our reading of the clause as actually granting a power. After all, Madison said that people supported vesting the executive power. He did not merely claim that there was unanimous support for a single person. Moreover, Madison notoriously read the clause as granting power throughout his congressional career. *See infra* notes 288, 307, and accompanying text.

280. Prakash & Ramsey, *supra* note 3, at 295–340.

281. Bradley & Flaherty, *supra* note 7, at 636.

282. *Id.* at 637.

affairs powers, while instead looking to the President's specific powers to justify his foreign affairs actions.[283]

Bradley and Flaherty's attempt to inflate the supposedly "specific" powers falls flat. Statesmen of the era did not rely upon the Appointments, Treaty-Making, or Ambassadors Clauses to justify Washington's control over U.S. diplomats, his monopoly on communications with foreign governments, or his formulating and announcing the foreign policy of the United States. Rather, as we discuss below, statesmen explained the President's wide-ranging authority by citing the President's executive power. And this makes good sense, because despite Bradley and Flaherty's best efforts, the specific powers simply cannot be stretched as far as they wish.

1. Statesmen Explain the Executive Power

We start with Thomas Jefferson, someone generally not regarded as suffering from a pro-executive bias. In his 1790 opinion addressing which branch could set diplomatic grades and destinations, Jefferson concluded that these authorities were executive powers:

> The Constitution . . . has declared that 'the Executive powers shall be vested in the President'. . . . The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that

283. Bradley and Flaherty open their discussion of the Washington administration with an extended account of the exercise of the treaty-making power, focusing on the question whether the Senate's "advice and consent" power implies a continuing involvement in treaty negotiation, or only comment upon and approval or rejection of the President's final product. *See id.* at 629–31. They claim that the Constitution requires the former, but practice under the Washington administration evolved into the latter. *See id.* at 626. Even if we were inclined to accept this reading of the Constitution (their arguments for it hardly seem conclusive), we are at a loss to see how this affects the residual theory. First, we claim only that the President has "executive" treaty functions, subject to the "advice and consent" of the Senate—whatever that may mean—for treaty making. Whether this requires a broad or narrow role for the Senate in treaty making is a question answered by Article II, Section 2, not by Section 1. (By the same token, we claim that the President has executive war powers, subject to Congress's power to declare war. That claim is consistent with either a broad or a narrow definition of "declare war," a question that can only be answered by examining the meaning of declaring war.) Second, to the extent Bradley and Flaherty's account implies that Washington sometimes deviated from the Constitution's text, we do not claim Washington always followed the Constitution in every respect. (For example, we have some reservations about his appointment of "private" diplomatic agents without the approval of the Senate.) We only claim that in general one should prefer a reading of the Constitution that comports with early practice to one that does not.

> department, except as to such portion of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[284]

Consistent with this view, Jefferson insisted upon the executive's monopoly over foreign communication. Writing to French Ambassador Edmond Genet, for example, Jefferson argued that the Constitution had made the President the "only channel of communication" between America and foreign countries, an argument that necessarily relied upon the Vesting Clause for no specific presidential power could justify the President's communications monopoly.[285]

Jefferson was not alone in voicing the residual theory. Washington and Foreign Secretary John Jay both referred to the President's "executive authority" in explaining Washington's monopoly over foreign communications.[286] Oliver Ellsworth voiced it on the Senate floor, saying that the Constitution "positively placed" a communications monopoly with the President.[287] In his diary, Washington noted that James Madison and John Jay concurred with Jefferson's view that the Senate had a narrow advice and consent role, and that setting diplomatic grades and destinations were "Executive and vested in the President."[288] Madison (and a number of others) relied on

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284. Jefferson, *supra* note 6, at 378–79 (emphasis omitted).

285. Letter from Thomas Jefferson to the French Minister Edmond Charles Genet (Nov. 22, 1793), *in* 6 THE WRITINGS OF THOMAS JEFFERSON 451 (Paul Leicester Ford ed., 1895).

286. *See infra* text accompanying notes 344–47.

287. 5 ANNALS OF CONG. 32 (1795) (statement of Sen. Ellsworth). Though Ellsworth does not explicitly cite the Vesting Clause here, it is clear he is referring to it because no other clause can be read as "positively plac[ing]" a communications monopoly with the President.

288. 6 THE DIARIES OF GEORGE WASHINGTON 68 (Donald Jackson & Dorothy Twohig eds., 1979). Washington's diary noted these three gentlemen were of the view

> that [the Senate] have no Constitutional right to interfere with either [destination or grade, and] that it might be impolitic to draw it into a precedent their powers extending no farther than to an approbation or disapprobation of the person nominated by the President all the rest being Executive and vested in the President by the Constitution.

6 *id.*

Bradley and Flaherty suggest that perhaps Madison and Jay relied on the Appointments Clause. Bradley & Flaherty, *supra* note 7, at 656 n.539. But Washington's diary entry says that Madison's opinion coincided with Jefferson's, *see* 6 THE DIARIES OF GEORGE WASHINGTON, *supra*, at 68, and as we have seen, Jefferson said that setting the destination and grade preceded nomination and appointment and hence was granted as part of the executive power. Jefferson, *supra* note 6, at 378–79. Moreover, Washington describes their position as being that "all the rest being Executive and vested in the

the residual theory in the removal debate, in arguing that the President's executive power gave the President the power to remove the Secretary of Foreign Affairs.[289] Hamilton provided a detailed explanation and defense of the executive foreign affairs residual in his *Pacificus* essay.[290]

Though Bradley and Flaherty claim that early statesmen rarely relied on the residual theory, they make little progress in disputing these authorities. They contend that Jefferson's opinion relied not upon a residual theory, but upon the President's specific powers to nominate, appoint, and commission U.S. diplomats.[291] Jefferson's opinion cannot bear this reading. As we noted, Jefferson begins by quoting the Vesting Clause as "vest[ing]" the "executive powers" in the President,[292] and then repeating the common understanding that foreign affairs powers are "executive altogether." He goes on to declare that while the Constitution specifically grants the powers of appointment, nomination, and commissioning, the powers of setting destinations and grades *are not part* of these "specifically enumerated" powers.[293] As Jefferson put it,

> [t]o nominate must be to propose: appointment seems that act of the will which constitutes or makes the Agent: and the Commission is the public evidence of it. But there are still other acts previous to these, not specially enumerated in the Constitution; to wit 1. the destination of a mission to the particular country where the public service calls for it: and 2. the character, or grade to be employed in it. The natural order of all these is 1. destination. 2. grade. 3. nomination. 4. appointment. 5. commission. If appointment does not comprehend the neighboring acts of nomination, or commission, (and the constitution says it shall not, by giving them exclusively to the President) still less can it pretend to comprehend those previous and more remote of destination and grade.[294]

And Jefferson repeated in conclusion, "[t]he Constitution, analyzing the three last [i.e., nomination, appointment, and com-

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President," language that clearly echoes Article II, Section 1's vesting of executive power. 6 THE DIARIES OF GEORGE WASHINGTON, *supra*, at 68.

