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## How to Think Constitutionally About Prerogative: A Study of Early American Usage

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### ABSTRACT

This Article challenges the view of “prerogative” as a discretionary authority to act outside the law. For seventy years, political scientists, lawyers and judges have drawn on John Locke’s account of prerogative in the *Second Treatise*, using it to read foundational texts in American constitutional law. American writings on prerogative produced between 1760 and 1788 are rarely discussed (excepting *The Federalist*), though these materials exist in abundance. Based on a study of over 700 of these texts, including pamphlets, broadsides, letters, essays, newspaper items, state

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papers, and legislative debates, this Article argues that early Americans almost never used “prerogative” as Locke defined it. Instead, the early American understanding of “prerogative” appears to have been shaped predominantly by the imperial crisis, the series of escalating disputes with the British ministry over taxation which preceded the Revolutionary War; in this crisis, Americans based their claims to enjoy rights of self-taxation on their colonial charters, which were issued by the King’s prerogative. The primary connotations of “prerogative” for Americans were thus self-government and the benefits of government, principally the protection of property and liberty. Drawing on this view, the Article proffers several principles for constructing the powers of the President. It argues that the Article II Vesting Clause should be treated as a substantive grant of executive power, but conceived narrowly as the power to carry out the law and not as a grant of prerogative. It is the enumerated powers in Article II that establish presidential prerogatives. These powers should be treated as “defeasible” in the sense that they may be regulated by statute and judicial decision, within limits reflecting the independence of the presidential office. This framework is consistent with the series of modern statutes regulating presidential emergency powers, including the War Powers Resolution and the National Emergencies Act.

#### INTRODUCTION

What does “prerogative” mean in American constitutional law? What does it mean to say that it is someone’s “prerogative” to decide on a course of action? To describe the powers of an office as “prerogatives”?

A common answer to these questions is that to have a “prerogative” is to enjoy a kind of discretion. More precisely, “prerogative” is a discretionary power that inheres in an office, and which cannot be controlled by law, but only guided by the officer’s sense of public interest.<sup>1</sup> American writers

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1. See, e.g., HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 13, 71 (2015); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 206–15 (2015) [hereinafter PRAKASH, *IMPERIAL*]; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 2–3, 8–10, 23–25, 115–16, 142–43, 147–49, 263–64 (1973); David Gray Adler, *The Framers and Executive Prerogative: A*

giving this account largely credit John Locke.<sup>2</sup> A short chapter in the *Second Treatise of Government*, conveniently titled “Of Prerogative,” tells us that prerogative is the executive’s “[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it.”<sup>3</sup> Originally, Locke surmised, “Government was almost all *Prerogative*,” but over time its misuse by “weak Princes” led the people to form legislative assemblies and “by express Laws to get Prerogative determin’d.”<sup>4</sup> What remained was a kind of residual executive discretion. William Blackstone repeated Locke’s definition in the first book of his *Commentaries on the Laws*

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*Constitutional and Historical Rebuke*, 42 PRESIDENTIAL STUD. Q. 376, 377–79 (2012); Larry Arnhart, “The god-Like Prince”: John Locke, Executive Prerogative, and the American Presidency, 9 PRESIDENTIAL STUD. Q. 121, 122–25 (1979); Richard H. Cox, *Executive and Prerogative: A Problem for Adherents of Constitutional Government*, in 2 CONSTITUTIONALISM IN AMERICA: EL [sic] PLURIBUS UNUM: CONSTITUTIONAL PRINCIPLES AND THE INSTITUTIONS OF GOVERNMENT 102, 111–18 (Sarah Baumgartner Thurow ed., 1988); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 808–13 (2013); Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 48 AM. J. POL. SCI. 429, 437–38 (2004); Owen Gross, *Emergency Powers*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 785, 792 (Mark Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015); Benjamin A. Kleinerman, *Cant the Prince Really Be Tamed? Executive Prerogative, Popular Apathy, and the Constitutional Frame in Locke’s Second Treatise*, 101 AM. POL. SCI. REV. 209, 209–10 (2007); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392 (1989); Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 50, 54–57 (2014); Richard M. Pious, *Inherent War and Executive Powers and Prerogative Politics*, 37 PRESIDENTIAL STUD. Q. 66, 67–71 (2007); Robert Scigliano, *The President’s “Prerogative Power”*, in INVENTING THE AMERICAN PRESIDENCY 236, 239–46 (Thomas E. Cronin ed., 1989); Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 321–23, 331–38 (1952). Cf. *Prerogative*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “prerogative,” without reference to the public interest, as “[a]n exclusive right, power, privilege, or immunity, usu[ally] acquired by virtue of office”).

2. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). On Locke’s influence on the literature on presidential prerogative, see, for example, Adler, *supra* note 1, at 377; Scigliano, *supra* note 1, at 236–39.

3. LOCKE, *supra* note 2, at 375.

4. *Id.* at 376.

of *England*, inserting it into a catalogue of traditional royal powers—making war, concluding peace, appointing ministers, dispensing justice, and so on—which, taken together, described the King’s place in the British constitution. He called these powers the King’s “prerogatives.”<sup>5</sup>

The notion of prerogative as a kind of discretion has been extremely important to the development of American constitutional law, especially in the last seventy years. It has furnished a language and a set of ideas for describing the extent of the President’s subordination to law. In denying that the President could seize domestic steel mills in the face of contrary legislation, Justice Jackson described the assertion of such a power as “military prerogative,” and the President’s duty to comply with legal limits, an absence of “prerogative.”<sup>6</sup> To others it has seemed undeniable that the President requires this discretion, and that presidents have actually employed it to manage foreign affairs, military conflicts and emergencies.<sup>7</sup> Lawyers have used “prerogative,”

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5. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244–70 (David Lemmings ed., Oxford University Press 2016). Modern commentators use Locke and Blackstone to interpret prerogative talk in *The Federalist* and other early sources. For commentators relying on Locke, see sources cited *supra* note 1. For an analysis of executive power based on Blackstone’s catalogue of prerogatives, see generally, e.g., Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). Other writers combine Locke and Blackstone, suggesting (or implying) that the powers Blackstone identifies are in some way discretionary or immune to regulation by law. See generally, e.g., Michael W. McConnell, *The Logical Structure of Article Two* (Nov. 14, 2016) (unpublished manuscript) (on file with the Buffalo Law Review), [http://www.law.northwestern.edu/research-faculty/colloquium/constitutionallaw/documents/2016\\_Fall\\_McConnell\\_Art.pdf](http://www.law.northwestern.edu/research-faculty/colloquium/constitutionallaw/documents/2016_Fall_McConnell_Art.pdf).

6. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 641, 646 (1952) (Jackson, J., concurring) (“What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.”).

7. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 677–78 (1981) (Rehnquist, C.J.); *Youngstown*, 343 U.S. at 700 (Vinson, C.J., dissenting); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (Sutherland, J.); *Assignment of Ground Forces of the United States to Duty in the European Area*:

as well, to mark an upper boundary on Congress's power over the President under the portion of the Necessary and Proper Clause known as the "Sweeping Clause."<sup>8</sup> In this sense, to say a presidential power is a "prerogative" is to suggest that Congress has limited authority to regulate that power—or perhaps no authority at all.<sup>9</sup> Such "prerogatives" are powers the President can exercise unilaterally, without consulting Congress or following any particular procedures.<sup>10</sup> "Prerogative" may even imply the absence of legal limits altogether. As one historian memorably described this idea, which he attributed to Americans, "to be governed by prerogative was to live at the mere grace and pleasure of a master."<sup>11</sup>

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*Hearing on S. Res. 8 Before the S. Comm. on Foreign Relations & S. Comm. on Armed Servs.*, 82d Cong. 88–93 (1951) (statement of Dean Acheson, Sec'y of State); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 173, 202–07 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (regarding standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A); John G. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 *FOREIGN AFF.* 229, 231–34 (1981). For scholarly use of "prerogative" to describe such powers, see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1984*, at 7–10, 169–81 (Randall w. Bland, Theodore T. Hindson, & Jack W. Peltason eds., 5th ed., 1984); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 43 (1972).

8. U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.")

9. *E.g.*, *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (Field, J.) ("The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."); *Schick v. Reed*, 419 U.S. 256, 262–63 (1974) (similar); McConnell, *supra* note 5 (manuscript at 90) (concluding that the powers listed in Article II, section 2, clause 1 are "[p]rerogative powers, meaning powers that the President has the constitutional right to exercise without need for statutory authorization, and which cannot be regulated or abridged by Congress").

10. See ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 14 (1976) (arguing that, with respect to prerogative powers, "the executive could take any action . . . on its own responsibility, without consulting [the legislature] in advance").

11. Eric Nelson, *Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75*, 68 *WM. & MARY Q.* 533, 542 (2011). Nelson was criticized for this line. Referring in particular to James Wilson, from whose views Nelson drew

This view of prerogative has had its proponents, but it is worth understanding that eighteenth-century Americans were generally not among them. This Article is a study, first, of how early Americans actually used the word “prerogative.” Its aim is to describe and make sense of the forensic arguments in which they employed the term, and to identify various constitutional roles for which they recruited “prerogative” over time. Rather than returning, yet again, to Locke and Blackstone, and relying, as one leading historian has put it, on Americans’ “presumed uncritical acceptance” of their theories,<sup>12</sup> this study is based on a much larger body of texts: over 700 American pamphlets, broadsides, letters, essays and newspaper items, along with state papers and legislative debates, all created between 1764 and 1788.<sup>13</sup> Broadening the body of evidence and setting that evidence in its political and social context reveals patterns of usage that

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support, historian Pauline Maier responded,

Wilson thought the harmony and interests of the British people would be better preserved under “the *legal* prerogatives of the Crown” than “an unlimited authority by Parliament,” but neither he nor any other colonial writer thought of the prerogative as a means of subjecting the people, as Nelson assumes, to “the mere grace and pleasure of a master.”

Pauline Maier, *Whigs Against Whigs Against Whigs: The Imperial Debates of 1765–76 Reconsidered*, 68 WM. & MARY Q. 578, 580 (2011) (emphasis in original). See discussion *infra* Section I.A on Wilson.

12. Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRESIDENTIAL STUD. Q. 85, 88 (2007).

13. There is a large volume of printed material from this period that discusses prerogative or mentions the term. For example, a search of “prerogative” in the Readex database of “Early American Newspapers” between 1764 and 1783 returned roughly 2200 items. To reduce the amount of material, I narrowed my search of pre-independence texts in Readex to the dates 1764–68 and 1774–75, in light of their importance in the imperial crisis. This resulted in 677 items mentioning “prerogative,” all of which were examined. I searched for post-independence materials mentioning “prerogative” in Peter Force’s “American Archives,” the National Archives’s “Founders Online,” and Rotunda’s “American Founding Era Collection,” which includes the Jefferson, Hamilton, and Adams papers, as well as a digital edition of the Documentary History of the Ratification of the Constitution. I combined this body of material with pamphlets and other texts identified in the existing secondary literature, nearly all of which are now available in Gale’s “Eighteenth Century Collections Online,” HathiTrust Digital Library, Internet Archive, Google Books, or similar digital repositories.

are otherwise invisible.<sup>14</sup> It also corrects for errors of perspective, showing actual lines of influence of European writers on Americans and setting American innovations in relief.

The results of following this approach are set out below. As we will see, the revolutionaries and framers of our state and federal constitutions almost never used “prerogative” as Locke defined it, though they understood well the importance of discretion.<sup>15</sup> Far more common were a different set of uses. Americans used “prerogative” to describe the power of the King over his subjects’ liberty and property, both within the realm and in the colonies of the British empire. They used it to refer to the King’s authority to charter colonial governments. They used it to describe specific royal powers under the British constitution, as Blackstone had, but also Mansfield, Bacon, Comyns and other English legal writers, whose texts Americans cited. When it came time to frame the first state constitutions, Americans pointedly contrasted these “royal prerogatives” with “executive power,” which, in that context, they conceived as a narrower power to carry out the law.<sup>16</sup> A

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14. Cf. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 581–83 (2008) (faulting legal scholarship on the Suspension Clause for relying on “the same problematic body of evidence,” i.e., leading legal treatises).

15. See *infra* Part I. On discretion, see Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 996–97 (1993) (“‘Discretion’ was an important and extremely controversial concept in early American constitutional discourse . . .”). Powell observes that “discretion” had two principal meanings: prudence and knowledge or skill; and uncontrolled, unconditional power. *Id.* at 996 (citing 1 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (1755)). The issue raised by Lockean prerogative is the place of the second kind of discretion in constitutional government.

16. For this definition of “executive power,” see, for example, Adler, *supra* note 1, at 380–81; Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704, 716; Wilmerding, *supra* note 1, at 334. This is what Harvey Mansfield calls the “dictionary definition” of the executive, in contrast to the Machiavellian conception of “execution” as action that is sudden, secret, performed by a single person, without procedure, and for the purpose of preserving the state. HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE*

principal constitutional task of the 1780s was figuring out which prerogatives could be vested in an executive department (understood narrowly), consistent with republicanism.<sup>17</sup> Prerogatives like the veto could be used to prevent the legislature from interfering with law enforcement, giving the executive some “independence” and thereby enhancing its ability to carry out the law and bring security to liberty and property; the danger was that prerogatives would also give the executive the appearance of a monarch, or even an ability to “corrupt” the legislature, as British kings had done by offering members lucrative offices or special privileges. If anything, then, it was *government*, not discretion, that was the core connotation of “prerogative” for early Americans. Appeals to prerogative were typically appeals to the benefits of government—self-government under colonial legislatures, or, later, a more “vigorous” execution of state government. But usage was hardly uniform. The English constitutional heritage of “prerogative” was layered, and disputants digging through it for helpful precedents came away with diverse notions.<sup>18</sup>

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AMBIVALENCE OF MODERN EXECUTIVE POWER 2, 130–49 (1989).

17. Consider Madison’s account of the aim of the Philadelphia Convention: “blending a proper stability & energy in the Government with the essential characters of the republican Form.” Letter from James Madison to Edmund Pendleton (Sept. 20, 1787), <http://founders.archives.gov/documents/Madison/01-10-02-0124>. (Very similar language can be found in Number 37 of *The Federalist*.) Even though Madison did not contribute significantly to the design of the federal executive, he understood the parameters well.

18. The early modern law of prerogative was, in essence, the predecessor to English public law. For a sense of its scope in the relevant periods, see 4 A NEW ABRIDGMENT OF THE LAW, “A Table of the Several Titles” and 149–214 (1759) (entries on “prerogative”); Sir Matthew Hale, *The Prerogatives of the King*, 92 SELDEN SOC’Y, at xii–xx (D.E.C. Yale ed., 1976) (figures depicting the law of prerogative). From an historical perspective, “prerogative” was connected to a variety of issues in the English constitution and government, including royal pleading rights, royal revenue, succession, foreign affairs, the nature of ‘sovereignty,’ the authority of Parliament, and Crown supervision of imperial and local government. See, e.g., P. R. CAVILL, THE ENGLISH PARLIAMENTS OF HENRY VII: 1485–1504, at 207–10 (2009); S. B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 41–62 (1936); ALAN CROMARTIE, THE CONSTITUTIONAL REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450–1642, at 179–233



The Article's second aim is to explore some implications of these findings for our own understanding of Article II. It is not my position that we can derive concrete answers to our questions about presidential power, and, even if we could, much has happened in the interim that I would want to consider. Still, early Americans' views about prerogative do suggest some principles useful for constructing Article II and its relationship to Article I. These principles are meant to constitute a framework for, as my title has it, "thinking constitutionally about prerogative," in the sense that they help to situate prerogative within a government whose powers are limited by fundamental law.

First, as I have already noted, Americans engaged in framing our first republican constitutions regularly distinguished executive power from prerogative. A presumption that the federal Constitution reflects this distinction would be of some use in resolving a well-known interpretive dispute over the meaning of the Article II

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(2009); G. R. ELTON, *THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY* 17–20, 25–26 (1960); J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 48–49, 56, 67–72 (1961); PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 64–95 (2010); 4 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 190–217 (3d ed. 1945); MARGARET ATWOOD JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603–1645*, at 23–34 (Octagon Books 1971) (1949); DANIEL LEE, *POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT* 274–82 (2016); JENNIFER LOACH, *PARLIAMENT UNDER THE TUDORS* 105–08 (1991); MARGARET MCGLYNN, *THE ROYAL PREROGATIVE AND THE LEARNING OF THE INNS OF COURT* 1–26 (2003); CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 111–25 (1940); FRANCIS OAKLEY, *OMNIPOTENCE, COVENANT, AND ORDER: AN EXCURSION IN THE HISTORY OF IDEAS FROM ABELARD TO LEIBNIZ* 103–18 (1984); THOMAS POOLE, *REASON OF STATE: LAW, PREROGATIVE AND EMPIRE* 19–60 (2015); FRANCIS D. WORMUTH, *THE ROYAL PREROGATIVE, 1603–1649*, at 47–82 (1939); G. R. Elton, *The Rule of Law in Sixteenth-Century England*, in *TUDOR MEN AND INSTITUTIONS: STUDIES IN ENGLISH LAW AND GOVERNMENT* 265, 270–81, 286 (Arthur J. Slavin ed., 1972); G. L. Harriss, *Medieval Doctrines in the Debates on Supply, 1610–1629*, in *FACTION AND PARLIAMENT: ESSAYS ON EARLY STUART HISTORY* 73, 75–80, 90–91, 100–03 (Kevin Sharpe ed., 1978); Francis Oakley, *Jacobean Political Theology: The Absolute and Ordinary Powers of the King*, 29 *J. HIST. IDEAS* 323, 326–29, 334–46 (1968); Kevin Sharpe, *Introduction: Parliamentary History 1603–1629: In or Out of Perspective?*, in *FACTION AND PARLIAMENT*, *supra*, at 1, 28–32.

Vesting Clause. One party in that dispute would read the Vesting Clause merely as providing for a single chief executive officer, while their antagonists would read it as a substantive grant of all powers traditionally held by executives, including a number of prerogatives.<sup>19</sup> Here, I suggest we presume the clause is a grant of substantive power, but only “executive power” narrowly conceived—the power to carry out the law. The power to carry out the law implies a significant discretion, but it is not a discretionary authority to contravene the law for the public good; this, or any other presidential prerogative, should be derived from an enumerated grant of power. Second, early Americans discussing prerogative generally assumed that it was defined and limited by law. They called it “legal prerogative”; in contemporary terms, we would say that prerogative powers were regarded as “defeasible.”<sup>20</sup> This assumption appears to have been widely held. Thus, for example, the staunchest defender of an independent executive in the Philadelphia Convention, James Wilson, was also the author of the Sweeping Clause, which, by its terms, grants Congress a power to regulate the President and the administration.<sup>21</sup>

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19. See, e.g., PRAKASH, IMPERIAL, *supra* note 1, at 84–85.

20. On this usage of “defeasible,” see, for example, Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006); McConnell, *supra* note 5 (manuscript at 88). In this context, to say an executive power is defeasible is to say that the legislature may define it and prescribe the manner in which it is exercised; however, it is not to say that the legislature may eliminate the power entirely. For this reason, I sometimes write of the legislature “regulating” prerogative, or of prerogative powers being “regulable.”

21. John Mikhail, who has studied the Sweeping Clause in greatest depth, has argued persuasively that Wilson was its principal author (as well as the source of a similar provision in Resolution VI of the Virginia Plan), and that he “presumably intended to give Congress whatever instrumental power it needed to organize and regulate the other branches and agencies of the government.” John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1056 (2014). In the same vein, but one step further, Jack Goldsmith and John Manning have provocatively described the Sweeping Clause as Congress’s portion of executive power. Goldsmith & Manning, *supra* note 20, at 2307 (“In a quite literal sense, the Necessary and Proper Clause gives Congress a form of executive power . . .”).

Yet, there must be some limits to the power to regulate presidential prerogatives. I suggest that congressional regulation of prerogative powers under the Sweeping Clause should not compromise the President's "independence of judgment"—his *autonomy* in exercising the power as limited by law—a capacity leading framers thought necessary for a "vigorous" executive power. Finally, I explore the Constitution's framework for handling emergencies. Early Americans tended to regard executive action without sanction of law as illegal, but expected that an officer could be indemnified after the fact by the legislature.<sup>22</sup> This approach has been mistakenly credited to Locke.<sup>23</sup> The embrace of the Lockean prerogative, which began in earnest during the Cold War, sought to justify the adoption of a very different regime: executive unilateralism. Although the early institutional framework for handling emergencies has not persisted, its core political values have, and are reflected today in framework statutes regulating the President's use of emergency power, and in judicial decisions, like Jackson's *Steel Seizure* concurrence, which buttress those statutes.<sup>24</sup> The executive discretion and institutional flexibility under this regime leave little practical need for a Lockean prerogative.

What follows is divided into two parts, corresponding to

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22. Wilmerding, *supra* note 1, at 324 ("That this doctrine was accepted by every single one of our early statesmen can easily be shown."). Scigliano objects, but only to Wilmerding's requirement that the executive immediately report his illegal conduct to the legislature. Scigliano, *supra* note 1, at 252–53 ("We should amend Wilmerding's statement: executive officers must be prepared to justify acts outside the law to Congress . . . should the acts be questioned."); *see also* SCHLESINGER, *supra* note 1, at 10, 148–49.

23. *See, e.g.*, Lobel, *supra* note 1, at 1392. This is the basis for the proposition, often encountered in the political science literature, that Thomas Jefferson believed the President to possess a Lockean prerogative. For the distinction between Lockean prerogative and Jefferson's views—that an executive acting illegally might be indemnified by the legislature—see Mortenson, *supra* note 1, at 63–65, 64 nn. 49 & 51; Wilmerding, *supra* note 1, at 323, 328–38.

24. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–38, 649–51 (1952) (Jackson, J., concurring).

my two announced aims. Part I, the bulk of the Article, describes the uses that Americans made of “prerogative” between 1764 and 1788. On the basis of this account, Part II proffers three principles for the construction of Article II, applying them to the Vesting Clause, the Take Care Clause and the question of emergency power.

### I. HOW AMERICANS USED “PREROGATIVE”

“Prerogative” wore a Janus face for Americans. Viewed from one side, it was the source of their rights to govern themselves, and of the liberties self-government secured. As one writer reminded the American patriots, they were “contending for the crown and prerogative of our King, as well as for liberty—property—and life.”<sup>25</sup> Turned round, however, prerogative was power, and like all kinds of power, it sought aggressively to expand, and if left unchecked would destroy liberty. It was this guise that James Warren described as “the dirty part of the Constitution.”<sup>26</sup>

The upheaval and transformation Americans experienced between 1764 and 1788 brought out both faces, in some cases simultaneously. The first problem that presents itself is therefore how to impose some order on the evidence without doing violence to it. Below, I have divided my study into three periods. First is the imperial crisis, by which I mean the political struggle between the British ministry and the colonial gentry over the series of taxation measures beginning in the mid-1760s, which led to armed conflict in April 1775 and a declaration of American independence about a year later. The second period is the formation of the first American governments, including the revolutionary conventions and congresses that took over

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25. Letter, *To the Freemen of America*, PA. J., May 18, 1774, at 3.

26. Letter from James Warren to John Adams (Nov. 5, 1775), in FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov> [hereinafter FOUNDERS ONLINE] (Warren was referring in particular to the prerogatives exercised by governors, as opposed to the King or Crown).

when imperial government lapsed, followed by the framing of state constitutions and the establishment of government under those constitutions. The third period is the framing and ratification of the federal Constitution. In each of these periods, I will argue, Americans faced specific political and constitutional problems that gave shape to their uses of “prerogative.” By consulting a broad range of sources and paying close attention to context, we can untangle the term’s various uses and describe how those uses changed over time. The result might be called a “conceptual history” of prerogative in the era of revolution and state formation.<sup>27</sup>

#### A. *The Imperial Crisis*

The core of the ideological account of the imperial crisis, probably the account most influential among lawyers, is the debate between the British ministry and Americans over the meaning of parliamentary sovereignty.<sup>28</sup> In its mature form, parliamentary sovereignty was the doctrine that, as Blackstone put it, there must exist in every state a “supreme, irresistible, absolute, uncontrolled authority,” which in Great Britain was vested in the national legislature, Parliament.<sup>29</sup> This theory had a wide currency in the late eighteenth century. Even Americans acknowledged it; the difficulty was then explaining why Parliament should lack a power to tax them. In the late 1760s, patriots aired a series of distinctions, now familiar, between external taxes (permissible, they said) and internal taxes (not), taxes with a regulatory purpose (okay) and taxes for raising revenue

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27. See, e.g., Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WILL. & MARY Q. 341, 354–55 (1989) (On Onuf’s usage, following Terence Ball and J.G.A. Pocock, “conceptual history” is more concerned with political context than are traditional histories of ideas.).

28. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198–229 (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 344–54 (1998 ed.) (1969).

29. 1 BLACKSTONE, *supra* note 5, at 39–41.

(not okay), and commercial regulation (yes) and taxes (no), but these did little to persuade British administrators, whose views largely hardened over the same period.<sup>30</sup> By the early 1770s, the state of debate brought about what Gordon Wood describes as “a fundamental shift in the American position.”<sup>31</sup> Unable to work around parliamentary sovereignty, American writers began to disavow Parliament’s authority entirely and to appeal instead to the person of the King. The colonies, they maintained, were his overseas “dominions,” granted and chartered under the authority of the King’s prerogative.<sup>32</sup> Thus we see an increasing reference to “prerogative” in the final stages of the crisis.

The conventional account encourages us to think about prerogative in a particular way. That royal prerogative was a solution to a crisis caused by insisting on parliamentary jurisdiction over an empire implies, or at least suggests, that prerogative was thought to be immune from parliamentary control. In fleeing from parliamentary sovereignty to royal prerogative, the colonists were fleeing to a royal jurisdiction unregulated by acts of Parliament. The suggestion is, further, that royal jurisdiction is something like the equitable jurisdiction of early Chancery, in which the King’s conscience is the measure of state power, rather than the common law or statute.<sup>33</sup> Yet if we study how Americans wrote about prerogative during the imperial crisis, it becomes obvious that the term could not stand, simply, for immunity from parliamentary control and subjection to royal

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30. The imperial administrator William Knox is the leading example. BAILYN, *supra* note 28, at 218.

31. WOOD, *supra* note 28, at 352.

32. See, e.g., CHARLES HOWARD MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 18–21, 112–47 (1923); ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 33 (2014); Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1194–1211 (1976).

33. Eric Nelson’s repeated invocations of a patriot embrace of “sweeping prerogatives” carry this connotation. See NELSON, *supra* note 32, at 5, 123.

control. As I show in the next several subsections, Americans often used “prerogative” to justify their immunity from parliamentary *and* royal control, by analogizing their charters to Magna Carta and arguing that the King had indefeasibly delegated his law-making power to colonial assemblies. On other occasions, writers used “prerogative” to describe matters *within* Parliament’s jurisdiction, in order to emphasize that royal power was limited by law. The term was ambiguous, and because it was ambiguous it could be used to describe a variety of institutional and legal relationships of value to writers uncertain about the constitution of the British empire, or who intended to invoke different constitutions at different times. “Prerogative” thus illustrates what John Phillip Reid called the “state of contrariety” or “polarity” in eighteenth-century British constitutional thought.<sup>34</sup>

In the last subsection, I explore the differences in American and English perspectives on “prerogative,” and the significance it had for the imperial crisis. From the American perspective, prerogative’s role in sanctioning the royal charters that formed the basis of their political communities seems to have left an indelible mark on the term, transforming it into a metonym for American rights to self-government. This is why “prerogative” formed a crucial component in what Charles McIlwain called “the charter claim” against metropolitan English power.<sup>35</sup> From the metropolitan perspective, in contrast, American appeals to “prerogative” invoked past efforts to undermine Parliament’s control over governmental supply, principally King Charles’s

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34. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* 4 (1993).

