



PLACE IN RETURN BOX to remove this checkout from your record.
TO AVOID FINES return on or before date due.
MAY BE RECALLED with earlier due date if requested.

DATE DUE	DATE DUE	DATE DUE
JAN 09 2006	01 08 03 OCT 27 2003	
01 01 2009		
102509		

**THE PLACE OF EXECUTIVE POWER IN THE AMERICAN CONSTITUTIONAL
REPUBLIC**

By

Benjamin A. Kleinerman

A DISSERTATION

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

Political Science

2004

THE PL

Though q

remarkabl

Much of t

Woodrow

constitutio

contributi

Federalist

presidentia

attempts to

should run

however, n

republic. I

drastically

governmen

wants to ex

considering

Locke, the c

constitution

he offers us

ABSTRACT

THE PLACE OF EXECUTIVE POWER IN THE AMERICAN CONSTITUTIONAL REPUBLIC

By

Benjamin A. Kleinerman

Though quite diverse in other respects, the extant scholarship on the presidency is remarkably unified in its understanding of the *constitutional* place of executive power. Much of this unity regarding the weakness of the constitutional executive can be traced to Woodrow Wilson's attempt to free the president from what he perceived as his constitutional prison, thus allowing for presidential leadership. This dissertation offers a contribution to presidency scholarship by showing that Hamilton's arguments in *The Federalist* and, later, as *Pacificus* make room for surprisingly strong, but constitutional, presidential leadership within the new republic. In these same papers, Hamilton also attempts to "constitutionalize" ambition—showing to the potential Caesars why they should run for president. Contrary to some scholars, I then argue that the founders were, however, not unified in their understanding of the place of executive power in the new republic. Instead, two of our principle intellectual founders, Madison and Hamilton, have drastically different understandings of the role of the executive in a constitutional government; Hamilton wants to accommodate a powerful executive, while Madison wants to exclude him entirely from the republic. This disagreement is not surprising considering the problematic role the executive plays in Locke's constitutional scheme. In Locke, the executive is both absolutely necessary and fatally dangerous to any constitutional government. Finally, the words and deeds of Lincoln are explored because he offers us an interesting combination of Madison's "Whiggishness" and Hamilton's

dis

Lin

hea

rep

it ne

discretionary executive power. Though impressive, I find, however, that the example of Lincoln, precisely in its “superhuman” restraint, is too high to use as an example for a healthy executive power. I conclude that only Hamilton’s executive provides the republic with the strong and discretionary—though somehow constitutional—leadership it needs to achieve the peace and prosperity it promises to its people.

To My Wife

Ther

my s

weal

nothi

youn

huma

State

Nietz.

being

As a g

have t

of us r

approe

from t

itself.

Zinna

would

encou.

Kautz

politic

made

I must

ACKNOWLEDGEMENTS

There is little I can say to acknowledge assistance in this project that would do justice to my sense of gratitude. That being said, an author must struggle with those words his weak eloquence can muster. First, I must thank David Leibowitz. Though he had nothing to do with this dissertation, his persistent and unmatched teaching transformed a young, pretentious graduate student who thought he knew much into a more mature human being who better understood how much he did not yet know. I came to Michigan State to study Nietzsche with the great Werner Dannhauser. Though I did not write on Nietzsche, I did learn from Professor Dannhauser, as much about how to be a human being as how to be a scholar: no man better embodies the fullness of humanity than he. As a graduate student, I have had the rare opportunity of encountering two peers who have taught me as much as any teachers, B.J. Dobski and Teddy Haduong. Though none of us may be philosophers (unless Socrates loves football), their friendship has approached philosophy in its benefit upon me. My graduate education profited greatly from the artful teaching of Arthur Melzer and Jerry Weinberger. As for the dissertation itself, I must thank my committee Douglas Hoekstra, David Rohde, Arthur Melzer, Dick Zinman, and Bill Allen for being patient with its flaws and drawing out its strengths. I would especially like to thank Dick Zinman for reading earlier versions of it and encouraging me to excise some of its early failures. And, I must thank my advisor, Steve Kautz. He arrived fortuitously at Michigan State just as I began my turn to American political thought. His steady guidance and patient criticism throughout this project have made what is best in it possible; what is worst in it remains mine. Finally, but not lastly, I must thank my wife, Kim. Her tender patience and unwavering support allowed me to

do what ne

our daughte

soul a warm

|

do what nearly everyone thought impossible: finish a dissertation in the first year after our daughter, Madeleine, was born. But more than this, I must thank her for giving to my soul a warm quietude that radiates most when she is near.

INT
THE

CHA
HAM

CHA
HAM
ACCO

CHA
LOCK
REPR

CHA

TABLE OF CONTENTS

INTRODUCTION

THE CONSTITUTIONAL DIVERSITY OF EXECUTIVE POWER.....	1
Presidential scholarship and the Constitution.....	16
Woodrow Wilson's "Refounding".....	19
"Leaderless" government.....	21
Critique of the founders.....	23

CHAPTER 2

HAMILTON'S EXECUTIVE GOVERNMENT.....	28
Madison and Hamilton.....	30
The myth of Hamilton's "monarchism".....	33
Hamilton and the "modern" presidency.....	35
The love of fame and constitutionalism.....	37
Hamilton's system of government.....	40
Distance from monarchy.....	53
Energy.....	56
Presidential "prerogative".....	62
Presidential administration.....	65
Administrative leadership.....	72
Conclusion.....	75

CHAPTER 3

HAMILTON'S TREATMENT OF AMBITION: AN AMBITIOUS ACCOMMODATION AND THE REDEFINITION OF POLITICAL VIRTUE...	77
"Perverted" and "dangerous" ambition.....	84
Classical ambition.....	86
Ambition and modern liberalism.....	90
Worthy and immortal ambition.....	96
A moderate ambition, a redirected ambition.....	103
The need for reconstituted ambition.....	107
Reconstituted ambition actualized within the presidency.....	111
Conclusion.....	120

CHAPTER 4

LOCKE, HAMILTON, AND MADISON ON EXECUTIVE PREROGATIVE AND REPRESENTATION.....	124
Locke's Prerogative.....	130
Hamilton's Executive.....	146
Madison's Executive.....	152
Conclusion.....	163

CHAPTER 5

ABR

CON

BIBL

ABRAHAM LINCOLN, THE WHIGGISH HAMILTONIAN.....	167
Lincoln's controversial legacy.....	171
The Whigs.....	176
The case against an activist president in legislation.....	182
Lincoln's case against military rule.....	186
Lincoln's use of emergency powers.....	192
Evaluating Lincoln.....	198
CONCLUSION.....	201
BIBLIOGRAPHY.....	215

"Th
it...
and
hun

appe

answ

place

a wid

weak

const

prero

const

(1898

writes

consti

ever si

consti

all of th

There is
fullest ar
than the
character

Dissertation Introduction: The Constitutional Diversity of Executive Power

"The Presidency is the most peculiar office in the world. There's never been one like it...The longer I live, the more I am impressed with...our American Constitution. Read it and think about it. It's a plan, but not a strait jacket, flexible and short. Read it one hundred times, and you'll always find something new –Harry Truman

What is the place of executive power in our *constitutional* republic? To ask this appears commonplace, asked a thousand times before and given a thousand different answers. But if one places the emphasis on the "Constitution" and the constitutional place of the executive, one finds a striking similarity in the extant scholarship. There are a wide variety of characterizations of the present condition of the presidency: it is too weak, it is too strong, it is too rhetorical, it is too "imperial", it has overrun our constitutional system, it is too political, it is not political enough, it has too much prerogative, it does not have enough, etc. But the descriptions of the presidency's constitutional powers are strikingly similar. In a classic statement, Henry Jones Ford (1898), after a vigorous argument showing how much power the president already has, writes: "The greatness of the presidency is the work of the people, *breaking through the constitutional form*" (292-93). The questions of the vast majority of presidency scholars ever since seem to begin with the same underlying assumption: the presidency is limited constitutionally. In other words, the constitutional powers remain roughly the same for all of them.¹

¹ There is one very notable exception. Skowronek (2002) writes: "It is a telling sign of the time that the fullest argument for the indeterminacy of constitutional form in recent years has come from the Right rather than the Left. In *Taming the Prince* (1993), Harvey Mansfield identified 'ambivalence' as the essential characteristic of the executive power in the American Constitution" (744). Perhaps it is best if I

one

treat

men

recon

to be

Cong

howe

Wilso

recon

overo

matur

write

Const

acknow

the pre

"The p

toward

viewed

challen

One c

The d

Skowronek (2002) summarizes well the research on the presidency over the last one hundred years. The course of that research has been heavily influenced by the treatment of the presidency at the turn of the century in the progressive movement. For men like Henry Jones Ford and Woodrow Wilson, the institution promised that reconfiguration of American politics they thought so necessary. The presidency seemed to be the institution capable of breaking through the dominance of an unresponsive Congress to respond directly to the people's wishes and desires. From the beginning, however, as seen not so much in the thought of Henry Jones Ford as in that of Woodrow Wilson, the Constitution itself posed a barrier to presidential leadership. The reconfiguration of American politics toward presidential dominance required the overcoming and abandonment of the constitutional form.² For instance, in one of his mature statements of the Constitution's intent as to the executive power, Wilson (1908) writes:

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his 'check' on Congress, --was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones...The constitutional structure of the government has hampered and limited his action (59-60).

The Wilsonian conception of presidential leadership over and against a restricted Constitution has influenced almost all presidential scholarship since.³ Thus, the first

acknowledge immediately my enormous debt to Mansfield's work. It would be no exaggeration to say that the present study would not exist were it not for his book.

² The progressive treatment of the constitutional executive was of a piece with its more general attitude toward the Constitution. Zentner (1994) writes: "Limited constitutional government was increasingly viewed as an impediment to social progress, and the old social contract was judged inadequate to meet the challenges of the new era" (580-81).

³ One could and should ask why it is Wilson, rather than Ford, or the other prominent progressive president, Theodore Roosevelt, who has influenced most presidency research since, especially because Roosevelt too

major

accep

Roose

be a C

theref

system

Corw

an age

in Wi

docum

allowi

Schles

Imper

before

had a th

intention

Hamilton

intellect

(*The Le*

than Ro

Wilson.

understa

scope of

presiden

protest.

governm

unbroke

statesma

Rooseve

republic

* In anov

though n

structur

major scholar to take issue with the progressive reconfiguration, Edward Corwin, still accepts its basic premise regarding the constitutional form itself. In the wake of Roosevelt's leadership, Corwin (1948; 1976) thought that "what was originally deemed to be a Constitution of Rights" had been transformed into a "Constitution of Powers," thereby creating a "revolutionary reversal of constitutional values."⁴ In this revolutionary system, the presidency had "reached a position of unhealthy dominance" (157, 176). For Corwin, "this is a government of laws and not of men" and so "everything that is done by an agent of government must be traced to some legal warrant" (159). As we will also see in Wilson, the Constitution, as Corwin understands it, is fundamentally a restrictive document. Too much executive power poses a threat to these restrictions because, in allowing for individual discretion, it does not fall well within the rule of law.

Following Corwin, even those "high-flying prerogative men"(137-38) like Arthur Schlesinger came to distrust the presidency in the wake of the Vietnam War. His *Imperial Presidency* (1973) explicitly denies to the president what Corwin had, years before, accused him of giving: "The idea of prerogative was not part of presidential

had a theory of presidential power--one that, it could be argued, is more compatible with Hamilton's intentions. See Croly (1909 1965, 167-171); also see Knott (2002) where Roosevelt is quoted calling Hamilton "the most brilliant American statesmen who ever lived, possessing the loftiest and keenest intellect of his time" (87). Roosevelt also referred to himself as a "strong Hamiltonian" in one of his letters (*The Letters of Theodore Roosevelt*, 1415). All I can claim is that Wilson has been far more influential than Roosevelt. As evidence, I submit: Neustadt's very influential theory seems almost borrowed from Wilson. The reasons *why* Roosevelt's stewardship theory of the presidency and his far more nuanced understanding of what he took to be the founders' intentions had less influence than Wilson is beyond the scope of this dissertation. To a certain extent, Roosevelt could be thought of as the most Hamiltonian of presidents in both word and deed. Rossiter (1964) writes: "No matter how loudly our latter-day Whigs may protest, the 'Stewardship Theory of Theodore Roosevelt expresses the realities of presidential power in a government committed to vast responsibilities at home and abroad, and that theory may be traced back in unbroken line to Hamilton's teachings" (248). See Tulis (1987, chapter 4) for a discussion of Roosevelt's statesmanship. Throughout this dissertation in both footnotes and in the argument itself, I will utilize Roosevelt's profound understanding of the relation between executive power, leadership, and a democratic republic.

⁴ In another place, Corwin (1947) amends this claim some. He writes: "The Constitution of 1789, even though not originally designed as such, early became primarily a Constitution of Rights, and hence structurally a Constitution of checks and balances" (170-71).

power

be exa

for on

within

came t

studen

of Rich

most i

order"

the Co

Corwin

writes:

sought

genera

⁵ See bel

⁶ He wr

⁷ See the

Constitu

⁸ In my u

He too h

legislativ

leadership

modern F

Roosevel

similar to

different

understan

the argum

recognize

examinati

power as defined in the Constitution" (9). Whether this characterization is accurate will be examined later,⁵ the relevant point remains that Schlesinger returned to the founding for original intent to ground certain restrictions on the current presidency.⁶

The view that Corwin and the progressives agree on the status of the presidency within the Constitution is, however, not novel. Many of the students of Herbert Storing came to the same conclusion twenty years or so ago. Bessette and Tulis (1981), two such students, write: "Whether praising the actions of Franklin Roosevelt or castigating those of Richard Nixon, it is generally implied by legalists and political scientists alike that the most interesting aspects of these presidencies lie outside or beyond the constitutional order" (7-8). In contradistinction to this view, these students of Herbert Storing revisited the Constitution and found a presidency that is much stronger institutionally than either Corwin or the progressives had thought.⁷ Characterizing these scholars, Nichols (1994) writes: "According to this strong constitutional Presidency school, the Constitution sought ways to provide institutional supports for the exercise of political authority in general and executive power in particular" (34).⁸

⁵ See below chapter 2, section h and chapter 4.

⁶ He writes: "Even if the search for original intent is difficult, it is not impossible" (1).

⁷ See the collection of essays edited by Joseph M. Bessette and Jeffrey Tulis, *The Presidency in the Constitutional Order*.

⁸ In my understanding of these issues, I owe much to David Nichols' *The Myth of the Modern Presidency*. He too has argued that the modern presidency is not so "modern" as it appears. "It is my contention that legislative leadership, administrative control, the exercise of unilateral authority, and popular symbolic leadership are all crucial elements of the constitutional Presidency. The major defect of the doctrine of the modern Presidency is the failure to recognize that these attributes of the Presidency predate Franklin Roosevelt and in fact find their origins in the Constitution" (9). In many ways, my argument is quite similar to Nichols'. Although, he does not separate Hamilton and Madison from each other as distinctly different articulations of executive power at the founding. He does, however, contrast the Whig understanding of the presidency with what he claims is the Constitution's intention. And, while I analyze the arguments of *The Federalist* to derive a "constitutional frame of mind," he claims his view "that recognizes both the institutional and popular sources of presidential authority" emerges "from a careful examination of Article II of the Constitution" (35).

corre

legal

tend

abou

abou

create

leade

execu

constr

from t

consti

strong

argum

to Har

empha

power

For the

which t

* In this c

(1987).

¹⁶ This w

Genovese

preside

¹⁷ Anothe

the groun

Thus, to a certain extent, this "strong Presidency school" has already provided a corrective to the limited view of the Constitution that had united the progressives with the legalists. As we shall see, while admitting a stronger constitutional presidency, they also tend to insist on the constitutional exclusion of presidential leadership. Thus, their claim about the constitutional executive has been to a large degree obscured by their claim about the constitutional place of leadership. They bemoan the "rhetorical" presidency, created by Woodrow Wilson, that makes too much room for a quasi-demagogic form of leadership. This "rhetorical" presidency camp sees the founders' intentions regarding the executive power as wiser than the Wilsonian attempt to free the president from such constitutional restrictions.⁹ Their analysis of the modern presidency takes its bearings from the ways in which the modern presidency has departed from a superior constitutional presidency. They think the Constitution provides for an executive who is strong precisely because he need not lead the people. I will subsequently treat their argument more extensively; for now, I submit that their understanding does not do justice to Hamilton's understanding of constitutional leadership.