289. *See infra* Part II.E.2.d.

290. HAMILTON, *supra* note 6, at 39.

291. *See* Bradley & Flaherty, *supra* note 7, at 574.

292. As Bradley and Flaherty point out, Jefferson actually misquoted the Vesting Clause as vesting "executive powers" rather than "executive power." *Id.* at 654. We do not attach any significance to the minor error. In either event, Jefferson was relying on the Vesting Clause to convey power (or "powers") he said were not contained within the President's specific powers. *See* Jefferson, *supra* note 6, at 379.

293. *See* Jefferson, *supra* note 6, at 379.

294. *Id.* (emphasis omitted).

missioning], shews they *do not comprehend* the two first [i.e., setting destination and grade]."[295]

Jefferson's articulation of the residual theory could not be clearer. He noted that the Constitution vests the President with executive powers; that the transaction of business with foreign nations is executive, except as has been conveyed elsewhere; and that the powers to set grade and destination are not part of the specifically enumerated powers of nomination, appointment, and commissioning, and therefore they are part of the President's executive power.[296] Bradley and Flaherty's claim that Jefferson relied on the President's specifically enumerated powers is belied by Jefferson's own language.

Bradley and Flaherty do not dispute (or even discuss) the fact that Washington and Jay referred to the executive power as the source of Washington's monopoly power over foreign communications. These references are crucial, though, because there is no other explanation for the power Washington asserted (and Bradley and Flaherty do not suggest one). In particular, it could not come from the appointments power—Bradley and Flaherty's frequent claim in other areas—because this correspondence occurred at the very beginning of Washington's term, before he had made any of his own appointments.

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295. *Id.* (emphasis added). Jefferson's opinion also illustrates why some executive foreign affairs powers needed to be listed in Article II, Sections 2 and 3, despite the grant of residual executive power. Because the Senate's consent is necessary to appoint, one might have argued that this implied a share of the power to nominate, notwithstanding the grant of residual executive power. Article II, Section 2 makes clear that the Senate's advice and consent role in appointments does *not* include a role in nominations, and that the latter remains with the President. And, as Jefferson said, this also shows that all powers *preceding* nomination (and, we would add, all powers that come after commissioning, such as instructing and recalling), are all beyond the Senate's advice and consent role in appointments. They are, as a result, part of the executive residual, just as Jefferson said.

296. *See* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 230–31 (1994) (discussing Jefferson's opinion in similar terms and calling it one of a number of "broad statements regarding the executive nature of . . . foreign affairs" made by Jefferson). In particular, Professor Mayer associates Jefferson's later statements to Genet regarding the President's communications monopoly with Jefferson's view of residual executive power. *Id.* at 231. As he further points out, Jefferson thought (consistent with our theory) that the residual foreign affairs power was limited by the Constitution's specific grants to other branches, especially the war and treaty-making powers. *Id.* at 231–32.

Bradley and Flaherty devote much energy to Hamilton's *Pacificus*.[297] They do not dispute that Hamilton read the Vesting Clause to give the President "executive power," which includes foreign affairs powers traditionally defined as "executive," less powers assigned to other branches by the Constitution's text. But they think *Pacificus* counts for little, because he also relied upon the Faithful Execution Clause, and because (they say) he defended only the narrow power to issue the Neutrality Proclamation, not a broad view of presidential power in foreign affairs.[298]

In addition to relying on the Vesting Clause, Hamilton did claim that in carrying out foreign affairs functions the President was "executing" the law of nations, and thus the power also arose from the Faithful Execution Clause.[299] Despite Bradley and Flaherty's implication, however, the Vesting Clause argument was central to Hamilton's essay; he made this argument first, so presumably he thought he was making a powerful claim for a residual power. And, as we have pointed out, his argument was consistent with the vocabulary of the time and with Jefferson's prior legal opinion. All we claim for *Pacificus* is that it shows Hamilton endorsed the residual theory. This proposition is not undermined because Hamilton relied on both the Vesting Clause and, secondarily, on an extrapolation from the Faithful Execution Clause.[300]

Nor is it true that *Pacificus* defended only a narrow view of executive power. According to Bradley and Flaherty, Hamilton

297. *See* Bradley & Flaherty, *supra* note 7, at 679–86. Contrary to Bradley and Flaherty's implications, we do not claim that Hamilton's *Pacificus* essays, standing alone, establish the validity of the residual theory. Rather, we argue that the Neutrality Proclamation and Hamilton's defense of it fit a broader pattern: Washington exercised foreign affairs powers not traceable to specific constitutional powers, and political leaders of the time explained these powers as being part of "[t]he executive Power."

298. *Id.* at 680–82.

299. *See id.* at 681–82.

300. To the extent Bradley and Flaherty mean to imply that Hamilton's secondary argument was the better one, we are unpersuaded. As we discussed in our previous article, the law of nations did not *require* the Proclamation, nor did Hamilton as "Pacificus" claim otherwise. Prakash & Ramsey, *supra* note 3, at 328–34. We would need more proof of its common usage to find the Faithful Execution Clause preferable to the Vesting Clause. In any event, Hamilton's Faithful Execution Clause argument effectively claims for the President under the Faithful Execution Clause what we would give the President under the Vesting Clause. We are not sure why Bradley and Flaherty would prefer that explanation, though we would be happy to consider a complete argument for it.

referred only to the power to declare the nation's position under the law of nations, and did not justify (for example) treaty termination or lawmaking in support of the Proclamation.[301] In fact, Hamilton wrote broadly of the executive power to conduct relations with foreign nations. *All* matters involving foreign affairs, he said, were given to the executive exclusively by the Vesting Clause (save those given to or shared with other branches).[302] Hence, the Proclamation was justifiable by the executive power because it involved foreign affairs and was an authority not allocated elsewhere.[303] To claim that Hamilton defended only a narrow foreign affairs power is to ignore what Hamilton said, including his broad rationale.[304]

It is noteworthy that Bradley and Flaherty place little weight on the most common objection to reliance on *Pacificus*: the fact that Jefferson (in private letters) and Madison (in his *Helvidius* essays) disagreed with it.[305] As we discussed, Jefferson disagreed with parts of *Pacificus*, but not with its exposition of the residual theory;[306] Bradley and Flaherty do not

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301. Bradley & Flaherty, *supra* note 7, at 681–82.

302. *See* HAMILTON, *supra* note 6, at 39–40.