35. MCILWAIN, *supra* note 32, at 184. Rather uncharacteristically, McIlwain took a Londoner’s dismissive view of the argument. For more sympathetic accounts of the charter argument, see Black, *supra* note 32, at 1198–1207, as well as the sources cited in Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATL. Q. 56, 58–73 (1986).

use of “prerogative taxation.”<sup>36</sup> Not sharing the Americans’ association of royal prerogative with political community, the ministry could not understand how prerogative might sanctify colonial assemblies any more than it had “prerogative courts,” commissions, monopolies or other instruments of royal administration subject to parliamentary dissolution.<sup>37</sup> As McIlwain put it, that a colonial charter “was in fact . . . a provincial constitution for some thousands of Englishmen affected its legal status not in the slightest degree. From that point of view, *the people of Maryland did not exist . . .*”<sup>38</sup> The focus on charters may explain why Americans found little occasion to use “prerogative” as Locke had defined it, since a discretionary authority to violate the law would be at cross-purposes with paeans in its defense.

#### 1. Considerations on the Nature and Extent of the Legislative Authority

We should begin with James Wilson’s short pamphlet, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, which was written in 1768 and, although not published until 1774, is probably the most important treatment of the issue from the crisis.<sup>39</sup> The

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36. See Black, *supra* note 32, at 1200 (describing the metropolitan concern that “royal power must not wax fat on contributions from grateful colonial beneficiaries of royal license, lessening dependence on Parliament”). “Prerogative taxation” refers to royal powers to raise money from subjects without parliamentary consent. For its use under Charles I, see J. P. KENYON, *THE STUART CONSTITUTION, 1603–1688: DOCUMENTS AND COMMENTARY* 53–89 (1966).

37. “Prerogative courts,” sometimes “conciliar courts,” emerged from the King’s Council after the common law courts were already distinct, with relatively settled forms and a body of professional advocates and judges. The most famous of these courts, Star Chamber, was used to political ends and abolished by Parliament in 1641. See KENYON, *supra* note 36, at 117–24, 192, 223–25.

38. McILWAIN, *supra* note 32, at 179, 180–81 (emphasis added).

39. JAMES WILSON, *CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT* (Philadelphia, William & Thomas Bradford 1774). Wilson tells us that the pamphlet was “written during the late Non-Importation Agreement,” *id.* at iii, and Robert McCloskey dates it to



pamphlet illustrates well the diversity of meanings I have already attributed to “prerogative.” Wilson uses the term to describe the power of the Crown generally; its specific powers, among which he lists war, peace, and treating with foreign nations; the particular royal powers to establish governments and regulate domestic trade; and, most familiar to us, a “discretionary power of acting where the laws are silent,” a prerogative Wilson thinks “most properly entrusted to the executor of the laws.”<sup>40</sup> In the last phrase, the expression “discretionary power” is appositional to “prerogative” and can be read naturally as a definition, though it does not account for the term’s other uses in the pamphlet. We read of “its prerogative” (the Crown’s), “*his* prerogative” (the King’s, used four times, twice italicized), “all prerogative” (plural), “this prerogative” and “prerogative” (both singular, but the latter a putative ‘kind term’), “Royal prerogative” and “legal prerogative”—without any hint as to whether these are meant to be the same or different things.<sup>41</sup> Indeed, the last two uses, or even the first two, could refer to contrasting or opposed things; and if we look to see what idea, institution or practice prerogative is opposed to, we see that it is opposed to “the privileges of the people” or “the liberties of the people”—except, apparently, when the liberties of the people are secured by “governments under the sanction of *his* prerogative”; and that prerogative is opposed to law or “the exertion of an unlimited authority by Parliament”—except, that is, when prerogative is expanded by acts of Parliament, whose House of Commons, says Wilson, has occasionally “thr[own] into the scale of prerogative all that weight, which they derived from the

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1768. Robert Green McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON 9 (Robert Green McCloskey ed., 1967). Its importance for us stems in part from Wilson’s sustained discussion of prerogative; he uses the term seventeen times in thirty-five pages.

40. WILSON, *supra* note 39, at 6, 9, 13, 29, 33.

41. *Id.* at 6, 9, 11–14, 29, 33–35, 34 n.\*.

people.”<sup>42</sup> It is enough to make one’s head spin. And this from James Wilson, generally regarded as one of the patriots’ most acute legal thinkers.<sup>43</sup>

Wilson *was* one of the patriots’ most acute legal thinkers. Acute lawyers did not grasp at general principles where none were to be had; they understood how to use terms whose meaning depended on context and purpose. We can make better sense of Wilson’s varied uses of “prerogative” if we approach the pamphlet from this perspective. His core purpose, announced on page three, is to trace the consequences of the view that “lawful government” rests on “the consent of those, who are subject to it.”<sup>44</sup> This was a familiar starting point for American writers disputing Parliament’s power to tax the colonies, but it also could be used to impugn *any* parliamentary jurisdiction over the colonies, as demonstrated in a pamphlet by the radical William Hicks, published the year Wilson was writing.<sup>45</sup> Wilson quotes Burlamaqui, the Swiss legal theorist, for the proposition that “sovereigns” derive their authority from the agreement of “individuals” to part with a portion of their natural liberty in exchange for happiness.<sup>46</sup> Yet, reasons

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42. *Id.* at 6, 9, 11, 13, 29, 34.

43. *See, e.g.,* McCloskey, *supra* note 39, at 6.

44. WILSON, *supra* note 39, at 3.

45. *See* WILLIAM HICKS, THE NATURE AND EXTENT OF PARLIAMENTARY POWER CONSIDERED 3–5, 21 (New York, John Holt 1768). Hicks regarded the general assemblies as guarding the “liberties” of “colonists” “not only . . . against the encroachments of the royal prerogative, but” also protecting “their property against the invasions of their more powerful brethren” (in Parliament). *Id.* at 4–5. On the role of consent in arguments by American Whigs against parliamentary taxation, see The Virginia Petitions to the King and Parliament (1764) *as reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 14 (Edmund S. Morgan ed., 1959) [hereinafter PROLOGUE TO REVOLUTION]; The New York Petition to the House of Commons (1764), *as reprinted in* PROLOGUE TO REVOLUTION, *supra*, at 8–9; The Resolutions as Recalled by Patrick Henry, *as reprinted in* PROLOGUE TO REVOLUTION, *supra*, at 48; and McILWAIN, *supra* note 32, at 156–57.

46. WILSON, *supra* note 39, at 3. This looks like the familiar social contract. Burlamaqui followed Pufendorf in identifying two contracts: the first was the transfer of some portion of individual rights to a sovereign, constituting the

Wilson, the British Parliament cannot actually promote the happiness of Americans, since Americans lack the privilege to vote for its members. History shows that such a Parliament will be corrupted by the Crown, who will use offices and emoluments to extend “the prerogative” and destroy the privileges of the people. Since Parliament could not secure Americans against the prerogative, it could not be their sovereign.

An imperial Parliament would threaten the ‘balanced constitution’ so praised by establishment Whigs in a second way, as well.<sup>47</sup> Parliaments elected by the people, whose members share interests with the people, are “[s]ensible” of the need to limit themselves, says Wilson, and thus preserve for “the executor” “a discretionary power of acting where the laws are silent.”<sup>48</sup> This he also calls “prerogative.”<sup>49</sup> We are left to infer that the present British Parliament will not preserve this prerogative in the empire, since its members know little of American interests; it would surely trench on uses of executive discretion that accommodated and benefitted the colonies.

The consequence to which Wilson is drawn is that imperial sovereignty cannot constitutionally be lodged in the British Parliament. He closes his essay by turning, briefly, to an alternative account of how lawful government in the colonies is constituted.<sup>50</sup> Here Wilson drops the constitutional framework of the establishment Whig and

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formation of political society (this is the ‘social contract’); the second was a contract settling the form of government. J. J. BURLAMAQUI, *THE PRINCIPLES OF POLITIC LAW* 29 (Nugent trans., London, J. Nourse 1752); see RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* 129–30 (2016); Mikhail, *supra* note 21, at 1076–77 (describing the first contract and Wilson’s use of the idea).

47. On the constitutional views of establishment Whigs, see JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776*, at 14–16 (1987); REID, *supra* note 34, at 160.

48. WILSON, *supra* note 39, at 13.

49. *Id.*

50. *Id.* at 28–29.

assumes a different perspective, more distinctively American. He adopts the views, then in print, of former Massachusetts Governor Thomas Pownall, as well as “N.N.,” the author of a series of letters published in the *Pennsylvania Chronicle*, who turns out to be Benjamin Franklin.<sup>51</sup> Their accounts feature the King presiding over an “imperial federation,” whose provinces each have a basic charter and an independent legislative assembly.<sup>52</sup> The King can occupy this place in the empire because he has a constitutional obligation to protect his subjects, wherever they are, in exchange for their obedience.<sup>53</sup> To manage the “great machine” of imperial government, the King is to employ a litany of traditional royal powers, called “prerogatives,” using them to balance conflicting interests expressed by “different legislatures throughout his dominions.”<sup>54</sup> Note again how “prerogative” is being used. In this part of the essay, Wilson opposes “prerogative” to itself, but in two

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51. THOMAS POWNALL, THE ADMINISTRATION OF THE COLONIES 43–55 (4th ed., London, J. Walter 1768); Benjamin Franklin (N.N.), *On the Tenure of the Manor of East Greenwich*, PENN. CHRON., Mar. 9, 1767 (essay dated Jan. 6, 1766), <https://founders.archives.gov/documents/Franklin/01-13-02-0006>. Franklin also authored a letter from “A Briton,” published in the *London Chronicle*, which advanced the same views. Benjamin Franklin (A Briton), *To the Printer of the London Chronicle*, LONDON CHRON., Oct. 18–20, 1768, reprinted in 15 THE PAPERS OF BENJAMIN FRANKLIN 233–37 (William B. Willcox ed., 1972). Wilson is likely to have read or at least discussed these texts. In 1767 he was reading law with John Dickinson, who was then publishing the *Farmer’s Letters*, which argued that Parliament lacked a power to tax the colonies for purposes of raising revenue and thus was engaged in this debate. Wilson was apparently drafting *Considerations* around the same time. McCloskey, *supra* note 39, at 10. In addition to Pownall and Franklin, James Otis had advanced a similar argument several years earlier, also in print (in several editions) by the late 1760s. *E.g.*, JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES, AGAINST THE ASPERSIONS OF THE HALIFAX GENTLEMAN 21, 23–24 (Boston, Edes & Gill 1765).

52. RANDOLPH GREENFIELD ADAMS, POLITICAL IDEAS OF THE AMERICAN REVOLUTION 29–39 (1922).

53. WILSON, *supra* note 39, at 31. As Aaron Knapp has observed, “although Wilson advocated remaining loyal to the crown’s ‘legal prerogatives’ . . . [it was] only so long as the king protected the colonists.” Aaron T. Knapp, *Law’s Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POL. 189, 200 (2013).

54. WILSON, *supra* note 39, at 33–34.

different senses: first, as a royal power to charter assemblies, which serve to express local interests; and second, as a set of powers to manage an empire of conflicting local interests.<sup>55</sup> In no case was there a “royal prerogative” to *alter* colonial charters, since, as Wilson explained later, this would be “diametrically opposed to the principles and the ends of prerogative.”<sup>56</sup>

Using the structure of the argument as a guide, there appear to be at least four senses of “prerogative” in *Considerations*. “Prerogative” means: (1) royal power over subjects; (2) an executive discretion to act where the laws are silent; (3) a royal authority to charter provincial governments and legislative assemblies, although not to alter or destroy them; and, (4) a traditional set of specific royal powers, set out in English legal literature, with which the King is to manage and direct an imperial federation of provincial governments. Wilson is not alone in using the term these ways for these purposes. Indeed, as we will see, the four senses of “prerogative” just identified occur

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55. *Id.* at 29, 33–34. Among the royal powers to manage imperial government, Wilson includes “regulat[ing] domestic trade by his prerogative.” *Id.* at 33. Eric Nelson finds the passage “remarkable.” NELSON, *supra* note 32, at 35–36. The power to regulate domestic trade is, however, included in most period treatises on prerogative. *See, e.g.*, 1 BLACKSTONE, *supra* note 5, at 176; 6 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 50–51 (4th ed., Dublin, Luke White 1793). The King traditionally regulated trade by chartering associations for that purpose. *See* 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 203–04 (London, Catherine Lintot 1759). These associations self-regulated by law or custom. A defense of their charter liberties was in this sense corporatist and *anti*-Stuart, not absolutist and pro-Stuart, as Nelson frames the passage. *See* Victor Morgan, *Whose Prerogative in Late Sixteenth and Early Seventeenth Century England?*, 5 J. LEGAL HIST. 39, 47–49 (1984); Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in Central Courts*, 70 ENGLISH HIST. REV. 879, 879, 905 (2005).

56. That is, altering a charter would be opposed to the well-being of the people. James Wilson, Speech Delivered in the Convention for the Province of Pennsylvania (Jan. 1775), in 2 THE WORKS OF JAMES WILSON, *supra* note 39, at 754, 756. Again, Benjamin Franklin had made the same argument, in print, over ten years earlier. BENJAMIN FRANKLIN, COOL THOUGHTS ON THE PRESENT SITUATION OF OUR PUBLIC AFFAIRS, IN A LETTER TO A FRIEND IN THE COUNTRY 18–19 (Philadelphia, W. Dunlap 1764).

throughout American writing during the imperial crisis. Each is relevant to the arguments advanced by American writers, but in different ways.

## 2. “Prerogative” in Pamphlets and Broadsides

Like Wilson, but to a greater degree, the leading pamphlet literature reveals a concern with establishing the sanctity of American charters and positioning their legislative assemblies as a check on imperial power, whether royal or parliamentary. For example, in response to the gibe of metropolitan writers that appealing to the royal prerogative invited “Danger,” Edward Bancroft reminded his readers that “Royal Charters” are “fundamental, and consequently indefeasible Acts, equally binding on the Prince and his Subjects.”<sup>57</sup> These royal charters confer “[l]iberties,” and render these liberties “at least as secure from the [e]ncroachments of Prerogative” as Parliament does within the realm.<sup>58</sup> Once the King divested himself of authority to convene a legislative assembly, “the Royal Prerogative could afterwards have no Power,” thereby exempting colonists from “Impositions by the King’s Prerogative.”<sup>59</sup> To Bancroft’s eye, then, colonial charters were indefeasible acts of prerogative, and as such served to check imperial administrative power, also described as “prerogative.” But why should colonial charters be indefeasible? Any other view, wrote James Iredell, would fashion the charters “a mere snare and delusion to induce our forefathers to come abroad.”<sup>60</sup> In truth, “the share which the people have in the

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57. EDWARD BANCROFT, REMARKS ON THE REVIEW OF THE CONTROVERSY BETWEEN GREAT BRITAIN AND HER COLONIES 9, 11 (London 1769). The charter specifying the form of government was an exercise of “his Prerogative.” *Id.* at 43.

58. *Id.* at 13.

59. *Id.* at 20, 24, 40, 41. Bancroft makes the same point about judicial authority, although a right of final appeal to the Privy Council was reclaimed from corporate colonies in the eighteenth century. *Id.* at 66–67; see generally MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004).

60. James Iredell, *To the Inhabitants of Great Britain, September 1774*, in 1

legislative power” under those charters was “the chief essential” for protecting their property from arbitrary deprivation; and the king “had a right to stipulate the conditions upon which his subjects might be encouraged to venture risks.”<sup>61</sup> Americans therefore would “not submit to any alteration of the original terms of the contract, because they were the price for which the service was engaged.”<sup>62</sup> The position was self-consciously *anti*-Stuart. As American expat Stephen Sayre observed, the practice of “the faithless Stuarts” had been to “look[] upon the people’s charters as waste-paper.”<sup>63</sup> Moses Mather, a Connecticut clergyman, imagined an idealized past in which charters had been “settled and established, determining and bounding the power and prerogative of the ruler” and the liberties of the subject.<sup>64</sup> Though the charters rested on “certain prerogatives,” they were now “permanent and perpetual, as unalterable as Magna Charta,” and could not be “vacated or changed by the king.”<sup>65</sup> Mather’s argument followed that of another minister, the Georgian John Zubly, who had earlier observed that the Crown did not “reserve unto itself a right to rule over [the colonies] without their own Assemblies.”<sup>66</sup>

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THE PAPERS OF JAMES IREDELL 253, 253 (Don Higginbotham ed., 1976).

61. *Id.* at 260. Several years later, Thomas Jefferson made the same point in his draft of resolutions in response to Lord North’s “Conciliatory Proposal,” which would exempt any colony from parliamentary taxation for common defense or support of government if the assembly voluntarily voted a supply. Jefferson objected that it was “the freedom of granting our Money for which we have contended. Without this we possess no check on the royal prerogative . . .” Thomas Jefferson, *Virginia Resolutions on Lord North’s Conciliatory Proposal, 10 June 1775*, in FOUNDERS ONLINE, *supra* note 26.

62. Iredell, *supra* note 60, at 261.

63. STEPHEN SAYRE, *THE ENGLISHMAN DECEIVED; A POLITICAL PIECE* 27 (London, Samuel Hall 1768).

64. MOSES MATHER, *AMERICA’S APPEAL TO THE IMPARTIAL WORLD* 22 (Hartford, Ebenezer Watson 1775).

65. *Id.* at 25.

66. JOHN ZUBLY, *AN HUMBLE ENQUIRY INTO THE NATURE OF THE DEPENDENCY OF THE AMERICAN COLONIES UPON THE PARLIAMENT OF GREAT-BRITAIN* 23 (Charleston 1769). Zubly, it should be noted, sought reconciliation during the imperial crisis and eventually became a loyalist. The passage quoted here speaks

Nor could Parliament alter colonial charters, maintained another writer, for that would be inconsistent with “the Dignity of the British Crown.”<sup>67</sup>

Pamphlet-writers also regularly invoked the fourth sense of “prerogative” to describe the structure of the imperial federation. “Prerogative” in this sense referred to a traditional set of royal powers with which the King conducted the business of government. Perhaps the most distinctive contribution to the line of argument from a patriot was from John Adams, writing to the people of Massachusetts as “Novanglus.” Although Adams described something like a federative imperial structure, he insisted that “the British government is not an empire.”<sup>68</sup> Properly understood, an empire was “a despotism,” in which the ruler was “bound by no law or limitation, but his own will.”<sup>69</sup> The British government, in contrast, was a “*government of laws*” and thus a republic. That the King possessed “ample and splendid prerogatives” did not make it an empire, Adams maintained, since his government was “bound by fixed laws, which the people have a voice in making.”<sup>70</sup> So bound, Adams’s “prerogative” could not refer to Locke, but had to mean the royal powers, regulated by Parliament, with which the King governed this massive, transatlantic “republic.” John Dickinson, too, had been converted to this vision of British government, although he did not express it in Adams’s terminology. From the very beginning of his lengthy

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of royal “right” but not “prerogative”; the pamphlet mentions “prerogative” three times, each time opposing it to privilege or right, a traditional usage. *Id.* at 10, 15, 20.

67. BENJAMIN PRESCOTT, A FREE AND CALM CONSIDERATION OF THE UNHAPPY MISUNDERSTANDINGS AND DEBATES 4, 43 (Salem, S. & E. Hall 1774). “Dignity” and “Prerogative” are closely related in early English writings on monarchical power.

68. John Adams, *Novanglus VII. To the Inhabitants of the Colony of the Massachusetts-Bay of the Colony of the Massachusetts-Bay*, in 2 THE ADAMS PAPERS DIGITAL EDITION 307, 314 (Sara Martin ed., 2018) [hereinafter ADAMS PAPERS].

69. *Id.* at 314.

70. *Id.*



*Essay on the Constitutional Power of Great-Britain over the Colonies in America*, Dickinson thought it important to “acknowledge the prerogatives of the sovereign,” including powers of making “peace and war, treaties, leagues and alliances,” citing Blackstone’s *Commentaries* in support.<sup>71</sup> Just as treatise writers insisted, these prerogatives were limited, having been “vested in the crown *for the support of society*,” and infringing natural liberty no more “than is expedient for the maintenance of our *civil*.”<sup>72</sup> These limits were firm. As Dickinson explained elsewhere, it was because Charles I had not satisfied himself with “the points of prerogative . . . contested and settled,” that even powers “legally vested” in the Crown had been lost.<sup>73</sup>

Of course, the King might go astray by misusing his lawful prerogatives, as Thomas Jefferson explained in *Summary View of the Rights of British America*.<sup>74</sup> George III had used his prerogative to veto salutary acts of colonial assemblies (in particular, observed Jefferson, laws that would have ended the slave trade in Virginia), while failing to stop the enactment of unjust legislation by Parliament.<sup>75</sup> For the King to be a true “mediatory power,” “holding the balance of a great, if a well poised empire,” he would need to exercise his prerogatives with greater concern for the well-being of his American subjects.<sup>76</sup>

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71. JOHN DICKINSON, AN ESSAY ON THE CONSTITUTIONAL POWER OF GREAT-BRITAIN OVER THE COLONIES IN AMERICA 10 n\* (Philadelphia, William & Thomas Bradford 1774).

72. *Id.* at 11–12.

73. John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies: Letter XI*, PROVIDENCE GAZETTE; & COUNTRY J., Mar. 5, 1768, at 1.

74. See THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 16 (Philadelphia, John Dunlap 1774) [hereinafter SUMMARY VIEW].

75. See *id.*

76. *Id.* at 15, 22. For incisive comments on this aspect of Jefferson’s constitutionalism, see PETER ONUF, THE MIND OF THOMAS JEFFERSON 83–95 (2007). Iredell, too, thought the King should use his veto to “prevent the actual injury” of his colonies by a foreign legislature, Parliament. Iredell, *supra* note 60,

### 3. “Prerogative” in American Newspapers

We see a similar set of uses if we expand the scope of our sources beyond the leading pamphlets. These uses are subsumed within a larger body exhibiting some variety; “prerogative” was not uncommon in print, and seems regularly to have suggested itself to writers in need of a synonym for “power,” or even a piquant name for a racehorse or a boat.<sup>77</sup> In most cases, the term was used simply to refer to royal authority and contrasted with the privileges, liberties, or rights of the people.<sup>78</sup> Elsewhere, “prerogative”

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at 266.

77. As a synonym for power, “prerogative” could be applied to Parliament, colonial legislative assemblies, or even “the kingdom.” See A. B., *To the Printers*, BOS. EVENING-POST, Aug. 12, 1765, at 1 (Parliament); Cato, *From the Gazetteer*, CONN. GAZETTE & UNIVERSAL INTELLIGENCER, Jan. 21, 1774, at 2 (Parliament); John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies: Letter V*, PA. CHRON., Dec. 28, 1767, at 195 (“The people of *Great-Britain* consider that kingdom as the sovereign of these colonies, and would now annex to that sovereignty a prerogative, never heard of before.”); *Great and Glorious News to America, and Comfortable News to the Printer of the Virginia Gazette*, VA. GAZETTE (Williamsburg), May 2, 1766 at 1 (colonial assemblies). “Prerogative” could be used, and regularly was, to refer to God’s power or special authority, see, e.g., *From the Free Savages I now come to the Savages in Bonds*, MASS. GAZETTE & BOS. NEWS-LETTER, Apr. 2, 1767, at 1 (“[t]o know what constitutes mine or your Happiness, is the sole Prerogative of Him who created us, . . .”), or the special authority of married men, see C. Arpasia, *The Visitant*, PA. CHRON. & UNIVERSAL ADVERTISER, Apr. 11, 1768, at 81 (the husband’s “lordly prerogative”), or even “the prerogative of every human being” to “commend Virtue and . . . oppose Vice . . .” See Felton, *From the Boston Gazette to Mr. Hutchinson*, DUNLAP’S PA. PACKET, OR GEN. ADVERTISER, Jan. 31, 1774, at 2. For other uses, see reports of the “Scotch horse Prerogative” in *Westminster Races*, N.Y. MERCURY, July 22, 1765, at 3, or the wreck of “the Prerogative, a Custom-house Yatch, bound for the Leeward Islands” in *More Ship News*, MASS. GAZETTE, Dec. 26, 1765, at 2.

78. See Americanus, *To the Printers of the New-Hampshire Gazette*, N.H. GAZETTE, & HIST. CHRON., Oct. 7, 1768, at 2 (referring to “a Balance between the Prerogative of the Crown, and the Rights of the People”); Claud, *The Nature and Extent of Parliamentary Power Considered*, N.Y. J., OR GEN. ADVERTISER, Feb. 6, 1768, at 4 (“[Colonists] have not only to guard their liberties against the encroachments of the royal prerogative, but even to protect their property against the invasions of their more powerful brethren.”); *Extract of a Letter from Dominica, Dated October 10*, N.Y. GAZETTE; OR, THE WEEKLY POST-BOY, Nov. 26, 1767, at 2 (“The four and a half per cent duty upon our produce, causes much murmuring, being not laid upon us by act of parliament, or act of assembly, but

was used to refer to a particular royal power or a power attached to a royally commissioned office.<sup>79</sup> These

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only by prerogative royal, which is looked upon as unconstitutional and dangerous . . ."); *Extract of a Letter from London*, PA. J.; & WKLY. ADVERTISER, Sept. 7, 1774, at 3 ("The Bostonians . . . are cruelly used, deprived of their natural rights and liberties. . . [C]ontinual steps advance, and increase the power of the ministry, and influence of the crown and prerogative."); *From the New York Gazette*, BOS. EVENING-POST, July 22, 1765, at 1 (opposing "the prerogatives of the crown" and "the encroachments of the people" and "the rights of the commons"); T. M., *Mr. Printer*, CONN. COURANT, Mar. 28, 1768, at 1 ("[T]he stretch of the prerogative in King James the Second's short reign, brought all people to see the necessity of a revolution."); *May it Please Your Excellency*, BOS. EVENING-POST, Oct. 28, 1765, at 3 ("[T]he King . . . holds the rights of all his subjects sacred as his own prerogative . . ."); *Messeurs Edes & Cill*, BOS. GAZETTE, Mar. 9, 1767, at 4 ("It is as much the duty of a member of society to oppose every encroachment on the subject, as it is to support the prerogative when in danger, from the licentiousness of the people."); N.Y. MERCURY, Sept. 2, 1765, at 3 (describing the General Assembly "weighing the privileges of the prerogative on the one side and the liberty of the subject on the other"); *Observations Historical and Political*, N.Y. GAZETTE, Apr. 21, 1766, at 1 (stating that under Elizabeth, "it became the grand struggle of the people and their sovereign, on the one part, to enlarge the royal prerogative, and on the other to preserve the CHARTER of LIBERTY entire."); John Penn, *On Delaware, and Province of Pennsylvania, to the General Assembly of the said Counties*, PA. GAZETTE, Apr. 12, 1764, at 1 ("The Harmony and good Understanding, which have so long and happily subsisted between the Legislative Branches here, have principally been owing to a due and constant Attention to the civil and religious Rights of the People, without attempting to invade the Royal Prerogative, or trample on the just Rights of Government."); *To the Publisher of the New-Hampshire Gazette*, N.H. GAZETTE, & HIST. CHRON., Apr. 1, 1774, at 1 (contrasting "the Rights of the Prerogative," entrusted to the Peers of Great Britain, with "the People's Privileges"). This use is also present in the leading pamphlet literature. See PRESCOTT, *supra* note 67, at 31; ZUBLY, *supra* note 66, at 15, 20.