On the other hand, the modern presidency school, following Neustadt, tends to emphasize the manner in which the Constitution unnecessarily restricts presidential power and attempts to liberate the presidency from this restrictive constitutional form.¹⁰ For them, as for the progressives before them, the Constitution stands as a hurdle over which the president must leap to exercise his leadership in the system.¹¹ As much as the

⁹ In this camp, I would put, among others, Eidelberg (1974), Ceaser (1979), Kesler (1984), and Tulis (1987).

¹⁰ This would include, among others, Burns (1978), (1984), Lowi (1985), Rosenbloom (1988), and Genovese (1995). See Wayne (1983, 30-34) for a discussion of Neustadt's influence on subsequent presidency scholarship.

¹¹ Another recent school of thought, the "new institutionalists" led by Terry Moe, challenges Neustadt on the grounds that he underappreciated the importance of the institutional rules provided by the Constitution.

studen

embod

system

there i

disagre

indebte

As we s

the cons

flowed

starting

presiden

foundin

reason. I

of altern

They empt
president s
'move unit
presidents
(1985): "Th
would the p
Though Mc
explore the
center of th

students of Herbert Storing worry about the departure from the constitutional system embodied by the “rhetorical” presidency, they worry about the extent to which the old system stands in the way. For them, there is not enough leadership; for the other camp, there is too much.

The best example of this fundamental agreement at the bottom of their disagreement can be found in Lawler (1987). Emphasizing in a footnote that he is indebted to Ceaser, Kesler, and Tulis, Lawler writes:

In agreement with Wilson and his disciples today, *The Federalist* understands the Constitution to establish an “anti-leadership system,” [a term borrowed from one of Wilson’s so-called disciples, Burns (1984)] to resist the imposition of innovations proposed by leaders. *The Federalist*, unlike Wilson, affirms this resistance, because it is considerably less sanguine than Wilson about the motivations and likely consequences of the success of democratic leaders (712).

As we shall see, at the bottom of Wilson’s reforms to the presidency was a concern about the constitutional prohibitions against leadership. In a sense, Wilson’s whole project flowed from his understanding of that prohibition. I will argue that Wilson’s basic starting point is wrong and so too are all those scholars who, in his wake, also see the presidency as *necessarily* and *constitutionally* restricted. Instead, right from the founding, the constitutional form of executive power was a contested issue. It is for this reason, I argue, that we must return to the founding. Doing so provides us with a range of alternatives regarding the executive power, most notably Alexander Hamilton’s whose

They emphasize that the constitutional ambiguity of executive power enhance rather than detract from the president’s strength (Moe and Wilson 1994). The president’s independence from Congress and his ability to “move unilaterally into new territory, claim new powers, and make policy on [his] own authority” give presidents a distinct advantage over Congress in strength and power (21). Contrast this claim with Lowi (1985): “The Constitution was designed to make Congress the center of the power structure--why else would the powers delegated to national government be lodged in Article I, the legislative article?”(30). Though Moe thinks the president still very limited by the separation of powers (1995, 433) and does not explore the fact that one school of thought at the founding thought the executive could and should be the center of the new government.

under

execu

"anti-

fact, o

defenc

the sta

precise

the sta

men w

unders

But if o

project

of the f

"consti

govern

seeks th

definitio

4

question

well wh

with Wi

T

p

understanding stands in striking contrast to the dominant view of the Constitution's executive. In fact, I will argue, Hamilton's arguments in *The Federalist*, rather than being "anti-leadership," made significant room for executive leadership after the founding. In fact, one could say precisely the opposite of Tulis (1987). He writes: "*The Federalist* defended a theory of governance that would not require and did not provide support for the statesmanship of founders after the founding" (111). Hamilton's interpretation seems precisely to show the necessity that the executive power allow and provide support for the statesmanship of founders after the founding.

Perhaps this last statement should be qualified some. If, by founders, one means men who would overturn the constitutional order so as to institute their different understanding of the proper purview of government, then Hamilton does not want them. But if one means men who would be allowed significant flexibility to achieve those projects that would win them enduring fame--projects that would approach the grandeur of the founding itself, then Hamilton provides space for them. In other words, Hamilton's "constitutionalism" is not properly conceived as a limitation of even the ends of government. It is a redefinition of the purview of government itself according to which it seeks the public good through administrative responsibility and action. Within that definition, any end is allowed.

And Hamilton's argument simply seems significantly more nuanced regarding the question of leadership than the "rhetorical presidency" camp admits. Eden (1983) states well what seems to be their view of founding intent and the crux of their disagreement with Wilson:

The liberal enlightenment, prior to Wilson, had combined a prudent (but popular) fear of power with a sober (but universally intelligible) reading of

As we

seems

had w

ambiti

power.

the pec

argume

foundin

reveals

disagre

4). it se

founder

correct

modern

"proper"

human nature as striving after power. A properly ordered political law would bring these politically relevant facts into sharp focus by instituting a perpetual vigil, a constantly reinvigorated suspicion, against any departure from the strictly limited powers granted to each official. Leadership, as a close look at the language of *The Federalist* will amply confirm, was considered to be precisely such a departure and the one most likely to occur in a democratic republic. Only in a single instance, 'the leaders of the Revolution,' did *The Federalist* speak favorably of political leadership. This singular, extraordinary reliance upon 'leadership' was apparently not to be part of their constitution. Publius generally employed 'leader' as a term of opprobrium. Once the republic was placed on a sound footing, the leaders of the Revolution would disappear, to be replaced by (or to reappear transformed into) a chief magistrate, court justices, and so forth (5).

As we shall see in our discussion of the debate between Madison and Hamilton, this seems a very accurate description of Madison's understanding of what the Constitution had wrought. But, while *The Federalist* does often speak of leadership and of that ambition that fuels leadership with distaste, it also, in Hamilton's papers on executive power, seems then to make room for those "irregularly ambitious" men who would lead the people, through the presidency, in order to secure their own enduring fame. Eden's argument, however sound it might be regarding the Madisonian understanding of the founding, does not do justice to Hamilton's constitutional understanding.

This is not to say that Hamilton's interpretation of the constitutional executive reveals a fundamentally different "original intent." In light of the rather strong disagreements between Hamilton and Madison over executive power in 1793 (see chapter 4), it seems to me misleading if not impossible to rescue a coherent doctrine of the founders' "original intent" on this issue. Instead, we return to the founding in order to correct a misunderstanding among most presidency scholars. Their accounts of the modern president are almost always informed by what they take to be the president's "proper" constitutional place. Insofar as they seek to find some original founding

intention

Madison

president

Hamilton

without

solution

who in

"democratic"

1965, 1

executive

overcoming

argument

against the

Constitution

into a doctrine

¹² See Gra

¹³ Some ne

rightly em

element of

¹⁴ The prog

chapter 5)

Hamilton, 1

also distrust

30). Althou

at least in e

the thesis o

described as

people, mai

general disc

: 1961).

¹⁵ Eisenach

progressivis

intention, they turn to the more limited conception found of executive power found in Madison and Jefferson.¹² In doing so, they too often ignore Hamilton's argument for presidential leadership within the constitutional system.¹³ A proper recognition of Hamilton reveals the possibility of a *constitutional* executive who leads the people without becoming a demagogue.

A full recovery of the Hamiltonian possibility might point to an alternative solution to the problem that the progressives were trying to overcome. The progressives, who in some cases understood themselves as "new Hamiltonians," were trying to give "democratic meaning and purpose to Hamiltonian tradition and method" (Croly 1909; 1965, 169).¹⁴ Especially in the wake of Wilson's brand of progressivism,¹⁵ while the executive might potentially institute the reforms they desired, it first must struggle to overcome its fundamentally anti-democratic and limited constitutional position. Such an argument gives up the Constitution to their opponents: they appeared to be struggling against constitutional intent. Their opponents could say, as Corwin did, that the Constitution was intended to be a document of rights and their reforms revolutionized it into a document of powers. It is not surprising then, that the twentieth-century witnessed

¹² See Grant and Grant (1981) for a nice discussion of "The Madisonian Presidency."

¹³ Some notable exceptions are Burns (1965, chapter 1) and Binkley (1947, chapter 2). Although while rightly emphasizing the legislative leadership of Hamilton's executive, both do not see that there is also an element of popular leadership.

¹⁴ The progressive's understanding and use of Alexander Hamilton merits its own book. See Knott (2002, chapter 5) for a discussion of their appropriation of Hamilton's thought. However, while they admired Hamilton, in contrast to Jefferson, for seeing the necessity of an effective and energetic government, they also distrusted what they took to be his anti-democratic instincts (Stettner 1993, 38-39; Forcey 1961, 29-30). Although, Croly (1909 1965) writes: "The extent of this antagonism to democracy, if not in intention at least in effect, is frequently over-rated" (33). And Ford (1920), a quasi-progressive, writes what could be the thesis of my treatment of Hamilton: "The constitutional ideal aimed at by Hamilton may be fairly described as plenary power in the administration, subject to direct and continuous accountability to the people, maintained by a representative assembly, broadly democratic in its character" (364). For more general discussions of Herbert Croly and progressivism, see Stettner (1993), Levy (1985), and Forcey (1961).

¹⁵ Eisenach (1994) argues that the victory of Woodrow Wilson paradoxically led to the defeat of progressivism as a national movement.

the eva

the ref

preside

against

impedi

summa

the presi

almost in

first posi

against F

what the

fulfilling

intend a

political

even aga

that the C

¹⁴ Consider
the United
person, are
391). Ford
powers are
wake of the
See Nich

the evaporation of the progressive hopes and an ever greater increase in pessimism about the reforming capabilities of presidential power. Therefore, Neustadt, who also wants the president to be the prime mover within the system and to represent the people over and against an unresponsive Congress, emphasizes even more than Wilson the great impediments that stand in the way of executive power. Or by 1995, Genovese delivers a summary judgment of the results of the progressive experiment in executive leadership:

The deck is stacked against presidential leadership; the presidency is dealt a very weak power-hand. How each president plays the hand they are dealt, however, how they use their skills and opportunities, goes a long way in determining the success or failure of the administration, but skill is not enough. A variety of built-in roadblocks created an immunity system from leadership in all but the most extraordinary of times.

In the first place, Genovese's judgment does not seem quite an accurate picture of the presidency's true power situation.¹⁶ But, given their starting assumption, it seems an almost inevitable conclusion. These modern presidency scholars, following Neustadt, first posit that the Constitution constrains presidential leadership or "stacks the deck" against Presidents.¹⁷ Their study of the branch in the political world then tends to prove what they have already assumed. Moreover, their research is, to some degree, self-fulfilling to the extent that it convinces the populace that the Constitution does indeed intend a significantly limited executive power. In short, the Constitution shapes our political world to too great a degree for presidents to succeed if they act outside of and even against what is perceived to be constitutional intent. By contrast, Hamilton shows that the Constitution can, as he interprets it, leave room for significant executive power

¹⁶ Consider John Quincy Adams: "It has perhaps never been duly remarked that, under the constitution of the United States, the powers of the executive department, explicitly and emphatically concentrated in one person, are vastly more extensive and complicated than those of the legislature" (quoted in Ford 1898 1967, 291). Ford's whole chapter on the presidency should be consulted for a convincing case that the president's powers are vastly greater than we realize. His argument is especially striking because it was written in the wake of the height of congressional government at the end of the nineteenth-century.

¹⁷ See Nichols (1994) for a discussion of some of the mistakes that the "modern presidency" scholars make.

and a

the C

role p

have

But on

unders

Skowr

becaus

scale o

suprem

pressec

one ver

insight,

contro

"politic

much ex

original

"the case

and a kind of leadership. Rather than acting as a usurper of those powers not granted by the Constitution, the active executive can claim to act as the fulfiller of the constitutional role prescribed by him to him by Hamilton.

Skowronek (1997) begins his seminal book by pointing out the same problem as I have emphasized with the dominant understanding of the presidency. He writes:

Succeed or fail, presidents are formidable political actors. They are continually remaking our politics, changing the terms of debate and the conditions of maneuver. The wonder is that we so seldom think about them this way. We know far more about the obstacles the frustrate presidents' efforts to become masters of American politics than about what those efforts do to American politics. The ineffectiveness of our leaders has become a consuming preoccupation (3).

But one might argue that Skowronek himself also falls into this trap insofar as his understanding constrains presidents within "political time" (Hoekstra 1999). Moreover, Skowronek argues that Franklin D. Roosevelt found himself on precarious ground because the Constitution does not support presidential domination. He writes: "Given the scale of his undertaking, mastery entailed *prima facie* recognition of presidential supremacy, and that was something the basic constitutional frame was especially hard-pressed to accommodate" (320-21; see also 323-24). I argue that Hamilton shows us that one version of the constitutional frame can accommodate such mastery. With this insight, we can better see that FDR failed in something like the executive reorganization controversy not because the Constitution did not support such power but because of a "political frame" in which his opposition made a crucial political argument against too much executive power--albeit a political claim significantly enhanced by its claim to original constitutional intention. Conversely, to the extent that Roosevelt failed to argue "the case forthrightly on constitutional grounds rejecting the previously dominant reading

of the d

did so b

opponen

-rather t

(321). 7

Wilsoni

constitu

T

The Fed

the Cons

never mo

the const

imagine

"parchme

what the

Madison

the restric

were mos

B.

power, the

authoritati

¹¹ Because m

exercise in "c

specific claus

See, for ins

Federalists or

of the document and substituting a definite alternative deemed truer to its real spirit," he did so because he failed to see the Hamiltonian possibility--thus implicitly accepting his opponents' claim that his project was truly a departure from the intent of the Constitution--rather than because the Hamiltonian possibility did not exist, as Skowronek claims (321). To make the point more general, in a constitutional republic like our own, the Wilsonian constitutional argument actually limits presidential power because it cedes constitutional authority to the political opponents of such power.

Tulis (1991) describes what he calls the "constitutional frame of mind" created by *The Federalist*. More important than any of the clauses is the frame of mind created by the Constitution. In fact, Tulis notes that one of the most famous papers, *Federalist 10*, never mentions any clauses of the Constitution. The mistake that presidency scholars and the constitutional scholars from whom they take their cue typically make is that they imagine the Constitution to be "clause-bound," limiting governmental power to a set of "parchment distinctions."¹⁸ But this, according to text of *The Federalist*, is precisely what the founders did not want. The term "parchment distinction" is used pejoratively by Madison to describe what the Constitution *is not*. It was over precisely this question of the restrictions upon governmental power that the Anti-Federalists and the Federalists were most at odds.¹⁹

By ceding to their opponents the claim that the Constitution limits presidential power, the progressives unnecessarily hampered themselves with overcoming supposedly authoritative constitutional intent. Understanding an alternative "constitutional frame of

¹⁸ Because my subsequent study is an attempt to elucidate a "constitutional frame of mind," rather than an exercise in "clause-bound" interpretation, I will spend very little time discussing the legal ramifications of specific clauses in the Constitution.

¹⁹ See, for instance, Miller (1988) for a discussion of the differences between the Federalists and the anti-Federalists on the question of governmental power.

mind"

departu

necessi

returnir

constitu

The Fed

could al

been ma

the Elec

intended

both Wi

interven

"ought to

the Grea

Legislati

²⁰ On this radically new President (twentieth-century). Also, particular, commonpl governance affairs, the an unmedi distinctivel change rep Constitution or most of

mind" would help us to see that the modern powerful president is not some radical departure from founding intention,²⁰ but a logical possibility (and possibly even a necessity) of what was implied by the ratification of the Constitution. In claiming this by returning to the founding, I do the same as Tulis: I appeal "to them as indicators of a constitutional logic, not as authority for the points I wish to press" (143).