303. It is true, as Bradley and Flaherty say, that *Pacificus* does not support executive lawmaking in support of foreign affairs objectives. *See* Bradley & Flaherty, *supra* note 7, at 679–86. We do not claim otherwise, and the residual theory does not claim this power for the President. Prakash & Ramsey, *supra* note 3, at 262–65. With respect to treaty termination, Hamilton likely thought that the residual reading of executive power gave the President treaty termination power. Indeed, he urged Washington to suspend the treaties of alliance with France. *Id.* at 324–27.

304. Even had Hamilton offered only a narrow defense of the Proclamation, Bradley and Flaherty understate the Proclamation's importance. The President unilaterally declared the policy of the United States in a manner that was bound to (and did) excite passion amongst Americans and tension with the great powers at war. *See* Prakash & Ramsey, *supra* note 3, at 332–34. If all Hamilton had done was successfully defend a presidential power to create nonbinding foreign policy, he still would have accomplished quite a bit.

305. *See id.* at 334–39; Letter from Thomas Jefferson to James Madison (June 29, 1793), *in* 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 285, at 325; Letter from Thomas Jefferson to James Madison (July 7, 1793), *in* 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 285, at 338; JAMES MADISON, LETTERS OF HELVIDIUS NO. 1 (Apr. 22, 1793), *reprinted in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 612 (J.B. Lippincott & Co. 1865).

306. Prakash & Ramsey, *supra* note 3, at 335. Specifically, Jefferson took a broad view of Congress's power to decide whether to go to war in support of France, and wanted to be sure that the Proclamation did not constrain Congress's future decision making. Although Washington did not purport to bind Congress, Hamilton seemed to say otherwise, and this was Jefferson's principal objection. *See* MAYER, *supra* note 296, at 232–33.

claim otherwise. As we also discussed, Madison's *Helvidius* agreed that the Vesting Clause vested law execution authority, but denied that it vested any foreign affairs powers. But in denying residual foreign affairs powers, Madison—one of the most articulate constitutional theorists of his generation—sounded strained and unconvincing.[307] As Edward Corwin observed, *Helvidius*'s "great shortcoming . . . is its negative character, its failure to suggest either a logical or practicable construction of the Constitution to take the place of the one it combats"[308]—a comment that applies equally to Bradley and Flaherty's argument.

Bradley and Flaherty markedly distance themselves from *Helvidius*, agreeing that Madison's response is structurally flawed, incomplete, and unpersuasive.[309] They also do not dispute that the *Helvidius* essay was inconsistent with the position that Madison had previously taken while advising Washington in less partisan moments. The best they can say is that

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> Jefferson suspected that [Hamilton] wanted to bind the future conduct of the country—to ensure that the United States would not go to war against Britain—by executive act . . . . Jefferson's constitutional position [was] that because the power to decide between war and peace was assigned by the Constitution to Congress, the president could not initiate a policy which would confront Congress with a fait accompli.

Id. Whether or not Jefferson's position on this point is correct, it is obviously consistent with the residual theory; it depends upon one's view of the Declare War Clause.

307. Prakash & Ramsey, *supra* note 3, at 334–39. It is not merely our observation that *Pacificus* was well-received while *Helvidius* was not: this is the view of respected historians of the period. *See, e.g.*, STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 361–62 (1993) (noting that *Helvidius* proved unpersuasive while *Pacificus* "was a strong performance, and seems to have been generally so recognized").

308. EDWARD CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 28 (1917). In discussing the Neutrality Proclamation, Madison said the authority arose from Congress's war power. MADISON, *supra* note 305, at 612–13. But that was a fortuity of the Neutrality Proclamation: many aspects of foreign policy do not relate to war (or to other enumerated congressional powers), and Madison provided no way to approach such matters. Similarly, Bradley and Flaherty barely mention the Proclamation or the power to establish foreign policy more broadly, and plainly have no explanation for it. To repeat an example we used earlier, what should one make of the power to announce the Monroe Doctrine (that is, that the United States opposed any recolonization of Latin America)? *See* Prakash & Ramsey, *supra* note 3, at 246.

309. Bradley & Flaherty, *supra* note 7, at 685 ("There are a number of weaknesses in Madison's analysis."); *id.* at 683 (acknowledging "weaknesses" as well as admitting that *Helvidius* "may have been less than convincing," and noting that Madison "apparently was dissatisfied with his performance").

Madison "may have simply failed to make the best arguments," without saying what the better arguments would have been.[310]

While only weakly disputing our authorities, Bradley and Flaherty also assert that specific powers were more often cited than the Vesting Clause in explaining presidential power and that some people denied that the Vesting Clause vested anything.[311] Neither point undermines the residual theory. As to the first, of course Americans cited the specific powers in defending presidential powers closely related to the specific powers; this does not suggest the absence of residual power. The question is how Americans of the time justified presidential actions *not* closely tethered to the specific powers. Though Bradley and Flaherty argue that the President's specific foreign affairs powers can be stretched to justify, among other things, Washington's control of U.S. diplomats and his ability to expel foreign emissaries, *they never cite anyone who actually made such claims.* It appears that in the early years, no one endorsed Bradley and Flaherty's capacious readings of supposedly specific powers.[312]

As to denials of the substantive reading of the Vesting Clause, Bradley and Flaherty's only authority comes from the well-known removal debates of 1789 (*Helvidius* is no source for the vesting-clause-vests-nothing view because *Helvidius* admits that the Vesting Clause vests a law execution power). It is true that during the removal debates some members of the House denied that the Vesting Clause conveyed *any* power, and in particular argued that it did not vest the power to remove executive officers.[313] But we think these statements count for little. The idea that the Vesting Clause conveys nothing has a host of textual and historical difficulties, the speakers Bradley and Flaherty cite were not prominent constitutional thinkers, and the statements were made by the losing side in a debate

310. *Id.*

311. *See id.* at 636–37.

312. To be clear, we do not deny that when a specific power was available to justify executive action, people appealed to it. The executive power residual only comes into play when no specific foreign affairs power exists. As should be obvious, reliance on a specific power says nothing about what the speaker thinks regarding the existence of a residual to justify seemingly unallocated powers. True, if speakers *always* relied on specific power and never referred to a residual, that would weaken our theory. But as we have shown, that clearly was not the case.