79. See *A Letter from Mr. Wilkes to his Grace the Duke of Grafton*, BOS. POST-BOY & ADVERTISER, July 6, 1767, at 1 (describing the "Prerogative" of "mercy"); *A Letter to a Right Noble Lord*, BOS. GAZETTE & COUNTRY J., July 22, 1765, at 2 ("It is a maxim at this day that the Crown by royal prerogative alone can levy no taxes on the subject."); *Copy of a Petition Reported to the Late House of Representatives*, ESSEX GAZETTE, Aug. 2, 1768, at 7 (noting the "Royal Prerogative" to grant "a Charter for a College"); *London*, BOS. POST-BOY & ADVERTISER, Apr. 1, 1765, at 3 (judicial prerogatives); *London, February 4*, BOS. POST-BOY & ADVERTISER, Apr. 15, 1765, at 2 (prerogative to levy an impost); *Phocion's Letter to the King*, DUNLAP'S PA. PACKET OR, GEN. ADVERTISER, Aug. 29, 1774, at 1 (appealing to the King to use "Your prerogative . . . power to suppress the unjustifiable invasions of our fellow-subjects [in] the Parliament"); *To His Excellency Josiah Martin*, N.Y. J., OR GEN. ADVERTISER, Feb. 10, 1774, at 4 (referring to "his Majesty's prerogative," vested in the governor, to issue "commissions of Oyer and Terminer"); *To Metriotes*, VA. GAZETTE (Williamsburg),

prerogatives had legal limits; even “the most extensive prerogatives of the crown,” while “discretionary,” were not “unlimited.”<sup>80</sup> To maintain otherwise was to advocate prerogative “above [l]aw,” rather than prerogative “limited by the law.”<sup>81</sup> Whether the precise legal limits on prerogative should be settled by Parliament or by some other body was disputed.<sup>82</sup> Whoever it was, however, this approach to “prerogative” was the seed of a more general theory of government. As one essayist put it, drawing on language attributed to Lord Mansfield, prerogative was not “some peculiar riches, or interest, which the crown has above, or opposed to, the rights and privileges of the people,” but “in reality, no more than that share of the government, which is vested in the crown . . . for the general welfare of the community.”<sup>83</sup> Thus, we see in the period two uses of

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Sept. 12, 1766, at 1 (describing an “ancient prerogative,” given the King’s Bench, to bail in criminal cases); *To the Printers*, BOS. GAZETTE, & COUNTRY J., Aug. 20, 1764, at 3 (prerogative to “prorogue the assembly”).

80. A Citizen, *To the Farmer*, N.Y. MERCURY, Dec. 21, 1767, at 2.

81. *Mr. Parker*, N.Y. GAZETTE; OR, WKLY. POST-BOY, Feb. 15, 1768, at 2 (prerogative limited by law); *Preface for a 30th of January Sermon*, BOS. GAZETTE, & COUNTRY J., Feb. 29, 1768, at 1 (prerogative above the law). “Prerogative above the law” was likely something akin to what Englishmen called “high prerogative,” a general power to act when necessary to protect the public. See Wilmerding, *supra* note 1, at 322.

82. *Compare Queries Proposed to the Committee of Philadelphia Merchants, Now Sitting*, MASS. GAZETTE, Aug. 11, 1768, at 2 (“Whenever any Contention or Controversy arises between the Governors and Governed, whether the Legislature is not the proper Tribunal for the Determination of them; being a Body of Men, duly authorized, in a legal Capacity, to address, redress, hear and determine the Rights of the Subject and the Prerogative of the Crown . . .”), with *The British American: Number IX*, VA. GAZETTE (Rind), July 28, 1774, at 1 (“[T]hough this prerogative may be exercised oppressively, still the subject must submit. He may petition, but majesty only can redress the grievance.”).

83. *Further Remarks on the British Government*, GA. GAZETTE, Feb. 24, 1768, at 1. For Mansfield’s view, see 16 WILLIAM A. COBBETT, PARLIAMENTARY HISTORY OF ENGLAND: FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803. AD 1765–1771, at 266–67 (London, T.C. Hansard 1813) (“[P]rerogative is that share of the government which, by the constitution, is vested in the king alone.”). For other American expressions of this view, see *A View of the British Constitution*, ESSEX GAZETTE, Oct. 25, 1768, at 54 (listing powers of war and peace, assenting to “new laws” or withholding assent, etc.); *At a Provincial Meeting of Deputies Chosen by*

“prerogative,” coexisting alongside one another: prerogative as opposed to privilege or right, and prerogative as a suite of powers associated with the Crown, with which imperial government could be conducted.

We see, also, beginning in the mid-1760s, royal “prerogative” regularly adduced (or denied) as authority for colonial charters and legislative assemblies.<sup>84</sup> In his 1771 Oration commemorating the Boston Massacre, James Lovell told his listeners that the colony’s first settlers had “entered into a mutual, sacred compact” with the King, in which “we find *our only true legislative authority*.”<sup>85</sup> This compact, said Lovell, bound the British King, “though the most powerful

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*the Several Counties of Pennsylvania*, PA. J., July 23, 1774, at 1 (similar).

84. See *A Vindication of a Late Pamphlet*, PROVIDENCE GAZETTE; & COUNTRY J., Mar. 2, 1765, at 1 (describing the colony charters as “mere efforts of the royal prerogative”); *Causes of the Present Discontent and Commotion in America*, VA. GAZETTE (Pinkney), Feb. 16, 1775, at 2 (“such are the great charters of the colonies, each alike deriving its vigour and activity from the same immutable source, the ROYAL PREROGATIVE.”); *Extract of a Letter from London*, N.Y. MERCURY, May 27, 1765, at 3 (“[I]t was absurd, to suppose that a body of Adventurers could carry the Legislative power of Great-Britain along with them; that he was sure the charters could convey no such power, for the very best reason in the world, because the prerogative could not grant it.”); *From the Public Advertiser, London, April 11*, N.H. GAZETTE, & HIST. CHRON., June 20, 1766, at 1 (“[T]he Moment that the Crown parted with a Grant, or a Charter, the Colonists considered themselves as possessed of the very Power which the King had given away, and that it was not even in his own Option to resume it. . . .”); MASS. GAZETTE, Mar. 6, 1766, at 2 (describing the colonies “claim to . . . their respective legislatures” under the “royal prerogative”; and continuing, “it has been asserted with more justice and consistency, that the King’s Scepter is the instrument of power over the colonies, and Prerogative the rule by which their obedience must be regulated. In this case, however, have not the royal charters been granted, establishing a constitution, and delegating to them [a] qualified power of legislation?”); PA. GAZETTE, May 29, 1766, at 1 (“King, Lords and Commons . . . would, in effect, surrender their ancient unalienable rights of supreme jurisdiction, and give them exclusively to the subordinate provincial legislatures, established by prerogative . . . .”); *To the Printer of the London Chronicle*, PA. GAZETTE, Apr. 10, 1766, at 1 (“[T]he modelling of those matters [i.e., relating to currency] peculiarly belongs to the Royal Prerogative, and was certainly not conceded to the Colonies by their Charters . . .”).

85. James Lovell, Remarks at Boston (Apr. 2, 1771), in *PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA* 17, 19 (H. Niles ed., 1822). Lovell made no mention of the revocation of the original colonial charter and the colony’s royalization in the late seventeenth century.

prince on earth, yet, a subject under a divine constitution of LAW,” while expressing, at the same time, his constitutional authority as “royal landlord of this territory.”<sup>86</sup> Parliament’s assertion of the right to legislate for the colonies ‘in all cases whatsoever’ was, therefore, “A DOWN-RIGHT USURPATION OF HIS PREROGATIVE as king of *America*.”<sup>87</sup> Probably the line drove the crowd to huzzahs, as it expressed the ‘cult’ of limited, protestant monarchy that took hold in the colonies after the Glorious Revolution, and which traced sovereign authority to a sacred contract, in contrast to the arbitrary rule of Catholic princes.<sup>88</sup> Thus, when the author of an *Address to the Freemen of America* reminded his “countrymen” that “we are contending for the crown and prerogative of our King, as well as for liberty, property, and life,” no one thought him guilty of contradiction, since prerogative was the origin of charter rights, by which life, liberty and property were secured.<sup>89</sup> The measure of colonial legislative authority under the prerogative, according to another, more lawyerly writer, was the limitation expressed in the writ of *Quo Warranto*, “illi qui

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86. *Id.*; see also A.B., *The Centinel No. VII*, BOS. EVENING-POST, June 6, 1768, at 1 (arguing that it had been “prudent . . . to receive a charter,” because it enabled colonists to “direct the mode of exercising their privileges, and to . . . ascertain the bounds of royal prerogative with regard to them.”).

87. Lovell, *supra* note 85, at 19.

88. See BRENDAN McCONVILLE, *THE KING’S THREE FACES: THE RISE & FALL OF ROYAL AMERICA, 1688 – 1776*, at 15–21, 40–46, 203–04 (2006).

89. *To the Freemen of America*, in 1 AMERICAN ARCHIVES: FOURTH SERIES 335, 336 (Peter Force ed., 1837); see also MASS. GAZETTE: & BOS. WKLY. NEWSL., Jan. 6, 1774, at 2 (“We are of Opinion, that the Prerogative of the Crown and the Rights of the Subjects are by the English Constitution inseparable, so in the Maintenance of the one we shall secure the other.”). Indeed, the same argument could be made about Magna Carta and English liberty; according to “Caius Memmius,” a metropolitan writer sympathetic to the Americans, colonial governments “derived from the same authority from which we have received our great charter of liberties,” and that “in this light,” Parliament’s effort to tax the colonies was “an infringement of the sovereign’s prerogative.” Caius Memmius, *From the Gazetteer and New Daily Advertiser*, N.Y. GAZETTE, & WKLY. MERCURY, Dec. 5, 1768, at 2. The argument implies Magna Carta is a fundamental law, by framing it as an exercise of the sovereign’s prerogative to enter into a “sacred” compact.

habent chartas regales, secundum chartas istas et earundem plenitudinem judicentur [Let those who have royal charters be judged *according to those charters and their breadth of content*].”<sup>90</sup> Even if granting the charters had exceeded “the power of prerogative,” the fact was, wrote one commentator, that “prerogative *did* grant them, [and] parliament *acquiesced* in the grant, and the free people of *Britain acted under the security of that grant*”—an argument Benjamin Franklin would reiterate, several months later, writing as “A Briton” in the *London Chronicle*.<sup>91</sup> It was only during the English Civil War that Parliament had begun “to interfere in that prerogative” and “usurped the government” in all the King’s dominions.<sup>92</sup> Thus, prescription ratified the King’s use of prerogative and now guaranteed Americans’ charter rights.<sup>93</sup> No American took the opposing view, defended on the floor of Commons by Welbore Ellis, who maintained that “chartered rights are by no means those sacred things which never can be altered,” and that, while “vested in the crown as a prerogative, for the good of the people at large,” they might be altered “if the supreme legislature find [them] unfit and inconvenient.”<sup>94</sup> Rather, according to the authors of the

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90. *To P. P., Author of the Letters to the Inhabitants of the British Colonies in America*, in 1 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 89, at 396 (emphasis added). Authority to conduct government was legally understood as a franchise, derived by grant from the King by his prerogative; this is why it might be challenged in a *quo warranto* proceeding. See Hale, *supra* note 18, at 240–41.

91. *Monitor V*, N.Y. J.; OR, GEN. ADVERTISER, Apr. 14, 1768, at 1; see Franklin, *supra* note 51, at 233.

92. B. Franklin, *The Answer*, PA. J., Apr. 20, 1774, at 5.

93. See Black, *supra* note 32, at 1201–02 (discussing the doctrine of usage).

94. *Interesting Debate on the Second Reading of the Bill for Regulating the Civil Government of Massachusetts Bay*, in 1 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 89, at 415. Eric Nelson cites Bancroft for the proposition that “the King might, by his Prerogative, put the Inhabitants of that Colony under whatever Form of Government he pleased,” but the language is a quotation Bancroft attributes to the King’s judges, and which Bancroft himself denies, concluding that the King “could *not*, by his Prerogative” alter their form of government. Compare BANCROFT, *supra* note 57, at 43 (emphasis added), with NELSON, *supra* note 32, at 46. According to Gervase Parker Bushe, attacks on the sanctity of colonial charters, even by British administrators and members of

*Humble Petition and Memorial of the Assembly of Jamaica*, “the royal prerogative” was “totally independent of the [English] people,” who could not, through their House of Commons, “restrain or invalidate those legal grants which the prerogative hath a just right to give, and hath very liberally given for the encouragement, of colonization.”<sup>95</sup>

#### 4. “Prerogative” and Self-Government: The Imperial Crisis

Of the different senses of “prerogative,” by far the most important in the imperial crisis was the third, which Americans used to describe the founding of their political communities and the basis of those communities’ continuing rights of self-governance. In this sense, from the American perspective, the question of the King’s power to raise money by grant of supply from his provincial legislative assemblies

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Parliament, “have been very weak, and very few.” G. P. BUSHE, *THE CASE OF GREAT BRITAIN AND AMERICA* 2–3 (Dublin, James Williams 1769). Asserting a sovereign power to alter charters was Stuartist in its connotation; compare the claim advanced 150 years earlier by Archbishop William Laud: “all corporations, societies, nay counties, provinces and depending kingdoms, have all their jurisdictions and governments established by [the King]; and *by him (for public good) to be changed or dissolved.*” Morgan, *supra* note 55, at 47 (emphasis added) (quoting Statutes of Oxford).

95. *To the King’s Most Excellent Majesty in Council: The Humble Petition and Memorial of the Assembly of Jamaica*, in 1 *AMERICAN ARCHIVES: FOURTH SERIES*, *supra* note 89, at 1073. Notably, the Jamaican Assembly had opposed itself to the royal prerogative in the struggle to maintain its privileges with the colony’s governor during the 1760s. See JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 135 (2011). There was no charge of inconsistency for first attacking and then invoking “prerogative” in a different context. Similarly, when in the Quebec Act, Parliament did transfer legislative power from provincial assembly to royal governor and council, Americans could describe it as “the most daring stretch of the prerogative of the Crown.” *Extract of a Letter from a Very Respectable Gentleman in London, to a Correspondent in Philadelphia*, in 1 *AMERICAN ARCHIVES: FOURTH SERIES*, *supra* note 89, at 513. Complaining of a different feature of the act, Alexander Hamilton remarked that “[t]here must be an end of all liberty, where the Prince is possessed of such an exorbitant prerogative as enables him, at pleasure, to establish the most iniquitous, cruel, and oppressive courts of criminal, civil, and ecclesiastical jurisdiction; and to appoint temporary judges and officers, whom he can displace and change, as often as he pleases.” *Remarks on the Quebec Bill: Part One*, in 4 *THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION* 165, 167 (Harold C. Syrett ed., 2011).



was different than the question of his power to raise money by non-parliamentary mechanisms *within* the realm. Members of Parliament, in contrast, might sensibly debate whether grants of supply by American assemblies violated the English Bill of Rights, which prohibited “levying money . . . by pretence of Prerogative, without grant of Parliament.”<sup>96</sup> Their constitutional views were formed by a need to control the King and his administration of government.<sup>97</sup> From this metropolitan perspective, “prerogative” suggested that American legislative assemblies were like prerogative courts, or other instruments of administration founded on prerogative, whose so-called ‘liberties’ or ‘privileges’ might be employed to undermine Parliament. This is what Benjamin Franklin meant when he suggested that the right of colonial assemblies to grant supply to the King “begins to give [Parliament] jealousy.”<sup>98</sup>

From the American perspective, “prerogative” connoted a right of government the King had transferred to colonial communities. “The original intent of the prerogative,” wrote

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96. *Debate on Mr. Burke’s Resolutions*, in 1 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 89, at 1776 n.\* (“[I]f the dispositions of the Colonies had been as favourable as they were represented, still it was denied that the American Assemblies ever had a legal power of granting a revenue to the Crown. This they insisted to be the privilege of Parliament only; and a privilege which could not be communicated to any other body whatsoever. In support of this doctrine, they quoted the following clause from that palladium of the English Constitution, and of the rights and liberties of the subject, commonly called, the Bill, or Declaration, of Rights: viz. that ‘Levying money for, of to the use of the Crown, by pretence of prerogative, without grant of Parliament, for a longer time, or in other manner, than the same is, or shall be granted, is illegal.’”).

97. See REID, *supra* note 34, at 151. In this respect, there is another constitutional parallel to be drawn between mechanisms of legal control over localities under a developing English public law, and those asserted against American colonies. See Joanna Innes, *The Local Acts of a National Parliament: Parliament’s Role in Sanctioning Local Action in Eighteenth-Century Britain*, 17 PARLIAMENTARY HIST. 23, 30–37 (1998); Michael Lobban, *Custom, Nature, and Authority: The Roots of English Legal Positivism*, in THE BRITISH AND THEIR LAWS IN THE EIGHTEENTH CENTURY 27, 57–58 (David Lemmings ed., 2005).

98. Franklin, *supra* note 51, at 260–61.

one author, “was to enable the representatives of the State to form inferiour communities, with municipal rights and privileges.”<sup>99</sup> The King had exercised his “prerogative right” to form the colonies “into separate civil states” by “solemn compact.”<sup>100</sup> Because this exercise of the prerogative established a political society, it implied limits on royal power. The King’s “prerogatives” had to be exercised for “the happiness of the people” whose political community his prerogative had created.<sup>101</sup> As the author of a series of letters *To the Inhabitants of Massachusetts-Bay* described it, “The prerogatives of the Crown are defined, and limited with convenient certainty by our several Charters, the ends of Government being confined within the circle of doing good.”<sup>102</sup> Most charters limited prerogative by requiring that colonial laws conform to English law, so as to “reduce to a certainty the rights and privileges we were entitled to by our Charter, [and] to point out and circumscribe the prerogatives

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99. *A Candid Examination of the Mutual Claims of GREAT BRITAIN and the COLONIES*, in 1 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 89, at 88.

100. E. B. Grotius, *Extract Referred to by the British American No. VI*, N.Y. J.; OR GEN. ADVERTISER, Sept. 1, 1774, at 1.

101. *Argumentative Part of the Instructions to the Representatives in Assembly*, in 1 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 89, at 565.

102. *Id.* at 246 (emphasis added) (*To the Inhabitants of the Massachusetts-Bay No. VII*). For other examples of this argument, see *Continuation of the Piece in Our Paper of the 30th September Last*, BOS. GAZETTE, Oct. 21, 1765, at 2 (“Let it be known, that British liberties are not the grants of princes or parliaments but original rights, conditions of original contracts, coequal with prerogative & coequal with government . . .”); *From a London Paper*, MASS. GAZETTE & BOS. NEWSL., Feb. 7, 1765, at 2 (“Thus the good of the people may spring from prerogative, &c. but prerogative cannot spring from the good of the people. Prerogative is established to produce the good of the people.”); *From the Newport Mercury*, CONN. GAZETTE, Jan. 24, 1766, at 2 (“I know no prerogative in the crown, which is not, at the same time, a certain privilege of the people, for their sake granted, and for their sake to be exerted . . .”). The claim in *To the Inhabitants of Massachusetts-Bay* that prerogatives could be “defined, and limited” by those who decide what the public good is thoroughly anti-Stuart, to the extent that it denies what James called “the mysterie of the Kings power,” which “is not lawful to be disputed.” It is, insisted James, “Atheisme and blasphemie to dispute what God can do. . . . So, it is presumption and high contempt in a Subject, to dispute what a King can doe, or say that a King cannot doe this, or that. . . .” OAKLEY, *supra* note 19, at 103–18.

of the Crown,” which were consequently “as much limited and confined in the Colonies as they are in England.”<sup>103</sup> Again, this put “prerogative” on both sides of the constitutional balance, in two difference senses. Prerogative became associated both with American privileges of self-government *and* with the imperial power that self-government checked. The logic was captured in July 1775 by the Continental Congress, which explained that the “privilege of giving or withholding our moneys”—a charter right originating in prerogative—“is an important barrier against the undue exertion of prerogative, which, if left altogether without controul, may be exercised to our great oppression.”<sup>104</sup> Such arguments can be found throughout the final decade of the imperial crisis. Although Charles McIlwain thought all but “a handful” of Americans conceded the weakness of the charter claim, the evidence examined here suggests that American reliance on charters was widespread and persistent.<sup>105</sup>

Largely in the background during the imperial crisis is “prerogative” in the second sense, executive discretion to act where the law is silent.<sup>106</sup> There are occasional references to

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103. *To the Inhabitants of Massachusetts-Bay No. VII, in 1 AMERICAN ARCHIVES: FOURTH SERIES, supra* note 89, at 292.

104. *Report of the Committee on the Resolve of the House of Congress, in 2 JOURNALS OF THE CONTINENTAL CONGRESS: 1775*, at 224, 226–27 (Worthington Chauncey Ford ed., 1905).

105. MCILWAIN, *supra* note 32, at 185. McIlwain focuses on the authority at English law for the insulation of colonial charters from legal and parliamentary challenge, which he reasonably judges to be poor; American writers focused, in contrast, on the connection between the charters and their long-standing privileges of self-government—liberties American elites claimed as a matter of birthright. See MICHAEL JAN ROZBICKI, *CULTURE AND LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 74–77, 81–82, 83–84 (2011).

106. For two uses of “prerogative” in something like this sense, see *A Letter to G. G., BOS. POST-BOY & ADVERTISER*, May 18, 1767, at 2 (“[T]he King of this country has ever been invested with a prerogative, during the intervals of parliament, to lay embargoes in case of famine, or other natural necessity, although in no other case whatever.”); *Vaneris*, 8 Die Novembris, A.D. 1765, BOS. GAZETTE & COUNTRY J., Nov. 11, 1765, at 1 (“[T]he Good of the Society for obvious Reasons requires, that, several Things should be left to the Direction of him or

Blackstone and a handful to Locke, but many, many more to colonial charters and acts of Parliament. It is therefore almost certainly a mistake to read writers like Wilson as *defining* “prerogative” as Lockean executive discretion; rather, because it was an exceptional usage in this context, writers were explicit when they intended to invoke the idea. For the same reason, it is also incorrect to cite Americans’ invocation of prerogative during the imperial crisis as evidence of their desire to live under a royal jurisdiction resembling equity. Indeed, I am unaware of a single patriot text that expresses such a view. If anything, this was their principal *fear*, the boogeyman of Catholic despotism from which the colonists’ beloved protestant monarch was supposed to protect them, by use of his *lawful* prerogative. The nightmare was memorably captured by one American writer, who described a feverish vision of England’s Glorious Revolution, in which

English Liberty, like a beast, was made to run on all four with Prerogative mounted on her back, whipping and spurring her, and running her out of breath, till at last she dropped down, and would have expired with her sister Religion by her side, had not the belgie Hero [William III], at the request of the Whigs, hurried to her relief, and drove the detestable tyrant, who had gagged, bound, and trampled on them, out of the kingdom, set Liberty and Religion free, and exalted their banners high.<sup>107</sup>

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them who have the Executive Power. But this hinders not but that the Prerogative should in certain Instances be limited and bounded.”). These are the only pre-independence examples I found.

107. *From the London Public Advertiser*, N.H. GAZETTE, & HIST. CHRON., Aug. 31, 1764, at 1. Americans widely perceived a connection between lawful prerogative, liberty and resistance to Catholicism. In October 1774, “Scipio” reminded his King that “Tis your’s, Sir, to maintain and support, *equitably*, the prerogative of your Crown:—Tis your Subjects to oppose every *encroachment* of that authority, to prevent the smallest violation of their civil and religious liberties, and to endeavor to be always before hand with the *Pope*, the *Devil*, and ALL their Emissaries . . .” Scipio, *To the King*, CONN. COURANT, & HARTFORD WKLY. INTELLIGENCER, Oct. 24, 1774, at 2. It was princely discretion that these writers feared; as Benjamin Prescott explained, “I am sadly sensible, that in some former Reigns the King’s Prerogative has been carried to an enormous Heighth, so high as to include in it a Power, at Pleasure, to take and apply to his own Use

B. *Revolutionary Government and State Constitutions*

This background should serve as a premise in an account of the place of prerogative in the first state constitutions. What we know, already, of how Americans used “prerogative” during the imperial crisis tells us that a purported “[i]dentification by the popular mind of executive strength with the limitation of individual rights” gets things nearly backwards.<sup>108</sup> In explaining how framers thought about executive power and its relationship to prerogative, we cannot begin from the premise that all good Whigs distrusted “magisterial power.”<sup>109</sup> That was true in some contexts, but

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his Subjects Property; and King Charles the First proceeded so far in the exercising such a Power, as cost him first his Crown, and soon after His Head that wore it. But our wise and gracious Sovereign, now upon his British Throne, lays Claim to no such Prerogative as vests him with a Right to do Wrong to any of his Subjects . . .” PRESCOTT, *supra* note 65, at 51. For further discussion of these ideas, see MARSTON, *supra* note 47, at 29; MCCONVILLE, *supra* note 86, at 108, 136–37, 192–219, 250. The emphasis on charter rights as constituting legal limits on prerogative is one reason I regard the account of prerogative given in Francis Oakley and Paul Halliday’s writings—as an absolute power to perform ‘miracles,’ intervening in a legal order—as incomplete and, as applied to this context, unsatisfactory. Here, the aim was to *vindicate* legal restrictions embodied in colonial charters (which functioned as ‘franchises’), not to dissolve them or act arbitrarily by absolute power. See OAKLEY, *supra* note 18, at 103–18; Halliday & White, *supra* note 15, at 600–03.

108. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789, at 25 (1922). As Thach summarized his view of the changes in this period, “[i]n short, the change of emphasis from liberty to authority had meant a corresponding change of emphasis from the legislature to the executive.” *Id.* at 51–52. But magisterial power could be associated with liberty or authority; a desire to protect liberty explains, in part, why mere ‘executives’ were invested with prerogatives.

109. See PRAKASH, IMPERIAL *supra* note 1, at 31–34; WOOD, *supra* note 28, at 135–36. Jefferson’s own request in *Summary View* that the king use his prerogative to protect the rights of Virginians, described above, cautions us against interpreting too broadly the oft-quoted remark in his 1821 *Autobiography* that “[b]efore the Revolution we were all good English Whigs, cordial . . . in their jealousies of their executive Magistrate.” Thomas Jefferson, *Autobiography*, in 1 THE WORKS OF THOMAS JEFFERSON 3, 121 (Thomas Leicester Ford ed., 1904). This was not true of all Whigs. As Jerrilyn Marston observed, “[w]ith the very definition of the king’s prerogative precluding the abuse of such discretionary power, Whigs could defend the considerable prerogative powers that the eighteenth-century constitution confided in the king.” MARSTON, *supra* note 47,

not in others. From the imperial perspective, the King's prerogative was the *source* of their liberties.

Again we have a conventional account to help us frame our study. The account distinguishes two stages of constitution-making in the period from 1776 to 1786.<sup>110</sup> State constitutions framed in 1776 and 1777 (sometimes described as the "first wave") expressed a distrust of imperial government and consequently emptied the governorship of all prerogatives, leaving it a mere executive department with the power to carry out laws passed by the state legislature. The executive department was in this sense an agent of the legislature and executive power an inferior power. Beginning, however, with the New York Constitution enacted in April 1777 (the start of the "second wave"), governors were reinvested with some prerogatives, principally the veto, and made independent of state legislatures by longer terms and direct election. Prerogative played a key role in this transformation. Indeed, a leading commentator has maintained that "[t]he history of constitutional doctrine in the decade between the Constitution of Georgia [enacted in 1777] and the Federal Constitution is, in part at least, the history of the search for a rationale for dealing with the former prerogatives of the Crown."<sup>111</sup> Constitutions in the first wave withheld these prerogatives entirely, or deposited them in the legislature; constitutions in the second wave (and beyond) allocated them

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at 30.

110. See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 96–110 (1988); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 86–88 (1998); WOOD, *supra* note 28, at 127–60, 430–67. For a brief account that does not emphasize this transition, at least in terms of separation of powers, see GERHARD CASPER, *SEPARATING POWER* 7–16 (1997). In contrast to Casper, Marc Kruman argues that from the beginning, state constitutions largely embraced separation of powers, and that in the service of this end, they stripped state executives of prerogative powers like the veto. See MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 109–30 (1997).

111. M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 143 (1967).

more evenly, in an effort to give the executive independence and thereby bring “energy” to “the administration of government.”<sup>112</sup>

The conventional account has much to recommend it, but it is marred by an overemphasis of American distrust of magisterial power. We have to start with the right perspective. There was no abstract problem of ‘allocating powers among the branches,’ as if the framers were theoretical writers, or retirees recalling events from far outside the window of threat. Framers were revolutionaries trying to achieve ends of government—security, peace, order—and to preserve what they regarded as their rightful place in government. Ordinary forms of government, rather than *ad hoc* revolutionary forms, secured these goals best, but ordinary government required a plan or frame—what Americans called a “written constitution.”<sup>113</sup> “Prerogative” was useful to the elites drawing up constitutions insofar as it referred to a suite of relatively well-known, legally defined powers that had been used to administer government in the empire. These were powers that American writers had entreated the King to exercise in their defense during the

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112. WOOD, *supra* note 28, at 432 n. 5 (quoting the Hartford Connecticut Courant published on September 16, 1783); *see also* THACH, *supra* note 108, at 36–37, 44.