In seeking "the constitutional frame of mind" at the founding, I turn primarily to *The Federalist* and the subsequent debate between Madison and Hamilton. But, one could also look to the debates in the Constitutional Convention. For instance, much has been made about the Electoral College and its supposed anti-democratic character. It is the Electoral College which causes Henry Jones Ford to conclude that the founders intended that the president not be a popular leader. Madison's *Notes*, however, show that both Wilson and Morris argued openly for popular election, even "without the intervention of the States" (48, 50, 326). Moreover, Morris argues that the executive "ought to be so constituted as to be the great protector of the Mass of the people" "against the Great and wealthy who in the course of things will necessarily compose the Legislative body" (322-23). The Electoral College is perhaps better viewed as a

²⁰ On this point, Neustadt essentially agrees with (and may even borrow from) Rossiter regarding the radically new character of the twentieth-century president. For instance, Rossiter writes: "The role of the President as active participant in every stage of the legislative process is almost wholly the creation of three twentieth-century incumbents: Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt" (114-15). Also, on the revolutionary character of the modern state, generally, and the modern presidency, in particular, see Greenstein (1977), Lowi (1985), and Ackerman (1988). Tulis (1991) writes: "It is now commonplace to observe that the New Deal represented a constitutional revolution in American governance. The establishment of a welfare state, the birth of a huge administrative apparatus for domestic affairs, the expansion of executive powers at the head of the national government, and the development of an unmediated, plebiscitary relation between the president and the people are all said to make a distinctively new America, born of this constitutional revolution...But the familiar argument that such change represents a constitutional revolution is wrong, or mostly wrong. Properly conceived, the Constitution is better understood as the generator of these developments rather than the repudiator of them, or most of them" (133-34).

necessi

strengt

Conver

good b

an atten

(136).²

danger

interwa

Magist

with th

the pic

Wilson

possibi

thinkin

Execut

²¹ See W

²² One co

would the

Chapter

²³ Consid

what wil

actions.

²⁴ As a re

Madison

can be ta

discussion

earlier sta

It appear

propositio

continues

the increa

permanent

necessary compromise made by the "presidentialists" in the context of a larger victory--strengthening the executive by freeing him from election by the legislature (Riker 1984).

Of course, one must then confront Hamilton's less than popular argument in the Convention for an "elective Monarchy" in which the executive served for life "during good behavior" (138). In the first place, Hamilton makes this argument in the context of an attempt to create such "stability and permanency, as republican principles will admit" (136).²¹ Moreover, Hamilton thought only hereditary monarchs were "placed above the danger of being corrupted from abroad" (136) because only their interests were interwoven with the Nation they govern.²² But Hamilton does argue that all the Magistrates still should be "appointed...by the people, or a process of election originating with the people" (136). But still, the picture of the executive we get in this speech is not the picture that emerges from *The Federalist*--the latter seems closer to Morris's and Wilson's understanding.²³ Two considerations seem though to require us to consider the possibility that Hamilton was, in fact, quite similar to Morris and Wilson in his thinking.²⁴ First, Morris himself suggests "he saw no alternative for making the Executive independent of the Legislature but either to give him his office for life, or

²¹ See Walling (1995) for a lengthier discussion placing this speech in the context of Hamilton's thought.

²² One could say that, given this insight, Hamilton's task became constructing an executive office that would tie its holders' interests to the interest of the office and the country as a whole. This, I will claim in Chapter 3, is essentially what he does by redirecting and reconstituting their ambition.

²³ Consider for instance this passage from one of Morris's speeches which may summarize in two sentences what will be one of my arguments in Chapter 3: "The love of fame is the great spring to noble & illustrious actions. Shut the Civil road to Glory & he may be compelled to seek it by the sword" (323).

²⁴ As a response to criticism that must have begun about this speech even before it was published in Madison's posthumous *Notes*, Hamilton, in an 1803 letter to Timothy Pickering, denies that that this speech can be taken as his final thoughts on the election of the president. He writes: "In the course of the discussions in the Convention, neither the propositions thrown out for debate, nor even those voted in the earlier stages of deliberation were considered as evidences of a definitive opinion, in the proposer or voter. It appeared to me to be in some sort understood, that with a view to free investigation, experimental propositions might be made, which were to be received merely as suggestions for consideration." He continues: "It is a fact, that my final opinion was against an Executive during good behavior, on account of the increased danger to the public tranquility incident to the election of a Magistrate of this degree of permanency" (*Writings*, 1002-03).

make him

speech in

legislatur

H

sp

In

H

to

T

both to t

Genoves

Hamilton

to think

presider

demago

without

presider

interests

the Con

examine

Locke's

shows u

that the

make him eligible by the people" (325). This means that we might understand Hamilton's speech in the context of the attempt to free the president from dependence on the legislature. Richard Pious (1979) has another suggestion. He writes:

Hamilton could not expect delegates to vote openly for prerogatives. His speech to the convention was tactical; it was designed to shock, and it did. In turn, other presidentialists like James Wilson appeared moderate; Hamilton's speech had the intended effect of giving his allies some room to maneuver (38).

That this "presidentialist" executive is a popular leader should also be important both to the progressives along with their modern descendants like Neustadt and Genovese, on the one hand, and to the "rhetorical" presidency scholars, on the other. Hamilton shows both sides a certain insufficiency in their thought. The progressives tend to think that only a populist president will suffice as a leader and the "rhetorical" presidency scholars tend to think only a "constitutional" president avoids the danger of demagoguery. To the progressives, he shows that a president can be representative without being a mere populist. To the "rhetorical" presidency scholars, he shows that a president can be constitutional while being a leader. He leads the people to their true interests and away from their mere inclinations.

As I have already stated, however, Hamilton shows us only one possibility within the Constitution for executive power. After laying out Hamilton's argument, I will then examine Madison's critique of Hamilton, as can be seen best by first understanding Locke's treatment of executive power. Finally, Lincoln, in both his words and his deeds, shows us a powerful third alternative to Madison and Hamilton. The underlying point is that the constitutional form seems to permit at least these three possibilities.

there is

executi

cannot

Jefferso

perhaps

be alwa

Perhaps

before

Constit

prescie

overem

howeve

someho

demag

constitu

a. Pres

from th

power t

²³ Interest
primarily
an examin
²⁴ In this c

That being said, I would also suggest that, given the nature of executive power, there is a kind of inevitable drift toward the Hamiltonian executive. The Madisonian executive who willingly restrains himself transforms into the Lincolnian executive who cannot possibly abstain from a power that can produce such good ends, or into the Jeffersonian executive who pretends restraint while actually practicing control. It is perhaps for this reason that Franklin says in the Convention: "The Executive will always be always increasing here, as elsewhere, till it ends in Monarchy" (*Notes*, 65-66). Perhaps it is also this fact that caused the "rhetorical" presidency scholars, and Corwin before them, so much to emphasize the restrictions placed on executive leadership by the Constitution.²⁵ To avoid that inevitable drift toward monarchy,²⁶ which our most prescient founder had predicted even before our government's institution, these scholars overemphasize the constitutional argument against leadership. Hamilton might respond, however, that it is better to allow their leadership within the Constitution and thus somehow "constitutionalize" it, than to exclude it and run the greater danger of demagogues arising who, because they must be outside of it, would destroy the constitutional order itself.

a. Presidential scholarship and the Constitution

In his famous book, Neustadt claims: "The probabilities of power do not derive from the literary theory of the Constitution" (51). Instead, "Presidential power is the power to persuade." Neustadt claimed to be a "realist" in opposition to the old

²⁵ Interestingly, Corwin also claims the "modern theory of presidential power" is "the contribution primarily of Alexander Hamilton" (quoted in Loss 1990, xii). See also Rossiter (1964, especially 248) for an examination of Corwin's claim.

²⁶ In this context, by monarchy, I mean, and I take Franklin to mean, an elected "King."

"instituti

gesture t

attempts

successfu

in our ur

an exam

managem

B

Constitut

created a

a govern

president

separate

"The stat

other wor

powers, h

power. N

stem from

Constituti

"probabili

Constitut

⁷ Neustadt w
authority in s
obtain results

"institutionalists" like Corwin and Rossiter. Neustadt writes, "It is not sufficient to gesture toward the 'institutionalized Presidency'" (146). The beginning of his book attempts to show us why the Constitution's powers are insufficient for a president successfully to exercise and maintain power.²⁷ Because it does not adequately guide us in our understanding of actual presidential power, the Constitution is negated in favor of an examination of practical presidential powers, i.e. persuasion, bargaining, and management of prestige.

But Neustadt's whole argument is predicated upon a certain understanding of the Constitution. He writes: "The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions sharing powers" (42). The limitations upon presidential power seem to flow from the constitutional limitations created by a system of separate institutions sharing the same power. Or, on the other hand, Neustadt writes: "The status and authority inherent in his office reinforce his logic and his charm" (43). In other words, though he always puts powers in quotations, implying that they are not real powers, his own analysis testifies to the importance of the president's constitutional power. Moreover, as Tulis (1991) notes, for Neustadt "a president's strategic advantages stem from the fact that 'no one else sits where he sits,' an unintended shorthand for the Constitution's structural properties" (139). Thus, Neustadt unwittingly shows that the "probabilities of power" do derive, at least in part, "from the literary theory of the Constitution."

²⁷ Neustadt writes: "The President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. Here is testimony that despite his 'powers' he does not obtain results by giving orders--or not, at any rate, merely by giving orders." (23).

N

understan

Constitut

certain un

present p

the full c

diversity

president

determine

short, my

of the Co

investigat

understan

TH

(2002). H

Th

bee

po

of

the

con

the

(75

I would on

concepts, w

historical c

Neustadt's analysis of presidential power is heavily influenced by his understanding of the executive's place, as it was conceived at the founding, within our Constitution. I would submit that this is true of most scholars of the presidency. A certain understanding of the president's constitutional place shapes their analysis of his present power. The problem is that their glances back at the founding do not do justice to the full complexity of presidential power as it was conceived at the founding, or to the diversity of opinions regarding what power the Constitution did, in fact, give to the president. Instead, they find one view, assert it is constitutional intent, and then determine if it is compatible or incompatible with the present condition of the office. In short, my study will be relevant for all scholars of the presidency because a certain view of the Constitution always influences their understanding of the present office. A fuller investigation of the constitutional place of executive power should influence the way we understand the present office.

This study then proceeds in the spirit of Skowronek's recent recommendations (2002). He writes:

The objective of this article is not to persuade presidency researchers to become more like historians, much less to promote antiquarian interests in politics of the past. It is to persuade them that a conceptual reorganization of the history at hand might better suit their own purposes, to suggest that the time has come for presidency researchers to undertake a comprehensive review of the historical concepts and categories on which they inevitably rely in their analysis of contemporary presidential politics (750).

I would only modify his statement to claim that, even before reviewing the historical concepts, we must first review the constitutional concepts. Once this is done, the historical concepts can then be reconsidered in light of our more nuanced constitutional

unde

betw

pres

b. W

aga

Con

pro

Wi

wh

the

ent

²⁸ F

reev

arise

max

mak

built

²⁹ M

thou

spee

³⁰ Se

and

inter

³¹ h

understanding.²⁸ For instance, only after understanding what's at stake in the debate between Madison and Hamilton can we properly appreciate and understand the presidencies of Thomas Jefferson and James Madison.

b. Woodrow Wilson's "Refounding"

Before revisiting Hamilton, Madison, and Lincoln with a fresh willingness to see again (or for the first time) their understanding of what had been created by the Constitution, it seems first necessary to examine more closely that thinker who has most profoundly effected our current understanding of the Constitution.²⁹ In returning to Wilson, I do so in a somewhat different spirit than those "rhetorical presidency" scholars who have found in him the source of the modern plebiscitary president.³⁰ As I have said, they tend implicitly to cede to him the accuracy of his constitutional description while criticizing his prescriptive solution. As Bimes and Skowronek (1996) write:

In their efforts to retrieve the original constitutional understanding of the executive as a standard for criticizing twentieth-century developments, Wilson's critics seem to be every bit as intent on leveling the field of nineteenth-century practice as were the early Wilson and his latter-day advocates (37).

²⁸ Flaumenhaft (1992) states in poetic form the spirit of this dissertation's turn to the founding: "Our wish to reexamine the founding of our constitution springs not from an antiquarian love of lingering in museums; it arises neither from a pious longing to perform the rites of civic reverence, nor from a petulant delight in mocking heroes or battling authorities. We must make plans about the house that we've inherited; and in making plans for maintenance or renovation, a prudent heir examines plans and records left by those who built the house" (7).

²⁹ My examination of Wilson will, in fact, be rather brief. I will only examine the broad contours of his thought. My only attempt is to show that, at bottom, his "leadership reforms" were predicated upon a specific constitutional understanding.

³⁰ See Ceaser (1979, chapter 4), Ceaser, Thurow, Tulis, and Bessette (1982), Eidelberg (1974, chapters 8 and 9), Kesler (1984), Sedgwick (1986), and Tulis (1987). See Bimes and Skowronek (1996) for an interesting discussion and challenge to these scholars' understanding of Wilson. Consider also Eden (1983) who places Wilson's arguments regarding leadership in a broader post-Weberian, nihilistic context.

A n

con

But

the

beca

sinc

exe

then

argu

that

of th

depa

gran

claim

have

Wils

then

admi

steps

²¹ Actu
attempt
He reve
the anti-

A recent book by Mel Laracey (2002) ably shows some of the problems with a conception of a unified "nineteenth-century practice" in regard to presidential leadership. But while Laracey gets right the historical diversity, he misses the opportunity to discuss the diversity of constitutional opinions on this question.³¹

I turn to Wilson, first and foremost, to understand his constitutional argument, because it was, as I have also asserted of the progressives and of presidency scholars since, his constitutional understanding that informed his prescriptions for change to the executive power. If he is wrong, as I will claim he is, in his constitutional understanding then we can also call into question the adequacy of his prescriptions. To make their argument less nuanced than it in fact is: the problem with Wilson's prior critics has been that they seem to admit he was right about the Constitution but insist upon the superiority of the founders' conception. They seem stubbornly to resist all modern innovations that depart from the founders' "original intent." The critics of Wilson's critics might even grant that they are right in the description of the founders, but simply write off such claims as immaterial to our modern age. What does an "anti-leadership" Constitution have to do with an age when we seem to need leadership more than ever? By contrast, if Wilson is wrong and the Constitution is far more dynamic and flexible than he thinks, then perhaps we can still learn something from a "constitutional frame of mind" that admits of and *encourages* executive energy and *leadership* but warns against and takes steps to prevent such leadership from becoming mere demagogic flattery.

³¹ Actually, as I'll later discuss in chapter five, I should modify this statement some: he does make a passing attempt to show that there was also constitutional diversity but his discussion is both inadequate and wrong. He reverses the sides, making the Federalists into the advocates of a weak, non-leadership executive and the anti-Federalists/Jeffersonians the advocates of a strong leadership executive.

i."

po

at

efi

en

de

su

pr

et

b

a

f

c

c

c

c

v

n

n

v

s

3

i. "Leaderless" government

Wilson starts not so much from a specific concern about the status of executive power as from a more general worry about the "leaderless" character of American politics at the end of the nineteenth century. Congress rules the country but does so neither efficiently nor responsibly. The American form of government as Wilson found it at the end of the nineteenth century was too complex, too mired in special interests, and too dominated by hack politicians (rather than inspiring statesmen) to be either admirable or successful. It needed reform because, as it stood, the United States could neither proclaim itself as the model of noble self-government to the world nor accomplish effectively any of the necessary tasks of government.³²

For Wilson, this lack of leadership stems not from the lack of men of character but from defects in the institutions of government. While government institutions are not and cannot be responsible for producing strong leadership, they are responsible for facilitating it. The connection between leadership and institutions forms one of the cornerstones of Wilson's political thought. Wilson writes: "The excellence of any form of government depends upon the provision it has made for the action of those who conduct it and choose its policies. It gets its character from what they find it possible to do" (338, "Leaderless Government"). Or, Wilson writes: "The best polity is that which...calls with the most stirring and persuasive voice to the leading characters of the nation to come forth and give it direction" (439, "Ideals of America").

It will turn out that the crucial problem facing us is that the institutions created by the Constitution not only fail to facilitate leadership--they actually hinder it. Wilson writes: "The President cannot lead" (340, "Leaderless Government"). And Congress,

³² See "Leaderless Government," in *College and State*, 336-51.