313. *See* Bradley & Flaherty, *supra* note 7, at 660–61.

over a distinct power, removal.[314] In any event, we never

314. For the most part, we regard their treatment of the removal debates as credible. But they do make a critical mistake, one that greatly undercuts their ultimate conclusion. As Bradley and Flaherty note, on June 22, 1789, the House voted on two amendments designed to reflect the view that the Constitution granted the President a removal power. *See* Bradley & Flaherty, *supra* note 7, at 656. The first provided that the clerk in the Office of Foreign Affairs would assume the secretary's duties "when ever the said principal officer shall be removed from office by the president of the United States" and the second removed language that could be read to suggest that the statute itself granted a removal power. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES 1028 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS]. Both amendments passed, but with different majority coalitions. According to Bradley and Flaherty, "one cannot infer majority support from this [second] vote for the Vesting Clause Thesis" for some of those who voted for the second amendment were openly opposed to the Vesting Clause Thesis. Bradley & Flaherty, *supra* note 7, at 663. Bradley and Flaherty then claim that the House sent the bill to the Senate. *Id.*

Bradley and Flaherty seem unaware that the vote on the second amendment *was not* the final House action on the bill. Votes on amendments are never final action; one always must vote on the amendment and then vote on the bill. Before the actual final vote, which took place two days later, 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra*, at 692 (Charlene Bangs Bickford & Helen E. Veit eds., 1986), it was obvious what was at stake and the opponents of the constitutional grant theory had a chance to take a stand. If there truly was a majority that opposed the constitutional grant theory, as Bradley and Flaherty contend, this majority ought to have defeated the bill. Because there were no pressing foreign crises, the supposed majority should have defeated the bill and drafted a new one that made it clear that the Constitution did not grant the President a removal power.

This never happened. In the House, the bill that assumed a constitutional removal power passed by a 29 to 22 margin. 4 *id.* at 692. This vote shows that a sizable majority accepted the constitutional grant theory. As Charles Thach noted, the final vote was a "clear-cut test of [Constitutional] strength," because the bill assumed that the President had a constitutionally based removal power. THACH, *supra* note 210, at 154. The same must be said of the far closer vote in the Senate. On two occasions, Vice President Adams cast a tie-breaking vote to defeat amendments that would have defeated the reference to removal by the President. *See* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra*, at 697 n.4. "There can, then, be no question that the matter of removal was voted upon by the Senate with a full knowledge of what it signified in all its aspects. The issue was crystal clear . . . ." THACH, *supra* note 210, at 157.

That Congress passed three bills (the acts creating the three great departments), each of which assumed that the President (an institutional rival) had a removal power arising out of the executive power itself, plainly supports the residual theory. Rather than undermining our claim, we think the removal debate further validates Jefferson's residual theory. In any event, it plainly does not undermine it, for it is clear that many (though not all) participants endorsed it. By themselves, the debates refute Bradley and Flaherty's assertion that people of the era relied on the Vesting Clause "almost not at all."

claimed that *everyone* in the 1790s endorsed our theory—only that many of the most prominent figures did.

In sum, we argued that key figures such as Hamilton, Jefferson, Washington, Jay, and Madison endorsed the residual theory. Bradley and Flaherty do nothing to undermine these authorities or our claims about them. We also claimed that no one in the 1790s advanced a coherent theory of foreign affairs authority to rival the Jeffersonian theory. Bradley and Flaherty do not seriously dispute that. Though they maintain that early statesmen relied upon specific grants of power to explain presidential foreign affairs powers, they find no one who actually used the President's specific constitutional grants to explain the exercise of foreign affairs powers that are remote from any specific power, such as the President's monopoly on foreign communications and his ability to establish the foreign policy of the United States.

2. Practice Under the Washington Administration

Bradley and Flaherty devote much attention to the actual practices of the Washington administration. Rather than contesting our account of the historical practices or their relevance, they contest the rationales for these practices, disputing our claim that the residual executive power is the best means of explaining Washington's foreign affairs actions.[315] They argue instead that specific grants of authority—such as the powers to appoint ambassadors, make treaties, and require opinions of the heads of the executive departments—can explain the President's actions.[316]

In making these claims, Bradley and Flaherty effectively discard their specification theory. Whereas before they argued that the President only had the specific powers in Sections 2 and 3 of Article II, they now are open to the idea of general powers emanating from the supposedly specific ones. They read each of the specific powers to have an implausibly generous penumbra and, in so doing, abandon their previous argument that general powers were contrary to the doctrine of enumerated powers. The power to appoint ambassadors is somehow

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Bradley & Flaherty, *supra* note 7, at 637.

For an extended examination of these momentous debates, see Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. (forthcoming 2006).

315. *See* Bradley & Flaherty, *supra* note 7, at 556, 636.

316. *Id.* at 636.

read as the power to control and remove them.[317] The power to receive ambassadors is read as the power to send them home.[318]

We hold no brief for the specification theory, and we are glad to see that they abandon it. But even a theory of generous emanations and penumbras cannot explain all of Washington's actions. What accounts for Washington's sole control of foreign communications? What permitted Washington to establish nonbinding foreign policy, such as the Neutrality Proclamation? Why did members of the Washington administration believe that the President could withdraw from treaties? One needs a residual theory to justify the Washington administration's practices, and the theory of Jefferson, Washington, and Hamilton is the only viable one available.

a. The Sole Organ of Communication

Washington asserted and enjoyed a monopoly on foreign communications. Communications addressed to the former executive power (the Continental Congress) were routed to the new chief executive.[319] Foreign ministers who wished to communicate with Congress were required to submit the documents to the President, and the President decided which documents, if any, he would send to Congress.[320] Rather than communicating with foreign nations and ministers directly, Congress requested that the President forward its sentiments and resolutions, and those resolutions made clear that the particular chamber was not speaking on behalf of the United States, but was only speaking for itself.[321]

Bradley and Flaherty say virtually nothing about this widely accepted presidential power. They neither discuss the practices nor provide specific textual support for any monopoly. They do consider some limited communicative powers in their discussion of the Act for Establishing the Executive Department of Foreign Affairs.[322] The Act permitted the President to delegate certain tasks to the Secretary of Foreign Affairs, including the power of communicating with U.S. diplomats and receiving memorials and applications from foreign diplomats

317. *See id.* at 647.
318. *See id.* at 664–79.
319. Prakash & Ramsey, *supra* note 3, at 317.
320. *See id.* at 321–22.
321. *See id.* at 318–20.
322. Bradley & Flaherty, *supra* note 7, at 642–43.

and foreigners.[323] Bradley and Flaherty claim that the power to communicate with U.S. diplomats "finds a provenance" in the power to appoint diplomats, while the power to receive applications and memorials "echoes" the duty to receive ambassadors and foreign ministers.[324] Neither claim withstands scrutiny. The power to appoint does not encompass a power to communicate. And to say that the ability to receive memorials and applications "echoes" the duty to receive ambassadors is to admit that the President's specific powers do not encompass the power to receive applications from others, for "echoes" do not grant power.