113. For a period expression, see THE POLITICAL ESTABLISHMENTS OF THE UNITED STATES OF AMERICA 3–5 (Philadelphia, Robert Bell 1784) [hereinafter POLITICAL ESTABLISHMENTS]. This proposition—that framers sought ordinary government to achieve security, peace and order, principal ends of government—is consistent both with the thesis that framers sought ordinary government because they felt insecure under revolutionary forms of government, *see, e.g.*, WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 40–46 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers 2001) (1973), and that they sought benefits that flowed from recognition by the international community, *see* Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 770–90 (2014). On the significance of written constitutions, *see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 40 (2004); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 23–30 (1990).

imperial crisis. Now their natural repository was with “the people” whose safety and security they were meant to ensure, embodied in the assembly by colonial elites.<sup>114</sup> James Wilson, seeking to justify efforts by the Continental Congress to establish military forces, described the “Prerogative of the Crown” as that “Share of Power, which the King derives from the People,” and which “*the sacred Authority of the People*” now required Congress to exercise for their safety.<sup>115</sup> “Prerogatives” in this sense were, Wilson wrote, “well known and precisely ascertained,” since they had long been subject to law.<sup>116</sup> They fit naturally in an assembly whose acts were law. It was this connection between prerogative and “the people,” along with an expectation that colonial elites would continue to fill the assembly, that led the framers of ‘first-wave’ constitutions to invest assemblies with such extensive authority. Where it was thought that a strong magistrate would be necessary to preserve the existing social and political order, elites considered sharing a portion of the prerogative with the chief executive; as we will see, these debates occurred in the framing of the earliest state constitutions, rather than awaiting a ‘second wave.’

The demands of the war and conduct of assemblymen soon exposed difficulties with the first constitutions. State assemblies did not exercise their prerogative powers merely by the passage of laws; assemblies regularly embraced extraordinary and irregular forms to accomplish their ends, in some cases executing government directly.<sup>117</sup> The resort to

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114. See ROZBICKI, *supra* note 105, at 115–16, 122–23 (describing the relationship between the King and “the people” and the presence of “the people” in the legislature).

115. James Wilson, *To the Inhabitants of the Colonies of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, the Counties of New Castle and Sussex on Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, from their Delegates in Congress*, in 4 JOURNALS OF CONTINENTAL CONGRESS, 1774–1789, at 134, 135, 141 (Worthington Chauncey Ford ed., 1906).

116. *Id.* at 135.

117. See Edward S. Corwin, *The Progress of Constitutional Theory Between the*



“novelties and singularities,” wrote one contemporary, had left “prerogative and privilege . . . wholly undefined and unlimited,” with “no rule established for public procedure.”<sup>118</sup> This destabilized and enervated government, as the conventional account emphasizes, but it also endangered the liberties protected by executing ordinary forms.<sup>119</sup> Old concerns about the sanctity of colonial charters, which writers had linked to the King’s prerogative, now resurfaced as concerns about the inviolability of state constitutions, which were made to rest on what Wilson had identified as the font of prerogative, “*the sacred Authority of the People*.” Just as before, the security of liberty and the protection of property seemed at risk. This is one reason why, in a 1783 draft of a new constitution for Virginia, Thomas Jefferson thought it important to expressly deny the legislature a “power to infringe this constitution.”<sup>120</sup> To give effect to such a limit, however, required that the departments of government have some independence from the legislative assembly, so that they might employ customary forms without interference. In the case of the executive, this was accomplished, to some degree, by its investiture with the prerogative powers of the veto and appointment.<sup>121</sup>

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*Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514–15, 519–20 (1925).

118. POLITICAL ESTABLISHMENTS, *supra* note 113, at 22. The author of *Political Establishments* is unknown. Edmund S. Morgan, *The Political Establishments of the United States 1784*, 23 WILL. & MARY Q. 286, 286–87 (1966).

119. Corwin, *supra* note 117, at 513–14, 517.

120. Thomas Jefferson, *Jefferson’s Draft of a Constitution for Virginia*, in 6 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION 294, 298 (James P. McClure & J. Jefferson Looney eds., 2018) [hereinafter JEFFERSON PAPERS].

121. The extent of change in the constitution of the executive department was not great and has been, at times, exaggerated. Compare WOOD, *supra* note 28, at 433–34, and THACH, *supra* note 108, at 44–48 (describing the Essex Result and the office of Governor under the Massachusetts Constitution of 1780), with CASPER, *supra* note 110, at 15 (“In the end, the 1780 Massachusetts Constitution was not dramatically different from the 1778 draft in the manner in which it distributed powers, although the later document did provide for the (overrideable) gubernatorial veto.”).

In what follows, I explore these developments in more detail. I begin by tracing the efforts of revolutionary bodies to reclaim and exercise royal prerogatives on behalf of the people. I then examine debates over the allocation of prerogative powers under what is perhaps the most influential of the early state constitutions, the Virginia Constitution of 1776. It was to quiet concerns among the Virginia elite about preserving the existing social order that John Adams recommended they vest their executive with a veto. Adams's advice evolved into one of the leading pamphlets of the period, *Thoughts on Government*. Finally, I briefly consider changes in second-wave state constitutions.

### 1. Revolutionary Government

To understand this perspective requires that we begin, briefly, with the revolutionary governments that emerged after the collapse of royal authority in 1775 and 1776. There is no question that revolutionary governments that took control after the dissolution of royal colonial governments exercised powers that could be described as "prerogatives." Governor Josiah Martin of North Carolina complained that companies of North Carolina volunteers had "usurp[ed] the prerogative of the Crown, by forming a Militia, and appointing officers thereto."<sup>122</sup> When the Second Continental Congress turned in the summer of 1775 to supplying and regulating a continental army, it, too, was described as asserting a "claim" to the King's "prerogatives."<sup>123</sup> It was these actions that Wilson sought to justify by describing them as a popular reclaiming of prerogative.<sup>124</sup> Congress worked in conjunction with the Provincial Congresses or Conventions, which provided men and supplies, thereby

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122. Martin, in 1 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 89, at 63.

123. Patriotic Letter from a Minister of the Church of England, to the Earl of Dartmouth, in PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA, *supra* note 85, at 265; see also *A Proclamation*, PROVIDENCE GAZETTE; & COUNTRY J., Nov. 19, 1774, at 3 (similar).

124. Wilson, *supra* note 115, at 135, 141.

partitioning the royal obligation to “protect the continent” along lines the Articles of Confederation would later confirm.<sup>125</sup> Local committees, too, exercised a “prerogative” to protect their communities. Recent studies of the revolutionary committees have tended to focus on their harsh treatment of loyalists who violated the continental boycott of British goods or refused to subscribe to a loyalty oath.<sup>126</sup> The focus is understandable but risks throwing the committees out of perspective. The intolerance committeemen showed for speech ‘inimical to the common cause’ and symbolic conduct like ‘toasts to the King’ expressed largely conventional views of seditious libel and “hot and angry words” that tended to disturb the public peace.<sup>127</sup> In handling such cases, committees built upon existing practices and understandings that had long characterized local government in the American colonies (and which are seriously invasive by modern standards).<sup>128</sup> And while the committees used force, intimidation, harassment, and mock or summary legal proceedings to coerce the intransigent, they also took steps to ensure that revolutionary action did not unwind into complete lawlessness or uncontrolled violence—thereby exercising

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125. See ARTICLES OF CONFEDERATION OF 1781, art. IX; see also MARSTON, *supra* note 47, at 131–32 (“The appointment of Virginia’s George Washington to command the New England troops symbolized congressional acceptance of the old royal responsibility of protecting the continent.”). On the role of the provincial congresses and conventions in establishing, supplying and regulating a regular armed force, see MARSTON, *supra* note 47, at 140–41.

126. See, e.g., T. H. BREEN, *AMERICAN INSURGENTS, AMERICAN PATRIOTS: THE REVOLUTION OF THE PEOPLE 185–206* (2010). Breen calls the committees “schools of revolution” for their role in disciplining political ideology and consolidating the revolutionary movement. While there is a renewed interest in this function of the committees, the thesis itself isn’t new. Hamilton Eckenrode described the same function for the county committees of safety in Virginia. H. J. ECKENRODE, *THE REVOLUTION IN VIRGINIA 96* (1916).

127. 4 BLACKSTONE, *supra* note 5, at 241–54.

128. See, e.g., WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 8–27* (Peter Charles Hoffer & N.E.H. Hull eds., 2000) (Chapter 1, *The Consensual Community*).

what was, in effect, a kind of police power.<sup>129</sup> In legal treatises, this power was sometimes described as *patria potestas*, the King's power to preserve order and protect the well-being of the community, another form of royal prerogative.<sup>130</sup>

## 2. Adams, Jefferson and the Virginia Constitution of 1776

The transition from revolutionary government by committee to ordinary government began in 1776 with the formation of the first state constitutions. Rather than survey the appearance of "prerogative" in these documents, I want to focus on one particular, influential constitution: the Virginia Constitution of 1776. As it happens, a number of the most important texts discussing "prerogative" from the period can be linked to this constitution and its framing. Set in context, what they suggest is that the framers of our first constitutions associated "prerogative" primarily with governmental structures that ensured order, peace and the preservation of existing social and political hierarchies. The question faced by those drawing up *republican* constitutions was the degree to which these values—peace and order—

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129. ADAMS, *supra* note 113, at 32; RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772–1774, at 213–14, 220–22, 225 (1970); EDWARD COUNTRYMAN, A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760–1790, at 136–43 (W. W. Norton & Co. 1989) (1981); see Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATLANTIC Q. 56, 61 (1986) (advancing a similar claim about mobbing during the Revolution); Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 3, 28–29 (1970) (similar). Breen edges up this point, but he doesn't focus on it. BREEN, *supra* note 126, at 199.

130. See 1 BLACKSTONE, *supra* note 5, at 162–63 (describing the King's prerogative over domestic commerce and the establishment of marts, "which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases"); *id.* at \*375–76 (similar, with respect to criminal law). These ideas are the subject of an ambitious and important study. See MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 16–20, 29, 42–43, 49–61 (1999).

could be achieved under a government whose dominant central body was an assembly and in which a considerable amount of governance took place solely at the local level.

Our account of Virginia's constitution begins in November 1775, when John Adams wrote to Richard Henry Lee on the "curious problem" of what form of government "is most readily and easily adopted by a Colony, upon a Sudden Emergency."<sup>131</sup> The two men had conversed while serving as delegates at the Continental Congress, and Lee "quickly perceived the value of Adams's approach to constitution making for persuading hesitant colonists that the practice difficulties of declaring independences were not as great as they feared."<sup>132</sup> Leading men in Virginia were concerned that a democratic form of government, which declared and guaranteed the natural equality of men, would serve, in the words of planter Robert Carter Nicholas, as a "forerunner or pretext of civil convulsion."<sup>133</sup> Nicholas referred to an emancipation of Virginia's slaves, a prospect he knew triggered deep-seated fears of violence, but planters were also concerned with preserving their economic independence and prominence in the colonial political order.<sup>134</sup> The elderly

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131. Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), in 3 ADAMS PAPERS, *supra* note 68, at 307.

132. John E. Selby, *Richard Henry Lee, John Adams, and the Virginia Constitution of 1776*, 84 VA. MAG. HIST. & BIOGRAPHY 387, 391 (1976).

133. Robert Leroy Hilldrup, *The Virginia Convention of 1776: A Study in Revolutionary Politics* 185 (1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with the Buffalo Law Review).

134. JOHN E. SELBY, *THE REVOLUTION IN VIRGINIA 1775–1783* 106–08 (1988); Hilldrup, *supra* note 133, at 220–21. As Selby notes, George Wythe later held that language in the constitution's Declaration of Rights freed the state's slaves, although the position was rejected by St. George Tucker on the state's high Court of Appeals. SELBY, *supra* at 107. The case was *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806). See ALAN TAYLOR, *THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA, 1772–1832* 106–10 (2013). On the decline of the social standing of Virginia gentry in the decades prior to the Revolution, see generally RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA 1740–1790* (1982). Edmund Randolph explained in his *History* that "it was tacitly understood, that every body and individual came into the revolution with their rights, and was to continue to enjoy them as they existed under the former government." Edmund Randolph, *Essay*

Landon Carter suspected middling Virginians were after “a form of government” that would make them “independent of the rich men,” so “every man” could “do as he pleased.”<sup>135</sup> From this perspective, Adams’s aim was to advise Lee how republican government could be established while preserving—indeed, buttressing—“the form we have been used to,” the political institutions through which men like Nicholas and Carter had exerted such a profound influence on colonial life.<sup>136</sup> As Adams explained later, his advice to Lee was particularly “calculated for Southern Latitudes, not northern.”<sup>137</sup> In particular, he thought, “[t]he Negative given . . . to the first Magistrate” (that is, the veto given to the governor) would “be adopted no Where but in S. Carolina,” and Adams himself would “certainly never be happy under such a Government.”<sup>138</sup> A number of southern delegates also sought Adams’s advice, and each time he refined it slightly. A copy was finally printed as *Thoughts on Government, Applicable to the Present State of the American Colonies*, and, far from being “a poor Scrap,” as Adams described it, it became one of the most influential plans of

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*on the Revolutionary History of Virginia, 1774–1782*, 44 VA. MAG. HIST. & BIOGRAPHY 35, 48–49 (1936).

135. Hilldrup, *supra* note 133, at 225 (quoting Letter from Landon Carter to George Washington (May 9, 1776)).

136. Thomas Jefferson, *The Virginia Constitution: Editorial Note*, in 1 JEFFERSON PAPERS, *supra* note 120, at 334; Selby, *supra* note 132, at 396.

137. Letter from John Adams to Francis Dana (Aug. 16, 1776), in ADAMS PAPERS, *supra* note 68, at 465, 466.

138. *Id.* at 466–67; *see also id.* at 181 (Letter from John Adams to James Warren) (“In New England, the ‘Thoughts on Government’ will be disdained, because they are not popular enough. In the Southern Colonies, they will be despised and dissected, because too popular. . . . I dont expect, nor indeed desire that it should be attempted to give the Governor a Negative, in our Colony. Make him President, with a casting Voice.”). Interestingly, Adams prediction was reversed; Virginia did not adopt an executive veto in its 1776 Constitution, while the Massachusetts Constitution of 1780 did—which Adams endorsed. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Letter LIII, in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 87, 87 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC].

government circulated during the revolutionary period.<sup>139</sup>

Adams didn't mention prerogative powers in his initial letter to Lee, but subsequent versions did, including one to Virginian George Wythe that became *Thoughts on Government*. He began by revisiting a point he had made during the imperial crisis as "Novanglus": that men had nothing to fear from republican government, as "[t]he British Constitution itself is republican," since it was "an Empire of Laws and not of Men," which was "the very definition of a Republic."<sup>140</sup> Novanglus had not complained of the British King's "ample and splendid prerogative," since it was (he had said) "bound by strict laws," but now Adams recommended that governors "be stripped of most of those badges of domination called prerogatives."<sup>141</sup> The office was merely to have "the executive power."<sup>142</sup> The only prerogative a governor should possess over a state's legislative assembly was "a negative," in order to prevent the legislature from "continually encroaching upon" his executive office.<sup>143</sup> The result, thought Adams, would be a *balance* between executive and legislative departments, rather than a government in which they "oppose and enervate upon each

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139. See Martin, *supra* note 139, at 72.

140. Adams, *supra* note 140, at 86–87. To be sure, Adams' use of "empire of laws" shows he had amended his categories, since as Novanglus he had contrasted an empire with a government of laws.

141. *Id.* at 89; Adams, *supra* note 68, at 314. As Adams explained in an earlier version of *Thoughts*, it was not the possession of prerogative that made the "spirit" of colonial government absolute rather than republican, but the Crown's possession of "the whole of the Executive [power]," "with an enormous Prerogative," and the legislative and judicial powers as well. Letter from John Adams to William Hooper (Mar. 27, 1776), in ADAMS PAPERS, *supra* note 68, at 74. The concern about "badges of domination" thus appears to concern the use of prerogative against the legislature or judges, rather than private persons. In another version of *Thoughts*, however, Adams uses "badges of slavery" rather than "domination," invoking constitutional ideas relating to security of property and liberty, rather than governmental balance.

142. Adams, *supra* note 140, at 89.

143. *Id.*

other,” a “contest” Adams worried would “end in war.”<sup>144</sup> Adams would also grant the governor the King’s prerogative powers to command the army and militia; with the approval of a privy council, he might also pardon crimes and appoint civil and military officers.<sup>145</sup> On the other hand, indictments should be framed as against the peace of the colony (they had formerly been *contra pacem regis*) and writs run in the colony’s name, rather than the governor’s.<sup>146</sup> The aim, in short, was to alloy executive power with a few traditional royal powers, thereby securing for the governor the “free and independent exercise of his judgment,” which was necessary for “an impartial and exact execution of the laws”—something Virginia planters wanted—while avoiding, at the same time, magisterial domination of the assembly, where the leading planters would sit.<sup>147</sup> If the proposal proved “inconvenient,” wrote Adams, there should be no worry; “the legislature” could “devise other methods of creating” an executive department.<sup>148</sup>

When, on May 15, 1776, the Virginia Convention appointed a committee to prepare a “plan of government as will be most likely to maintain peace and order in this colony,” Adams’s pamphlet did its intended work.<sup>149</sup> Richard

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144. *Id.* James Warren had pressed this point in a series of letters to Adams during late 1775, when the lower house of the General Court was struggling with the Council over the right to appoint military officers. He complained in one letter that “we are plagued with a Constitution where the Prerogative of the Crown, and the Liberty of the Subject are Eternally militateing,” a state of affairs that led him to declare, “I am so sick of our Constitution.” Letter from James Warren to John Adams (Nov. 14, 1775), in ADAMS PAPERS, *supra* note 68, at 303.

145. Adams, *supra* note 140, at 90.

146. *Id.* at 90–91. Commissions would likewise be under the seal of the colony and the signature of the governor.

147. *Id.* at 87, 89. Interestingly, after the Revolution, a movement arose to have judicial process run in the name of the President. 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 538–40 (Stanley N. Katz ed., 1971).

148. Adams, *supra* note 140, at 90; Martin, *supra* note 139, at 66.

149. *Proceedings of the Ninth Day of Session, Fifth Virginia Convention (1776)*, in 7 REVOLUTIONARY VIRGINIA, THE ROAD TO INDEPENDENCE 141, 143 (Brent



Henry Lee was not in attendance, as he was again serving as a delegate to the Continental Congress in Philadelphia, but he mailed printed copies of *Thoughts on Government* to the framing committee's leading men, including Patrick Henry, Robert Carter Nicholas and others.<sup>150</sup> At the same time, Lee drew up a handbill of his own setting out a simple plan of government, based on Adams's earlier letter to him (though saying nothing about prerogative), which was printed and then published in the *Virginia Gazette*.<sup>151</sup> Lee pitched both plans as familiar, orderly and flexible, and it seems the pitch was successful.<sup>152</sup> Adams's plan would likely continue the lower house of the assembly as the dominant force in Virginia's central government, and it said nothing of (and thus left undisturbed) the system of local county courts through which planters' exercised much of their authority. Moderates were attracted enough so that by the time a more aristocratic plan surfaced, in late May, it could be derided by Patrick Henry as "a silly thing."<sup>153</sup> Unlike Adams, the author of this plan, Carter Braxton, saw no danger from vesting the royal prerogative in a governor who held his office for life. "If placemen and pensioners were excluded a seat in either house," he reasoned, describing men whose financial connection to the governor might corrupt their judgment, "*what danger could be apprehended from the prerogative[?]*"<sup>154</sup> Yet Adams had struck first, and, as

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Tarter ed., 1983).

150. CHARLES RAMSDELL LINGLEY, *THE TRANSITION IN VIRGINIA FROM COLONY TO COMMONWEALTH* 169 (1910); Jefferson, *Editorial Note*, in *JEFFERSON PAPERS*, *supra* note 120, at 333–34.

151. *A Government Scheme*, VA. GAZETTE (Purdie), May 10, 1776, at 1.

152. See SELBY, *supra* note 134, at 112–13; Selby, *supra* note 132, at 394–96. Hilldrump paints a less sanguine picture, influenced by his odd attachment to Carter Braxton's plan of government. Hilldrump, *supra* note 133, at 244–51.

153. Letter from Patrick Henry to John Adams (May 20, 1776), in 1 *PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES* 412, 412–13 (William Wirt Henry ed., 1891).

154. CARTER BRAXTON, *AN ADDRESS TO THE CONVENTION OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA* 11 (Philadelphia, John Dunlap 1776) (emphasis added). Braxton's governor would continue in his office during good behavior, "of

committeemen began their work with his pamphlet at hand, its ideas acquired a degree of normativity, giving the Braxton plan a look of “extreme conservatism.”<sup>155</sup>

Lee and Adams had succeeded in checking the effect of conservatives on the framing process, but the framing committee was still dominated by politically moderate, older planters, and these men proved equally resistant to incorporating democratic features into the constitution.<sup>156</sup> Another delegate to the Continental Congress frustrated with having to miss the Virginia Convention was Thomas Jefferson, who drafted three versions of a state constitution and dispatched them to Williamsburg in early June.<sup>157</sup> Jefferson’s plan included liberal provisions that broadened

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which the two houses of the Council of State and Assembly should jointly be the Judges,” and thus “have dignity to command necessary respect and authority, to enable him to execute the laws, without being deterred by the fear of giving offence; and yet be amenable to the other branches of the legislature for every violation of the rights of the people.” *Id.* at 20, 21–22.

155. Jefferson, *supra* note 150, at 335. Braxton’s defense of “elegance and refinement,” BRAXTON, *supra* note 154, at 16–17, helps both to capture the point of view from which Braxton wrote and the vague embarrassment with which the plan was apparently greeted. Braxton’s argument was that Adams, in connecting happiness to virtue, had confused public virtue with private virtue; private virtue was an interest in one’s own welfare, and it was this self-interestedness that had made a “bountiful” country like Virginia so wealthy. There was thus nothing wrong with the “elegance and refinement” of the great planters, contrary to the sumptuary laws included in Adams’s plan. *Id.* at 15–17. A certain ambivalence, even among planters, about luxury, gaming and idleness had characterized Virginia society since the rise of evangelical religions in the 1750s. *See generally* ISAAC, *supra* note 134. For more on Braxton’s pamphlet, see WOOD, *supra* note 28, at 96–97; Isaac Kramnick, *The “Great National Discussion”: The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 22 (1988). With respect to the formation of the Virginia Constitution, at least, it is hard to accord the Braxton pamphlet the significance Wood and Kramnick want to give it.

156. Hilldrup, *supra* note 133, at 171–76.

157. Letter from Thomas Jefferson to Thomas Nelson (May 16, 1776), in JEFFERSON PAPERS *supra* note 120, at 292 (“Should our Convention propose to establish now a form of government perhaps it might be agreeable to recall for a short time their delegates [to the Congress]. It is a work of the most interesting nature and such as every individual would wish to have his voice in. In truth it is the whole object of the present controversy . . .”). On the dating of the draft constitutions, see *First Draft by Jefferson*, in JEFFERSON PAPERS, *supra* note 120, at 345.

suffrage, subjected local offices like the sheriff to popular vote, and ended the importation of slaves, but these “fell by the roadside,” arriving too late in the framing process and challenging too centrally the gentry’s social authority and way of life.<sup>158</sup> In contrast, provisions in Jefferson’s plan relating to prerogative did have some influence. Jefferson faulted the King for misusing his prerogative to veto colonial legislation and (through his governor) to dissolve legislative assemblies, a complaint Jefferson had made previously in *Summary View*, and he now proposed that the state’s legislative assembly should continue to sit “so long as they shall think the publick service requires.”<sup>159</sup> Jefferson’s governor, like Adams’s, was expressly divested of a set of identified royal prerogatives, retitled “Administrator” and granted only undefined “executive powers.”<sup>160</sup> The prerogatives, including “declaring war or concluding peace,” “raising or introducing armed forces,” and “erecting courts, offices, boroughs, [or] corporations,” were to be “exercised by the legislature alone.”<sup>161</sup> Other provisions in Jefferson’s plan stripped the Administrator of the veto and the pardon, making him weaker than Adams’s governor relative to the legislative assembly, although both offices possessed a power to appoint civil and military officers, subject to the approval of another body.<sup>162</sup> Neither office approached Braxton’s governor-for-life.

When the framing committee’s draft constitution came before the full Convention, it debated Jefferson’s language on

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158. SELBY, *supra* note 134, at 120.

159. *Third Draft by Jefferson*, in JEFFERSON PAPERS, *supra* note 120, at 356, 358; SUMMARY VIEW, *supra* note 74, at 19, 23.

160. Jefferson, *supra* note 159, at 359–60.

161. *Id.* at 360.

162. *Id.* at 359–60. In addition, the same Administrator could not be appointed by the lower house twice in a row. *Id.* at 359. *Thoughts on Government* did express some support for a requirement of rotation in office. Adams, *supra* note 140, at 90.

prerogative and added some of it to the draft.<sup>163</sup> It added and then deleted the list of prerogative powers Jefferson had expressly prohibited, opting instead for a general prohibition on exercising “any power or prerogative by virtue of any law statute or custom of England.”<sup>164</sup> The only exception was the pardon, a power the governor could exercise with the approval of his privy council, setting aside impeachment or where “the law shall otherwise particularly direct.”<sup>165</sup> The governor was to have no veto.<sup>166</sup>

That the governor was to exercise no prerogative “by virtue of any law” evidenced an understanding that royal prerogatives were in some cases articulated in acts of Parliament and judicial decisions. The delegates’ concern was, it seems, to prohibit “laws for enlarging the prerogatives”—and not, as Jefferson recalled some years later, to “prescribe[] under the name of *prerogative* the exercise of all powers undefined by the laws.”<sup>167</sup> Restrictions on the exercise of “powers undefined by law” did exist in the new constitution, but they were to be found elsewhere. Earlier in June, “Democraticus,” writing in the *Virginia Gazette*, had suggested granting an executive department a

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163. See *Amendments to the Plan of Government Continued, Proceedings of the Forty-sixth Day of Session, Friday, June the 28th 1776, in The Draft Reported by the Committee*, in 7 REVOLUTIONARY VIRGINIA, THE ROAD TO INDEPENDENCE *supra* note 147, at 635, 637, 642 n.16; Thomas Jefferson, *The Draft Reported by the Committee (Amendments Thereto Offered in Convention)*, in JEFFERSON PAPERS, *supra* note 120, at 373, 376 n.1.

164. Thomas Jefferson, *Amendments to the Plan of Government Continued*, in JEFFERSON PAPERS, *supra* note 134, at 637.

165. The limitation on the pardon power was the source of the famous *Case of the Prisoners*. See, e.g., PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 492 (2008); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

166. Henry pushed for a veto, without which he thought the governor would be “a mere phantom,” but no other delegate supported the proposal. LINGLEY, *supra* note 150, at 173; SELBY, *supra* note 134, at 119.