4.

n

P

g

b

ne

ei

th

w

de

tra

pra

pra

firs

"Le

our

foun

enco

lead

presic

¹³ See

while it controls the government, is so constructed as to make it incapable of leadership.³³ After initially attempting to reform Congress, Wilson turned to the executive office as the most effective repository of leadership power within the republic. It would be the natural place within which statesmen could achieve the leadership he thought so necessary for good government. But, because the founders were excessively worried about checks and balances, Wilson claims they withheld from the president the constitutional power necessary to lead the country. "It is a game in which he has no means of attack and few effective weapons of defense" (341). For his leadership project to work, Wilson thought the president must overcome his position: though at the centre of the government, he is weak and subject to the whims of a Congress dominated not by statesmen but by hacks.

Thus far, Wilson's argument appears to call for a radically new constitutional definition of executive power. Wilson, however, often speaks of his proposed transformation of executive power not as something radically new but as a return to the practice that existed immediately after the founding. In comparison to his age, Wilson praises their understanding of leadership and statesmanship. "It was taken for granted at first that the real leaders of the nation would be put into the presidential chair" (343, "Leaderless Government"). His reforms of the executive branch "would be a return to our first models of statesmanship and political custom" (358). Apparently, while the founders' institutions made presidential leadership more difficult, their political custom encouraged it.

So, the Constitution does not provide the President with the power he needs to lead the country. Instead, it hinders his power. For this reason, Wilson proposes that the president cease to regard himself as an executive within the Constitution and instead only

³³ See "Government under the Constitution," in *An Old Master and Other Political Essays*, 152-53.

as the lea

given a p

custom.

T
th
n
c
C

Wilson

constitu

politic

country

possib

politic

upon

suppo

trans

in wh

ii. C

gov

som

exp

pri

—
2
the
S

as the leader of the nation. Seeing that presidents could be powerful after the founding given a political custom that supports their power, Wilson attempts to change the political custom. He writes:

The incumbents of the great office will more and more come to feel that they are administering it in its truest purpose and with greatest effect by regarding themselves less and less executive officers and more and more directors of affairs and leaders of the nation. (81, *Constitutional Government in the United States*).

Wilson is, of course, fully aware that this new political custom would, in fact, not constitute a return to the age after the founding. Instead, he attempts to found a new political custom in which presidents would possess the power they need to lead the country effectively. Present and future presidents would take their bearings as little as possible from their constitutional powers as executive and as much as possible from their political powers as leaders of the country. Given the limitations Wilson thinks are placed upon the executive by the Constitution, he attempts to create a political custom that supports a powerful "extra-constitutional" president.³⁴ As Tulis (1987) shows, this transformation had lasting effects both on the office-holders themselves and on the way in which we observers understand the office.

ii. Critique of the founders

In fact, much of Wilson's reform project is rooted in his critique of the founders' government. Unlike nearly all important statesmen before him (with the exception of some southerners prior to the civil war), but of a piece with his progressive roots, Wilson explicitly and extensively criticizes the founders' constitutional arrangements.³⁵ The principal problem, he thinks, stems from an excess of "Newtonian" or "mechanistic"

³⁴ Zentner (1994) thinks this president so powerful that "Wilson's political science approximates in theory the absolutism of Thomas Hobbes" (581).

³⁵ See "Government under the Constitution," in *An Old Master and Other Political Essays*, 141-44.

ba

en

liv

me

av

ar

pe

pe

pe

h

t

t

c

balancing systems in the government. Their Newtonianism made the founders too enthralled by checks and balances to recognize that "government is not a machine, but a living thing" (56, *Constitutional Government in the United States*). The founders worried more about security than about efficiency, so they excessively limited the powers available to those elected. Wilson claims only Hamilton understood that government was an "organic" and living thing that must act "with straightforward and unquestionable power." The rest thought that it was a machine that "you could afford to tie up in a nice poise, as if it were to be held at an inactive equilibrium" (199). Unfortunately for the present, "the temper and circumstances of the time gave public men little inclination to heed" Hamilton's theory (200).³⁶

The presidency is the natural home for the forcefulness and straightforwardness that government needs. Wilson claims the founders, because of both their excessive distrust of anything that resembled kingly power and their Newtonian enthrallment with checks and balances, did not give the president enough power to possess such force. They misconceived the proper mode of democratic government and the country has continued to perpetuate this misconception. Wilson writes:

We have hesitated to put our presidents or governors or mayors into direct and responsible positions of leadership with our legislators and councils in the making of laws and ordinances, because such a connection between lawmakers and executive officers seemed inconsistent with the theory of checks and balances whose realization in practice we understood Montesquieu to have proved essential to the maintenance of a free government (401, "Democracy and Efficiency" in *College and State*).

³⁶ This is one of the strangest assertions in Wilson's body of writing. He completely ignores Hamilton's integral part in writing *The Federalist* without any indication why. Hamilton was, after all, interpreting and defending the powers that the Constitution gave to the government. If Hamilton had a theory of government more like Wilson and revealed this theory in his interpretation of the Constitution, how can Wilson be so confident that the Constitution is "mechanistic" and that Hamilton went unheeded? If nothing else invited us to reconsider Hamilton, this strange argument might be enough.

Or, as

in thin

modes

valuab

loyalty

perfect

govern

Other

can cop

on its c

govern

creatin

Constit

leader

"soluti

executi

institut

persona

position

serious

³⁷ See E
should al
understan
regarding
he is inde

Or, as Wilson notes prior to this, the founders and those who follow them make a mistake in thinking that democratic government and monarchical government must have different modes of leadership and efficiency (400). Democracies should instead integrate what is valuable in monarchy. Monarchy's "cohesion, readiness and power to act, its abounding loyalty to certain concrete things, to certain visible persons, its concerted organization, its perfect model of progressive order" make it sometimes appear an ideal form of government (137, "Character of Democracy in the United States" in *An Old Master and Other Political Essays*). For Wilson, in supposed contrast to the founders,³⁷ democracies can copy and integrate monarchy's cohesion and power because the electoral connection, on its own, provides enough security against tyranny.

Wilson claims the monarchic element, so necessary to good and effective government, is not supported by the Constitution. Wilson's whole project aims at creating a new political order which supports the "monarchic" leader which the Constitution had excluded. I will suggest that Wilson's premise is wrong: a "monarchic" leader is supported by at least one understanding of the Constitution. Moreover, Wilson's "solution" may have caused more of a problem than it solves. As Hamilton interprets the executive in *The Federalist* and as Pacificus, he derives his power at least in part from his institutional and constitutional position. In deriding these and attempting to increase his personal power, Wilson may place the president in a weaker, because unsupported, position. It could be said that, given his primary concerns, if Wilson had taken more seriously Hamilton's role as interpreter of the executive branch, he would have sought not

³⁷ See Eidelberg (1968, chapter 9) for the view that the Presidency was "monarchic in principle" (191). I should also state my significant debt to the book as a whole and to this chapter in particular for my own understanding of Hamilton's understanding of political leadership. Although, I disagree with his argument regarding why the presidency is monarchic in principle: he claims that the president can be a leader *only* if he is independent of the people.

a ne

whic

that

"con

reser

mind

const

Zentr

"Mac

his cr

execu

dange

limite

bonda

tiger b

possib

govern

one m

³⁴ In a fa
attempted
increasin
American
Wilson so

a new transformation but a more complete understanding and even a real return to that which already existed.

I will suggest that a proper understanding of Hamilton reveals a constitutionalism that is neither fixed nor so unlimited as to be no longer meaningfully called “constitutional.” But to see how closely Wilson’s understanding of the Constitution resembles that of his critics, consider the following passage from Zentner (1994): “In the mind of the Founders, the Constitution represented a fixed and unalterable law. Formal constitutionalism limits political life by limiting the will of the majority” (588). And, Zentner continues, much of this limitation arises from the need to restrict the “Machiavellian executive power” as it was universalized by Hobbes (593). According to his critics, Wilson’s reforms are dangerous because they unfetter the prudently fettered executive power. I would also suggest that Wilson’s reforms are dangerous; but that danger arises from the lack of any guidance from the Constitution. Seeing that same limited Constitution that his critics defend, Wilson unleashes the executive from his bondage.³⁸

To expand upon the metaphor, where his prior critics respond by trying to put the tiger back in the cage, I would claim that a proper appreciation of Hamilton reveals the possibility of an acclimated tiger that has been unleashed but made amenable to a government of limited ends. Because a democratic people will always look to leadership, one must do more than insist on limited Constitutional government that excludes strong

³⁸ In a fascinating article that expands upon his earlier work on Wilson, Eden (1996) argues that Wilson attempted to transform the presidency by demoting the president’s role as an executive officer and increasing his role as an opinion leader. “The opinion-forming responsibilities that Wilson assigned to the American President were not, as he saw them, mere additions or augments to executive power. Rather Wilson sought to bring about a shift in the ranking of opinion leadership and executive power” (358).

leadership

tames that

leadership. One must find a solution that accepts the people's desire for a leader but tames that leader to safe constitutional government.

The day
the all-c

dominan

These tw

they cre

dominan

rights.

group, t

govern

precisel

too far u

Chapter 2

Hamilton's Executive Government

The day will most assuredly come "when every vital interest of the state will be merged in the all-absorbing question of who shall be the next President." -Alexander Hamilton

Through a few examples, Flaumenhaft (1992) states well what has become the dominant view of our Constitution:

As a panelist reviewing applications for grants under a Bicentennial program of the National Endowment for the Humanities, I read a stack of proposals whose unstated premise was that *the* purpose of the Constitution is to protect the citizens against the government. The dominant theme of these proposals was the restraint imposed upon the power of the United States either by the Bill of Rights or by the existence of the several states. Later, as a visitor to the hall in Philadelphia where the Constitution was framed, I listened to a guide who spoke repeatedly of the intention of the founders to protect the citizens against their government by establishing a system of checks and balances: not once did he even hint that the framers sought to *energize* government even while they sought safeguards for the citizenry against abuses in the exercise of that great power which they thought they needed to establish (264-65).

These two examples show the extent to which a certain view of the founders, i.e. that they created, in the words of Corwin, a "Government of Rights" not of "Powers," dominates the American mind. This is not to say that they did not create a government of rights. But it is all-but-forgotten that, to the extent that we can speak of them as a unified group, the founders aimed to create a government of rights that were secured by a government of powers. The anti-Federalists complained bitterly against the Federalists precisely because they thought this new national government of powers would encroach too far upon people's rights. If he heard the way we speak today, an anti-Federalist might

becom

the fan

unders

Federa

did tak

progre

interpr

seeme

time--t

provid

did not

Consti

constit

Consti

mechar

constit

scholar

Wilson

³⁸ Hayler
adoption.
economy
³⁹ See, fo

become convinced that a new anti-Federalist Constitution had been created in the wake of the failure of the Federalists'.³⁹

It is neither novel nor path-breaking, however, to suggest that, properly understood, the Constitution is more than a government of rights. With the fading of the Federalist party and the triumph of Jefferson and his heirs, this view of the Constitution did take pride of place in the American lexicon. But the previously mentioned progressives had realized back at the turn of the century that the Jeffersonian interpretation did not do justice to Hamilton's conception (Ford 1920). Still, Wilson seemed to win the day and Wilson's Constitution ruled out Hamilton.

But, even if Wilson were right about Hamilton's theory being unheeded by his time--the victory of the Jeffersonians at the beginning of the eighteenth-century may provide some evidence that Wilson is, to some extent, right--it is not clear why Wilson did not take more seriously Hamilton's claim that his theory was supported by the Constitution itself. In other words, Wilson infers from the victory of the Jeffersonian constitutional interpretation Jeffersonian constitutional intent. And so Wilson claims the Constitution creates a weak government because it concentrates too much on "Newtonian mechanics." Nonetheless, that *The Federalist* provides for a much more "energetic" constitutional government than Wilson claims has been argued persuasively by some scholars over the last forty years.⁴⁰

Yet, as we have already seen in the stories reported by Harvey Flaumenhaft, the Wilsonian conception of a Constitution that concerns itself much more with "checks and

³⁹ Huyler (1995, chapter 10) claims that, since the interpretation of the Constitution continued after its adoption, the anti-Federalists did "triumph" through the Jeffersonian reaction to Hamiltonian political economy.

⁴⁰ See, for instance, Eidelberg (1968), Epstein (1984), and Flaumenhaft (1992).

balan

wisde

leade

(198-

Cons

introc

energ

espec

latter

execu

Const

leader

that, v

best, i

a. Ma

not di

⁴¹ Low

(30).

⁴² See,

determ

constit

bargain

Tulis (

progres

origina

works (

Constit

against

balances" against government than with energy for government remains the conventional wisdom. In the study of the presidency where scholars are often in search of presidential leadership over and against what they take to be an ineffective government (Burns 1978) (1984), the Wilsonian view of the founders' intent is especially prominent. For them, the Constitution's "design"⁴¹ must always be overcome. Moreover, as was discussed in the introduction, some of the same scholars who have rightly pointed to more constitutional energy have also claimed that the Constitution is "anti-Leadership" in its intent. Thus, especially in the study of the presidency, their first argument has been obscured by their latter argument. Presidency scholars, who could have learned much from an emphasis on executive energy within the Constitution, have instead only taken from them that the Constitution intends the president to be subordinate to Congress as a "check" on his leadership or demagoguery.⁴² It will be the argument of this chapter and chapter three that, while Hamilton's version of the Constitution surely proscribes demagoguery, it is, at best, misleading, and at worst, simply wrong, to claim it proscribes "leadership."

a. Madison and Hamilton

Most scholars who emphasize Publius's negative disposition toward leadership do not distinguish between Madison and Hamilton. Instead, the body of essays is treated as

⁴¹ Lowi (1985) writes: "The Constitution was designed to make Congress the center of the power structure" (30).

⁴² See, for instance, Skowronek (2002). He summarizes Tulis (1987) by emphasizing his constitutional determinism, placing his argument in the same vein as Neustadt: "Neustadt's presidents were stuck in a constitutional system designed to thwart them, and they were thrown back upon their personal skills in bargaining and persuasion to meet the governing demands of the day. Later scholars went further. Jeffrey Tulis (1987), for example, theorized that the new, more personal forms of leadership anticipated by the progressives failed to reach their mark because the reforms on which they rested failed to displace the original constitutional structures that had supported the principles of the past" (744). That Tulis, in other works (1991) and even in the same book (7), has pointed to the energy and "modernity" of the Constitution's executive seems to have been obscured by his emphasis on the constitutional prohibitions against leadership.

a who

"amb

"lead

But is

the di

well t

⁴³ The
for ins
Adair
their d
Feder
Helvic
ways
possib
was m
that M
to sho
from E
incons
premi
that th
admin
energe
they v
substa
suppo
anima
goven

a whole and much is made of the negative connotation which is given to words like "ambition" and "leaders." The Constitution's executive must be insulated from "leadership" or the Constitution will dissipate into a government of men rather than laws. But is this perhaps more Madison's than Hamilton's argument (see chapter four)?⁴³ On the differences between the two, Gerald Stourzh (1970) writes:

Ironically, except for a few passages by Hamilton indicative of the mixed character of the new government, the anti-majoritarian emphasis of *The Federalist* is stronger in Madison's than in Hamilton's essays...It was Hamilton who justified judicial review as an exaltation of popular over legislative omnipotence. It was Hamilton who proclaimed as 'the fundamental maxim of republican government' that 'the sense of the majority should prevail. It was Hamilton, above all, who developed an argument against a Federal Bill of Rights that is one of the most ingratiating praises of popular sovereignty in American political literature (52-53).

It is worth quoting and discussing this last argument fully because it rejoins quite well the modern claim that all the founders were anti-democratic (see, for instance,

⁴³ There has been much scholarship concerned with whether Publius possesses a "split personality." See, for instance, Adair (1944 1974), Mason (1952), and Carey (1984). Carey (1984) argues persuasively that Adair and Mason are wrong to read a split personality into *The Federalist*. Carey writes: "evidences of their differences, in the sense of antagonistic views on the nature of the Constitution, are not evident in *The Federalist*" (19). Because I do not analyze Madison's argument as Publius but only his argument as Helvidius, I do not propose to settle this question in my dissertation. In chapter four, I will indicate certain ways in which Madison's argument as Helvidius seems to differ from his argument as Publius. It is possible, and has been argued by many (see, for instance, Peterson 1981 and Carey 1995), that Madison was much closer to Hamilton during the writing of *The Federalist* than in subsequent years and therefore, that Madison contradicted himself (although, see Rosen 1999 and Banning 1995 for two different attempts to show the consistency of Madison). Publius may not have had a split personality, and Madison departed from Publius in the subsequent years. Rosen (1999), however, defends Madison against the charge of inconsistency in a very sensible manner. He writes: "These indictments of Madison are based on a false premise. They assume that his 'nationalism' necessarily implied the broad construction of national powers, that the Constitution was a meaningful reform only if animated by Hamiltonian principles of administration. From this perspective, it is not enough that both Madison and Hamilton sought a more energetic national government as the Articles of Confederation crumbled; it must be supposed as well that they were of a single mind as to the extent of the government's powers, its relation to the states, and the substantive ends of its economic policies...It turns the real but limited consensus among the Constitution's supporters into a monolith of thought and action" (158-59). It is, to some degree, this same assumption that animates this dissertation: Madison and Hamilton could agree about the need for a stronger national government without agreeing on the particular character of that government.