Even were we to concede their dubious derivation of the narrow communicative powers listed in the Act, they still cannot account for the scope of the President's communications monopoly. The Act merely permitted the President to delegate his constitutional authorities to communicate with U.S. diplomats and to receive documents from foreign ministers and foreigners.[325] Yet Washington exercised a monopoly on foreign communication. Neither the Act nor any specific constitutional power can account for the fact that Congress, U.S. diplomats, and other countries all channeled their foreign affairs communications through the President. The power to appoint diplomats (with the Senate's advice and consent) cannot ensure that *only* the President could communicate with them on behalf of the United States. The duty to receive diplomats cannot grant a monopoly on any foreign nation's communications with the United States. Nor can the Ambassadors Clause encompass a right to serve as the sole means of expressing the foreign policy of the United States to foreign countries. The question remains: why did the President have a foreign affairs communications monopoly?

b. Treaty Termination and Removal of Foreign Diplomats

Bradley and Flaherty also tiptoe around two other powers assumed to lie with the President in the 1790s: the power to withdraw from or suspend treaties and the power to expel foreign diplomats.[326] Again, that casts doubt on their claim that

323. An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

324. Bradley & Flaherty, *supra* note 7, at 643–44.

325. *See* An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

326. *See* Bradley & Flaherty, *supra* note 7, at 661, 664–79.

the President was understood to only possess specific foreign affairs powers.

In our previous article, we discussed how, in conjunction with a decision whether to receive French Ambassador Edmond Genet, Washington requested opinions about whether to suspend or renounce two Franco-American treaties from 1778. Based on that episode, we concluded that Washington and members of his administration believed that he could suspend or renounce treaties unilaterally. Washington wanted to make a quick decision because he wanted to announce any suspension or withdrawal upon receiving Genet. He had already decided that there was no need to call Congress into session, suggesting that he thought he could make the suspension/withdrawal decision himself. Consistent with that reading, Washington did not seek any opinion on whether he had the authority to withdraw or suspend; he sought opinions on whether he *ought to* withdraw or suspend—indicating that he thought he had these powers. Neither Hamilton nor Jefferson counseled the President that he lacked constitutional authority to suspend or withdraw. While Hamilton urged the President to suspend, Jefferson argued that doing so would violate the laws of nations. Given that Jefferson thought that the President should adhere to the treaties, his failure to argue that the Constitution did not permit presidential withdrawal or suspension suggests that Jefferson understood that the President could withdraw or suspend when the law of nations permitted.[327]

While noting that Washington sought opinions about suspension and withdrawal,[328] Bradley and Flaherty do not take a position on whether Washington could withdraw or suspend. Instead they note that no one discussed the constitutional questions involved, and no one focused on which institution could suspend or withdraw.[329] We agree, but do not see how that matters. The circumstances indicate that Washington, Hamilton, and Jefferson thought that the President could withdraw or suspend—that is why none of them discussed these matters. Because the question was whether to renounce the treaties upon Genet's reception and because Washington

327. Prakash & Ramsey, *supra* note 3, at 324–27. The conclusion that Jefferson thought the President could withdraw from treaties is supported by Jefferson's view, expressed three years earlier, that "[t]he transaction of business with foreign nations is executive altogether." Jefferson, *supra* note 6, at 378.

328. Bradley & Flaherty, *supra* note 7, at 666–67.

329. *See id.* at 667–68.

already had decided not to call Congress back into session before Genet's reception, all three must have thought that Washington could unilaterally withdraw from the French treaties.[330]

Bradley and Flaherty also gingerly sidestep the question of expelling foreign representatives. With respect to ambassadors, they point out that Washington never actually expelled Genet, but only requested that France withdraw him.[331] But Washington and his administration clearly thought the President had the power to dismiss Genet. Jefferson told Genet that the executive had the power to admit and interdict foreign representatives, and specifically threatened that the executive would expel Genet if the latter did not obey the law and did not comport himself as a diplomat should.[332] Washington only refrained from expelling Genet because he thought it was better for France to recall its own emissary. Further, Washington made the withdrawal demand on his own authority, even though he lacked specific constitutional authority to make such requests. It is hard to believe that Washington thought he could unilaterally demand that France withdraw Genet but could not expel him outright.

In discussing Washington's expulsion of consuls, Bradley and Flaherty admit that Washington's actions may have "strained" the bounds of specific constitutional text (presumably because consuls are omitted from the Ambassadors Clause).[333] Even were we to regard the omission of consuls from the Reception Clause as a sort of scrivener's error, the Recep-

330. Prakash & Ramsey, *supra* note 3, at 324–27.

331. Bradley & Flaherty, *supra* note 7, at 670–71.

332. Letter from Thomas Jefferson to Edmond Genet (Sept. 15, 1793), *in* THE THOMAS JEFFERSON PAPERS AT THE LIBRARY OF CONGRESS, 1606–1827: SERIES 1 GENERAL CORRESPONDENCE, 1651–1827, http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html, image 653 (displaying letter in which Jefferson wrote that the President would "admit the continuance of [Genet's] functions so long as they shall be restrained within the limits of the law").

333. Bradley & Flaherty, *supra* note 7, at 677. We note that they do a commendable job of adding to the evidence that the omission of consuls from the President's reception duty was purposeful. *Id.* at 678–79. We would add that a 1794 opinion of Attorney General William Bradford supports the notion that consuls are distinguishable from foreign ministers. 1 Op. Att'y Gen. 22, 23 (1794). Based on his reading of judicial precedent, the law of nations, and the branch of federal court jurisdiction pertaining to ambassadors, other foreign ministers, and consuls, Bradford concluded that a 1790 statute did not cover offenses committed against a consul because the statute only covered violence committed on a public minister or ambassador. *Id.* at 22–23. According to Bradford, consuls were not public ministers. *Id.* at 23.

tion Clause is not an expulsion clause. It nowhere permits the President to expel existing foreign officials, a power that when exercised may lead to a diplomatic firestorm. To believe that the President has a right to expel consuls by virtue of the power to receive ambassadors and other public ministers is to move from the realm of scrivener's error to the realm of constitutional rewrite. We do not think that the "specific" constitutional clauses can be "strained" so far. Washington's actions must be explained some other way or cited as usurpation. We think the best explanation is the one we have offered: that the power to expel ambassadors and consuls arises from the President's executive power.

Hence Bradley and Flaherty fail to explain the following: why Washington, Hamilton, and Jefferson apparently thought that the President could withdraw from or suspend treaties; why Washington could request that foreign governments recall their diplomats; and why Washington could expel foreign agents. As with the sole communication power, one simply cannot inflate the President's specific foreign affairs grants to justify these powers. Indeed, it appears that under the specification theory, no branch of the federal government has these powers.

c. Control of the Instruments of Diplomacy

In our previous article, we showed that Washington controlled John Jay, Congress's holdover foreign affairs secretary; directed Thomas Jefferson, the new Secretary of Foreign Affairs; and superintended and recalled American diplomats.[334] We also showed that Congress, his institutional rival, assumed that the President had diplomatic powers beyond those specified in Sections 2 and 3 of Article II.[335] We claimed that only the Jeffersonian theory could justify Washington's exercise of these nonspecified powers.