167. *Albemarle County Instructions Concerning the Virginia Constitution, [ca. September–October 1776]*, in FOUNDERS ONLINE, *supra* note 26; THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 127 (William Peden ed., 1982) (1787). *Notes* was initially composed in 1781. *Id.* at xiv–xv.

power to act “in all cases of emergencies not provided for by the laws,” but “aided and assisted by the upper house.”<sup>168</sup> The Convention expressly rejected the suggestion, requiring that the governor exercise his executive powers “according to the laws of this common Wealth.”<sup>169</sup> It reserved a power of “suspending laws, or the execution of laws” for the legislative assembly.<sup>170</sup> During deliberations on the state’s new Declaration of Rights in May, Patrick Henry and his allies had insisted on removing language that banned *ex post facto* laws and bills of attainder, on grounds that “the safety of the state” might require the legislature to employ them in place of judicial proceedings.<sup>171</sup> Moreover, a power to act where the laws were silent, in order to safeguard the welfare of the community, had remained all along in the hands of elite planters, implicitly attached to local offices like justice of the peace.<sup>172</sup> The state’s constitution would do nothing to disturb this.<sup>173</sup>

In short, while ‘conservative’ Adams differed from ‘liberal’ Jefferson in proposing an executive veto and pardon,

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168. *Loose Thoughts on Government*, VA. GAZETTE (Purdie), June 7, 1776, at 2.

169. *Amendments to the Plan of Government Continued*, *supra* note 147, at 637. A number of state constitutions in the first wave followed Virginia in restricting the exercise of executive power to state law. *See, e.g.*, DEL. CONST. of 1776, art. VII; GA. CONST. of 1777, art. XIX; MD. CONST. of 1776, art. XXXIII; N.C. CONST. OF 1776, art. XIX.

170. *A Declaration of Rights*, VA. GAZETTE (Purdie), June 14, 1776, postscript at 1.

171. SELBY, *supra* note 134, at 102; Randolph, *supra* note 134, at 47 (“An article prohibiting bills of attainder was defeated by Henry, who with a terrifying picture of some towering public offender, against whom ordinary laws would be important, save that dread power from being expressly proscribed.”); Hilldrup, *supra* note 133, at 183–84, 202–03.

172. *See* 3 WILLIAM NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1660–1750* 33–37, 43–45, 49–50 (2016); A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810* 44 (Morris S. Arnold, ed. 1981).

173. Thus breaking the control of the planter gentry over local justice became a principal object of law reform spearheaded by Jefferson and James Madison in the decades after independence. *See generally* ROEBER, *supra* note 172.

neither approached the full panoply of prerogative implied by the Braxton plan, which appeared reactionary and had little influence. Delegates were principally concerned with which traditional royal powers should be vested in a republican governor, so he could execute the law and preserve order without unduly interfering with planter control; constitutional allocations of emergency power and the discretion to act where the law was silent, where such powers existed at all, were given to bodies those planters dominated. Practice under Virginia's first three governors largely followed these forms. As historian Emory Evans has put it, "the legislature had been more powerful than the executive in Virginia for a number of years. The new House of Delegates was a mirror of the old House of Burgesses, and it was accustomed to a position of leadership."<sup>174</sup> Henry's principal task was to raise military forces and supply them, and to do this he "worked primarily with the various county lieutenants," the leading planters who commanded them.<sup>175</sup> Even directing the movement of Virginia soldiers required the assembly to pass a law delegating the authority to the governor, which it did on a temporary basis, typically until the next meeting of the assembly. Henry found the office "too much cramped," and though he did not complain about the need to seek legislative authorization, says Evans, he and his council were "very sensitive of their own prerogatives," especially his power, in conformance with state law, to direct the militia.<sup>176</sup> When the British navy threatened an invasion from the Chesapeake, Henry and the council ordered loyalists forcibly removed from the area, for which the

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174. Emory G. Evans, *Executive Leadership in Virginia, 1776-1781: Henry, Jefferson, and Nelson*, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 188 (Ronald Hoffman & Peter J. Albert eds., 1981).

175. *Id.* at 189.

176. *Id.* at 190-92. The Constitution granted the Governor the authority to raise the militia with the approval of the privy council, and, when raised stated that he "shall alone have the direction of the Militia under the laws of the Country." VA. CONST. of 1776.

legislature later indemnified him.<sup>177</sup> When the Norfolk County Lieutenant requested another mass removal sometime later, Henry forwarded the request to the House of Delegates, along with a message stating that as “the executive power” was “not competent to such a purpose, I must beg leave to submit the whole matter to the general Assembly, who are the only Judges how far the methods of proceeding directed by Law are to be dispensed with on occasion.”<sup>178</sup> The methods proved cumbersome for prosecuting the war.<sup>179</sup> Governor Nelson, who took office following Jefferson, obtained sweeping grants of authority from the legislative assembly to call out the militia, direct its forces, impress food and supplies, confiscate the property of those who resisted state law, constitute common-law courts and declare martial law.<sup>180</sup> Nelson exceeded even these grants of authority, for which he was again indemnified by the Virginia elite sitting in the General Assembly.<sup>181</sup>

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177. At a General Assembly Began and Held at the Capitol in the City of Williamsburg (Oct. 20, 1777), in 9 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 337, 373–74 (William Waller Hening, 1821). Jefferson was a member of the legislative committee that drafted the indemnity bill. See Bill Indemnifying the Executive for Removing and Confining Suspected Persons (Dec. 16–26, 1777), reprinted in 2 THE PAPERS OF THOMAS JEFFERSON 119 (James P. McClure & J. Jefferson Looney eds., 2008–18). Although the Convention did not adopt the provision, Jefferson’s third draft of a proposed constitution had made the Administrator “liable to action, tho’ not to personal restraint[,] for private duties or wrongs.” Third Draft by Jefferson, in FOUNDERS ONLINE, *supra* note 26. Perhaps delegates thought it unnecessary. On the important role of civil damages suits against public officers in Jefferson’s constitutional thinking, see David Thomas König, Nature’s Advocate: Thomas Jefferson and The Rule of Law (2017) (unpublished manuscript of chapter titled, “Jefferson and Whig Lawyering”) (on file with author). In this respect, Jefferson’s thinking was representative of the early American approach to the legal accountability of government. See JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3–11 (2017).

178. Letter from Governor Patrick Henry to the Speaker of the House of Delegates, Benjamin Harrison, (May 27, 1778), in 1 OFFICIAL LETTERS OF THE GOVERNORS OF THE STATE OF VIRGINIA 283 (H. R. McIlwaine ed., 1926).

179. See, e.g., SELBY, *supra* note 134, at 123.

180. Evans, *supra* note 174, at 218–19.

181. *Id.* at 223–24; 1 THE CONGRESSIONAL REGISTER 525 (Thomas Lloyd ed.,

### 3. Prerogative in Second-Wave Constitutions

Second-wave state constitutions tended to make two changes to this allocation of powers. First, they pared back the ability of legislative assemblies to interfere in judicial proceedings by directly exercising judicial power. In Virginia's case, as early as 1783, Jefferson proposed revisions to the constitution that would bar bills of attainder outright and guarantee access to habeas corpus.<sup>182</sup> Second, constitutions elevated the governor by vesting royal prerogatives in the executive department. Jefferson retitled his Administrator as "Governor," but would still deny him "the prerogative powers of erecting courts, . . . laying embargoes, . . . of retaining within the state or recalling to it any citizen thereof," along with other powers, "except so far as he may be authorized from time to time by the legislature to exercise."<sup>183</sup> The last phrase clarified the relationship between the assembly and the governor in matters of prerogative; rather than the assembly exercising prerogative powers itself, it could empower the governor to exercise them by passing a law. Other prerogative powers, like declaring war and concluding peace, entering into alliances and regulating weights and measures, were to be reserved for a *national* assembly, acting "under the authority of the Confederation."<sup>184</sup> What about the authority to act where the law was silent? Jefferson addressed the matter explicitly, but described the power as a matter of "execution" rather than "prerogative." Jefferson wrote, "We give [the Governor] those powers only which are necessary to carry into execution the laws, and which are not in their nature either legislative or Judiciary. The application of this idea must be left to

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1789) (statement of Representative Alexander White (June 18, 1789)) (Nelson "exceeded his authority, . . . and [was] he himself afterwards indemnified by the legislature.").

182. JEFFERSON'S DRAFT OF A CONSTITUTION FOR VIRGINIA (1783) *reprinted in* 6 JEFFERSON PAPERS, *supra* note 175, at 298, 304.

183. *Id.* at 299.

184. *Id.*



reason.”<sup>185</sup> In no sense did “Executive powers” mean “powers exercised under our former government by the crown as of its prerogative.”<sup>186</sup> Jefferson followed most other states in still denying the Governor a veto. But it was clear that he was trying to solve much the same problem as was being confronted elsewhere: how to make an executive department sufficiently independent for it to execute the law.

### C. *The Federal Constitution*

As we have seen, Americans engaged in framing state constitutions tended to distinguish executive power and prerogative. “Executive power” was a power to carry out the law, and it might be vested in a department that lacked prerogatives, in the sense of discrete, traditionally royal powers used to conduct government. There are textual signals of this distinction; for example, grants of executive power were usually general, while grants of prerogative powers were specific and defined.<sup>187</sup> A second point about usage was that “prerogative” did not signal immunity from the power of a legislative assembly. Indeed, legislative assemblies in the states both regulated prerogatives and exercised such powers themselves by passing acts. The problems raised by legislative exercise of prerogative powers

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185. *Id.*

186. *Id.* at 298–99.

187. *See, e.g.*, MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 62–63 (1943); PRAKASH, *supra* note 1, at 73–74, 77; THACH, *supra* note 108 at 36–37. Prakash reads these general grants differently than I do. He maintains that their coupling with express exclusions of specific prerogative powers implies that the grants were of a substantive executive power including prerogatives, while I do not see the necessity of that reading. The exclusions may have been included because of a customary association of certain prerogatives with the office holding executive power. After all, there were also express *inclusions* of prerogative power, which would have been unnecessary had a grant of “executive power” simply implied prerogative. There may also have been disagreements, or confusion, or compromise, concerning which royal prerogatives were appropriate for republican executives—a possibility that suggests we should not simply assume express exclusions or inclusions of prerogative power reflect broadly shared understandings.

led framers to search for ways to ensure the independence of the executive department; and this they did not only by adjusting the institutional form of the office, but also by vesting it with prerogative powers. The difficult question, which continued to divide elites at the time of the Philadelphia convention, was which powers could be vested in an executive consistent with the premises of republican government. Most men believed that establishing a vigorous, independent executive department did not require rejecting a government in which the legislature was superior and possessed the greatest share of power.<sup>188</sup> Still, certain prerogatives could not be vested in the executive without creating at least the appearance of a monarchy. Finally, framers did not tend to use “prerogative” to describe the discretion that attached itself to a power to carry the law into effect (that is, executive power), or to powers to act in the absence of the law or even against the law to protect the public. “Prerogative” certainly *could* be used to describe executive discretion; it just usually wasn’t. As we’ve seen, emergency powers found their way to legislative assemblies by means of powers of suspension and legislative adjudication.

Drawing on this background, the men framing a federal constitution at Philadelphia employed “prerogative” for two related purposes. First, they drew on associations with prerogative to describe and defend an exclusive jurisdiction for the national government.<sup>189</sup> As Charles Pinckney put it,

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188. As Thach describes the views of the Virginia delegation, for example, “the executive proposed by them was essentially subordinate to the legislature. The fixed nature of the executive salary, the provision for ineligibility for reelection, and the council of revision point unmistakably towards a desire for an independent exercise of the executive powers. But legislative election and legislative determination of the major part of executive competency negated any idea of departmental coordination.” *Id.* at 84. Not everyone believed a vigorous executive was possible in a republic. For example, see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 86 (speech of John Dickinson (June 2, 1787)) (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

189. The usage was familiar; Hamilton, writing in 1781 as “The Continentalist,” had complained of the states, driven by “ambition and local

speaking in defense of a proposed national veto over state legislation, “the States must be kept in due subordination to the nation,” and without a veto, “it wd. be impossible to defend the national prerogatives, however extensive they might be on paper.”<sup>190</sup> “Prerogative” could be used to describe national powers because of the imperial connotations it still retained. In making his own case for a congressional veto over state legislation, Madison argued that “[t]his prerogative of the General govt. is the great pervading principle that must controul the centrifugal tendency of the States.”<sup>191</sup> The imperial comparison expressed the need not only to defend properly national interests, but to harmonize discordant state policies and maintain order. The veto, Madison thought, had operated just this way in the British empire, where “[n]othing could maintain the harmony & subordination of [its] various parts . . . , but the prerogative by which the Crown, stifles in the birth every Act of every part tending to discord or encroachment.”<sup>192</sup> And, in a long speech criticizing the New Jersey Plan, Madison observed that “omitting a controul over the States” through the veto left the “defence of the federal prerogatives . . . particularly defective.”<sup>193</sup> The weakness of the national government might be used to justify withholding “every effectual prerogative,” a result familiar to those who had sat in the Confederation Congress.<sup>194</sup>

Second, framers invoked “prerogative” to advance

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interests,” “constantly undermining and usurping” the “prerogatives” of “the FOEDERAL GOVERNMENT.” Alexander Hamilton, *The Continentalist No. 1*, in FOUNDERS ONLINE, *supra* note 26.

190. 1 FARRAND’S RECORDS, *supra* note 188, at 164 (speech of Charles Pinckney (June 8, 1787)).

191. *Id.* at 165 (speech of James Madison (June 8, 1787)).

192. 2 *id.* at 28 (speech of James Madison (July 17, 1787)). In contrast, the power of taxation was “the highest prerogative of supremacy”—another use of “prerogative” that alluded to the imperial crisis. 1 *id.* at 447 (speech of James Madison (June 28, 1787)).

193. 1 *id.* at 317 (speech of James Madison (June 18, 1787)).

194. *Id.* at 551 (speech of James Madison (July 7, 1787)).

arguments about the *form* national government should take. Which powers should be allocated to the national legislature and which to the national executive? Securing the “independence” of the executive was important, but this was not merely a question of what we would call today separation of powers; it had a federalism dimension as well. If the national government was going to curb the excesses of state legislatures, it seemed important to ask whether that should be done in a national legislature, a national executive, or even by means of a system of national courts. Thinking about the constitutional role of courts had developed considerably in the five years before 1787, to the extent that most framers now assumed courts would confine state legislatures to constitutional limits through judicial review.<sup>195</sup> But what should the role of the national executive be?<sup>196</sup> According to one commentator, delegate John Dickinson worried that a firm national executive would centralize political authority by “its inevitable concomitant, a bureaucracy.”<sup>197</sup> There is evidence that other delegates, too, felt this concern. Although during the imperial crisis patriots had used “prerogative” to press a case for a constitution of imperial federation, linked

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195. JACK N. RAKOVE, ORIGINAL MEANINGS IN POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, 175 (1996).

196. See Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, 490, 534–67 (2014). Although the veto had been theorized as a device for keeping a legislature within constitutional bounds, most of the men at Philadelphia seemed to think of it as a defensive device for preserving executive power. But nearly everyone who spoke described judicial review in more expansive terms.

197. THACH, *supra* note 108, at 90. Dickinson connected the firmness of the executive and the existence of separate states in a speech on June 2. 1 FARRAND'S RECORDS, *supra* note 188, at 86. Responding to this concern, Luther Martin remarked several weeks later, “A general government may operate on individuals in cases of general concern, and still be federal. This distinction is with the states, as states, represented by the people of those states. States will take care of their internal police and local concerns.” *Id.* at 439. Gouverneur Morris, for his part, was more forthright in his view that states’ “internal police . . . ought to be infringed in many cases, as in the case of paper money & other tricks by which Citizens of other States may be affected.” 2 *id.* at 26; see also 1 *id.* at 164 (speech of James Madison (June 8, 1787)).

through the *Crown*, reformers now sought to combine a national (imperial) executive with a national (imperial) *legislature*. Nationalists like James Wilson, Gouverneur Morris and Benjamin Franklin, who desired to establish a central government with powers over public finance and western lands, saw the Sweeping Clause as a key text, since it empowered Congress “[t]o make all Laws . . . necessary and proper for carrying into Execution . . . *all other Powers vested by this Constitution in the Government of the United States.*”<sup>198</sup> Thus, even proponents of a strong executive envisioned that “national prerogatives” would be regulated by a national legislature.<sup>199</sup> Congress would establish a national bureaucracy *by law*, articulating legal limits that might be enforced in a suit for damages before the courts. The legalization of bureaucratic power under the Sweeping Clause was an important concession to the tradition of radical English ‘country’ thinking distrustful of centralized state power, from which the patriots and now the Anti-Federalists drew so much inspiration.<sup>200</sup> From this perspective, a grant of prerogatives would not secure the President’s discretion to act outside the law—the Lockean theory—but, rather, as we will see, his “independence of judgment” within the law: his autonomy to exercise the legally defined powers vested in his office. Nor should there be worries that *Congress* would threaten local power, since it lacked “the Royal prerogative[]” to directly veto state laws, ensuring state control over internal police.<sup>201</sup>

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198. U.S. CONST., art. I, § 8, cl. 18 (emphasis added); Mikhail, *supra* note 21, at 1070, 1078–86, 1121–24.

199. See Mikhail, *supra* note 21, at 1078–86, 1121–24.

200. MAX EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 45–46, 61–66 (2003); Kramnick, *supra* note 155, at 23–24, 30.

201. In place of a national veto, Madison observed, was “the general provision that the Constitution & laws of the U. S. shall be paramount to the Constitutions & laws of the States.” Letter from James Madison to W. C. Rives (Oct. 21, 1833), in 3 FARRAND’S RECORDS, *supra* note 188, at 521–22; 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 392 (1905).

In designing the presidency, then, the framers used “prerogative” in debating which of the traditional royal powers of government could be vested in a national republican executive. But they always assumed that the administration of national power would be under law, and no one used “prerogative” to press the case for a discretionary authority to act outside the law. This would pose too great a threat to local discretionary authority and police. To see this in more detail, I turn first to the use of “prerogative” in the first debates about the national executive on June 1, early in the Convention. The second subsection deals with the mysterious exchange over Congress’s power to “make war” two-and-a-half months later, in mid-August. As far as we can tell, the exchange concerned the need for a discretionary authority in the President to respond to sudden attacks without a legislative declaration of war; yet no one, apparently, used the word “prerogative” to describe such a power. In the final subsection, I turn to the ratification debates, and show that disputants largely employed “prerogative” as the term had been used in the imperial crisis and the framing of the first state constitutions. The principal divide was over whether the executive had been given the necessary prerogatives to be independent, or so many that he was, in fact, a monarch. “Prerogative” played a role, as well, in supporting the Anti-Federalist case for a bill of rights, as we can see from the debate in the Virginia ratifying convention.

### 1. Prerogative Powers and the Problem of the Independent Executive

“Prerogative” made its first appearance at Philadelphia on June 1, when Resolution 7 of the Virginia Plan came up for discussion.<sup>202</sup> As it was drafted, Resolution 7 was sparse, reflecting Madison’s own uncertainty about the executive

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Of course, in the Philadelphia Convention Madison had strongly supported a national congressional veto over state laws. RAKOVE, *supra* note 195, at 51.

202. See 1 FARRAND’S RECORDS, *supra* note 188, at 64–69.

and perhaps, too, differences about the executive within the Virginia delegation.<sup>203</sup> The resolution stated that “a national Executive” should be “chosen by the national Legislature,” and possess “the executive powers of Congress &c.”<sup>204</sup> It said nothing about whether the office was singular or plural, its tenure or the length of term. (Resolution 8, not then under discussion, also made the executive part of a “Council of Revision,” which was to possess a qualified veto over national law.<sup>205</sup>) Several issues surfaced during the first exchange, but for our purposes most important was the association by several delegates of particular prerogative powers with monarchy. Charles Pinckney began debate by speaking in favor of “a vigorous Executive,” but thought if it possessed the “Executive powers of <the existing> Congress,” including “peace & war,” it would “render the Executive a Monarchy.”<sup>206</sup> John Rutledge, too, opposed granting the executive “the power of war and peace.”<sup>207</sup> James Wilson, who favored a strong national executive, seems to have thought the objection serious. Speaking after Rutledge, he declared that “[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers.”<sup>208</sup> A short time later, Wilson returned to the point, and, writes Madison, “repeated that he was not governed by the British model which was inapplicable to the situation of

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203. See 1 FARRAND’S RECORDS, *supra* note 188, at 66, 74, 88 (views of Virginia Governor Edmund Randolph); THACH, *supra* note 108, at 81–84.

204. 1 FARRAND’S RECORDS, *supra* note 188, at 64.

205. See *id.* at 105.

206. *Id.* at 64–65. Historian Richard Beeman suggests that Pinckney was speaking in support of the President in his own plan, who was made “Commander in chief of the Land Forces of U.S. and Admiral of their Navy,” and granted powers to convene the legislature “on extraordinary occasions,” and to prorogue them when they could not agree on a time to adjourn; but he did not possess a power of initiating war or concluding peace. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 126 (2009); 3 FARRAND’S RECORDS, *supra* note 188, at 606. It’s possible, but I see no evidence of it in Pinckney’s remarks.

207. 1 FARRAND’S RECORDS, *supra* note 188, at 65.

208. *Id.*

this Country.”<sup>209</sup> Advocating a single executive officer, as Wilson had, was apparently close enough to “the British model” that it required a disavowal.<sup>210</sup> He would assert, again, several days later, that “[a]ll know that a single magistrate is not a King.”<sup>211</sup> Wilson favored an executive that had “energy dispatch and responsibility,” because he thought it “would be the best safeguard against tyranny.”<sup>212</sup> The danger during the Revolution, after all, had come from “a corrupt multitude,” “the parliament.”<sup>213</sup> But energy did not necessitate vesting the executive with a power of war and peace. The only powers the executive *had* to possess were the powers “of executing the laws and appointing officers” not “<appertaining to . . . >” the legislature and thus rightly appointed by it.<sup>214</sup> The scope of executive powers would be determined by reference to the purpose of the department; “Extive. powers,” Wilson said, “are designed for the execution of Laws” and the appointment of executive officers.<sup>215</sup> Madison agreed. “[E]xecutive powers,” Rufus King recorded him saying, “ex vi termini, do not include the Rights of war & peace.”<sup>216</sup> After a brief discussion, the Convention modified Resolution 7 to empower the executive “to carry into effect. the national laws [and] to appoint to offices in cases not otherwise provided for.”<sup>217</sup>

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209. *Id.* at 66.

210. Eric Nelson has argued that Wilson understood his June 1 motion “that the Executive consist of a single person” to be an embrace of monarchy. NELSON, *supra* note 32, at 185. Wilson denied this very point on June 4, but the denial clearly did not convince Randolph and Mason. *See* 1 FARRAND’S RECORDS, *supra* note 188, at 96, 101.

211. 1 FARRAND’S RECORDS, *supra* note 188, at 96.

212. *Id.* at 65, 66.

213. *Id.* at 71.

214. *Id.* at 66.

215. *Id.* at 70.

216. *Id.*

217. *Id.* at 67. Madison suggested the delegates begin by ‘defining’ what powers were included, and then decide on the size and form of the office. *Id.* at 66–67. As King recorded Madison, “the powers shd. be confined and defined – if large we



This opening exchange was conventional in substance and well within the range of debate on state executive departments. Wilson's use of "prerogatives" clearly refers to traditional royal powers used to conduct government, several of which are identified, and not to executive discretion or emergency power.<sup>218</sup> Indeed, Madison was the *only* delegate who recorded anyone using the term "prerogative" at all during the discussion, and at this point of the convention, he was still writing from memory twice a week, with the assistance of rough notes.<sup>219</sup> William Pierce recorded Wilson as disclaiming the "powers" of "Making peace and war," which "Writers on the Laws of Nations" had described as "legislative."<sup>220</sup> Rufus King recorded Madison speaking of

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shall have the Evils of elective Monarchies." *Id.* at 70.

218. For a defense of the contrary position, see McConnell, *supra* note 5 (manuscript at 5–8).

219. BILDER, *supra* note 59, at 61–62. Bilder notes that Madison "translated the speakers' political concepts and ideas into his own terminology," and that other note-takers "recorded an inconsistent variety of political concepts and vocabularies." *Id.* at 64. The diction and organized composition of Madison's notes during this debate, in particular, make a striking contrast with the diaries of King, Hamilton and Pierce. Copies of rough notes included with Madison's manuscript can be found in 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, 1787–1870, at 34–35 (1900) [Hereinafter DOCUMENTARY HISTORY].

220. 1 FARRAND'S RECORDS, *supra* note 188, at 73–74. The reference to "[w]riters on the Laws of Nations" could be taken as a reference to Locke, whose *Second Treatise* was in conversation with Grotius, Hobbes and Pufendorf. See TUCK, *supra* note 46, at 117–20. Yet Locke famously describes war as a "[f]ederative" power, not a legislative one. LOCKE, *supra* note 2, at 365. Other writers take a variety of positions. Pufendorf distinguishes "the [l]egislative [p]ower" and "the power of [w]ar and [p]eace" as different "[p]arts of [s]overeignty." SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS, BOOK VII 165–66 (Oxford, Lichfield 1703). Vattel takes the position that the sovereign possesses both the right to enter treaties and to make war, although he observes that this sovereign may be constituted by fundamental law either as a prince or a legislative assembly. With regard to treaties, in particular, Vattel observes that some sovereigns "are obliged to take the advice of a senate, or of the representatives of the nation." EMER DE VATTEL, THE LAW OF NATIONS 192–93, 292–93 (Philadelphia, T. & J. W. Johnson & Co. 1863); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 297–98 n.10 (1972). It is possible, too, that by describing war as "legislative," Wilson's intent was to describe it as an attribute of "sovereignty," in light of the contrast writers like Grotius and Pufendorf drew between sovereign lawmaking and the execution of government.

“Rights of war & peace &c.”<sup>221</sup> Thus, if “prerogative” was, in fact, used by any speaker at all, it was used in a sense that made it nearly synonymous with “power.”<sup>222</sup> The usage was fitted to the problem delegates faced, set by Wilson, which was how to make a national executive sufficiently independent of the legislature to ensure “a vigorous execution of the Laws.”<sup>223</sup> As we have seen, the strategy employed in state constitutions was, in part, to vest particular ‘prerogative powers’ in the executive department. This reflected what was a longstanding association between prerogative and providing, as Wilson put it, “security to liberty.”<sup>224</sup> But too many prerogative powers, or the wrong sort, and the executive would appear to be a monarch, since it might frustrate or corrupt the legislature.<sup>225</sup> Wilson assured his audience that there was no need for a vigorous executive department to possess powers of war and peace. Indeed, an executive should not possess such a power, since, as “Writers on the Laws of Nations” had explained, it was a prerogative “of a Legislative nature.”<sup>226</sup> The words signaled to men from states whose legislative assemblies possessed many prerogative powers that even the learned, Tory James

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See TUCK, *supra* note 46, at 1–9 (distinguishing sovereignty and government, and crediting to Rousseau the view that war was a power of government). Madison, writing later as Helvidius, cites publicist writers for the proposition that “the powers to declare war, to conclude peace, and to form alliances, [are] among the highest acts of sovereignty; of which the legislative power must at least be an integral and preeminent part.” JAMES MADISON, LETTERS OF HELVIDIUS, NO. 1, *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 66, 67 (Philip B. Kurland & Ralph Lerner eds., 1987).

221. 1 FARRAND’S RECORDS, *supra* note 188, at 70.

222. This use of “prerogative” was familiar from the imperial crisis. *Supra* Section I.A.

223. 1 FARRAND’S RECORDS, *supra* note 188, at 71 (speech of James Wilson); see CORWIN, *supra* note 7, at 11–12; PRAKASH, IMPERIAL, *supra* note 1, at 27; RAKOVE, *supra* note 195, at 259.

224. 1 FARRAND’S RECORDS, *supra* note 186, at 74. Pierce’s notes also state, “Safety to liberty the great object.” *Id.* at 73.

225. See PRAKASH, IMPERIAL, *supra* note 1, at 17 (observing that “[c]ertain powers . . . were said to make a single executive a monarch.”).

226. 1 FARRAND’S RECORDS, *supra* note 188, at 65, 74.

Wilson, might be an ally.<sup>227</sup> No one on June 1 was advocating for the creation of an executive discretion immune from law; the thrust was exactly the opposite.