Hofstad

governm

It

or

pr

th

st

for

re

ne

re

of

Co

of

pr

so

go

We also s

understood

strictness.

definition

there are n

own libert

So

upon this

powers gi

Because a

fundamen

⁴ Carey's art
(1973), who
conversely, c

Hofstadter 1973) and that all the founders concerned themselves most with "checking" government power.

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince...It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people, and executed by their immediate representatives and servants. *Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations.* 'We, the people, of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sounder much better in a treatise of ethics than in a constitution of government (558-59; italics mine).

We also see in this argument why I claim Hamilton's constitutionalism is not best understood even as a limitation of the ends of government. The people "in strictness...surrender nothing." Instead, a constitutional government, by its very definition, means that which aims at the liberty of the people. Within that definition, there are no limitations upon what the people can do in establishing and improving their own liberty.

Some of the differences between Madison and Hamilton emerge from reflection upon this issue. The Madisonian Constitution is nothing if not a strict delineation of powers given to the federal government, beyond which it could not and should not go. Because anything else could lead to governmental tyranny, a Constitution is fundamentally a government of laws not of men (Carey 1978).⁴⁴ On the other hand,

⁴⁴ Carey's article is an intelligent reply to those scholars, i.e. Smith (1907), Dahl (1956), and Hofstadter (1973), who claim Madison "advocated separation of powers as a means of thwarting majority rule, or, conversely, of protecting identifiable minority interests."

Hamilton has nothing but disdain for those who think laws not men should rule. He writes:

The idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government), has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction (*Federalist* #28, 171).

This passage, perhaps better than any other, expresses the mistake those like Corwin make when they only find in the Constitution a government of "laws and not of men." Of course, insofar as he views the modern presidency as unconstitutional, Corwin's passing comment that "the modern theory of presidential power" is the contribution primarily of Alexander Hamilton indicates that he knew well the incompatibility of Hamilton's with his Constitution.⁴⁵ The key is that Hamilton thought he was a *constitutionalist* even as he decries those who think the simple force of law sufficient for maintaining government.⁴⁶

b. The myth of Hamilton's "monarchism"

In turning to Hamilton for a conception of constitutional executive power superior to our conventional understanding of the Constitution, we are confronted with the myth, propagated most forcefully by Jefferson, that Hamilton is a monarchist, unfriendly at best toward republican government.⁴⁷ In considering the merits of this claim, we can perhaps do no better than this from his friend Gouverneur Morris:

General Hamilton was of that kind of man which may most safely be trusted; for he was more covetous of glory than of wealth or power. But he was of all men the most indiscreet. He knew that a limited monarchy,

⁴⁵ Richard Loss (1990, xiii) quotes Corwin.

⁴⁶ Stourzh (1970) writes: "The ideal of a government of laws was for Hamilton a point of departure, not of arrival" (61).

⁴⁷ See Knott's book appropriately titled *Alexander Hamilton and the Persistence of Myth* for an intellectual history of the treatment of Hamilton throughout American history.

In Mo

an atte

that a l

freedom

because

people.

leaders

those w

strongly

demag

them, th

toward

limited.

character

⁴⁴ This is c

even if established, could not preserve itself in this country. He knew also, that it could not be established, because there is not the regular gradation of ranks among our citizens which is essential to that species of government, and he very well knew that no monarchy whatever could be established but by the mob...But although General Hamilton knew these things, from the study of history, he never failed, on every occasion, to advocate the excellence of and avow his attachment to monarchical government. By this course he not only cut himself off from all chance of rising into office, but singularly promoted the views of his opponents, who, with the fondness for wealth and power which he had not, *affected a love for the people which he had and they had not* (italics mine).⁴⁸

In Morris's judgment, Hamilton's defense of monarchical government never amounted to an attempt to create one in the United States. His study of history had simply shown him that a limited monarchy, as it existed in Great Britain, best promoted stability and even freedom. As Berns (1992) notes, Hamilton praises the British constitution mostly because it was a form of government in which the rights of man are well-secured.

Morris also claims that Hamilton, rather than his adversaries, truly loved the people. As we shall see, Hamilton deplores all forms of leadership that are not true leadership but instead mere pandering to the people's inclinations. Hamilton thought those who pretended to care most for the "rights of the people" and inveighed most strongly against dangerous governmental power were usually the most dangerous demagogues and future tyrants (*Federalist #1*, 6-7). Rather than pretending a love for them, the Hamiltonian statesman demonstrates his love for the people by leading them toward their better natures and away from their perverse demons.

Though Hamilton might have thought that the executive power when given to a limited monarch possesses more safety than any other, the essentially democratic character of the new government prevented any such possibility. Moreover, as has been

⁴⁸ This is quoted in an article written by Walter Berns (1992).

noted already, even Hamilton's most allegedly "monarchist" statements in the Convention still use popular sovereignty to originate those who would govern and had no principle of hereditary (Stourzh 1970, 46). If Hamilton can justly be called a monarchist, it is only because he thought republican governments could most profit by learning something from the stability and vigor of monarchies (Walling 1995). As always, Hamilton made a virtue out of necessity and sought alternative paths to secure the stability and vigor he thought so critical to the success of this bold experiment in republican government.

c. Hamilton and the "modern" presidency

George Will states simply and elegantly: "We honor Jefferson, but live in Hamilton's country."⁴⁹ Clinton Rossiter, more so than perhaps any other, explores how thoroughly Hamiltonian our country and, especially, our view of the Constitution has become. Rossiter (1964) writes: "In a world in which political energy is a major spur to progress and political power is the key to survival, this constitutionalist who talked incessantly of energy and power makes the kind of sense to posterity that he could never quite make to his own age" (246). He continues quoting Hamilton as he shows our own understanding:

We shun constructions 'calculated to defeat the...necessary authority of the government'; we shape our 'means' grandly to our 'ends'; we seem intent upon proving that this 'fabric' can 'advance' with us indefinitely, guiding us while it admonishes us, on the road to an ever higher civilization. In short, we read the Constitution, as he asked us to read it, in such a way as to 'provide for national exigencies,' 'obviate national inconveniences,' and 'promote national prosperity' (246-47).

If Rossiter is right, turning to Hamilton for a better understanding of our "modern" presidency would be most useful.

⁴⁹ Quoted in Knott (2001, 6).

R
president
important
other than
"boldly a
and the m
that Ham
his most

T
"executiv
been no s
Flaument
excepting
he subord
constitut

⁸⁰ See Loss
then claims
hoped to ma
modern the
lie to subord
comprehens
have demon
one-dimen
teachings of
⁸¹ Walling
executive"
authority an
complete th
republican
republican
this same ar
Hamilton co
begin there
confine my

Rossiter, quoting his teacher Corwin, also claims "the modern theory of presidential power" is "the contribution primarily of Alexander Hamilton" (248).⁵⁰ In his important book on Hamilton's "responsible republicanism" which demonstrates, among other things, that Hamilton was, in fact, a republican, Karl-Friedrich Walling speaks "boldly and without contradiction in asserting that Hamilton was both a constitutionalist and the most important Founder of the modern presidency" (153).⁵¹ This is not to say that Hamilton's only contribution is his conception of the presidency; but it is, perhaps, his most important and far-sighted contribution.

That being said, it is striking that, with the exception of Walling's chapter on "executive energy and republican safety" and some of Flaumenhaft's chapters, there has been no systematic treatment of Hamilton's conception of executive power. In fact, Flaumenhaft's book--the most extensive treatment of Hamilton's political thought excepting Stourzh (1970)--does not take up executive power as an explicit topic. Instead, he subordinates Hamilton's arguments about the executive to chapters on more general constitutional concepts: unity, unity and duration, duration. Insofar as Flaumenhaft wants

⁵⁰ See Loss (1982) (1990) for an attempt to show that Corwin and Rossiter are wrong in this claim. Loss then claims: "Corwin, the originator of the continuity thesis and a careful student of Hamilton's writings, hoped to make constitutional interpretation and presidential action more responsible by anchoring the modern theory of presidential power in Hamilton's thought. Accordingly, Corwin devised a Platonic noble lie to subordinate the one-dimensional modern theory of presidential power to Alexander Hamilton's comprehensive teachings" (1982, 7). If this last claim were true, however, it seems that Corwin would have demonstrated his thesis--something that Loss himself notes he never did (1982, 6). How could the one-dimensional modern theory of presidential power be subordinated to Hamilton's comprehensive teachings if we have no demonstration of them?

⁵¹ Walling argues that Hamilton shows us both that "no republic can be safe without an energetic executive" (153) and that "in America at least, no executive can be truly energetic without the moral authority arising from the republican principle of consent" (153). He writes: "Though Hamilton did not complete the transformation of the executive into a branch of American government accepted as equally republican as Congress, he certainly began it. He made executive energy both constitutional and republican" (153). In both points, I have learned much from Walling insofar as this dissertation will make this same argument. Walling, however, makes much more of the dialectical nature of Hamilton's argument. Hamilton only ended up making an argument for an energetic, because consensual, executive; he did not begin there. Whether or not this is the case is beyond the scope of this dissertation. For the most part, I confine my analysis to what was argued publicly as Publius and Pacificus.

to elucid

giving so

we do not

for the m

d. The lo

T

Gerald St

much of t

fame, the

explains

achievem

Stourzh e

"Whiggi

require ge

necessari

H.

lea

na

the

po

the

²² My treatm

treatment of

²³ Stourzh qu

²⁴ This passa

Hamiltonian

the founder

to elucidate the whole of Hamilton's political thought without obscuring some of it by giving some institution pride of place, his method makes sense. However, by doing so, we do not learn as well from him if Rossiter and Corwin are right to give Hamilton credit for the modern theory of presidential power.⁵²

d. The love of fame and constitutionalism

The most elegant book on Hamilton ever written--in this author's judgment--Gerald Stourzh's *Alexander Hamilton and the Idea of Republican Government* makes much of those passages from *The Federalist* that I will also treat extensively: "the love of fame, the ruling passion of the noblest minds."⁵³ For Stourzh, this passion for fame explains Hamilton's ambition--an ambition that found its ground in working toward the achievement of truly noble principles rather than mere self-aggrandizement. Moreover, Stourzh emphasizes that Hamilton was a republican though he was not as vigilant and "Whiggish" as Jefferson. In the first place, he thought republics, as any government, require governmental power. Second, for Hamilton, unlike Jefferson, power did not necessarily corrupt but instead could make more responsible. Stourzh writes:

Hamilton believed in both the possibility and desirability of personal leadership even beyond the admittedly extraordinary tasks of founding a nation and providing initial legislation. This belief was grounded in a theory of political conduct that opposed to the corrupting tendencies of power the sobering influence of responsibility. It is a notable contrast to the Jeffersonian tradition in American political thought (180).⁵⁴

⁵² My treatment of Hamilton may, however, commit the opposite error. By concentrating so much on his treatment of executive power, I may obscure other aspects of his thought on other institutions.

⁵³ Stourzh quotes this passage on 102 and 202.

⁵⁴ This passage should make us wonder: do not those students of Herbert Storing who subscribe to a Hamiltonian notion of governmental energy remain strangely Jeffersonian to the extent that they emphasize the founders' negative attitude toward political leadership?

"person

"tribun

by, at t

even W

inclinat

"Interp

bringin

Between

Hamilt

may on

intention

the end

Hamilt

for he w

"Moreo

executive

aristocrat

democrat

Antifeder

represent

America's

represent

elections.

worth, he

Anti-Fede

interests, t

someone l

This anti-f

during the

plebiscitar

mere major

Of course, in the office of the presidency, as we shall see, Hamilton's notion of "personal leadership" was not simply voicing the Wilsonian notion of acting as a "tribune" for the people by voicing their desires. Instead, the president would lead them by, at times, being willing to act in their interests even against their inclinations. But even Wilson did not want presidents simply doing whatever were the people's inclinations. After all, Wilson's leadership involves "interpretation." As Tulis writes: "Interpretation was the core of leadership for him" (125). And interpretation meant bringing forth the people's desires even if they were only vaguely known to them before. Between Wilson's leading the people to their best desires when only vaguely known and Hamilton's leading the people to their interests over and against their inclinations, there may only be a greater degree of popular pandering.⁵⁵

But to return to Stourzh's argument, as perceptive as this book is of Hamilton's intentions and of his understanding of government, it falls short in two critical places near the end of the book. First Stourzh wisely notes Morris's aforementioned judgment of Hamilton: "General Hamilton was of that kind of men, who may most safely be trusted, for he was more covetous of glory than of wealth or power" (202). Stourzh continues:

⁵⁵ Moreover, excepting Wilson and Morris in the Convention, there was not much of an argument for executive leadership being made by anyone at that time. The anti-Federalists, especially the so-called aristocratic anti-Federalists (see Cornell 1999, chapter 2), feared executive power, even or especially if democratic, much too much to advocate for a plebiscitary president. Laracey (2002) writes otherwise: "The Antifederalists lost the battle over ratification of the Constitution, but just barely. Moreover, the direct-representation arguments many of them articulated during the battle would have a profound influence on America's future political development. In particular, Antifederalist calls for the 'most explicit form of representation possible' led naturally to the idea that presidents, linked to the public via national, popular elections, could be the best representatives of the people in the national government" (31). For what it's worth, he cites Wood (1991, 259) in making this claim. But Wood (1991) only argues: "The grass-roots Anti-Federalists concluded that, given the variety of competing interests and the fact that all people had interests, the only way for a person to be fairly and accurately represented in government was to have someone like himself with his same interests speak for him; no one else could be trusted to do so" (259). This anti-Federalist argument, to the extent that it's accurate, sounds much more like the Whig argument during the early nineteenth-century which resulted in a stance against executive power than like the modern plebiscitary president. Because of the diversity of interests and peoples in America, one man elected by a mere majority cannot pretend to represent all the people (see chapter 5 on Lincoln's "Whiggism").

While

passag

much.

foundi

animat

or, at l

politic

politic

contra

includ

There

quotin

adhere

a repu

arbitra

Present-day political thought, exclusively attuned to the dimensions of wealth and power, is ill-equipped to grasp the relevance of this judgment. I believe it is a relevant judgment; though I would add that it seems more appropriate for the founder of a nation and the maker of its laws, both of which Hamilton was in a very real sense, *than for the practitioner of 'normal' politics or the servant of the Constitution*, both of which he was not (202; italics mine).

While this judgment makes some sense, it could also be quite misleading. That famous passage concerning the love of fame and the noblest minds, of which Stourzh makes so much, occurs in a public defense of the executive power as it will exist *after* the founding. To exclude from "post-founding" or "normal" politics the passion which animates Hamilton would be compelling if such had been indicated by his own writing or, at least, if he had failed to include such a passion in his description of "normal" politics. It seems a very dicey proposition to exclude such a passion from "normal" politics when one encounters the passion itself in a description of "normal" politics. In contrast to Stourzh, my dissertation attempts to ascertain *why* Hamilton would have included in his description of the executive power this extraordinary passion.

Second, in Stourzh's considered judgment:

Hamilton failed as a servant of the Constitution (in ways that have scandalized many students of latter days, who grew up within the framework of constitutional democracy), because the purpose of steering the new nation in the right direction prevailed, for a self-appointed founder of an empire, over strict adherence to constitutional rules (203).