Bradley and Flaherty deny that Washington controlled John Jay, claiming that their relationship was "informal and ad hoc."[336] Somewhat paradoxically, however, they admit that Washington controlled diplomacy and the diplomats.[337] Specifically, they contend that

334. Prakash & Ramsey, *supra* note 3, at 298–311.
335. *Id.* at 311.
336. Bradley & Flaherty, *supra* note 7, at 640.
337. *Id.* at 644–48.

> reasonable constructions of specific foreign affairs clauses, such as those authorizing the President to appoint and receive ambassadors, make treaties, and require opinions from the heads of executive departments, support accepted assertions of presidential authority more plausibly than treating the Article II Vesting Clause as a general source of foreign affairs authority.[338]

They later claim that the Foreign Affairs Act "can be understood as a function of discrete statutory allocations tracking specific constitutional grants,"[339] and that "[t]he history of the period . . . indicates that contemporaries both inside and outside of the administration followed this more modest interpretive strategy."[340] These arguments are unpersuasive.

In support of their claim that the Washington-Jay relationship was informal, Bradley and Flaherty cite Washington's letter to Jay requesting documents and analysis of America's foreign affairs in which Washington explicitly declined to make an "official[ ]" request.[341] Though they admit that there are some letters where both Washington and Jay speak of "order[s]" and "direct[ions]," these were likely slips of language.[342] They even say that "directions" is ambiguous because it is not obvious that this word refers to a command.[343]

Bradley and Flaherty are wrong on each of these points. First, there are at least a dozen letters where Jay and Washington speak of orders and directions.[344] It is impossible to believe that both men made repeated mistakes about the nature of their relationship. Second, Bradley and Flaherty treat the

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338. *Id.* at 636.

339. *Id.* at 644.

340. *Id.* at 636.

341. Letter from George Washington to the Acting Secretary for Foreign Affairs (June 8, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON 343, 343 (John C. Fitzpatrick ed., 1939).

342. Bradley & Flaherty, *supra* note 7, at 639 & n.459.

343. *See id.* at 640.

344. *See, e.g.*, Letter from John Jay to George Washington (July 15, 1789), *in* 28 GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 2 LETTERBOOKS 92, http://memory.loc.gov/ammem/gwhtml/gwseries2.html, images 57–58 (last modified Feb. 16, 1999) (showing Jay seeking Washington's instructions regarding an application from a Canadian and proposing that Washington order Jay to send a letter to the Canadian); Letter from John Jay to Phineas Bond (Aug. 24, 1789), *in* 28 GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 2 LETTERBOOKS 92, http://memory.loc.gov/ammem/gwhtml/gwseries2.html, image 53 (last modified Feb. 16, 1999) (showing Jay writing to Phineas Bond on orders of Washington).

Continental Congress's "orders" to Jay as actual orders.[345] They never justify their decision to treat some orders as mistakes and approvingly cite others as intentional. Third, we are unsure why they believe that "directions" are not commands. Washington was directing Jay to undertake certain foreign affairs tasks and in this context, to "direct" means to order. Lastly, the letter Bradley and Flaherty claim proves or suggests that Washington could not direct Jay does nothing of the sort. In that letter, Washington did not deem it "expedient" to call for documents officially, so he made an informal request to Jay.[346] This was a decision not to exercise power, not an admission that Washington lacked formal power over Jay; otherwise Washington would not have claimed it was *inexpedient* to make an official request. Indeed, the letter is replete with Washington's requests for documents and a report on America's foreign relations—materials Washington believed he would need in his role as (residual) superintendent of America's foreign affairs. Consistent with the repeated language of orders and directions to Jay (where Washington clearly did act "officially") and with the rest of Washington's letter, one should not read Washington's isolated decision not to make an official request as some indication he harbored doubts about his constitutional power to direct Jay. In supposing that the entire relationship between Jay and Washington was "informal and ad hoc,"[347] Bradley and Flaherty misread and embellish a single letter.

Perhaps sensing the weakness of their claims, Bradley and Flaherty also insist that the President's specific foreign affairs powers (for example, treaty negotiation and ambassadorial reception) can account for Washington's orders to Jay.[348] While these powers may account for the orders that Bradley and Flaherty discuss, there are many more orders and directions that cannot be so justified. For instance, Washington ordered Jay to correspond with foreign petitioners who sought the assistance of the federal government and ordered Jay to correspond with U.S. agents stationed overseas.[349]

345. Bradley & Flaherty, *supra* note 7, at 640.

346. Letter from George Washington to the Acting Secretary for Foreign Affairs, *supra* note 341, at 343.

347. Bradley & Flaherty, *supra* note 7, at 640.

348. *Id.* at 641.

349. *See* Letter from George Washington to the Acting Secretary for Foreign Affairs, *supra* note 341, at 343–44.

Given that Jay was charged by the old Department of Foreign Affairs statute with obeying *congressional* orders, the question remains: why did Jay act as if he were Washington's subordinate? Both Jay and Washington provided the answer: the grant of executive power. In a letter to Francisco Chiappe, Jay noted he was writing pursuant to Washington's order, for Washington now had "supreme executive authority" (we would say the executive power) and hence Washington was the one who would superintend America's agents and communicate with foreign potentates.[350] Later, in a letter to Giuseppe Chiappe (Francisco's brother), Jay stated that the President had powers and prerogatives of the type held by monarchs and that the Congress no longer had the "great executive powers," implying that Washington had them.[351] Finally, Washington wrote to the Emperor of Morocco observing that he now possessed the "supreme executive authority" and thus had the pleasure of responding to the emperor's letter.[352] Bradley and Flaherty say nothing about these letters.

Consistent with our claims, Washington not only directed Jay, but also assumed control of the diplomatic corps while Jay served as acting secretary. On his own, he appointed a special envoy to England and issued instructions to America's diplomats through Jay.[353] These actions leave little doubt that Washington's control of the foreign affairs apparatus was secure from the beginning of his administration.[354] Thus, unless one subscribes to a residual theory, one must regard Washington as having usurped power (and believe that Jay was his will-

350. Letter from John Jay to Francisco Chiappe (Dec. 1, 1789), *in* 28 GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 2 LETTERBOOKS 92, http://memory.loc.gov/ammem/gwhtml/gwseries2.html, images 110–12 (last modified Feb. 16, 1999).

351. Letter from John Jay to Giuseppe Chiappe (Dec. 1, 1789), *in* 28 GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 2 LETTERBOOKS 92, http://memory.loc.gov/ammem/gwhtml/gwseries2.html, images 112–16 (last modified Feb. 16, 1999).