The discussion of the council of revision and an executive veto power assumed much the same form. On the morning of June 4, Wilson finally prevailed on the Convention to make the executive unitary.<sup>228</sup> The next issue up for discussion was the Council of Revision described in Resolution 8. The Council, which comprised the executive and “a convenient number of the National Judiciary,” was proposed to have a power to examine and reject every act of the national legislature.<sup>229</sup> Elbridge Gerry thought the proposal problematic, since judges sitting on the Council would already possess a power of expounding the laws in cases that came before them, and thus (on occasion) “deciding on their Constitutionality.”<sup>230</sup> In place of the Council, Gerry proposed that the executive “have a right to negative any Legislative act,” subject to legislative override.<sup>231</sup> Wilson thought Gerry did not “go far enough,” as “a distinct & independent” “Exetiv” required “an absolute negative.”<sup>232</sup> Hamilton agreed.<sup>233</sup> The pace of proposals came fast, and other delegates expressed concern at the shape the national executive was assuming. Pierce Butler of South Carolina professed he “had been in favor of a single Executive Magistrate,” but had he known it would possess “a compleat negative on the laws,” “he certainly should have acted very differently.”<sup>234</sup> George Mason agreed. “We are Mr. Chairman

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227. On Wilson’s reputation as a stiff pedant with Tory sympathies, see BEEMAN, *supra* note 206, at 129–35.

228. 1 FARRAND’S RECORDS, *supra* note 188, at 93, 97.

229. *Id.* at 21.

230. *Id.* at 97–98.

231. *Id.* at 98.

232. *Id.*

233. *Id.*

234. *Id.* at 100, 109.

going very far in this business. We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one.”<sup>235</sup> The threat of a veto would enable the executive to control the legislature, a practice inconsistent with “the Genius of our People wh. is republican.”<sup>236</sup> Again, only Madison records any of these delegates using the word “prerogative.” This time he puts it in his own mouth, speaking against an absolute veto. “To give such a prerogative would certainly be obnoxious to the <temper of this country; its present temper at least.>”<sup>237</sup>

The debate over the veto was inconclusive on June 4, but still the discussion does something to reveal why delegates distinguished the veto from other prerogative powers like appointment. The issue was not the nature of the veto power. Madison did not mention the distinction between prerogatives “of a Legislative nature” and those “strictly Executive,” which he had drawn several days earlier, though it would have advanced his cause, as the veto was in an obvious way legislative rather than executive.<sup>238</sup> Apparently the distinction had no purchase on the fourth, if it ever had any; after disapproving of an absolute veto, the delegates also voted to reject a more executive-like substitute, a power of suspension.<sup>239</sup> Instead, delegates concerned about the veto focused on its application to corrupt the legislature, by requiring that it abandon a policy favored by the community, consent to desired appointments, or even that it pay the executive.<sup>240</sup> Without the benefit of a council, there was no

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235. *Id.* at 101.

236. *Id.* at 107–08.

237. *Id.* at 100. In Farrand’s edition, language enclosed in angle brackets was added after the Convention had concluded, as late as 1819. *See id.* at xvi–xix. In this case, Madison inserted the text to replace other text that he struck out and rendered illegible. *See* 3 DOCUMENTARY HISTORY, *supra* note 219, at 57.

238. *See* 1 FARRAND’S RECORDS, *supra* note 188, at 65–66.

239. *Id.* at 103–04.

240. Franklin suggested that the veto would be used as it had in proprietary Pennsylvania, to extract special benefits that enriched the governor. *Id.* at 99,

reason to think the views of the executive should be superior to “the decided and cool opinions” of “the best men in the Community,” sitting together in an august national legislature.<sup>241</sup> This veto would likely function something like the modern Senate’s filibuster, keeping government “clogged” until private interests could be gratified, rather than “expeditiously executed” as Pierce Butler desired.<sup>242</sup> It was because the negative empowered the executive to corrupt legislative judgment that it was “obnoxious” to the republican “genius” or “temper” of the people. When the veto came up for discussion again, several months later, Wilson succeeded by insisting that where an executive did not possess the “formidable” powers of the British King—his other prerogatives—he did not pose this threat.<sup>243</sup> The legislature would be far more powerful than the executive, and thus pose the real danger of tyranny.<sup>244</sup> In essence, the dispute was which prerogatives had to be vested in the executive for the desired “vigor,” but which could not be without creating an appearance of monarchy and a threat of corruption. The line was contested, and it would remain so for some time.<sup>245</sup>

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106, 109. Mason used the same logic, applying it to appointments. *Id.* at 101. Butler worried more generally that the veto would feed a “constant course of increase” in executive power “in all countries.” *Id.* at 100. It was for this reason, Roger Sherman explained in the United States Congress several years later, that the Convention “prohibited the President from the sole appointment of all officers,” since the British Crown had used “that prerogative” “to swallow up the whole administration” and by its “influence . . . upon the Legislature” subject Parliament “to its will and pleasure.” 3 *id.* at 357 (1789) (statement of Roger Sherman in the House of Representatives).

241. 1 *id.* at 98, 99.

242. *Id.* at 109.

243. 2 *id.* at 301.

244. *Id.* at 298, 300–01. Gouverneur Morris, too, argued that “[t]he British Executive has so great an interest in his prerogatives and such powerful means of defending them that he will never yield any part of them. The interest of our Executive is so inconsiderable & so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting incroachments.” *Id.* at 76.

245. That the Constitution could generate these conflicting appearances was well expressed by Jefferson in a letter to Massachusetts Attorney General James

## 2. War Power, Invasion and Discretion

A resolution instituting a national executive was approved on June 4 and delivered to a committee of detail on July 23.<sup>246</sup> The office consisted of a single person, and enjoyed powers to execute the national laws and appoint executive officers. What the committee reported to the convention on August 6, however, was quite different.<sup>247</sup> It added a number of prerogative powers, although it vested them primarily in the legislature. Thus, the committee's draft gave the Senate a "power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."<sup>248</sup> Congress was empowered "To make war."<sup>249</sup> The Senate's foreign policy prerogatives remained in that body until the end of August, when the "Committee of eleven" transferred them to the President.<sup>250</sup> The war prerogative remained in Congress, although the convention had earlier made one important, and very famous change.

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Sullivan. Jefferson wrote,

Where a constitution, like ours, wears a mixed aspect of monarchy and republicanism, it's citizens will naturally divide into two classes of sentiment, according as their tone of body or mind, their habits, connections, and callings induce them to wish to strengthen either the monarchical or the republican features of the constitution. Some will consider it as an elective monarchy which had better be made hereditary, and therefore endeavor to lead towards that all the forms and principles of it's administration. Others will [view it] as an energetic republic, turning in all it's points on the pivot of free and frequent elect[ions].

Letter from Thomas Jefferson to James Sullivan (Feb. 9, 1797), in 29 PAPERS OF THOMAS JEFFERSON: 1 MARCH 1796 TO 31 DECEMBER 1797, at 289 (Barbara B. Oberg ed., 2002).

246. 2 FARRAND'S RECORDS, *supra* note 188, at 129, 132.

247. *E.g.*, McConnell, *supra* note 5, at 24 ("On a range of issues, the Committee did not hesitate to exceed the instructions of the Convention. It added many provisions . . . . It even adopted provisions *inconsistent* with the votes of the Convention.); see 2 FARRAND'S RECORDS, *supra* note 188, at 177, 182, 183, 185.

248. 2 FARRAND'S RECORDS, *supra* note 188, at 183.

249. *Id.* at 182.

250. *Id.* at 493, 495. The Committee of Eleven is sometimes delightfully called the "Committee on Postponed Parts."

On August 17 the convention changed the power “To make war” to a power “To declare war.”<sup>251</sup> It is difficult to understand precisely why. Here we really are, as Justice Jackson put it, divining meaning “from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>252</sup> Madison’s record of the debate preceding the alteration is almost certainly incomplete, as his notes degraded appreciably in the second half of August.<sup>253</sup> Unfortunately, the completeness of the notes is relevant to our study here. What was absent, apparently, from deliberations over the draft’s allocation of war power was the word “prerogative.” There was certainly reason to invoke the concept. Pinckney opened the discussion by complaining that a legislature was “too slow” to make war.<sup>254</sup> If ever there was an occasion to invoke the Lockean prerogative to justify cleaving the war power so as to ‘leave’ an unregulated discretion for the President, here it was. Yet Madison made no mention of the concept when he proposed substituting “declare” for “make,” with the aim, he said, of “leaving to the Executive the power to repel sudden attacks.”<sup>255</sup> Several days later, members debated the draft’s handling of the treaty power, but again omitted any mention of prerogative, despite one delegate’s description of the President as “the general Guardian of the National interests,” a paternal image often associated with the King.<sup>256</sup>

It is a mistake to hang much on omissions in the records of the Philadelphia Convention, but here we should couple

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251. *Id.* at 319.

252. *Youngstown Sheet & Tube Co. V. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). As Arthur Schlesinger remarked about the discussion, which he placed at the beginning of his own book, “no one really quite knows what this exchange meant.” SCHLESINGER, *supra* note 1, at 4.

253. BEEMAN, *supra* note 206, at 292; BILDER, *supra* note 59, at 122–25.

254. 2 FARRAND’S RECORDS, *supra* note 188, at 318.

255. *Id.*; see Scigliano, *supra* note 1, at 245.

256. 2 FARRAND’S RECORDS, *supra* note 188, at 540–41; see DUBBER, *supra* note 130, at 16–20, 29.

the omission with several other acts the convention took, of which we possess a positive record. The President's power to repel sudden attacks must be read alongside an allocation of emergency power that actually resembles structures employed under early state constitutions. The convention empowered the national legislature "to provide for calling forth the militia" to, among other things, "suppress insurrections and repel invasions."<sup>257</sup> Although it denied Congress (and state legislatures) the power to pass bills of attainder or ex post facto laws, two devices state legislatures had used in emergencies, Congress was authorized to establish military tribunals or courts to try offenses in similar circumstances.<sup>258</sup> Congress could also suspend the privilege of the writ of habeas corpus "in cases of rebellion or invasion."<sup>259</sup> Suspension in eighteenth-century English practice was a parliamentary power, exercised by passing temporary statutes to secure public safety.<sup>260</sup> Thus, if we set aside the carve-outs for bills of attainder and ex post facto laws, the Constitution's allocation of emergency power assumes Congress is competent to regulate and even trigger the response of the national government to emergencies involving a breakdown in civil authority.<sup>261</sup> The Revolution's primary lesson appears to have been a narrowing of the *forms* by which a legislature should act; it could not exercise emergency power itself, for example, by trying and condemning rebels in the assembly by means of a bill of attainder, but should delegate that power by establishing an appropriate tribunal and body of law. Where governmental

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257. U.S. CONST. art. I, § 8; see Reinstein, *supra* note 5, at 302.

258. U.S. CONST. art. I, § 8, cl. 9–11, 18; *id.* art. I, §§ 9–10.

259. U.S. CONST. art. I, § 9.

260. Halliday & White, *supra* note 14, at 613–28, 670–71, 674–76. According to the authors, "[b]y suspending the action of law, Parliament . . . in effect captured the royal prerogative." *Id.* at 622. This was the tradition of legislative control over law in times of emergency in which the American revolutionaries had operated and which the framers of the Constitution largely continued.

261. See, e.g., CORWIN, *supra* note 7, at 152–69.



officers exceeded their authority to meet an emergency, Congress did retain a quasi-judicial power to judge that necessity on petition and to indemnify the officer if it thought his action justified by passage of a private bill.<sup>262</sup> Lastly, it might impeach and convict the officer. Although a Lockean theory of ‘discretionary’ prerogative might have justified exclusively vesting these powers in a national executive, the convention instead preserved a central role for the national legislature in handling emergencies and approving the use of armed force. Indeed, the decision to vest *Congress* with powers to provide for the “defense of the republic” would play an important role in federalists’ support of the proposed Constitution during ratification.<sup>263</sup>

### 3. The Place of “Prerogative” in the Ratification Debates

The public debate over ratification of the Constitution, both in print and in the ratification conventions, drew on senses of “prerogative” familiar from the imperial crisis. Despite the presence in Philadelphia of Wilson, Hamilton and other proponents of a vigorous executive, “prerogative” seems to have found more use during ratification than during framing itself. It was not a term reserved for use by lawyers, or one whose appeal was limited to lawyers, but a familiar component of Whig orthodoxy. Writing early in the ratification process, “A True Friend” reminded both the “advocates for the new federal constitution” and their “antagonists” that “the liberties and the rights of the people

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262. U.S. CONST. amend. I; see Adler, *supra* note 1, at 384–88; James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1062, 1929–31 (2010); Wilmerding, *supra* note 1, at 324–29. The framers’ embrace of what Adler’s calls “retroactive ratification” is not *eo ipso* an embrace of legalism or rule of law simply because it the legislature does the ratifying; it is vesting discretionary authority in a popular assembly, to be exercised after the fact, in the form of approval or disapproval of the prior conduct of an officer. Supposing this definition, it is unclear whether Adler will still agree that it was consistent with the American constitutional system, given the place he accords to law in his construction of that system.

263. EDLING, *supra* note 200, at 99.

have been always encroached on, and finally destroyed by those, whom they had entrusted with the powers of government,” who “in [their] nature” were continually “encreasing . . . their prerogatives” and “prolonging . . . the term of their function.”<sup>264</sup> This was the classic constitutional scheme. “A.B.,” responding to the Anti-Federalist “Brutus” in the pages of the *Hampshire Gazette*, counseled against taking it too far; unlike a monarchy, where the principle “may be admitted as true in general,” in a government “strictly elective and popular,” like the proposed federal government, instead of “extending the prerogative and inroaching on or abridging the rights of the states or of the people,” the government would “underact” where “popular rumour” challenged it.<sup>265</sup> Other writers showed how the old prerogative-*v.*-privilege frame had adapted itself to an emerging American doctrine of popular sovereignty. In its jurisdiction-constituting sense, the prerogative belonged to the people. “It is the prerogative of freemen,” wrote “The Landholder,” “to determine their own form of government,” and thus to settle the form “of the American empire.”<sup>266</sup> Although “the right of granting exclusive charters” had been, “in all old countries,” “considered as one principle branch of prerogative,” it now belonged to the people, who should not approve the Constitution without inserting “a restraining clause, which might prevent the Congress from making any such grant.”<sup>267</sup> This prerogative should remain with the

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264. A True Friend, RICHMOND, Dec. 5, 1787, in 14 DHRC, *supra* note 138, at 373–74.

265. A.B., HAMPSHIRE GAZETTE, Jan. 9, 1788, in 5 DHRC, *supra* note 138, at 671.

266. The Landholder X, CONN. COURANT, Mar. 3, 1788, in 16 DHRC, *supra* note 138, at 304–05; *see also* Statement of Thomas FitzSimons, 2 DHRC, *supra* note 138, at 73 (stating, on the question of whether the Pennsylvania Assembly should call for a ratification convention, “it is my wish, that the legislature should take the lead and guide the people into a decent exercise of their prerogative”); A Delegate Who Has Caught Cold, VA. INDEP. CHRON., June 25, 1788, in 10 DHRC, *supra* note 138, at 1683 (describing “all peoples existing on the earth and the nations” as possessing “their prerogatives and their government”).

267. Agrippa VI, MASS. GAZETTE, Dec. 14, 1787, in 4 DHRC, *supra* note 138, at

people. From one point of view, the proposed Constitution threatened this prerogative—a point, fittingly enough, that could itself be expressed by describing the national government as an unconstitutional *form* of “prerogative.” According to “Cato Uticensis,” for example, the delegates in Philadelphia had “proposed to you *a high prerogative government*, which, like *Aron’s* serpent, is to swallow up the rest,” dissolving the government’s formed by the people in their states.<sup>268</sup>

“Prerogative” was invoked, as well, in discussion of whether the convention had designed an appropriately independent executive power. Usage in this sense largely continued the constitutional framework that had emerged during the state framing process and which also characterized deliberations at Philadelphia. Executive power alone was usually distinguished from prerogative.<sup>269</sup> Specific prerogative powers had been added to executive power to insulate the department from legislative interference. Anti-Federalists thought the porridge too hot, and that this ‘President’ was in reality a king; as “Tamony” observed,

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268. Cato Uticensis, VA. INDEP. CHRON., Oct. 17, 1787, in 8 DHRC, *supra* note 138, at 73 (emphasis added).

269. See, e.g., A Farmer, PHILADELPHIA FREEMAN’S J., Apr. 23, 1788, in 17 DHRC, *supra* note 138, at 134 (identifying as a “general principle[]” that “[t]he power of making rules or laws to govern or protect the society is the essence of sovereignty, for by this the executive and the judicial powers are directed and controuled.”). For an important exception to this view of executive power, rooted in the Take Care Clause, see William Symmes, Jr. to Peter Osgood, Jr. (Nov. 15, 1787), in 14 DHRC, *supra* note 138, at 113–14 (“That there must be an executive power independent of ye. Legislative branch, appears to have been generally agreed by ye. fabricators of modern Constitutions. . . . But was ever a commission so *brief*, so *general*, as this of our President? Can we exactly say how far a faithful execution of ye. Laws may extend—or what may be called, or comprehended in, a faithful execution? . . . Should a Federal act happen to be as generally expressed as ye. President’s authority, must he not interpret ye. act? For in many cases he must execute laws independently of any judicial decision.—And should ye. Legislature direct ye. mode of executing ye. laws, or any particular law, is he obliged to comply, if he did not think it will amount to a *faithful* execution? For to suppose that ye. Legislature can make laws to affect ye. office of ye. President, is to destroy his independence, & in this case to supersede ye. very constitution.”).

although the “president is treated with levity and intimated to be a machine calculated for state pageantry,” in reality “his great prerogatives” gave him “more supreme power, than Great Britain allows her hereditary monarchs.”<sup>270</sup> Particularly alarming was his command “of a standing army,” which was “unrestrained by law or limitation.”<sup>271</sup> “Brutus” was equally concerned about the President’s power to enter treaties with the approval of the Senate, which, under the Constitution, would be “the supreme law of the land”—a power greater than that possessed by the British King, who could not alter the law of the land.<sup>272</sup> “An Old Whig” thought the President possessed every “important prerogative the King of Great Britain is entitled to,” and that subjecting such an office to election was, in fact, “dangerous,” violating conventional wisdom about the instability of nations with “an elective King.”<sup>273</sup> But to Edmund Pendleton, these concerns were overblown. “The President is indeed to be a great man,” he conceded, but this was only “to represent the Federal dignity & Power”; in substance, the office had “no latent Prerogatives, nor any Powers but such as are defined and given him by law.”<sup>274</sup> Although he was made commander-in-chief of the army and navy, “Congress are to raise & provide for them, & that not for above two years at a time.”<sup>275</sup> He could nominate officers, but required the Senate to appoint them, and anyway “Congress must first creat[e] the offices & fix the Emoluments, and may discontinue them

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270. Tamony, VA. INDEP. CHRON., Jan. 9, 1788, in 8 DHRC, *supra* note 138, at 287.

271. *Id.*

272. Brutus, VA. INDEP. CHRON., May 14, 1788, in 9 DHRC, *supra* note 138, at 801–02.

273. An Old Whig V, PHILADELPHIA INDEP. GAZETTEER, Nov. 1, 1787, in 13 DHRC, *supra* note 138, at 541–42. On the authorship of the Old Whig essays, which consisted of a team of leading Pennsylvania ‘Constitutionalists,’ see *id.* at 376.

274. Edmund Pendleton to James Madison (Oct. 8, 1787), in 8 DHRC, *supra* note 138, at 354.

275. *Id.*

at pleasure.”<sup>276</sup> Pendleton repeated the same point several months later in a letter to Richard Henry Lee, who opposed ratification but did not attend the state’s convention. “His powers are defined, & not left to latent Prerogatives—they none of them appear too large,” excepting perhaps the pardon and the treaty power.<sup>277</sup> Pendleton thus leaned heavily on contrasting *types* of prerogative; “prerogatives undefined,” as existed under the British constitution, and prerogatives limited by law and the need for support from the legislature—a distinction others drew as well.<sup>278</sup> Pendleton’s efforts did not prevent Henry and Mason from leading an attack in the ratifying convention on a presidency they thought conferred “too much power”—so much, they said, as to invite “foreign countries to interfere in his election.”<sup>279</sup>

There was notably little hysteria over the President’s veto prerogative. Some Anti-Federalists doubted the veto would be used, citing the example of the British monarch,<sup>280</sup>

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276. *Id.*

277. Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 18 DHRC, *supra* note 138, at 182.

278. 10 DHRC, *supra* note 138, at 1196 (statement of Edmund Pendleton in the Virginia Convention (June 12, 1788)); *see also* John Brown Cutting to William Short (Dec. 13, 1787), *in* 14 DHRC, *supra* note 138, at 477 (“[T]he powers of a senate and house of representatives as marked out by the american constitution—would more than counter-balance those even of an hereditary President—whose prerogatives and authorities were *definite, supported & circumscrib’d* by law—altho You even admit them to be much more enormous & influential than those confided to his possession by virtue of the new plan. . . . [Again contrasting the British King,] I pass over the absolute prerogatives of making *peace war-treaties*—prorogations dissolutions and sudden conventions of a Septennial House of Commons . . .”).

279. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 286 (2010); *see also* PRAKASH, *supra* note 1, at 20.

280. *E.g.*, Brutus, *supra* note 272, at 800; Centinel II, PHILADELPHIA FREEMAN’S J., Oct. 24, 1787, *in* 13 DHRC, *supra* note 138, at 464 (“Even the king of England, circumstanced as he is, has not dared to exercise it for near a century past.”). Federalists made this point as well, arguing from the British example that the power would not be abused. *See, e.g.*, 9 DHRC, *supra* note 138, at 922 (statement of George Nicholas in the Virginia Convention (June 4, 1788)) (“[T]here is scarcely an instance, for a century past, of the Crown’s exercising its undoubted prerogative, of rejecting a bill sent up to it by the two Houses of Parliament.”).

while others maintained it was inappropriate in a government where the executive did not possess “the sovereignty of the nation,” as the British King did.<sup>281</sup> Defenses emphasized that Massachusetts had already granted its executive a veto, and that the nation’s President would be a person of great public virtue.<sup>282</sup> Much more heated was the debate over the need for a bill of rights, a debate in which “prerogative” played an important role in the Virginia Convention. As Pauline Maier has described, Patrick Henry’s “persistent demands that the Constitution needed a bill of rights could not be dismissed” and on several occasions nearly derailed the Virginia convention.<sup>283</sup> English experience proved the need for explicit, clear guarantees of liberties. “The people of England lived without a declaration of rights,” Henry observed, until Charles “made usurpations upon the rights of the people.”<sup>284</sup> The King had been able to do so because “rights were in a great measure before that time undefined,” and their measure “depended on implication and logical discussion.”<sup>285</sup> It was only when the English “Bill of Rights put an end to all construction and implication” that liberty was made secured, “by defining the

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281. The Impartial Examiner IV, VA. INDEP. CHRON. June 11, 1788, in 10 DHRC, *supra* note 138, at 1610–11.

282. See, e.g., A Native of Virginia, *Observations upon the Proposed Plan of Federal Government*, in 9 DHRC, *supra* note 138, at 668–69 (“This power in the President [the veto] is derived from the State government of Massachusetts and New York. . . . [It] goes only to a reconsideration of the public measures . . . . [T]he President [will] in all probability be a man of great experience, and abilities, and as far as his powers extend, ought to be considered as representing the Union; and consequently would be well acquainted with the interests of the whole. Great utility is therefore likely to arise to Congress from his knowledge, and his reasoning upon their acts of Legislation. Farther, the experience of all ages proves that all popular assemblies are frequently governed by prejudices, passions, and partial views of the subject; nay sometimes by indecent heats and animosities. . . .”); Debate in the South Carolina Legislature (Jan. 16, 1788), in 3 FARRAND’S RECORDS, *supra* note 188, at 249 (statement of Charles Pinckney).

283. MAIER, *supra* note 279, at 284–85, 294–95, 300, 306–07.

284. 10 DHRC, *supra* note 138, at 1212 (statement of Patrick Henry in the Virginia Convention (June 12, 1788)).

285. *Id.*

rights of the people, and limiting the King's prerogative."<sup>286</sup> The key point for Henry was the general or undefined character of the prerogative, in which "every possible right which is not reserved to the people by some express provision or compact, is within the King's prerogative."<sup>287</sup> Over time, rights were "reserved to the people," by efforts to "enumerate the exceptions to his prerogative."<sup>288</sup> Henry returned to the point repeatedly; several days later, he observed again that "the prerogative of the King, and the frequent attacks on the privileges of the people," made clear the "necessity of excluding implication."<sup>289</sup> George Mason, who also pushed for the necessity of a bill of rights, thought common law had supplied the necessary limits. It was the "common law," Mason averred, that had "prevented the power of the crown from destroying the immunities of the people."<sup>290</sup> Although Virginia had received the common law by statute, the proposed federal Constitution made no provision for the common law. Absent some such guarantee, there was nothing to keep the President and Senate from, said Mason, "a dismemberment of the empire," selling off territory or even a state—a "prerogative" prohibited to the British monarch.<sup>291</sup>

The invocation of "prerogative" complicated, to some degree, the federalist response to Henry and Mason's

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286. *Id.*

287. *Id.* at 1328–29 (statement of Patrick Henry in the Virginia Convention (June 16, 1788)).

288. *Id.* at 1333.

289. *Id.* at 1505 (statement of Patrick Henry in the Virginia Convention (June 24, 1788)).

290. *Id.* at 1390 (statement of George Mason in the Virginia Convention (June 19, 1788)).

291. *Id.* at 1390–91. A related argument was that there was nothing to prevent Congress from constituting tribunals or courts that did not follow the common law, thereby undermining its protections. Agrippa VI, *supra* note 267, at 427. Notably, Mason reversed the reasoning of the patriots during the imperial crisis, who had insisted that the King's prerogative did extend to such grants. *See supra* Section I.A.

demand for a bill of rights. The stock reply was that the grants of power to the federal government were few and defined, obviating any need for an explicit reservation of rights. A written constitution, defining the powers of the executive department, would itself secure liberty against prerogative.<sup>292</sup> Yet the Constitution did grant the executive certain prerogatives; thus, if “prerogative” was understood to entail a broad discretion to act to protect the public, the limited nature of federal authority would offer little protection from tyranny. “A True Friend” insisted that, “[n]otwithstanding Mr. Wilson’s assertion, that *every thing which is not given up by this federal constitution, is reserved to the body of the people; that security is not sufficient to calm the inquietude of a whole nation.*”<sup>293</sup> Not only was there a need for a bill of rights, explained “A Delegate who has Caught Cold,” but for one “so expressive, so clear, and at the same time so short, as never to require either comment or interpretations.”<sup>294</sup> Defenders of the Constitution adopted several different responses. Some, like Pendleton, drew a distinction between the general and undefined character of the prerogatives of the British King, at least historically, and the particular, limited and legal prerogatives granted to the

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292. 9 DHRC, *supra* note 138, at 1092, 1135–36 (statement of George Nicholas in the Virginia Ratifying Convention (June 10, 1788)) (“In England, in all disputes between the King and people, recurrence is had to the enumerated rights of the people to determine. Are the rights in dispute secured—Are they included in Magna Charta, Bill of Rights, &c? If not, they are, generally speaking, within the King’s prerogative. In disputes between Congress and the people, the reverse of the proposition holds. Is the disputed right enumerated? If not, Congress cannot meddle with it.”); A Native of Virginia, *supra* note 282, at 660 (“It may be asked, why did the English consider a Bill of Rights necessary for the security of their liberty? The answer is, because they had no written Constitution, or form of government. . . . [Even their bill of rights left] the prerogative still inaccurately defined, [allowing the monarch] to claim by implication the exercise of all powers not denied it by that declaration.”).

293. A True Friend, *supra* note 264, at 373, 376 (emphasis in original). In a reversal of usage not unusual for “prerogative,” “A True Friend” then insisted that what was required was “a declaration of our rights, or an enumeration of *our prerogatives, as a sovereign people.*” *Id.* (emphasis added).