There was, for Stourzh, an "extreme gravity" to those actions taken by Hamilton which, quoting Hamilton, looked to "the substantial interests of society" against "a strict adherence to ordinary rules" (203-04). These actions pose the most serious dilemma "for a republican society that guarded itself by constitutional rules against the exercise of arbitrariness" (204). Here, however, Stourzh judges Hamilton by that very standard to

which m

imagine

accordin

words. h

strict "c

introduc

preserve

constitu

agency i

related.

space fo

such ren

e. Hami

S

Hamilton

as articu

as works

new Con

would be

those nec

was the d

endanger

which much of the rest of his book had shown Hamilton does not subscribe. Hamilton imagined himself as a constitutionalist who does not subscribe to that fallacious doctrine according to which constitutions mean a government of laws rather than of men. In other words, his constitutionalism is somehow not troubled by those actions that depart from strict "constitutional rules." It is, in fact, these two "mistakes" made by Stourzh that best introduce my treatment of Hamilton. How is the possibility for the noblest love of fame preserved within the post-founding executive office? How can Hamilton be a constitutionalist but yet allow for so much human agency or, more precisely, executive agency in departing from constitutional rules? And, of course, these two questions are related. It is precisely Hamilton's allowance for a flexible constitutionalism that provides space for those men who most love fame. But this begs one final question, how does such remain *constitutional*?

e. Hamilton's system of government

Since these questions can only be answered by engaging in a full study of Hamilton's argument, I turn now first to Hamilton's general understanding of government as articulated in *The Federalist*. Of course, these papers are properly conceived of both as works of political theory *and* as rhetorical devices to convince the states to ratify this new Constitution. In analyzing their arguments, we must be alive to their theories: it would be overly reductionist to view them as *mere* rhetoric; but we must also be aware of those necessities that the political situation imposed on their candor. Hamilton's first task was the defense of the Federalists against the charge that the new government will endanger the people's liberty. As Hamilton does so well, he turned the anti-Federalist

100

l
e
v
l

A

A.

ex

40

See

cor

38

1.

R-50

5

critique on its head. "Security of liberty" is not best secured by weak government but by strong (*Federalist #1*, 5-6). This theme runs throughout *The Federalist*: weak government would only force usurpation outside the Constitution, setting more dangerous precedents for the people's liberty. As Madison states succinctly in *Federalist 20*: "Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities" (122-23).⁵⁶

Hamilton later expands upon this teaching in his discussion of the instability that would result from a condition in which the federal government does not have the power to keep peace. Hamilton writes:

The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free (*Federalist #8*, 42).

Moreover, and most important for our purposes,

They would, at the same time, be necessitated to strengthen the executive arm of government, in doing which their constitutions would acquire a progressive direction toward monarchy. It is of the nature of war to increase the executive at the expense of the legislative authority (43).

According to Hamilton, the strength of the federal government and especially of the executive power under the new Constitution provides the people with more security than would an unstable and weak government that must usurp power so as to maintain security. It is better to provide for governmental strength beforehand so as to make it conduct its business through predictable and regular channels, i.e. constitutionally, than

⁵⁶ There are various passages in *The Federalist* that will also be discussed in chapter 4 in which Madison sounds much more like Hamilton than a "strict constitutionalist." To make sense of a passage like this, Rossiter writes: "He [Hamilton] persuaded Madison to go along with him in *The Federalist*" (167).

to

Th

to

ar

be

hi

ba

the

co

vig

pu

the

oc

aut

con

be

con

retu

W

(See

Con

insti

⁵⁶ Se

of the

to increase its power in reaction to the instability that a weak government has caused. The Roman republic fell to Caesar only because it was not strong enough on its own.

We should pause some to consider the implications of the "progressive direction toward monarchy" that Hamilton claims results from a state of war. According to the argument, this new government will be able substantially to avoid such a direction because it will maintain stability and peace. But how so? Hamilton reveals much about his solution in *Federalist #17's* discussion of the relations between the sovereign and the barons in feudal Europe. Because the sovereign did not have enough institutional power, the barons triumphed over him. In their triumph, they became "the oppressors of the common people" (104-05). The sovereign only triumphed if he "happened to be a man of vigorous and warlike temper and of superior abilities, which answered for the time, *the purposes of a more regular authority*" (104; italics mine). This history teaches us that, if the people want not to be oppressed, they must not rely on fortune, i.e. the chance occurrence of a vigorous sovereign. Instead, apparently the institution of a "more regular authority" might solve their problems. One avoids the direction toward monarchy by constituting a strong "monarch."⁵⁷ In short, the United States does not fall to a Caesar because he can be elected (and reelected) President.⁵⁸

The monarchic nature of the executive office will become most clear when we consider the papers in which Hamilton treats the executive power explicitly. For now, we return to the rest of his system and the rhetorical argument for strong government. First,

⁵⁷ Wilson argues that the president will only be powerful if he possesses a great amount of political skill. (See, for instance, "Leaderless Government," in *College and State*, 340-41 and "Government Under the Constitution," in *An Old Master and Other Political Essays*, 152-53. Here, Hamilton seems to point to the institution of an authority that transcends the absolute necessity of political skill.

⁵⁸ See Eidelberg (1968, chapter 9) for the argument that Hamilton constituted a "monarch" with the office of the presidency. Eidelberg's argument will be discussed more fully below.

the government must possess powers commensurate to its preservation. For Hamilton, this cannot be accomplished by spelling out the necessary powers and then providing for them constitutionally. Hamilton writes:

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. *These powers ought to exist without limitation*, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason *no constitutional shackles can wisely be imposed* on the power to which the care of it is committed (*Federalist #23*, 142; italics mine).

I place italics upon these two statements in particular because they are in such striking contrast to the typical understanding of the founders' intentions. According to the conventional understanding of the founding, the founders took great pains to limit governmental powers as much as possible while maintaining a viable government. Hamilton later defends his view and attacks what we would take to be the conventional understanding of the founders' intentions:

We must expose our property and liberty to the mercy of foreign invaders, and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation (*Federalist #25*, 156).

Hamilton envisions a government in which we realize that the representative principle and the constitutional framework control our leaders enough that we need not hamstring them by creating unnecessary constitutional impediments to the exercise of their power.⁵⁹

⁵⁹ See *Federalist #28*: "Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace, to say that the whole powers of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, *only* efficacious security for the rights and privileges of the people, which is attainable in civil society (172-73; italics mine). See, also, *Federalist #31*, 190.

The constantly unpredictable nature of the threats that might undermine government makes unlimited discretionary power absolutely necessary. If the constitution does not provide for such discretion, the government's interest in self-preservation will force it to usurp power. Once necessity forces government to act outside the constitutional structure, the rule of law itself is discredited. Hamilton wants the Constitution to allow sufficient discretion outside the rule of law because only as such can it maintain the rule of law.

Further, Hamilton writes:

Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of the country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable (*Federalist #25*, 158).

So Hamilton's constitution remains a body of "fundamental laws" for which the rulers, along with the ruled, have a certain reverence. In this, Hamilton sounds much like our conventional understanding of the founders. The founders created what could even be called a "constitutional faith" (Levinson 1988) within which certain "fundamental laws" are enshrined as inviolate and unalterable. Hamilton, however, reveals here a certain subtlety in his notion of "constitutionalism" that is not typically included in the conventional understanding. A non-Hamiltonian ruler who firmly believes that laws not men govern might still recognize that certain necessities dictate a breach of certain fundamental laws. In responding to these necessities, they may lose their reverence for the inflexible laws they must abrogate. If the notion of "constitutionalism" does not permit flexibility, political circumstances will inevitably dictate that a ruler do what

constitutionalism does not allow. In doing so, he will lose respect for the constitution that tried to prevent him from doing that which is necessary. For this reason, he, or those who follow him, since they have lost reverence for its wisdom, will find it much easier to work around the constitution in the future.

A constitution embodies certain fundamental laws about which a society feels so strongly that it encodes them in a document "higher" and more inviolate than those laws passed within our normal political sphere. But, according to Hamilton, "necessity" will sometimes dictate that a ruler breach even those fundamental laws. For instance, as I will discuss in chapter five, the Constitution embodies a certain prudence or flexibility in allowing Congress to suspend the writ of habeas corpus in cases of emergency. But what if, in an emergency, Congress cannot or will not convene to take the necessary actions? Should a president, in the words of Lincoln, allow "all the laws but one to be destroyed?" If he knows habeas corpus must be suspended and knows that Congress will not do it, does not necessity dictate that he breach the fundamental law embodied by the Constitution's apparent demand that Congress take this action? To maintain a ruler's reverence, the Constitution itself must recognize such actions as within its purview insofar as they conduce to the ends of the Constitution, i.e. the security and happiness of a society, even if they violate its prescribed means. For Hamilton, "utility is the prime end of all laws"⁶⁰ and so law must always be judged by the end to which it conduces. One needs the rule of law because it best produces a secure and happy society. But to sacrifice the ends to the means would be absurd. The rule of law should not be so inviolate as to reduce the security and happiness of a society. The representatives of the people within a Constitution that looks to their happiness and security must possess the

⁶⁰ Quoted from Hamilton's *Farmer Refuted* by Stourzh (1970, 25).

means necessary to accomplish these ends. Hamilton writes: "It rests upon axioms as simple as they are universal; the means ought to be proportioned to the end." Therefore, "the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained" (*Federalist* #23, 140).

Throughout the early papers, Hamilton continues to emphasize the wisdom of constitutional flexibility. Hamilton writes: "There ought to be a capacity to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity" (*Federalist* #34, 205). Or Hamilton writes:

There are certain emergencies of nations, in which expedients, that in the ordinary state of things ought to be forborne, become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them (*Federalist* #36, 223).

Here, Hamilton fails to specify the nature of those expedients he thinks ordinary times should forbid but extraordinary times allow. We can attribute this failure both to the rhetorical dangers of specifying what might seem extraordinary abuses of governmental power to those reading and to the theoretical difficulties of specifying that which Hamilton's very argument has claimed cannot be. There are simply extraordinary circumstances that demand prudential responses outside of and even against that which we would permit ordinarily. Hamilton claims that their constitutionalism should make room for such prudence so that those, perhaps otherwise illegal, "options" dictated by necessity become lawful.

Tarcov (1990) states well this argument: "The Constitution must itself be prudent in leaving room for prudence" (37). I will soon suggest that Hamilton thinks that, while in principle this power resides in the federal government as a whole, the executive is the

natural repository of such discretionary power. In matters of foreign policy, Tarcov contrasts the teaching of *The Federalist* with Locke:

Whereas Locke advocated leaving the conduct of the foreign affairs power to the prudence of the executive, free from direction by standing laws made by the legislative, *The Federalist* advocates leaving the extent of the essential foreign affairs powers to the prudence of the federal government (especially, in the cases under consideration, its legislative power), free from direction by constitutional limitations made by the people (38).

Apparently, for Tarcov, *The Federalist* points not to executive discretion but to governmental discretion, even primarily to legislative discretion. To the extent that this is true, as will be discussed in chapter four, *The Federalist* merely mirrors the Constitution. After all, the Constitution only explicitly provides for legislative prudence with the clause allowing Congress to suspend the writ of habeas corpus in emergencies.

But, Tarcov continues:

The Federalists's arguments against constitutional limitation of the essential foreign affairs powers do, however, indicate a conception of that power as an unlimitable capability to deal with unlimitable contingencies--a conception that can in turn also justify leaving the conduct by the executive of the foreign affairs power free from direction by standing laws made by the legislative power. That possibility leaves open again legislative control other than by standing laws. The legislature, however, is designed for the purpose of making general laws rather than occasional judgments founded on present circumstances (38).

I will suggest that, for both rhetorical and prudential reasons, Hamilton does not connect his arguments regarding unlimited governmental discretion to executive discretion. Here, Tarcov indicates the problem with imagining the legislature as the repository of the individualized discretion called for by Hamilton. As Hamilton writes: "The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the

regulation of the society."⁶¹ The situations herein discussed call for the prudential abrogation of rules for the sake of societal good. The problem is not that the rules themselves need to be changed; if so, one might naturally look to the legislature for the solution. Instead, these situations require that the rules be temporarily disregarded in the name of the public good. As we shall see, such prudence occurs much more naturally within and through the executive power.

On this point, Rossiter (1948), quoting Franklin D. Roosevelt's attorney general, writes: "the President's constitutional powers in time of emergency defy precise definition, 'since their extent and limitations are largely dependent upon conditions and circumstances' (218). Rossiter here, however, seems to stop somewhat short of the argument Hamilton implies because those actions demanded by an "evident national necessity" cannot be taken if "specifically forbidden...by the Constitution or by duly enacted laws of Congress" (218). Of course, this would raise the question as to whether anything could be "specifically forbidden," especially given that the president's emergency powers will defy precise definition. In the case of Lincoln, to forbid specifically his actions, the Constitution would have to say that a president cannot suspend the writ of habeas corpus when Congress is not in session.

Turning back to the general question of Hamilton's constitutionalism, he thinks, on the one hand, that a danger exists if the rulers lose respect for a constitution that forecloses those extraordinary responses demanded by certain kinds of exigencies. On the other hand, Hamilton thinks the people would lose respect for a constitutional government that does not make them feel secure. Hamilton defends the Senate because its distance from the people institutionally would allow it to resist the "propensity of all

⁶¹ Quoted in Stourzh (1970, 61).

single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions" (*Federalist* #62, 405). Moreover, in defending the benefits of a stable government against some of those, including Jefferson, who would have the government seized by periodic instability to insure that it remains republican and maintains its respect for the people's liberty,⁶² Hamilton writes:

But the most deplorable effect of all is that diminution of attachment and reverence which steals in the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will be long respected without being truly respectable, nor be truly respectable, without possessing a certain portion of order and stability(*Federalist* #62, 407).

Order and stability are more important to a healthy respect for the political system than almost all else. A constitution whose concern over protecting liberty would cause it to sacrifice stability is, by definition, unhealthy.

Moreover, as though he were responding directly to Wilson's claim that the Constitution is "Newtonian," Hamilton writes:

When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods (*Federalist* #22, 137).

This Constitution, in contrast to what conventional, i.e. Wilsonian, wisdom affirms, does not restrict what could be done so as to ensure that nothing unsafe can be done. Instead, for Hamilton, this is an active Constitution which allows "the doing what may be

⁶² Stourzh (1970) quoting and paraphrasing Jefferson: "'Tumults' or 'irregular interpositions of the people,' he wrote, would keep the governors of society 'to the true principles of their institution'" (34).

necessary" not only to ensure our security but even to enhance our prosperity.⁶³ In short, for Hamilton, as for Wilson, it is better to err on the side of action and risk safety than to err on the side of safety and risk inaction.⁶⁴

The problem, however, is that such action requires responsibility.⁶⁵ While republics need this vigorous action as much as any government, such power is not as safely entrusted to the leaders of a republic. Perhaps in a manner that sounds trite to our ears, Hamilton concentrates most on those dangers posed by "foreign corruption." He writes:

One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption. An hereditary monarch, though often disposed to sacrifice his subjects to his ambition has so great a personal interest in the government and in the external glory of the nation, that it is not easy for a foreign power to give him the equivalent for what he would sacrifice by treachery to the state (*Federalist* #22, 137).

This passage follows an example of such corruption in a time of war and the way in which it would tie the hands of a legislature so constructed as to require large majorities for action. He writes:

In such a state of things, this ally of ours would evidently find it much easier, by his bribes and intrigues, to tie up the hands of government from making peace, where two thirds of all the votes were requisite to that object, than where a simple majority would suffice. In the first case, he

⁶³ Oliver (1923) writes: "If nothing could be done that was not expressly named in the articles of union, these articles could never fit the uses of a great and developing state. The constitution under so strict an interpretation would be but a lifeless legal document and nothing more; a bone for dogs to quarrel over and not a rod to govern with. This constitution, Hamilton contended, was, and was meant to be, merely an outline" (226-27). Oliver wrote this in a spirited defense of Hamilton which Theodore Roosevelt called "the best life of Alexander Hamilton that has ever been written." See Knott (2002, 89-90) for a discussion of Oliver's book and for its impact on Theodore Roosevelt.

⁶⁴ See, by contrast, Goodin (1996). He claims *The Federalist* is a principled defense of the "deadlock of democracy."

⁶⁵ See Walling (1999) for the best case for Hamilton's republican responsibility. Walling claims there were two strains of republicanism represented at the founding. Hamilton argued for giving to this new government enough power to ensure its responsibility. Jefferson counseled vigilance in watching the government to ensure it did not abuse its power.

would have to corrupt a smaller number; in the last, a greater number (137).