352. Letter from George Washington to King of Morocco (Dec. 1, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 341, at 474, 474–75.

353. *See* Prakash & Ramsey, *supra* note 3, at 299.

354. Washington's control of Jay cannot be a function of the specific powers delegable to the foreign secretary under the Foreign Affairs Act, because Washington directed Jay even before the enactment of the Act. *See, e.g.*, Letter from John Jay to George Washington (July 15, 1789), *in* 28 GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 2 LETTERBOOKS 92, http://memory.loc.gov/ammem/gwhtml/gwseries2.html, images 57–58 (last modified Feb. 16, 1999).

ing accomplice). The President's specific powers cannot explain Washington's control of an officer statutorily charged to follow Congress's direction, and neither Washington nor Jay cited the specific powers as proof of Washington's foreign affairs authority. Instead, each cited the President's executive power.

Bradley and Flaherty agree that Jefferson, as Secretary of State, was Washington's subordinate, but they think this arose from the Foreign Affairs Act, which established the new Department of Foreign Affairs.[355] They also assert that the President's specific foreign affairs authorities explain all the powers that Congress assumed that the President had and could delegate to the secretary. For instance, Bradley and Flaherty contend that the President's power to instruct diplomats "finds a provenance" in the power to appoint ambassadors and other public ministers.[356] Yet their oblique language betrays the textual infirmity of this claim: no one supposes that the President's power to appoint federal judges gives (or even suggests) a power to instruct them.[357] Neither can the appointment power somehow justify the President's monopoly on communications with foreign nations and with America's diplomats. The Act also permitted the President to delegate the ability to receive memorials and applications from foreigners. Bradley and Flaherty half-heartedly claim that this power "echoes" the duty to receive ambassadors,[358] but it seems an entirely distinct function. Because the Act did not purport to give the President any powers (it only allowed him to delegate powers), and because the President's specific foreign affairs powers cannot be stretched to cover the authorities that Congress assumed the President possessed, Congress must have believed that the President had a residual executive power over foreign affairs.

Finally, the Act permitted the President to delegate to the secretary "other Matters relating to foreign affairs."[359] Bradley and Flaherty do not comment on what those matters could be. To stay true to their theory of specific powers, however, they

355. *See* Bradley & Flaherty, *supra* note 7, at 637–38, 643.

356. *Id.* at 643.

357. Federal judges are appointed in the same manner as diplomats and there is no express prohibition on presidential direction. Presumably, Bradley and Flaherty also do not think that the President can direct every nonjudicial, noninferior officer merely because the President nominates, appoints, and commissions them.

358. Bradley & Flaherty, *supra* note 7, at 643.

359. An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

must treat this language as superfluous, because *no other specific powers relating to foreign affairs remain.* In explaining the Act, they cite the duty to receive foreign ambassadors, the power to appoint U.S. diplomats and consuls, and the power to make treaties. According to their theory of specification, no other presidential foreign affairs powers remain. The residual theory allows us to make sense of this statutory language and render it meaningful. The President could transfer to Jefferson those residual foreign affairs authorities that rested with the President pursuant to the Vesting Clause, including the power to issue passports, the power to enunciate and formulate nonbinding foreign policy, etc.

Beyond their inability to explain the Act, Bradley and Flaherty have difficulty accounting for diplomatic practices. For instance, Bradley and Flaherty cannot explain Washington's ability to remove Ambassadors Gouverneur Morris and James Monroe from their postings in France. They claim that this removal power was "a corollary of the President's superior authority to remove the Secretary of State himself, something expressly contemplated by the Foreign Affairs Act."[360] But the Act was not some mathematical theory from which one could derive additional powers by resort to postulates or corollaries. The Act did not mention an ability to remove diplomats. Even if it did, Bradley and Flaherty believe that the Act is defensible by resort to the specific constitutional powers. Yet there is no specific constitutional power to remove diplomats. Finally, the Act did not grant power to remove—it assumed that the President had a pre-existing executive power to remove.[361]

When one steps back and examines Bradley and Flaherty's textual claims as a whole, a pattern emerges. Many of their claims focus on the object of a power clause and ignore the verb. Hence the power to appoint ambassadors becomes the power to instruct and remove them; the power to receive ambassadors becomes the power to expel them and includes a power to receive their communications. By using words and phrases like "finds a provenance," "echoes," and "corollary," they all but concede that the *specific* powers do not authorize either the powers that Congress permitted the President to delegate in the Act or all the diplomatic powers that Washington actually exercised.

360. Bradley & Flaherty, *supra* note 7, at 647.

361. An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

Perhaps sensing the difficulties with their textual claims, they ultimately admit that these are not "conclusive arguments."[362] We agree and would go further—these textual claims are just implausible, because no one apparently voiced them at the time and because the claims do not take constitutional text seriously.

In relying upon penumbral readings of specific foreign affairs powers to justify Washington's control of diplomacy, Bradley and Flaherty stretch the Constitution's specific powers beyond their tensile points while also abandoning their specification theory. Instead of consistently arguing that the President does not enjoy general powers, they now read the Constitution as granting him general powers around each of the supposedly specific ones. And by adopting "general" readings of the supposedly specific powers, they also abandon their claim that general powers somehow violate the doctrine of enumerated powers.

Finally, we note the ironic consequences of Bradley and Flaherty's penumbral theory. In the hands of advocates of presidential power, it likely leads to *far greater* presidential control of foreign affairs than would our theory. For example, the power to negotiate treaties might imply a power to terminate them, either in accordance with *or in violation of* their terms; the President's control over ambassadors might imply a power to use those ambassadors to negotiate executive agreements, including agreements preemptive of state law. The President's control over war making might imply a power to seize steel mills in support of the war effort. Though we do not approve of these readings (and we doubt that Bradley and Flaherty do either), they are at least as plausible as the readings Bradley and Flaherty half-heartedly advance. If one embraces Bradley and Flaherty's textual stretching and straining, it is difficult to know when to stop.[363]

d. Summary

Washington assumed control of many different aspects of foreign policy, a control that cannot be justified by reference to the President's specific foreign affairs powers. Along with Jefferson, Hamilton, Jay, Madison, and Washington himself, we

362. Bradley & Flaherty, *supra* note 7, at 644.

363. As we have explained, our theory, in contrast, contains its own limits. *See supra* Part I.B.

believe that the grant of executive power justified his general superintendence. The only viable alternative to the Jeffersonian theory is the usurpation thesis—Washington usurped foreign affairs authority not granted to him by the Constitution while Congress stood by without a murmur. America's Cincinnatus does not fit the role of usurper.