294. A Delegate who has Caught Cold, *supra* note 266, at 1683.



President and the Congress under the Constitution.<sup>295</sup> Other Federalists maintained that English charters, petitions, bills and other such guarantees were largely symbolic and had done little to actually limit monarchical power—pointedly reversing the valence of patriot thinking during the imperial crisis. In an undelivered speech, William Cushing, a delegate to the Massachusetts Convention, observed that “Bills of rights originated in ancient despotic times; in the times of despotic Kings, whose prerogatives were boundless & whole will alone was law.”<sup>296</sup> In response to the conduct of King Charles, “Ld. Coke & others drew up a *bill* of rights,” “[b]ut it was of no consequences, for no sooner had he assented to the bill of rights *than* he trampled the whole under foot.”<sup>297</sup> As Pendleton put this point, adopting the English Bill of Rights as a model for this country was “*humiliating & unsafe*,” because, first, the people would be accepting from an “*Agent* of their *Power* a Charter of their rights,” and, second, such an origin “*admits* a Power in the *Donor* to *take away*,” a source of “mischief” that explained Magna Charta’s “numerous Ratifications.”<sup>298</sup> The presence of prerogative powers in the Constitution thus forced federalists to characterize “prerogative” as legally limited and to subordinate it to the sovereignty of the people.

*The Federalist* letters brought largely the same arguments to the debate over ratification in New York.<sup>299</sup> In Number 26, Hamilton adopted the familiar framing on an establishment Whig in describing the effect of the Glorious

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295. See Cutting to Short, in 14 DHRC *supra* note 138, at 476–77; Pendleton to Lee, *supra* note 138, at 179–80; Pendleton to Madison, *supra* note 274, at 46.

296. William Cushing, *Undelivered Speech* (c. Feb. 4, 1788), in 6 DHRC, *supra* note 138, at 1431.

297. *Id.* at 1432.

298. Pendleton to Lee, *supra* note 138, at 179 (emphasis in original).

299. See LORRI GLOVER, THE FATE OF THE REVOLUTION: VIRGINIANS DEBATE THE CONSTITUTION 59 (2016); Onuf, *supra* note 27, at 366 (arguing that *The Federalist* was persuasive to the extent that it was responsive to arguments aired elsewhere).

Revolution on the royal prerogative to raise armies. “Inroads were gradually made upon the prerogative, in favour of liberty,” he wrote, “[b]ut it was not ‘till the revolution in 1688’ that liberty ‘was completely triumphant,’ secured by a requirement in the Bill of Rights that the prerogative be exercised with the consent of Parliament.<sup>300</sup> In Number 47, Madison identified the other prerogative powers traditionally exercised by the King, including “the prerogative of making treaties,” appointing judges, and “put[ting] a negative on every law,” in the course of examining how the British constitution mixed the functions of government, a pattern early state constitutions had followed.<sup>301</sup> ‘Paper’ constitutional boundaries between the departments had proved insufficient to maintain the functional distinctions that did exist, and thus, in Number 48 Madison turned, famously, to providing “some practical security for each, against the invasion of the others.”<sup>302</sup> The “executive power,” in particular, “being restrained within a narrower compass, and being more simple in its nature,” had been victimized by legislative assemblies, rendering it “dependent,” an account Madison then illustrated by citing Jefferson’s discussion of Virginia government in *Notes on the State of Virginia*.<sup>303</sup> What was required, in the case of the executive department, was to increase “the constitutional rights of the place” to the point they were “commensurate to the danger of attack.”<sup>304</sup> Madison was building the conventional case for returning royal prerogatives to the executive to insure its independence, a case he left to be

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300. Publius, *The Federalist* 26, N.Y. INDEP. J., Dec. 22, 1787, in 15 DHRC, *supra* note 138, at 66.

301. Publius, *The Federalist* 47, N.Y. INDEP. J., Jan. 30, 1788, in 15 DHRC, *supra* note 138, at 500–04.

302. Publius, *The Federalist* 48, N.Y. Packet, Feb. 1, 1788, in 16 DHRC, *supra* note 138, at 4.

303. *Id.* at 5–6.

304. Publius, *The Federalist* 51, N.Y. INDEP. J., Feb. 6, 1788, in 16 DHRC, *supra* note 138, at 44.

concluded by Hamilton in the last of the essays.<sup>305</sup> In Number 69, Hamilton undertook to demonstrate that the convention had not given the executive powers by which it could dominate or corrupt the national legislature, by comparing its powers to those of the British monarch.<sup>306</sup> He began with the qualified veto, which he contrasted with the King's "prerogative," an absolute negative, but likened to the weaker "revisionary authority of the council of revision of this State [i.e., New York], of which the governor is a constituent part."<sup>307</sup> He turned, then, to the other prerogative powers vested in the national executive, including command of the army, navy and militia; the pardon; the power to adjourn the national legislature in limited cases; and the power to make treaties with the concurrence of two-thirds of the Senate.<sup>308</sup> Comparing each with its analogue royal prerogative, as described by Blackstone, Hamilton concluded that the President was not, in fact, nearly as powerful as the British king. The argument was tendentious (as many understood, Blackstone's chapter on prerogative both overstated the monarch's constitutional power and understated its political power), but the same position had been advocated three months earlier in New York by "Americus," and by writers in other states as well.<sup>309</sup> Most disputants agreed on the premise—the need for

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305. See SOFAER, *supra* note 10, at 51, 56 (describing the aim of *The Federalist* as defending a vigorous, independent executive department with sufficient powers to avoid legislative control).

306. Publius, *The Federalist* 69, N.Y. PACKET, Mar. 14, 1788, in 16 DHRC, *supra* note 138, at 388.

307. *Id.* at 388–92.

308. *Id.* at 388–92.

309. See Americanus IV, N.Y. DAILY ADVERTISER, Dec. 5–6, 1787, in 19 DHRC, *supra* note 138, at 359–59 ("The most effectual way, perhaps, of effacing these gloomy fears from our minds, is to compare the distribution of power made by this Constitution, with the distribution of power which has taken place in the Government of Great-Britain. . ."). For another example of this argument, again made some three months before Hamilton published *Federalist* 69, see Cutting to Short, *supra* note 295, at 477 ("[s]elect the king of this *monarchic republic* Britain-and compare his powers and prerogatives with those of our President.").

an “energetic Executive”—since, as Hamilton put it in Federalist 70, “A feeble executive implies a feeble execution of the government,” and a feeble execution “is but another phrase for a bad execution.”<sup>310</sup> The conventional strategy for making an executive energetic was to grant it certain prerogative powers. This is what the proposed Constitution did; the powers it vested in the national executive—negotiating with foreign powers, preparing plans of finance, arranging the army and navy, directing the operations of war—were “most properly understood” as part of “the administration of government.”<sup>311</sup> A government with such prerogative powers was necessary, Hamilton reasoned, for “the security of liberty”—an idea of central importance, which with Hamilton had opened the letters in Federalist 1.<sup>312</sup>

Finally, in Number 84, Hamilton answered the argument in favor of a bill of rights based on the English experience with prerogative. He began by acknowledging the usual view that “bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege.”<sup>313</sup> But these agreements “have no application to constitutions professedly founded

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The debate about who was more powerful, the President or the British King, was common and usually carried out by comparing prerogatives and ‘influence’ over legislation. On the defects of Hamilton’s comparison in *The Federalist*, see NELSON, *supra* note 32, at 217–19; PRAKASH, IMPERIAL *supra* note 1, at 21; SOFAER, *supra* note 10, at 45, 51; Reinstein, *supra* note 5, at 267–69, 288–96.

310. Publius, *The Federalist 70*, N.Y. PACKET, Mar. 15, 1788, in 16 DHRC, *supra* note 138, at 396.

311. *Id.* at 612. The idea that prerogatives were powers necessary for the administration of government was, as we have seen, invoked during the imperial crisis. See *supra* Section I.A. When applied to these powers, the term “prerogative” was hardly, as Richard Pious describes it, a “forbidden term.” Pious, *supra* note 1, at 69.

312. Publius, *supra* note 310, at 451; see also *id.* at 91 (“the vigour of government is essential to the security of liberty”). On the association of “prerogative” and liberty, see *supra* Section I.B.

313. Publius, *The Federalist 84*, N.Y. PACKET, July 29, 1788, in 16 DHRC, *supra* note 138, at 128.

upon the power of the people,” since “in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations.”<sup>314</sup> There was no attempt to meet the argument that the grant of prerogative powers to the executive might be understood to convey broad, discretionary powers to protect the public—a suggestion, apparently, in no need of a response.

## II. USING “PREROGATIVE” TO CONSTRUCT ARTICLE II

“Prerogative” had no single meaning for early Americans. It had multiple meanings, which grew out of the different uses to which the term could be put in political, legal and constitutional argument. While those uses drew on a law of prerogative and English political writings of the seventeenth and eighteenth centuries, Americans did not typically treat the term as a technical one, in the sense that it was strictly bound by English theorizing. American usage did not conform to the expositions of Blackstone or Locke, although Blackstone’s catalogue of royal prerogative powers clearly influenced American thinking and did so to a degree far beyond Locke’s theory of prerogative. If the term had a core connotation for Americans, it was something like ‘strong government’ or ‘rights to government.’ They used “prerogative” to press a case for self-government, republican government and vigorous government, in each case to secure their rights.

The constitutional arguments described above also suggest some principles useful for own constructions of Article II and its relationship to Article I. These, as I said at the outset, are not meant to provide answers to concrete questions about executive power. The first two principles I have in mind function something like canons, constraining our interpretation of the constitutional text, while the last is really a set of values for guiding analysis within the larger

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314. *Id.* at 130.

context of emergency power. The first principle is that we should distinguish prerogative from executive power in the constitutional context (as opposed to, say, in political writings or legal treatises). The grant of executive power in the Article II Vesting Clause may be a substantive power, but, other considerations aside, it should be understood as a grant of the power to carry out the law, not prerogative power. Second, there is nothing about “prerogative” *per se* that immunizes it from legislative regulations. We should presume that presidential prerogatives are defeasible. Yet, in light of the functions that executive prerogatives serve, there must be some limits to legislative powers. I suggest two. Congressional regulation of presidential prerogatives should not compromise the President’s independence of judgment. Moreover, since a principal purpose of vesting prerogative powers in the President was to create a vigorous government capable of securing liberty and protecting property, courts should interpret his prerogative powers in ways that advance this purpose. The last principle I take from the discussion above is that we should generally presume that Locke has little to tell us about how our Constitution provides for meeting emergencies. The early American approach to emergencies involved both legislative and executive branches in a way that ensured emergency government remained a government of law and responsible for its actions. Although important elements of this approach have been displaced, the present statutory framework regulating emergency power, as well as the leading judicial framework set out in the *Steel Seizure Case*, continue to reflect the political values behind it.

#### A. *Prerogative and Executive Power*

As we have seen, Americans engaged in framing constitutions distinguished “executive power” from “prerogative.” They used “executive” in what has been called

its “principal,” “primary,” “precise” or “dictionary” sense.<sup>315</sup> Why should Americans distinguish “executive power” and “prerogative” in this context, when in political tracts, legal treatises and similar texts, “the executive” and “executive powers” could be used in ways that included prerogative power?<sup>316</sup> Americans drew such a distinction when, and to the extent that, they thought it necessary for the project of framing a vigorous republican executive, for showing doubters that such a form of government was possible. In this context, it was crucial to distinguish traditional executive *offices*, which (like the King’s) might possess prerogatives, from the executive governmental *function*, and the powers necessary to discharge that function adequately. For example, the famous *Essex Result*, in which the delegates of Essex County, Massachusetts explained their rejection of a proposed state constitution, uses “executive” in both these senses within the same paragraph, describing first an “internal executive power, which is employed in the peace, security and protection of the subject and his property, and in the defence of the state.”<sup>317</sup> In this sense, the aim of executive power was “to enforce the law, and to carry into execution all the orders of the legislative powers,” and, perhaps, to protect the instruments of civil government against the rebellious.<sup>318</sup> In contrast, war, treaty and the prerogatives of the British King relating to foreign nations were categorized as powers of “the external executive,” and which the federal Constitution would assign to the legislature.<sup>319</sup>

Thus, when James Wilson remarked that “[h]e did not consider the Prerogatives of the British Monarch as a proper

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315. MANSFIELD, *supra* note 16, at 130–49; PRAKASH, IMPERIAL *supra* note 1, at 65, 84–86, 108; Adler, *supra* note 1, at 380; Wilmerding, *supra* note 1, at 334.

316. See, e.g., PRAKASH, IMPERIAL *supra* note 1, at 31.

317. *The Essex Result*, in 1 THE FOUNDERS’ CONSTITUTION 112, 117 (Philip B. Kurland & Ralph Lerner eds., 1987).

318. See *id.*

319. *Id.*

guide in defining *the Executive powers*,” his concern was the function (here, “Executive” is used adjectivally, not nominally, as in ‘the Executive’s powers’); and his point was that in defining the powers necessary to execute the law (the function), one should not look to the traditional prerogatives of the office of the British King.<sup>320</sup> The only prerogative necessary to carry out the law was, said Wilson, the appointment of executive officers.<sup>321</sup> On this point—the meaning of executive power—Wilson’s principal opponent, Roger Sherman, was necessarily *agreed*, remarking that “the Executive magistracy [was] nothing more than an institution for carrying the will of the Legislature into effect.”<sup>322</sup> The two disagreed as to whether the executive should carry out the law according to his own, independent judgment; and whether, to this end, the office should be vested with prerogative powers. Madison’s suggestion that the delegates “fix the extent of the Executive authority” by identifying powers “in their nature Executive,” was, similarly, a suggestion that they use executive function as a guide to fixing the powers of a national executive office, including any prerogatives.<sup>323</sup>

Naturally there is room to contest too firm a distinction between uses of “prerogative” and “executive power,” even in the relatively narrow context of late eighteenth-century constitutional framing. But assume, for a moment, that the balance tilts in favor of drawing such a distinction and consider what follows. The Vesting Clause of Article II vests “the executive power” in a President serving for a term of four years.<sup>324</sup> What does this mean? Is it a substantive grant of power or merely a requirement that the office be held by a

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320. 1 FARRAND’S RECORDS, *supra* note 188, at 65 (emphasis added).

321. *Id.* at 66 (“The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.”).

322. *Id.* at 65.

323. *Id.* at 66–67.

324. U.S. CONST. art. II, § 1.



single person for a length of four years?<sup>325</sup> To a considerable degree, the perceived stakes of this debate are a result of conflating executive power with prerogative.<sup>326</sup> If “executive power” includes prerogative, and “prerogative” includes a discretion to act in the absence of law or even contrary to law, then the grant of executive power in the Vesting Clause is a mighty thing indeed. Its scope will almost certainly be settled by the President alone, and one struggles to imagine any President narrowing the power in the face of a crisis, or even threats of the kind almost constantly present.<sup>327</sup> As the scope of this power pushes outward, it gradually loses its resemblance to executive power (the power to carry out the law), and increases its resemblance to an absolute power whose only substantive limit is, as Locke required, promoting the public good.<sup>328</sup> The idea that such a thing

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325. PRAKASH, *IMPERIAL* *supra* note 1, at 63 (describing the debate). See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 48–50 (1994) and Prakash, *supra* note 17, at 713–20, for representative positions. The former argues that the Vesting Clause fixes the title of the national executive and makes it a singular office while the latter argues that the Vesting Clause is a substantive grant of power, including “executive power” in a strict sense and prerogative powers traditionally associated with executives.

326. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *id.* at 640–41 (Jackson, J., concurring) (“The Solicitor General seeks the power of seizure in three clauses of the Executive Article . . . Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: ‘In our view, this clause constitutes a grant of all the executive powers of which the Government is capable.’ If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.”); CORWIN, *supra* note 7, at 7–8; CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 12–13 (1948); Wilmerding, *supra* note 1, at 321–22.

327. As Justice Jackson memorably put this proposition, “emergency powers would tend to kindle emergencies.” *Youngstown*, 343 U.S. at 650 (Jackson, J., concurring).

328. LOCKE, *supra* note 2, at 375 (“Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands . . .”). See Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 *U. PA. J. CONST. L.* 569 (2010) for a more in-depth discussion on the tendency of this power to become absolute. Fisher argued that assertions of inherent power—power deriving from the executive office itself—“move a nation from one of limited powers to boundless

could be lurking in the Vesting Clause has seemed to many outrageous.

If the Vesting Clause merely vests the President with a power to carry out the law, however, less is at stake. The power vested by the clause is still significant. That the President possesses executive power in this “dictionary” sense does not imply, as Harvey Mansfield suggested, that he is merely “an errand boy.”<sup>329</sup> A grant of executive power conveys with it considerable discretion. The discretion is considerable, but not unbounded; it is bounded by its purpose, which is carrying out the law.

That a grant of power to carry out the law must convey with it a discretion of considerable scope becomes apparent when one considers what the task involves. Legal accounts of executive power describe some of its key elements: interpreting the law, issuing orders or administrative rules, and using force.<sup>330</sup> Each requires an exercise of discretion in the sense of choice.<sup>331</sup> Officers and executive attorneys must interpret laws open to a range of reasonable constructions; executive agencies are tasked with developing rules within broad statutory frameworks, whose details have been left open to allow agencies to determine how best to implement the legislative mandate, subject in recent decades to increasing supervision and review through the Executive

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and ill-defined authority.” *Id.* at 589.

329. MANSFIELD, *supra* note 16, at 2–3. Chief Justice Vinson similarly referred to the “messenger-boy” conception of presidential power. *Youngstown*, 343 U.S. at 708 (Vinson, C.J., dissenting).

330. *See Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”); CORWIN, *supra* note 7, at 141–61 (discussing executive interpretation, use of force); MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 159, 316, 318 (2d ed. 2013) (interpretation, execution, and non-prosecution).

331. *See Cary Coglianese & Christopher S. Yoo, Introduction: The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1591–1605 (2016); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 696–98 (2014).

Office of the President.<sup>332</sup> Presidents themselves engage in rulemaking using executive orders and guidance memoranda, and thereby “set national policy on a wide range of issues.”<sup>333</sup> Executive discretion arises, as well, from limits imposed by fixed resources and time, which require agencies to establish enforcement priorities.<sup>334</sup> Relatedly, sometimes law enforcement officers decide to “crack down” on an offense, directing additional resources to the enforcement of those laws.<sup>335</sup> The result of these kinds of policies is a partial non-enforcement of the law, the scope and content of which may settled by administrators balancing a range of

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332. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1044–45 (2013); Goldsmith & Manning, *supra* note 21, at 2295–97, 2307–08; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 224, 2248–50 (2001); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1857 (2015); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 39, 42–43, 57–59 (1993); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 968–69 (1997). Goldsmith and Manning's analysis of what they call the presidential “completion power” is most persuasive when described as a power to “prescribe *incidental* details *needed* to carry into execution a legislative scheme,” Goldsmith & Manning, *supra* note 20, at 2282 (emphasis added), a power they argue is implied by the grant of executive power in the Vesting Clause. *See id.* at 2304–05. Far less persuasive is their suggestion, building on Chief Justice Vinson's dissent in *Youngstown*, that the President has a residual constitutional power to carry into effect “a mass of legislation,” or a “legislative scheme” evidenced principally by appropriations acts. *Id.* at 2285. As Robert Reinstein has argued, and as the authors appear to acknowledge, the latter power shades into a prerogative to make law by proclamation or dispense with inconsistent congressional requirements in emergencies. *Id.* at 2309; Monaghan, *supra* note 332, at 40–41; Reinstein, *supra* note 5, at 311–13.

333. Metzger, *supra* note 332, at 1856.

334. *See Myers v. United States*, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting) (“Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or, because Congress, having created the office, declines to make the indispensable appropriation. Or, because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. . . . The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.”).

335. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 42–48 (2017).

factors.<sup>336</sup> For similar reasons, a President vested with the power to carry out the law enjoys a discretion to prohibit a prosecution from being initiated, or to direct the entry of a *nolle prosequi*, as do United States Attorneys.<sup>337</sup> The President might also forbid a prosecution because he judges it inequitable in the circumstances, or because it conflicts with other enforcement priorities.<sup>338</sup>

These forms of executive discretion are well-known to legal scholarship. My purpose here is not to intervene in this literature, but to observe a distinction, immanent in most accounts, between executive discretion and the Lockean prerogative. Executive discretion is suited to problems of application and administration of a complex system; it requires a capacity, for instance, to adapt a general rule (or set of rules) to particular circumstances, or to ensure that the law as carried out will be adequate for legislative purposes.<sup>339</sup> Lockean prerogative, in contrast, is triggered by

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336. See *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (“First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”); CORWIN, *supra* note 7, at 144 (stating a similar argument, with respect to the President).

337. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1967); *id.* at 196 (Wisdom, J., specially concurring); *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482 (1831), *reprinted in* H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 50, 52 (1999); Goldsmith & Manning, *supra* note 21, at 2293–94.

338. See, e.g., *The Jewels of the Princess of Orange*, *supra* note 331, at 52.

339. See, e.g., ADRIAN VERMEULE, *LAW’S ABROGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 53 (2016) for a discussion on the executive’s need to “fill in the details.” “The power to fill in the details is an indispensable element of what ‘executive’ power means; that to execute a law inevitably entails giving it additional specification, in the course of applying it to real problems and cases.” *Id.*; see also Goldsmith & Manning, *supra* note 20, at 2289, 2302–03, 2308; Price,

*sudden change*, and in particular those changes that threaten to destroy or seriously impair the state, where the costs of acting by law are thought to be too great to tolerate.<sup>340</sup> This conceptual distinction is evident in a range of institutional differences. In the former case, Congress can set the scope of discretion as it sees fit; it can leave law open or highly general, and allow the President or administration to develop policies within the law's scope that are fitted to the circumstances; or Congress can narrow the law, even overturning some executive policies *post hoc* using the Congressional Review Act.<sup>341</sup> Thus, it is unsurprising to discover that a conception of executive discretion as *delegated legislative power* was common in early America.<sup>342</sup> In contrast, a constitutional power to act in the absence of law or to violate the law during an emergency is, by definition, beyond the power of Congress to regulate. Perhaps, then, we should read Madison's anger over the "Pacificus" letters not as stemming from Hamilton's suggestion that the Vesting Clause conferred a substantive

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*supra* note 331, at 675. A related idea is that executive power includes a quasi-equitable authority to interpret and give effect to the law in a way that makes it just and equal to its purposes. This is sometimes described using Aristotle's notion of *epieikeia*. See, e.g., Delahunty & Yoo, *supra* note 1, at 843–45; cf. CROMARTIE, *supra* note 15, at 185 (describing a view of *epieikeia* as a form of equity "internal to the [legal] system"); R. H. HELMHOLZ, NATURAL LAW IN COURT 77 (2015) (describing an "internalist" use of natural law to "discover the meaning of existing laws"). Equity in this sense is not an authority to change the law, but a discretion to construct and implement it in a way that, admittedly, can have largely the same effect as changing it.

340. MANSFIELD, *supra* note 16, at 203 ("Locke's practical objection to the supremacy of the legislative power arises from the changeableness of things—a Machiavellian consideration—rather than from the generality of law that does not allow for the best case, as with Aristotle.").

341. 5 U.S.C. § 801 (2012). Congressional "levers of control" over "administrative policymaking" include "its ability to revise statutory mandates, reverse administrative decisions, cut agency budgets, block presidential nominees, or even conduct serious oversight hearings." Kagan, *supra* note 326, at 2256. Then-Professor Kagan acknowledged the conventional view that Congress rarely used these "levers," as well as a body of political science scholarship challenging it. See *id.* at 2256–60.

342. Scigliano, *supra* note 1, at 249.

power at all, but that it implied a power to abrogate a treaty because the President believed the peace and security of the United States to be in danger.<sup>343</sup> The discretion conferred by a grant of executive power did not extend to ignoring the law during an emergency, and to suggest it did could endanger the ability of the legislature to effectively regulate executive power.

The only prerogative framers thought necessary for the President to exercise executive power was appointment.<sup>344</sup> This suggests that we should the Article II Vesting Clause and the Appointments Clause together, as jointly conferring “executive power.” From this perspective, the executive power vested by the Constitution in the President is best described as a power of his administration to carry out the law. We can discern something, as well, about the President’s relationship to this administration from the contrast Americans drew between prerogative and executive power. The clearest cases of powers the President must exercise personally, like the pardon and the veto, are prerogatives conveyed by enumerated grants of power.<sup>345</sup> The Vesting Clause, however, is a general grant of power, which is consistent with a view that the President’s primary role in carrying out the law is supervisory, rather than personal. The examples of early presidents directing or forbidding prosecutions, adduced by proponents of a ‘unitary theory’ of executive power, do nothing to evidence an understanding that the President could personally execute the law, by standing in place of a ‘line officer’ or prosecutor over a significant period of time, in contrast to making periodic

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343. See MADISON, *supra* note 220, at 67 (“The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. . . . A treaty is not an execution of laws: it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the *executive magistrate*.”).

344. 1 FARRAND’S RECORDS, *supra* note 188, at 66.

345. See Relation of the President to the Executive Departments, 7 Op. Att’y Gen. 453 (1855), in POWELL *supra* note 337, at 131, 138; CORWIN, *supra* note 7, at 94–96; Mashaw, *supra* note 345, at 695–96.

interventions.<sup>346</sup> To be sure, supervision may include explicit instruction, as in the case of cabinet Secretaries exercising powers conferred on the President by law, or officers discharging statutory duties to take direction from the President.<sup>347</sup> In other cases, however, the offices to which individuals are appointed themselves convey an organic discretion, shaped by professional norms, the culture of the agency and what Bruce Wyman called its “internal law,” which makes the discharge of that office something more than an exercise of mere political discretion.<sup>348</sup> Constitutionally inferior officers are perhaps most likely to enjoy this kind of professional discretion, but Congress may

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346. Compare STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 49, 60–61 (2008), with Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 327–29, 345 (2016), Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 585–90, 637 (1989), and Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286–90 (1989). PRAKASH, *IMPERIAL* *supra* note 1, at 29 describes an occasion “when all the secretaries were away from the capital, [and] all departmental matters were transmitted to the president for his decision,” but this shows only the President issuing orders, which no one would doubt his authority to do, not standing in for (say) line prosecutors. Even exercising military power, although President Washington (himself a former general) “marched with the militia,” he did not command them during the encounter with the Whiskey rebels, but, as Prakash puts it, “execut[ed] the tax laws from afar.” *Id.* at 99. On this use, however, “executing the tax laws” is functionally indistinguishable from directing that they be executed by someone else.

347. See *Marbury v. Madison*, 5 U.S. 137, 165 (1803); Jerry Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic*, 45 WILLAMETTE L. REV. 659, 665, 667, 668–69, 675 (2008).

348. BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 4, 16 (1904); see also Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1368–73 (2010); cf. *The President and the Accounting Officers*, *supra* note 331, at 29, 30 (arguing that the Constitution assumes the President will not personally exercise certain line offices); Mashaw, *supra* note 345, at 681–87 (describing a series of Wirt opinions on this issue). A related case, which Krent and Shane have described, is the legislative vesting of executive power in officers over whom the chief executive has no control whatsoever. See Krent, *supra* note 346; Shane, *supra* note 346, at 345–47.

explicitly provide it by statute for principal officers as well.<sup>349</sup> Though they may be “executive,” the nature of these offices seems to require that the President’s authority be supervisory in a looser sense, so that explicit instruction is generally disfavored or even prohibited by procedural rules—and, in cases where the President himself has an interest, politically explosive.<sup>350</sup>

B. *Regulating and Interpreting Prerogative Powers: The Example of the Take Care Clause*

The power of the legislature to regulate prerogative was emphasized by many American writers during the imperial crisis. The prerogative they invoked was “prerogative under law,” or “legal prerogative,” rather than “high prerogative” or

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349. See Mashaw, *supra* note 345, at 677–78, 683, 695 (“No President [in the first seventy-five years under the Constitution] seems to have claimed that the President has authority to exercise personally the statutory jurisdiction of an officer empowered by Congress to make a particular decision or take a particular action.”); Metzger, *supra* note 332, at 1881, 1883 (describing a principle of “hierarchical superintendence,” under which the President supervises primarily principal officers, but there is not “broad presidential control” of inferior officers).