In other words, the principle of republican safety, i.e. to "check" the legislature by requiring "supermajorities" so as to diminish the danger that unjust majorities make harmful laws, could actually undo the republic.

In summary, while teaching us to expect a constitutional government that can preserve stability and enhance prosperity, that, as such, has certain unlimited powers, and that is limited primarily by the representative principle, Hamilton withholds from us the mechanism by which such things will be accomplished. He speaks of "authorities essential to the common defense" and the "powers" that must exist without limitation (*Federalist* #23, 142); but he has not yet revealed to us what department of the government will possess these powers and who will oversee such authorities.

In seeking it, we do best to note Hamilton's wariness of republican responsibility. Because the interests of hereditary monarchs were always tied to their country, they would not sacrifice their country for their interests. In solving the dangers of republican government, Hamilton, however, does not take that route so popular among the radical Whigs: to withhold from government power to ensure it does not abuse it.⁶⁶ Instead, Hamilton begins from this one famous insight: "The sense of responsibility is always strongest, in proportion as it is undivided" (*Federalist* #74, 482).⁶⁷ After all, it is not, for Hamilton, the virtue or wisdom of the hereditary monarch which makes him superior in looking to the country's interests; it is only his institutional position.⁶⁸ If one can

⁶⁶ For the best discussion of this difference between Hamilton and radical Whigs like Jefferson, see Stourzh (1970).

⁶⁷ See Flaumenhaft (1992, chapter 7).

⁶⁸ Whatever else may be said of Hamilton's propensity toward monarchy, nowhere can one find some anti-republican argument about the intrinsic virtue or wisdom of kings. The "wisdom" of monarchy comes not

construct an executive branch that has an institutional position similar to the monarch, one can more safely entrust the powers and the responsibility that goes along with those powers to the president. We take most responsibility for those things that are clearly our own and, if sufficiently strong, the nation will “belong” to the president while he holds office.

However, while Hamilton may have learned something from the British monarchy, his president is not a monarch. In the first place, even if the president resembled the monarchy quite closely, Hamilton could not openly argue such in defense of this new Constitution. The reason, however, may not be primarily rhetorical. Instead, the republican problem of responsibility calls for a republican solution.⁶⁹ Hamilton attempts to solve the problem of executive power by doing the opposite of what many of his contemporaries thought necessary: invigorating the executive office. He claims it has power at least equal to, if not superior to, the legislature. He encourages the most ambitious men to fill it. In fact, if it were a monarchy, the power granted and ambition encouraged might be most dangerous. But one might say he tries to solve the republican problem by making the presidency stronger than a limited monarch.

Walling (1996) writes: "He no doubt believed that the executive established by the Federal Convention was too dependent upon the people to take adequate responsibility for their welfare" (127). This may be true. As I have stated, I do not try to

from the monarch himself; it comes from a certain insight Hamilton had come to within his "science of politics" (*Federalist* #9, 48).

⁶⁹ Quoting a letter from Hamilton to Morris, Flaumenhaft (1992) writes: "The form of government 'most likely to be happy, regular, and durable,' is 'in my opinion,' says Hamilton, 'representative democracy,' in which 'the exercise of the legislative, executive, and judiciary authorities is vested in select persons,' these persons being 'chosen really and not nominally by the people'" (189). Contrary to any claims that he wanted to introduce something of a monarch in this republic, Hamilton thought one of the problems with popular governments has been "from its being compounded with other principles." "Compound governments, though they may be harmonious in the beginning, will introduce distinct interests; and these interests will clash, throw the state into convulsions & produce change or dissolution" (188-89).

trace the twists and turns of Hamilton's thought. I only try to make sense of what he argued as Publius and Pacificus. It seems that as Publius and Pacificus, the exact opposite of Walling's claim describes Hamilton's thought. The president could and would take adequate responsibility for the people's welfare only because he was dependent upon them. Thus, as Walling notes in the next sentence, "he turned this dependence into a political advantage" (127). And only because he was sufficiently vigorous to take most seriously his responsibility could he be trusted not to sacrifice his country's interest to his own. As in a monarchy, his country's interest became his interest.

f. Distance from monarchy

For what do seem to be rhetorical reasons, Hamilton disarms his readers' suspicions by establishing as much distance as possible between the American president and the British monarch. *Federalist #68* claims that the "sense of the people should operate in the choice of the person to whom so important a trust was to be confided" (441). But since the people themselves will not be as able to know the men most fit for the position, "the immediate election should be made by men most capable of analyzing the qualities adapted to the station." These would be a small number of men "selected by their fellow-citizens from the general mass" (441-42). Importantly, the appointment of the president should not "depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes" (442); it was perhaps most critical to Hamilton and others who wanted a strong independent executive that the appointment not be made by Congress. While the Electoral College as it was founded does not appear to our eyes sufficiently democratic, Hamilton emphasizes throughout this paper that the

choice of the executive would be "an immediate act of the people of America" (442). It would not be too strong to say that Hamilton would rather give up the Electoral College than give up the independence of the executive "on all but the people themselves" (443).⁷⁰

By contrast, from *Federalist* #68, Eidelberg (1968) concludes: "A system which makes the choice of a President dependent upon public debate or discussion of national issues would be regarded by Hamilton as an absurdity" (189). He continues, discussing the "founders" as a whole now rather than Hamilton in particular:

They simply felt that an election, upon whose outcome hangs the personal ambitions and material interests of so many individuals and groups, is a most dangerous means of providing public education...For the Presidency is so replete with the power to dispense good and favors that, were an election for this office predicated upon public debate and discussion of national issues, not reason so much as passion, not candor so much as deception, not statesmanship so much as demagoguery, would too often prevail over the public mind (*Federalist* #68, 189-90)

Eidelberg finds that the presidency is monarchic in principle precisely because it was "not to appeal to the suffrages of the people or of any electoral body whatsoever" (190). The president could and should exercise leadership but only so as to "speak with the force of wisdom" in exposing the error and vice of the people. According to Eidelberg, this could only be done if he is not dependent upon them.

By contrast, Nichols (1994) claims "that several elements of the constitutional authority were created specifically to enhance the President's role as popular leader" (35). In this, he departs from Eidelberg's more typical understanding of the Constitution, according to which it created as much distance in the presidency from the people as

⁷⁰ In fact, as Knott (2002) notes, Hamilton was a lifelong supporter of the direct election of electors by district and actually recommended a constitutional amendment establishing this method (220).

possible.⁷¹ One might say he makes more of Hamilton's claim that the presidency should be "independent for his continuance in the office on all *but* the people themselves" (443).⁷²

Eidelberg, however, does seem correct in his description of the kind of leadership Hamilton wanted. In this, Eidelberg's vision of the executive is superior to those who, even while defending it, bluntly claim that the Constitution is "anti-leadership" simply (Lawler 1987). He seems wrong, however, in not taking with more seriousness that element of *Federalist* #68 which explicitly connects the Electoral College to the people. In fact, as I noted in chapter one, some thought, i.e. Morris and Wilson, that executive independence could best be secured simply by popular election.⁷³ The president must be independent of Congress but dependent upon the people. In failing to note the democratic character of the executive, Eidelberg obscures one of the crucial questions which Hamilton tries to answer: how can the president be both dependent on the people and independent of their vices and follies?

Federalist #69 attempts to establish as much distance as possible between the elected magistrate in the United States and a king of Great Britain. Here, Hamilton repeatedly emphasizes that, more than any consideration of power or "energy," the president differs from a hereditary monarch because he is "reeligious as often as the people of the United States shall think him worthy of their confidence." This creates a "total dissimilitude between him and a king of Great Britain, who is an hereditary

⁷¹ Of course, Eidelberg's argument is not conventional because he defends the non-democratic nature of the Constitution's presidency. It is, however, conventional in finding that the presidency is non-democratic.

⁷² Although Nichols would not seem to agree with my claim that Hamilton actually means it when he makes this argument. See Nichols (2000) where, in praising Walling's book, he claims "If we look at Hamilton's political failures, we see that they are all tied to his failure to appreciate the importance of democratic politics and perhaps even to recognize its legitimacy" (211).

⁷³ Eidelberg (1968) himself notes this on 175.

1

monarch, possessing the crown as a patrimony descendible to his heirs forever" (446). And again, after a long list of those aspects of the president that differ from a king, the crucial difference comes in the answer "we give to those who would persuade us that things so unlike resemble each other" (453): "the whole of [this government]" is "in the hands of the elective and periodical servants of the people" (454). His argument is not merely a rhetorical ploy to slip a monarch in through the proverbial "backdoor" of this republic. He makes certain nods to "the advantages of monarchy" (*Federalist* #9, 50) but maintains, throughout, that this new republic is an experiment in government by the people and for the people--nothing more.

g. Energy

Hamilton writes: "There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government" (*Federalist* #70, 454). As the prior paper attests, there is a republican aversion to monarchy that causes it to be distrustful of strength in the executive branch. According to Hamilton, to the extent to which a republican government acts on the belief that a vigorous executive and a republican government are incompatible, it will be condemned either to its own destruction or to the abandonment of the republican form in times of crisis;⁷⁴ no matter what kind of government one creates, its stability and thus its goodness depend on the existence of an energetic executive.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a

⁷⁴ "Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator" (*Federalist* #70, 454). See Rossiter (1948) for a discussion of "constitutional dictatorships."

government ill executed, whatever it may be in theory, must be, in practice, a bad government (*Federalist* #70, 455).

The proponents of republican government who perceive a tension between it and a strong executive might theorize about the importance of a weak executive who cannot dominate the rest of the government. But if the executive is feeble, no matter what benefits that might theoretically hold, it will result in a bad government because it will not have the power to maintain stability. This argument, however, continues to beg the question: why is the executive the sole place capable of maintaining the stability of the government?

Before answering this, we should first consider what might be called Hamilton's rhetorical sleight-of-hand. As I have discussed, Hamilton has made his readers see the necessity of a government with virtually unlimited power to preserve itself and maintain stability. To have said openly that such power should rest in the executive branch would have alarmed his readers and have potentially defeated the Constitution in at least New York and perhaps elsewhere. Now, the executive branch will emerge as the great agent of stability--the only institution truly capable of taking those actions Hamilton showed were necessary in prior papers. As we shall see, while the executive will be responsible for preserving the government, Hamilton will be careful not to revisit his discussion of the limitless scope inherent in that power. His readers might see the necessity of a limitless power to maintain stability; they might see the executive as the agent of stability; but showing them that this means that the executive would have, in certain instances, limitless powers would surely alarm their suspicions.⁷⁵

⁷⁵ After reading Hamilton's treatment of executive power immediately after the papers that show the need for constitutional flexibility, a very perceptive student remarked: "I could have gone back to the early papers and inserted 'executive power' in each discussion of constitutional discretion and flexibility."

In discussing Hamilton's conception of executive power, it is important to remember Stourzh's sage advice: "Alexander Hamilton's thought, in particular, cannot be properly understood unless one grasps the interrelationship of the foreign and domestic halves of his political theory as much as of his statesmanship" (128). Since we are examining Hamilton's thought on the presidency, we should not, then, begin from the perspective, initiated by Wildavsky (1966), that dominates much literature on the presidency over thirty years. According to this perspective, one can separate the domestic presidency from the president's control over foreign policy.⁷⁶ In many ways, those scholars who focused on the "imperial" presidency (Schlesinger 1973) sought this separation because they wanted to curtail presidential power over foreign policy while maintaining and even enhancing the president's domestic authority. Or alternatively, conservatives have sought greater presidential control over foreign policy,⁷⁷ but shy away from that same power domestically.⁷⁸

Hamilton's discussion of the executive power always collapses any attempt to distinguish "two presidencies." In one of his more famous arguments for executive power, Hamilton writes:

It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; 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 (*Federalist* #70, 454).

⁷⁶ See Peterson (1994) for a recent argument which vindicates Wildavsky's "two presidencies" theory by claiming that the president is, and should be, more dominant in foreign affairs than domestically. He argues international relations theory imposes on a nation-state a centralized response, so the dominance of the executive at the expense of Congress is intrinsic to the nation-state system itself.

⁷⁷ See, for instance, Cheney (1990).

⁷⁸ Although see Eastland (1992) for a conservative case for a strong president domestically. As Eastland himself notes in the introduction, he is relatively unique among conservatives for making such a case.

In *Federalist #9*, Hamilton had introduced us to the calamities and "furious storms" that typically plague republics.⁷⁹ There we learn that the "enlargement of the orbit" will help to lessen or avoid these plagues. Now, we see that the executive will be primarily responsible for resolving those disturbances that do occur.⁸⁰ These disturbances for which the executive is responsible include both foreign attacks that affect all communities *and* those internal disturbances like factions and other "high-handed combinations" that particularly plague democratic republics. The executive energy consists in the power to preserve the community from every sort of threat, both domestic and foreign, to the security and liberty of the people.⁸¹

As he taught his readers in prior papers, "contingencies" will arise that demand expedients that depart from the "ordinary state of things." In other words, there will be situations in which the Constitution must be flexible enough to allow the government to act outside of and even against the fundamental body of law. Such acts are only, of course, justified if they truly do serve the ends of the Constitution: the security, happiness, and prosperity of the people. It seems fairly clear that these situations are the tumults for which Hamilton has made the executive responsible--especially because

⁷⁹ "It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed. If now and then intervals of felicity open to view, we behold them with a mixture of regret, arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage" (*Federalist #9*, 47)

⁸⁰ To see that the executive would be responsible for such domestic conflagrations, consider Hamilton's advice to Washington during the Whiskey rebellion (*Works VI*, 359-451).

⁸¹ Scigliano (1981) writes: "Energy in the executive is essential to the ends of representative government: the securing of citizens in their rights. It is the energetic executive who protects these rights from foreign and also domestic danger. To be sure, security is also provided by the extensive republic, but the extensive republic itself requires the energetic executive for the steady administration of its laws" (149).

Congress could be the source of some of these tumults.⁸² Hamilton writes: "There is no nation which has not, at one period or another, experienced an absolute necessity of the services of particular men in particular situations; perhaps it would not be too strong to say, to the preservation of its political existence" (*Federalist* #72, 472) Because it is the executive who is responsible for preserving the community in times of crisis, Hamilton's previous teaching concerning the relationship between means and ends implies that there can be no absolute constitutional prohibitions placed upon executive discretion. If the executive's end is to maintain the community, he must have all the means possible at his disposal for doing so.

To see why Hamilton thinks the executive better suited to this task than Congress, we should consider again his teaching on responsibility. Hamilton writes:

As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance (*Federalist* #74, 482).

The sense of individual responsibility inspires "scrupulousness and caution" but "as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy" (483). Regardless of his character--though Hamilton hopes that "the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications" (*Federalist* #68, 444)--a man is more responsible when all of the blame or all of the praise falls upon him individually. In the

⁸² In talking about the necessity of a veto, Hamilton writes: "The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the Executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn" (*Federalist* #73, 477).

case of pardons, for instance, a body of men "might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency" (483). They are less "sensible" to blame because they know they can always deflect the blame by pointing to their colleagues. Therefore, despite its dangers, the extraordinary actions that require extraordinary responsibility are more safely entrusted to one man than to a body of men. Moreover, as has been said already, the legislature is naturally that body which makes laws and these situations require individual actions outside of or even against the conventional law.

Finally, if Hamilton teaches us anything, it is not whether one should give to the government the power to respond to these exigencies, but whether such necessary responses will be constitutional. Once we see that it is better that these responses be constitutional than that they force the government "outside" an inflexible constitution, the question becomes who best to possess the discretionary power. Hamilton seems, indirectly, to indicate that the executive should possess such power. In matters of responsibility, however, no governmental solution is foolproof. So Hamilton would surely still worry about this extraordinary responsibility in the hands of an elected official, whose interest remains distinct from the country he serves. For this reason, it is perhaps not mere rhetoric that Hamilton emphasizes that the president, again unlike the monarch, "would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes and misdemeanors, removed from office" (*Federalist* #69, 446).

h. Presidential "prerogative"

Why, if my argument is correct, does Hamilton not make a stronger case for what Locke calls the "prerogative" power? After all, as Walling (1999) notes, even in his stronger argument for presidential power as *Pacificus*, Hamilton never uses the word "prerogative" to describe his argument (149). To explain this, Walling claims that strict construction left presidents no alternative "but to invoke prerogative when extreme danger appears or great opportunity knocks, as Jefferson did in his defense of the Louisiana Purchase." Contrary to this, Hamilton "preferred for the president to act energetically within rather than outside the law"(152). In other words, the word "prerogative" implies that a president has gone outside the law in response to necessity. Affirming this Jeffersonian view, Scigliano (1981) claims there is no *constitutional* sanction for "prerogative." According to him, "when the president suspends or dispenses with the prescriptions of law in special situations" he may exercise emergency power but we must "understand that the source of this power is not, strictly speaking, the Constitution or statutory law but the 'law of necessity'" (142). By contrast, Hamilton tried to *constitutionalize* those actions necessary to preserve the Constitution. It is possible that for Hamilton the word "prerogative" would imply an extra-constitutional power that flatters our false opinion that "laws not men" can govern. And, as has been examined previously, such inflexible constitutionalism would also cause rulers to lose respect for a Constitution that forecloses from them necessary action.