Bradley and Flaherty reject the residual theory, and they seem uncomfortable calling Washington a usurper. They believe they can transcend this quandary by asserting that "specific" constitutional provisions authorized Washington's actions. This turns out to be mostly rhetoric. They say almost nothing about a series of uncontroversial powers assumed to lie with the President: the right to serve as the sole organ of communication, the right to formulate nonbinding foreign policy, and the right to expel foreign ambassadors. Many of the powers they do discuss, such as the power to instruct and remove U.S. diplomats and the power to instruct and remove the Secretary of Foreign Affairs, cannot arise out of the President's specific powers to appoint and receive ambassadors, and to make treaties with the Senate's advice and consent. Indeed, they cite no one who actually justified the President's control of diplomacy by reference to the President's specific foreign affairs powers. Ultimately, despite insisting that their novel textual claims are plausible, even Bradley and Flaherty never fully embrace them.

CONCLUSION

In *Executive Power Essentialism and Foreign Affairs*, Professors Curtis Bradley and Martin Flaherty have produced a rhetorical masterpiece challenging the idea that the Vesting Clause vests the President with foreign affairs power. They do not advance any alternative theory of the Constitution's original meaning in foreign affairs but instead argue that the Jeffersonian theory is simply implausible on its own terms.

Yet despite the volume and artfulness of their writing, Bradley and Flaherty make little headway in refuting the propositions central to the Jeffersonian theory. Our first proposition is that the great political writers of the eighteenth century who most influenced the Framers, especially Montesquieu and Blackstone, classified foreign affairs powers among the executive powers of government. Professor Flaherty previously agreed: he has written that "[a]ccording to Montesquieu, to whom . . . Americans usually turned[,] . . . executive authority included the power to make peace or war and to establish pub-

lic security,"[364] and that "Blackstone saw foreign affairs authority as quintessentially executive."[365] More importantly, leading separation of powers scholars such as W.B. Gwyn and M.J.C. Vile read the political writers in the same way we do.[366] Bradley and Flaherty do nothing to disturb these settled readings.[367]

Our second proposition is that the vocabulary of the political writers, classifying foreign affairs powers as executive, carried over into American political discourse. For example, Americans thought the Continental Congress had executive powers in part because it had foreign affairs powers. Again, Professor Flaherty previously agreed:

> As the sole repository of national power, Congress performed legislative, executive, and judicial functions—imprecise as those terms remained—as well as duties that were less easily categorized. The Articles gave Congress what were considered core legislative powers, such as regulating financial matters, establishing post offices, and fixing weights and measures. But they also gave Congress the power to make war and appoint and commission all military officers serving the nation—authority usually thought to be executive in nature.[368]

Yet Bradley and Flaherty now argue that under the Articles, Congress was purely a legislative body and that the United States had no executive. This is not how contemporaries described the Continental Congress. Nor is it how modern scholars (including Professor Flaherty in prior articles) have described it: Congress had a "jumble of all three powers" and "[t]here is no doubt that [the Continental] Congress of necessity assumed a monopoly over 'executive' foreign affairs authority."[369]

Our most important proposition is that Article II, Section 1, vesting the President with "the executive Power," incorporates the late eighteenth-century meaning typically ascribed to

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364. Flaherty, *The Most Dangerous Branch*, *supra* note 13, at 1765.

365. Flaherty, *History Right?*, *supra* note 13, at 2106.

366. GWYN, *supra* note 68, at 103 ("Montesquieu, like most writers of his time, was inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs."); VILE, *supra* note 55, at 95.

367. Despite various quibbles, Bradley and Flaherty admit that Montesquieu equated executive power with foreign affairs power. Bradley & Flaherty, *supra* note 7, at 563. They claim that Blackstone did not share this view, but this assertion is based on an incomplete reading of Blackstone. *See supra* Part II.B.3.

368. Flaherty, *The Most Dangerous Branch*, *supra* note 13, at 1771–72.

369. Flaherty, *History Right?*, *supra* note 13, at 2117. It is true, of course, that under the Articles there was no separate executive *branch* at the national level, but (as Bradley and Flaherty thoroughly misunderstand) this does not mean that there were no executive *powers* exercised at the national level.

"executive power." As we demonstrated, at the Federal Convention some delegates initially proposed granting the new President the executive powers previously vested in the Continental Congress, and delegates plainly understood this to include foreign affairs powers. Bradley and Flaherty admit that the initial Convention proposal *would* have given the President foreign affairs powers (which effectively concedes our two prior propositions).[370] But they conclude that subsequent events show that the Constitution did not concentrate all foreign affairs powers in the President; for example, the final document gave important powers to other branches, while comments made during the drafting and ratifying process confirm that the Founders rejected the foreign affairs powers of the king as a model for the foreign affairs powers of the President.

These well-accepted points do nothing to undermine the Jeffersonian theory. The Framers objected to the king as a model, and as a result rejected the initial proposal to vest all executive powers in the President. The Framers believed that many executive foreign affairs powers should be exercised, in whole or part, by some body other than a chief magistrate—a result they accomplished by making specific textual assignments of those powers. But that does not undermine the claim that foreign affairs powers *not* specifically assigned to or shared with other branches remained part of the general grant of executive power, consistent with the vocabulary of contemporary political discourse. We have never argued that the President enjoys *all* (or even most) foreign affairs powers, or that there was complete "continuity" between the English king and the Constitution's President.

Our final proposition is that reading Article II, Section 1's executive power to include a foreign affairs residual comports with the way the Washington administration exercised foreign affairs authority, and with the way its leading members explained their actions. Bradley and Flaherty devote almost half of their article to the Washington administration, but fail to refute either claim. They agree that Washington exercised most of the powers we say he did, but struggle to justify the exercise of such powers by reference to "specific" powers in the Constitution's text. But they make no attempt to explain Washington's exercise of key foreign affairs powers, such as the sole communication power, and justify others, like Washington's control of

370. Bradley & Flaherty, *supra* note 7, at 592.

diplomacy, by an unconvincing recourse to penumbras, emanations, and other stretches of supposedly "specific" text. This latter tactic betrays the impossibility of their textual task, so much so that they never seem convinced of their own efforts. Finally, they never effectively dispute that Washington, Hamilton, Jefferson, etc. relied on the residual theory, nor do they identify a single leading speaker who denied the residual theory of foreign affairs (other than "Helvidius," whom they admit is unpersuasive).

We do not say that we have proven beyond all doubt that Article II, Section 1 vests the President with foreign affairs powers (nor, certainly, that the Jeffersonian theory provides an easy answer to all foreign affairs controversies). We remain convinced, however, that the Jeffersonian theory is a sound, historically supported reading of the Constitution's text that provides an explanation for the puzzle of supposedly "missing" foreign affairs powers and remains superior to any textual reading of the Constitution's foreign affairs powers yet advanced.