350. An example of procedural guidelines regulating the investigation of federal crime, a purely executive function, are the Attorney General’s Guidelines for the FBI. See John T. Elliff, *Attorney General’s Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 786, 793–94 (1984) (describing the adoption of the “Levi Guidelines”). These guidelines do not expressly bar presidential involvement with prosecutions, but as one commentator recently noted, they form part of a web of formal and informal norms insulating the work of the Department of Justice from political interference. Benjamin Wittes, *Trump and the Powers of the American Presidency (Part I)*, LAWFARE BLOG (May 25, 2016, 3:44 PM), <https://www.lawfareblog.com/trump-and-powers-american-presidency-part-i> (“The Justice Department has some institutional defenses against [presidential, politically motivated interference] . . . They mostly do not reside in statute or in the sort of complex oversight structures [characteristic of intelligence gathering]. They reside in the Levi Guidelines, in certain normative rules about contacts between the Justice Department and the White House, in norms that have developed over the years in the FBI. And they reside in the hearts of a lot of replaceable people.”). The paradigm of a politically explosive presidential interference with a purely executive function is, of course, the Saturday Night Massacre during Watergate. See Strauss, *supra* note 332, at 972–74, 984.



“absolute power.”<sup>351</sup> This idea was essential to self-government, whether under royal charter or constitution, since prerogative powers could be employed to deprive persons of liberty and property.<sup>352</sup> An absolute (irregulable) prerogative would make it impossible for a person to use his property and freedom as he might hope and reasonably expect to do—it would make him, in the language of the framing generation, a “slave,” someone subject to the arbitrary will of another.<sup>353</sup> This suggests that we should presume prerogative powers are defeasible; nothing about how Americans used “prerogative” implies that, as Abraham Sofaer suggested, “the executive could take any action falling within the prerogative on its own responsibility, without consulting [the legislature] in advance.”<sup>354</sup> Vesting a power in an independent department surely implies that the department may decide for itself when to exercise the power.<sup>355</sup> Nevertheless, we should presume that the scope of the power and procedures for exercising it may be settled by legislative regulation, and subject to *post hoc* investigation or even adjudication. This the Constitution expressly recognizes in the Sweeping Clause and impeachment provisions of Article I.<sup>356</sup>

The texts reviewed above also suggest important limits to the regulability of prerogative, in addition to a requirement of reasonableness that courts have attached to Congress’s implied powers. If prerogative powers were added

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351. WORMUTH, *supra* note 18, at 69–71, 74–77 (discussing a royalist theory of high prerogative and “reason of state” that entailed the King should be free of the law); OAKLEY, *supra* note 18, at 323–24, 326–27, 343 (describing the evolution of a distinction between “absolute” and “ordinary” powers of the King).

352. See *supra* Section I.A.

353. See ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804* 115–19 (2016).

354. SOFAER, *supra* note 10, at 14.

355. See Matthew Steilen, *Collaborative Departmentalism*, 61 *BUFF. L. REV.* 345, 359 (2013).

356. U.S. CONST. art. I, § 8, cl. 18; *id.* art. II, § 4.

to the executive department to ensure its independence from the legislature, with the goal of making government “vigorous” and securing liberty, then the legislature’s regulation of these prerogatives should not compromise this independence. The degree to which regulation compromises the independence of the President may differ depending on the prerogative power in question. For example, the veto was thought to be the primary device by which the President could resist congressional encroachment on his office. Any legislative limitations of the veto would impair this purpose and be presumptively impermissible. Pardons, too, might be used defensively against federal investigation or prosecutions that undermined the President’s constitutional authority; a regulation of the pardon that, say, prohibited its corrupt use or prevented it from impairing private rights would need to be construed in ways that preserved its defensive use.<sup>357</sup> In contrast, the President’s power to initiate armed conflict is of less use in defending the executive power against congressional interference, and therefore regulations of that power would be generally permissible, the chief exception being an interference with command. It follows, then, that some of the presidential prerogatives are regulable to a greater degree than others. If we were to describe a scale of defeasibility, the veto might occupy one end and the Commander-in-Chief clause the other.

This principle can also be applied with some benefit to the rather enigmatic Take Care Clause, whose text requires that the President “take care that the laws be faithfully executed,” and to which the Supreme Court has pinned a medley of constitutional doctrines.<sup>358</sup> Some of these doctrines

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357. On such limits to the British King’s prerogative to pardon, see, e.g., JUDSON, *supra* note 18, at 36, 38. This approach would permit legislative regulation of the presidential pardon, in contrast to the view taken by the Supreme Court in *Ex Parte Garland*, 71 U.S. 333, 380 (1866) and *Schick v. Reed*, 419 U.S. 256, 262–63 (1974).

358. See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836–37 (2016).

are manifestly in tension with one another: for example, the clause is said to prohibit a presidential prerogative to “suspend” the law or grant “dispensations,” as English Kings once asserted an authority to do, but also to grant the President a discretion not to prosecute or enforce the law.<sup>359</sup> This state of affairs leads the authors of a recent article to plead for a careful judicial construction of the clause, although, as we have seen, contrariety or polarity was typical of eighteenth-century arguments about prerogative, and its presence in the doctrine may evidence the continuing influence of such arguments on the Court’s construction of the clause.<sup>360</sup> Particularly relevant to the discussion here are what might be called ‘internal’ and ‘external’ dimensions of the Take Care Clause. Internally, the clause has been used to describe the President’s relationship to the administration, and, in particular, his power to remove executive officers for failing to faithfully execute the law.<sup>361</sup> This is the Take Care Clause as the missing ‘Removal Clause.’ Externally, the clause has been cited as the basis of a “protective power” in the President to safeguard the property of the United States and its officers, even absent law authorizing such action.<sup>362</sup> In this respect, the Take Care Clause empowers the President to protect the “peace of the nation” by shielding its government and instrumentalities from attack.<sup>363</sup>

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359. *Id.* at 1838, 1863.

360. *See supra* Part I.

361. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 503–04 (2010); *Myers v. United States*, 272 U.S. 52, 117 (1926); Metzger, *supra* note 332, at 1875–79.

362. *In re Neagle*, 135 U.S. 1, 63–68 (1890); Monaghan, *supra* note 332, at 61–70. This is much like what *The Essex Result* described as the “internal executive power” to act “in defence of the state.” *See The Essex Result*, *supra* note 317, at 117.

363. *In re Debs*, 158 U.S. 564, 582 (1895); *Ex Parte Siebold*, 100 U.S. 371, 395 (1879) (stating that government has the power to “command obedience to its laws, and hence the power to keep the peace to that extent.”); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 691 (1952) (Vinson, J. dissenting) (“As we understand the doctrine of the *Neagle* case, and the cases therein cited, it is

Both dimensions describe familiar royal prerogatives. It is thus consistent with the Supreme Court's jurisprudence to treat the Take Care Clause as primarily a grant of prerogative power.<sup>364</sup> (Unlike the Court, however, I would distinguish Take Care from the Article II Vesting Clause, which I read as a grant of executive power, not prerogative.) A presumption that presidential prerogatives are intended to ensure the independence of the office, vigorous government and a concomitant security of liberty and property can be fashioned not only as a limit on the regulatory power of Congress, but also as an interpretive canon for use by courts. We might put this canon as follows: "Interpret presidential prerogatives so as not to defeat the purpose of vesting them in the executive: to strengthen government and thereby protect liberty and property." Applied to the 'internal' dimension of the Take Care Clause, the canon provides support for the judicial rule that the President enjoys an absolute removal power over officers central to the execution of federal law.<sup>365</sup>

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clearly this: The Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government.") (emphasis in original) (quoting Brief of Solicitor General John W. Davis); Publius, *supra* note 310, at 396 ("[A] vigorous executive is . . . not less essential . . . to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.").

364. See 1 BLACKSTONE, *supra* note 5, at 171 (describing the King as "conservator of the peace of the kingdom"); 1 *id.* at 175 ("erecting and disposing of offices"); see also 4 BACON, *supra* note 55, at 174 (noting the King's prerogative in creating offices).

365. See *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988) ("[W]e simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."). It is consistent, as well, with the (old) rule that officers exercising quasi-legislative power may enjoy good-cause tenure, at least on the assumption that they are not tasked with executing government. This was the principle of *Wiener*, at least prior to *Morrison*. *Wiener v. United States*, 357 U.S. 349, 355–56 (1958) ("The claims were to be adjudicated according to law, . . . by a body that was entirely free from the control or coercive influence, direct or indirect, of either the Executive or the Congress.") (internal citation and quotations omitted). The principle admittedly

Applied to the ‘external’ dimension of the clause, the canon also makes sense of a presidential “protective power” in cases where the instruments of civil government are under attack. The President’s take-care duty is to safeguard the personnel and property of government itself, preserving the peace of the United States and the concomitant security of private liberty and property that follows from government.<sup>366</sup> Note the distinction with the Lockean prerogative power; the presidential “protective power” is not a general power to act in the absence of statutory law or against law during an emergency, but merely a power to protect civil government during such an emergency, guaranteeing peace by vindicating government under law.<sup>367</sup> So constructed, the Take Care Clause gives the President a key role in securing the benefits of government. Insofar as the preservation of peace by government is at its center, the presidential office lies not in the intellectual tradition of Machiavelli or the Lockean “supream executive,” armed with a discretion to act against law, but that of Erasmus, who urged that “the Prince’s first and most important objective is to strive his utmost to preclude any future need for the science of war,” and to secure liberty and property by means of ordinary justice and police.<sup>368</sup>

Considering the ‘internal’ and ‘external’ dimensions together, the picture that emerges is of a clause that describes the President’s special relationship to government itself. The Take Care Clause captures the chief sense in

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does little to explain why such protections should also extend to officers with quasi-judicial powers, whose ‘independence’ is clearly accounted for by a policy that it is desirable to insulate their decisions from the effects of partisanship.

366. See *In re Neagle*, 135 U.S. at 65–66; Monaghan, *supra* note 332, at 61.

367. Monaghan, *supra* note 332, at 70. Mortenson’s “republican prerogative,” though framed more broadly, amounts largely to a protective power of government. See Mortenson, *supra* note 1, at 75–76.

368. JOHN GITTINGS, *THE GLORIOUS ART OF PEACE: FROM THE ILLIAD TO IRAQ* 105 (2012). See Bruff, *supra* note 1, at 13 and MANSFIELD, *supra* note 16, at 247–78, for a discussion on Lockean and Machiavellian approaches to the American presidency.

which the President is the *head* of government. One eighteenth-century usage of “take care” signaled the patriarch’s superintendence of a complex household, in which the father did not exercise the functions of household members himself, but was entrusted with ensuring that everyone played his or her part, thereby securing the welfare of them all.<sup>369</sup> This superintendence required supervision, removal of those who did not play their role or who understood that role on terms fundamentally inconsistent with the patriarch, an occasional direct intervention, and the defense of the household itself against threats. This prerogative, captured best by the idea of ‘ensuring peace by government,’ is perhaps the core value of the Take Care Clause.

### C. *The Constitutional Structure of Emergency Power*

In an important article, political scientist Robert Scigliano traced the influence of Locke on constructions of American executive power to the publication of Edward Corwin’s monograph, *The President: Office and Powers*.<sup>370</sup> Scigliano asserted that Corwin was the first modern scholar to advance the hypothesis that executive power included a Lockean prerogative, and that one could observe in the political science literature on the presidency after 1941 a dramatic rise in discussions of Locke. Although he did not offer an explanation as to why Lockean prerogative suddenly found such a large audience, a plausible hypothesis is surely

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369. A classic example of this usage occurs in a letter from leading Virginia planter William Byrd II to Charles, earl of Orrery. Describing his plantation, Byrd writes, “I have a large Family of my own, and my Doors are open to Every Body, yet I have no Bills to pay . . . Like one of the Patriarchs, I have my Flocks and my Herds, my Bond-men and Bond-women, and every Soart of Trade amongst my own Servants, so that I live in a kind of Independence on every one but Providence. However . . . I must *take care* to keep all my people to their Duty, to set all the Springs in motion and to make every one draw his equal Share to carry the Machine forward.” Letter from William Byrd II to Charles, Earl of Orrery (July 5, 1726), in 32 VA. MAG. HIST. & BIO. 26, 27 (1924).

370. Scigliano, *supra* note 1, at 237.

that it answered a need for security that the time impressed on all who were living through it. Locke “constitutionalized” executive power, placing it for the most part under the rule of the legislature, but allowing also for an emergency prerogative in cases where the state was threatened with extinction.<sup>371</sup> As another commentator observed of the post-war period, the United States’ “new role as the world’s dominant superpower fed an obsession with crisis,” involving us in an unending series of armed conflicts around the world in which national security was thought to be at stake.<sup>372</sup> Having normalized a state of emergency, the Constitution’s grant of executive powers became a natural repository for emergency power.<sup>373</sup>

Another political scientist writing around the same time, Lucius Wilmerding, described a very different view of emergency power.<sup>374</sup> The root of the idea was a concept of high office he attributed to the framers. As Wilmerding explained it, the framers “thought it incumbent on those who accept great charges to risk themselves on great occasions, when the safety of the nation or some of its very high interests were at stake.”<sup>375</sup> Yet, he continued, “they never confounded acts which the law says may be lawfully done in a case of necessity with acts done in violation of the law for the public good.”<sup>376</sup> The latter were *illegal*. If, however, an

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371. See MANSFIELD, *supra* note 16, at 203–04, 258.

372. Lobel, *supra* note 1, at 1400–04.

373. *Id.* at 1404–05; see also STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 77–88, 109–114 (2015) (arguing that the Cold War brought about a change in the construction of war power and presidential authority to initiate conflict). Lobel saw the leading academic expression of this view as Clinton Rossiter’s book *Constitutional Dictatorship*, which was published several years after the first edition of Corwin’s monograph. ROSSITER, *supra* note 326, at 12–13. In contrast to the argument that I have developed here, Lobel describes Locke’s theory of prerogative as representative of the views of early Americans. Lobel, *supra* note 1, at 1392.

374. Wilmerding, *supra* note 1, at 322–24.

375. *Id.* at 322 (“high office” is my term).

376. *Id.* at 322–23.

officer immediately informed Congress of his action, a “full investigation” was performed, and Congress agreed that there had been an “urgent necessity as he professes,” then it was “the duty of the Congress to sanction his illegal act—if damages have been recovered against him, to indemnify him for those damages.”<sup>377</sup>

Our study of “prerogative” provides some support for Wilmerding’s characterization of early American views, and thus for the historiographical thesis that American conceptions of emergency power have changed markedly over time. As I have argued, that Americans distinguished “executive power” from “prerogative” suggests that they did not constitutionalize the Lockean prerogative. Nor did early Americans generally use “prerogative” when describing governmental power to respond to emergencies.<sup>378</sup> Above we saw the example of Virginia Governor Patrick Henry, who sought assistance from the state’s General Assembly in dealing with a request that he remove loyalists from a certain county, reminding the assemblymen that, as “the executive power” was “not competent to such a purpose, I must beg leave to submit the whole matter to the general Assembly, who are the only Judges how far the methods of proceeding directed by Law, are to be dispensed with on this occasion.”<sup>379</sup> When, at another time, Henry went ahead and removed such individuals merely on the advice of his privy council, the legislature indemnified him.<sup>380</sup> These examples can be readily multiplied.<sup>381</sup>

What relevance does the early American approach to

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377. *Id.* at 324.

378. *See supra* Section I.B.

379. Letter from Governor Patrick Henry to the Speaker of the House of Delegates, Benjamin Harrison (May 27, 1778), in 1 OFFICIAL LETTERS OF THE GOVERNORS OF THE STATE OF VIRGINIA 282, 282–83 (H. R. McIlwaine ed., 1926).

380. Bill Indemnifying the Executive for Removing and Confining Suspected Persons, in JEFFERSON PAPERS, *supra* note 120, at 119.

381. *See* MACMILLAN, *supra* note 187, at 83; PRAKASH, IMPERIAL *supra* note 1, at 94; Wilmerding, *supra* note 1, at 323–29.



emergency power have for us today? What relevance can it have, given the present dangers of terrorism, global instability and anti-liberalism? At the very least, we can take two things from the early American approach to emergency power. First, their approach suggests a presumption of institutional “joint action” in emergencies, involving the President and Congress, rather than a regime of executive unilateralism.<sup>382</sup> While our procedures and institutions have changed, the modern statutory framework continues to reflect this institutional presumption, as well as the political values that lie behind it. Second, the early American approach to emergency power also suggests an active role for courts of law, namely, safeguarding a regime of “joint action” in emergencies.

First, the presumption of “joint action.” We should begin by acknowledging that the early American regime Wilmerding describes of illegal action followed by legislative indemnity has largely been displaced. Judicial doctrines of official immunity protect officers from tort liability in many cases, and there is no longer a significant practice of congressional indemnification.<sup>383</sup> Assuming, as I think we should, that these developments are unlikely to be reversed, older practices remain important for what they can reveal of how Americans went about preserving important political values in times of crisis. The legislature’s establishment of an administration and *ex ante* regulation of executive powers helped to ensure the continuance of civil government under law when an emergency unfolded. Consultation,

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382. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 161, 162 (Mark Tushnet ed., 2005).

383. See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 51–61 (2018); Pfander & Hunt, *supra* note 262, at 1868. As Baude observes, police officers today *are* generally indemnified against liability arising out of their work; my point is that indemnification does not take the form of a special act passed by the legislature in response to a petition, as it did in the eighteenth and nineteenth centuries.

investigation and adjudication before and afterwards made executive officers responsible to the people's representatives for their exercise of governmental power. An officer seeking indemnity was, in the words of one early representative, "throw[ing] himself upon the justice of his country," much as he might before a jury in a parallel action for wrongful arrest.<sup>384</sup>

These political values—government under law and responsible government—are reflected today in a series of framework statutes that continue to marry executive discretion with various forms of legislative supervision, regulation and control. The War Powers Resolution, the National Emergencies Act and the International Emergency Economic Powers Act together define "national emergency" and require the President to exercise his constitutional powers by following a set of procedures.<sup>385</sup> The statutes are afforded by doctrinal limits on the use of executive orders, which reflect a view that the President is under law even in conditions of emergency.<sup>386</sup> The War Powers Resolution requires, further, that the President inform Congress when practicable before introducing the armed forces into hostilities, and it obligates him to continue reporting to

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384. Wilmerding, *supra* note 1, at 326 (quoting 16 ANNALS OF CONG. 516 (1807)) (statement of Representative Barnabas Bidwell).

385. See War Powers Resolution, 50 U.S.C. § 1541(c) (2012), for the definition of national emergency triggering the President's Commander-in-Chief powers. "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised only pursuant to . . . (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." *Id.*; see also National Emergencies Act, 50 U.S.C. § 1621(a) (2012) (authorizing the President to declare national emergencies as defined under "Acts of Congress authorizing the exercise . . . of any special or extraordinary power"); International Emergency Economic Powers Act, 50 U.S.C. § 1701(a) (2012) (limiting presidential emergency authority to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States").

386. See McConnell, *supra* note 5, at 48 (stating that the President may not, by executive order or proclamation, change the law or affect legal rights); Price, *supra* note 331, at 689–95.

Congress for the duration of conflict.<sup>387</sup> Despite the perennial controversy that surrounds these acts (and in particular the War Powers Resolution), the framework they establish continues the early American preference for institutional “joint action” in emergencies.<sup>388</sup> Congress also uses its powers of investigation to subpoena government officers to testify about threats, attacks and governmental responses.<sup>389</sup> This contributes to a process of “disclosure” and “public judgment” of executive conduct.<sup>390</sup>

Historically Congress has also used its power to retroactively ratify illegal executive conduct.<sup>391</sup> Although it is perhaps more controversial, we should presume that Congress may also ratify presidential violations of the War Powers Resolution and other statutes regulating emergency responses. The lesson of the Cold War is that national security risks can generate irresistible pressures to discover the Lockean prerogative lurking within ordinary executive power.<sup>392</sup> In contrast, a practice of legislative ratification enables *Congress* to exercise discretion in responding to

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387. See 50 U.S.C. § 1543(a), (c) (2012).

388. The greatest constitutional objection is to a provision in the War Powers Resolution that requires the President to withdraw armed forces from hostilities outside the United States “if the Congress so directs by concurrent resolution.” 50 U.S.C. § 1544(c) (2012). This use of a concurrent resolution is a legislative veto of the type held unconstitutional by the Supreme Court in *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919, 921 (1983).

389. For a recent account of the procedures employed in congressional investigations and the constitutional limitations on congressional power, see Andrew McCanse Wright, *Congressional Due Process*, 85 *MISS. L.J.* 401, 423–56 (2016). Congressional investigations may, of course, serve partisan purposes, like any exercise of congressional power. See, e.g., Press Release, U.S. House of Representatives Permanent Select Committee on Intelligence, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures (Jan. 25, 2017), <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=758>.

390. See Mortenson, *supra* note 1, at 80–81.

391. The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863).

392. These forces have already operated to narrow key provisions in framework statutes so as to enhance the President’s discretion in handling emergencies. See Lobel, *supra* note 1, at 1405.

emergencies. Ratification preserves a role for Congress after the fact, lessening the need for excessive *ex ante* delegations or a doctrine of executive unilateralism. The price, of course, is publicly acknowledging illegal conduct by the United States President. Whether one is willing to pay the price will depend on the value one places on firm limits on executive power.<sup>393</sup>

The second lesson we can take from early American approaches to emergency power is that it supports a role for courts of law. Once we divorce executive power from the Lockean prerogative, it becomes easier to describe a reasonable use of judicial power in marking its limits.<sup>394</sup> In part, this role consists of adjudicating civil damages claims against executive officers, although, as I mentioned, this is now tempered by official immunity doctrines. There is also the possibility of prospective injunctive relief, although there is concern about the nationwide scope of injunctions and we may see this form of relief trimmed as well.<sup>395</sup> Yet courts can also play a role in enforcing a constitutional regime of “joint action.” As a number of commentators have observed, this

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393. A second cost to this approach is acknowledging congressional power to act in ways other than by passing general, forward-looking rules. Julian Mortensen describes this as “turning our backs on the rule of law.” Mortenson, *supra* note 1, at 64. However, an extraconstitutional executive power to violate the law in cases of a sudden threat to the state, such as Mortenson defends, is also premised on limits to the rule of law. The key difference is apparently its narrower scope. The moral argument Mortenson advances for this power is, in all likelihood, much like the reasoning legislators would employ. *See id.* at 73–83. As I see it, the important question is whether we commit to the legislature a power to examine the executive’s moral reasoning post hoc. The long tradition of investigation, indemnification, and ratification in American legislative assemblies reflects the usefulness of these practices in checking executive unilateralism.

394. *See* Lobel, *supra* note 1, at 1412 (arguing that the need for a flexible emergency power in the executive, combined with legal realism, left courts unwilling to draw lines between regimes of ordinary and extraordinary law).

395. *See Ex Parte Young*, 209 U.S. 123, 148–50 (1908); Katie Benner, *A DACA Question: Should Judges Use Local Cases to Halt National Orders?*, N.Y. TIMES (Jan. 14, 2018), <https://www.nytimes.com/2018/01/14/us/politics/federal-injunctions-judicial-power.html>.

does not require that courts decide whether the executive has violated constitutionally protected rights, but that they determine in the course of adjudicating a case or controversy whether Congress has authorized the executive's conduct, thus guarding the vision of an "institutional process" involving both branches.<sup>396</sup> The role is what one should expect, if one assumes presidential prerogatives are generally regulable. In exercising its own war powers and in regulating the President's commander-in-chief powers, Congress has established by law regular procedures for the exercise of these powers, and these are precisely the sort of limits that courts of law are institutionally equipped to enforce, in contrast to measuring an exercise of Lockean prerogative against the President's assertion that it ultimately served the public good.

This brings us to the *Steel Seizure Case*. Fortunately, there is no need to add a lengthy discussion to the many excellent treatments of the case already in existence. My point is a relatively narrow one: that the early American political values and modern institutional roles just described are also at work in Justice Jackson's famous concurrence.<sup>397</sup> Jackson's premise, recall, is that the Constitution must "integrate the dispersed powers" of the Congress and the President "into a workable government." Governing requires that the branches be 'interdependent' and they exercise 'reciprocal' powers, that is, that they act on one another. In one sense, however, the branches are not perfectly coordinate, since, as Jackson frames it, the President's power "fluctuates" *depending on what Congress has already done*. The formulation gives Congress what one former executive-branch attorney has described as "legal priority."<sup>398</sup> By creating an administrative structure and specifying the

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396. See Issacharoff & Pildes, *supra* note 382, at 167–68.

397. *Id.* at 179–80.

398. H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER-IN-CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 102 (2014).

procedures through which the President can exercise his powers, Congress ensures that presidential action is under law—a concept Jackson described as “free government.”<sup>399</sup> The courts then ensure the President is made responsible for his action. From this perspective, the significance of Jackson’s three categories is that they are described in the language of standards of judicial review, ranging from deferential to strict. The framework thereby establishes judicially workable standards for examining the exercise of powers whose scope is necessarily in flux. The effect is very different from a regime based on Lockean executive power, which also fluctuates, but whose contours are unilaterally determined, incapable of being regulated by law, judicially indeterminable, and thus made responsible to the people only through election.

#### CONCLUSION

In discussing the American patriots’ appeals to royal prerogative during the imperial crisis, John Phillip Reid remarked that “[t]he Twentieth Century may no longer understand what was going on in the 1770s.”<sup>400</sup> The comment was off-hand, but we should take seriously the prospect it suggests: some ways in which the world appeared to the elites who led the Revolution, and some ways in which they aimed to take hold of that world by their arguments, may be beyond our ability now to grasp. (Call this, if you want, ‘skepticism about historical knowledge.’) In thinking through this possibility, it seems right to assume that our own experiences have some effect on what we can hope to understand about the past, just as they do the present lives of others. So even if Reid was right, and the Twentieth Century did not understand what was going on in the 1770s, the Twenty-First Century may now understand it quite well. Too well. The dangers of the present moment may help us

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399. *Id.* at 103–04.

400. REID, *supra* note 34, at 154.

understand the framers' perspective in a way that even the 1930s, the 1950s and 2001 did not.

In the story as I have told it, appeals to prerogative were often appeals to the benefits of government. The benefits of government were security of liberty and protection of property. The framers valued liberty and property and so they wanted vigorous self-government. Today's dinner-table talk of civil dissolution, breakup of the United States, revision or rejection of the Constitution, all help to make real the framers' way of viewing the world. Peeling away civil government, considering what would occur if this country's government were to be unable to execute the law, puts flesh and blood on the framing perspective. Everything one values—the security of loved ones, one's home and the things in it, the expectations, hopes and plans that can arise in conditions of security and peace—all these things are put at risk by the lapse of civil government. During the Revolution, men and women on either side risked losing their home to confiscation, being forcibly relocated, being harassed or jailed for their associations and expressions of allegiance, not hearing from or seeing loved ones for months on end and suffering from the poverty that follows severe disruption. The framers described an ever-present prospect of arbitrary deprivation of liberty or property as “slavery.” They knew this condition because they held slaves. To be free, to not be a slave, required civil government by traditional forms. Since government was founded on prerogative, since the exercise of its power was an exercise of prerogative, prerogative was necessary to the liberty and property that made people free.

Most of the time, when Americans were appealing to “prerogative,” this was what they were appealing to. Prerogative was “constitutional” in the sense that it figured in Americans' understanding of the ordinary political order and the security and protection this order entailed. It is understandable, then, that although the elites who led the Revolution and framed our constitutions had read Locke and found use for him elsewhere, they rarely found it appealing

to use “prerogative” as he had used it, to signal an executive discretion to act in the absence of law or against law. The disruption of the 1780s did not alter this perspective but reinforced it; prerogative powers would be necessary for a vigorous national government, just as they had been for imperial government, and the question was how many of these powers should be vested in an executive department to guarantee security of liberty and protection of property, without creating the appearance of a monarchy.

These patterns of arguing and thinking remain relevant today, as we consider the benefits of civil government under our Constitution, and how to handle emergencies so as not by our own conduct to approximate the dissolution of government, but, rather, to secure its vital instruments against attack.