Moreover, precisely in its legalism, an explicitly delegated "prerogative" power might pose real dangers in a republic. To see this, consider Nixon's claim in an interview about illegal activity in which he and his subordinates had engaged: "When the President

1

does it, that means it is not illegal."⁸³ Nixon claims that the Constitution grants to the president the power to act in whatever manner he deems necessary regardless of the legality of his actions. Essentially, Nixon claims as a matter of legality the absolute right for the executive to break any and all laws.⁸⁴

In Hamilton's view, the necessity of executive discretion arises in response to circumstances that the law could not have possibly foreseen and for which the law is not an adequate response. The preservation of the community requires the wise and prudent judgment of a single man. If the executive power is too weak, the man will necessarily arise outside the constitution. Because Hamilton thinks the executive power sufficiently strong, the wise and prudent statesman can fulfill his duties within and for the Constitution--though the actions he takes could *appear* to be outside of and even against the Constitution. In other words, Hamilton's Constitution must possess sufficient flexibility that those extraordinary actions taken for its preservation--that would not be countenanced in ordinary times--still remain somehow constitutional. They remain constitutional because they aim at the same fundamental end as the Constitution: the preservation of the political community. By contrast, the term "prerogative" implies a legal right to take any actions outside an inflexible Constitution the executive deems necessary--a standard that Hamilton thought invites more abuse and less respect for the body of law outside of which the ruler must act.⁸⁵

⁸³ Nixon said this in an interview with David Frost in response to a question regarding the "Huston Plan," a secret order that allowed federal intelligence agencies to engage in burglaries and other illegal surveillance activities. See Pyle and Pious (1984, 74).

⁸⁴ Of course, I use Nixon's isolated argument in this interview only to instruct us on the dangers of "legalizing" prerogative. I do not claim to know Nixon's settled view of the matter.

⁸⁵ Schmitt (1989), from whom I have learned much on this point, writes of Jeffersonian prerogative as compared to Hamilton's: "In pointing toward a less imposing executive authority which nevertheless might break the bonds of the law as necessity dictated, Jefferson believed he was devising a presidency more in tune with the nation's republican character and less susceptible of abuse. Hamilton might have countered

Perhaps for Hamilton, Nixon's understanding of an absolute right to executive "prerogative" as delegated by the Constitution, which, at the same time, remains outside of it possesses too much danger for abuse. A prudent executive must possess the discretion to act in that manner he deems necessary for the country's preservation. To legalize such discretion, however, and deem it acceptable for any executive, no matter how prudent, to act in whatever manner he desires would be to depart too far from the constitutional order. Those men who have the community's survival in view will understand that they must utilize the means necessary for their noble end. A good Constitution must be flexible enough to enable some executives to take those actions necessary for its survival; but a good Constitution must also not confer upon the executive a discretionary power simply as a matter of legal right. As necessary as executive discretion might be, to grant it by law would be to change it into a different kind of power than that for which it is intended. The executive does not have a legal right to prerogative; he has a constitutional duty to preserve the happiness and security of the community in situations that demand a departure from the fundamental body of law.

Of course, if this characterization is correct, it invites the question: what is the standard that determines true prudence from mere usurpation? In other words, how does one determine if the executive is right in claiming that he must abrogate the fundamental law for the sake of a greater public good in, what he will claim, is an extraordinary circumstance? How can one determine if these claims are not mere pretense claimed by the executive so as to increase his own power? Hamilton may implicitly attempt to avoid this problem by claiming "there will be a constant probability of seeing the station filled

that necessity is often in the eye of the beholder and would have doubted whether such a presidential regime was in fact more likely to promote the rule of law and maintain republican mores" (343). Chapter four will discuss this issue in greater depth.

by characters preeminent for ability and virtue" (*Federalist* #68, 444). But, to our eyes, this "constant probability" seems more like a faint hope. This issue will be revisited in chapter four. For now, it is perhaps enough to say that the dangers of executive usurpation are intrinsic to the regime itself. One cannot escape the problem by wishing away its necessity. If the potential usurper chooses to work within Hamilton's flexible Constitution to achieve his plans, it is at least as likely, if not more, that he would have undertaken the same usurpation in a strict constitutional order.⁸⁶

i. Presidential administration

Contrary to the conventional conception of the pre-modern president,⁸⁷ Washington's administration was not characterized by its lack of involvement in the legislative process. Tulis (1987) writes: "Our first president, George Washington--with Hamilton's guidance--fashioned a legislative program, used the veto for policy purposes, and exercised all of the unilateral powers that are allegedly new today" (7-8). Perhaps this passage from the diary of a Senator during the early stages of Washington's administration best summarizes the relations between the executive branch and Congress at the time:

Were Eloquence personified and reason flowed from her tongue, her talents would be in vain in our assembly...Congress may go home. Mr. Hamilton is all-powerful, and fails in nothing he attempts.⁸⁸

⁸⁶ Flaumenhaft (1992) writes: "The necessity of executive energy was rooted in the nature of things: in some way or other it would return; and if refused a stately republican administration, it would break violently through the front door--or enter by stealth through the back door" (192-93).

⁸⁷ This conception is reinforced by books such as Ketcham (1984).

⁸⁸ Quoted in Harlow (1917, 141).

As Washington's Secretary of the Treasury, Hamilton acted as a kind of prime minister initiating legislation and merely seeking congressional approval for it.

Binkley (1947) states well the question before the new government at the time: "Shall the leadership of Congress be provided internally or shall that body frankly accept leadership from without?" (35) The Federalists answered this question in their actions by giving to department heads, within the executive branch, control of legislation. The initiation and preparation of legislation was to be the concern of executive "ministers," and not of specialized committees within Congress as became the case under the Jeffersonians (Binkley 1947, 33).

Ultimately, the Federalist attempts to establish control of legislation within the executive department failed because the Jeffersonians repudiated this system. As Binkley writes, it "aroused the fear of the agrarian element because they regarded it as placing the center of governmental gravity in the Executive, which they considered the historic dwelling place of tyranny" (48). Nonetheless, the fact that the Federalists attempted such a plan teaches us much about the supposed constitutional injunction against executive leadership of legislation. It also shows us that Hamilton thought he could put his theory, set forth in *The Federalist*, into practice in this new government.

Turning back to Hamilton's theory, he thinks the president must possess the virtue and ability not only to save the country in times of crisis but also to run the country in normal times. If the process of election does, in fact, ensure virtue and ability, "this will be thought no inconsiderable recommendation of the Constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration." In every government, whether republican or not, the

executive necessarily has a large share in its administration. Moreover, "the true test of a good government is its aptitude and tendency to produce a good administration"

(*Federalist* #68, 444). And how large is the executive's share in this administration?

Nearly all:

The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, *it is limited to executive details, and falls peculiarly within the province of the executive department*. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriation of the legislature, the arrangement of the army and navy, the direction of the operations of war--these and other matters of a like nature, constitute what seems to be most properly understood by the administration of government (*Federalist* #72, 469).

Not only does Hamilton's executive guard the Constitution from the abuses of Congress and preserve the political existence of the nation, he also conducts the daily business of government. Moreover, the conduct of this business is more than mere "administration" of laws passed by others; instead his theory of administration seems to encompass the ability "to plan and undertake extensive and arduous enterprises for the public benefit" (*Federalist* #72, 470).⁸⁹

Writing as Pacificus in defense of Washington's neutrality proclamation, Hamilton writes: "The executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions" (*Letters of Pacificus and Helvidius*, 13). In this case, he is speaking about the executive control of foreign policy; but, considering the prior passage from *The Federalist*, the

⁸⁹ In this context, Walling (1999) notes the necessity that the executive possess the "time to do extraordinary things." He writes: "Precisely because empires are not built in a day, Americans could not reasonably expect to harness the ambition of empire builders unless they gave such figures the time to begin their arduous enterprises, prove their value before an election, and substantially complete them in another term or series of terms of office" (133).

point seems to have broader implications. Just as the president will do more than merely "preside" over the country, his administration will do more than merely "administer" law.⁹⁰ To "establish an antecedent state of things," one must be exercising significant control over public policy and the general conduct of government. For Hamilton, the real power is in controlling the details of government--details about which the executive and his cabinet will have the requisite knowledge and expertise to conduct government business smoothly.⁹¹ Perhaps it would be only a slight overstatement to say that, in Hamilton's vision, the legislature merely appeases the people by giving them the appearance of a more direct control over their government, while the executive and his administration actually control almost all facets of public policy.⁹²

In truth, Hamilton's theory concerning the relationship between the executive and the legislature is more substantial than this overstatement makes it sound. Presidential administration should neither go unnoticed by Congress nor should the president

⁹⁰ For a discussion for the misleading way in which these modern terms such as "executive" and "president" are used, see Mansfield (1989). He argues that we mean more than merely someone who "executes" the law and we mean more than merely someone who "presides" over the country; but we use these words to hide from ourselves the fact that they're essentially ruling us.

⁹¹ See Flaumenhaft (1981) for an extensive discussion of Hamilton's "Administrative Republic." Consider also Bryce's argument: "It is therefore clear that the extent of the power of the executive magistrate depends upon the particularity with which the law is drawn, that is, upon the amount of discretion which the law leaves to him. If the law is general in its terms, the executive has a wide discretion. If, for instance, the law prescribes simply that a duty of ten per cent *ad valorem* be levied on all manufactured goods imported, it rests with the executive to determine by whom and where that duty shall be collected, and on what principles it shall be calculated. If the law merely creates a post office, the executive may fix the rate of payment for letters and parcels, and the conditions on which they will be received and delivered. In these cases the executive has a large field within which to exert its free will and choice of means" (*The American Commonwealth*, 194).

⁹² Koritansky (1989) writes: "But it is not only in the field of foreign policy where, Hamilton thought, the executive ought to supply the initiative of American government. In general, Hamilton tried to make the concession to the principle of legislative supremacy that would interfere as little as possible with the power of the executive to promote rational and energetically administered policy. Legislative supremacy was considered a formal requirement of legitimacy; executive direction was considered an actual requirement of rationality. These two principles could both be honored without contradiction if the actual role that Congress played in government was restricted to that of ratifying, or refusing to ratify, the general features of an administration's policy" (295).

disregard Congress. While many other members of the Convention thought that the executive branch would serve as a kind of "check" upon the possible excesses of the legislative branch, they still thought the real governing would take place in what they took to be the most democratic body, Congress. In Hamilton's theory, however, rather than the executive "checking" the legislature, the legislature checks the executive.

Perhaps then Hamilton did not depart so much from his early writings on politics during the period from 1774 to 1776. Stourzh (1970) claims that during that period the leading revolutionaries denied "the supremacy of the British Parliament in which they were not represented" but "continued to see the king of England their sovereign ruler"

(26). Hamilton contributed the following:

It may with propriety be said, that the King is the only Sovereign of the empire. The part which the people have in the legislature, may more justly be considered as a limitation of the Sovereign authority, to prevent its being exercised in an oppressive and despotic manner: Monarchy is universally allowed to predominate in the constitution (27).

This is not to say that Hamilton thought that monarchy did or should predominate in the American Constitution. But because Hamilton's writings on the executive tend to conceive of it as the essential feature of any good government, perhaps this relation between the legislature and the King describes as well the relation between Congress and the president. Moreover, Stourzh continues: "Insofar as Hamilton identified the king as the sovereign, it was logical for him to regard the social contract as an agreement between the king and the people" (27). So too, one could say that in the American Constitution the real agreement and representation is not between the legislature and the people but between the executive and the people. While the legislature might serve as the

agent of vigilance for the people against executive usurpation and may also pass certain general laws that the executive must then administer, the executive is the real ruler.

However, Congress does more than maintain vigilance over executive usurpation, it also improves the quality of executive rule. In speaking about the propriety of the president submitting his appointments to the approval of Congress, Hamilton first writes: "It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests." But when he is "bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature" (*Federalist* #76, 494-95), his choices will take the common good more into mind. Hamilton then broadens the point and applies it to the British system: "Hence it is (the present reign not excepted) that the sense of that body [the House of Commons] is often seen to control the inclinations of the monarchy, both with regard to men and measures" (495-96). The same would apply to the American system. Just as the concurrence of the Senate will moderate and improve the president's appointments, the general sense of Congress will moderate and improve the president's administration. He will rule but tempered and moderated by Congress.

Hamilton's theory of executive administration within a democratic republic constitutes the real vigor of the republic and will help to insure its stability. Hamilton has suggested, first, that the executive is essential to maintain the nation in a time of crisis. But perhaps even more important, Hamilton thinks his executive can and should steer the nation in normal times. Perhaps the real danger to republican government may stem from ambitious men who satisfy their ambition by overturning the political order. They

overturn the republican political order, in part, because it proclaims that justice is to rule and be ruled in turn or that no man is more important than any other and they see no prospect for the fulfillment of their ambition within such a regime; they want to rule simply.⁹³ Hamilton thinks that if, within a republican government, an executive office can be created which gives the ambitious man the ability to rule simply, albeit according to the representative principle,⁹⁴ one can avoid some of the tumults which seemed to have been coeval with any republic. Because the administration of the government will be the peculiar province of the executive and where the real governing takes place, the ambitious man will run for president rather than seek to overturn the government.

Republican politics in the past had always been characterized by disputes over fundamental political issues, i.e. rule of the few or rule of the many, protection of private property or redistribution of wealth, whose definition of virtue should rule. By contrast, Hamilton's theory of administration directs political concern away from such divisive fundamental questions and toward the improvement of the public good--something upon which nearly everyone can agree. Hamilton seems to subscribe to Machiavelli's division of people between the great and ambitious, on the one hand, and those who want to be left alone so long as they have security and, if possible, prosperity, on the other (*The Prince*, Chapter IX, 39). Hamilton tries to teach the ambitious to concern themselves not with disputes over fundamental political issues but with the improvement of the public

⁹³ The phenomena of ambition will be discussed much more fully in the next chapter.

⁹⁴ In fact, as should become clear in the next chapter, the representative principle will not be an impediment to these types of men because they have always founded their power on the people. Now, they are just encouraged to do so constitutionally and safely rather than unconstitutionally and unsafely.

good through its administration, for which those who want security and prosperity will be forever grateful.⁹⁵

j. Administrative leadership

Hamilton's theory of executive administration shows that the presidency can be institutionally much stronger than Wilson thought. Wilson, because he did not think the presidency sufficiently strong or "representative," undertook a project to make the office into the "rhetorical" mouth-piece for the people. Wilson, wanting leadership, thinks the president must be less of an administrator and more of a leader. But Hamilton thinks the executive can best exert leadership precisely by being an administrator. In other words, in the administrative state that Hamilton wants to create, merely leading the people through words would accomplish nothing for them in deed.⁹⁶

⁹⁵ If Hamilton learned to found on the people from Machiavelli, it would perhaps be the most surprising way in which Hamilton is a "Machiavellian statesman." For a summary of the various ways in which Hamilton has been thought to be a "Machiavellian statesman," see Walling (1995, 419). This would be an especially unconventional way of understanding both Hamilton and Machiavelli and thus, without an argument that goes beyond the limits of this dissertation, I cannot offer it as, in any way, conclusive. But, Machiavelli writes: "He who comes to the principality with the aid of the great maintains himself with more difficulty than one who becomes prince with the aid of the people, because the former finds himself prince with many around him who appear to be his equals, and because of this he can neither command them nor manage them to suit himself. But he who arrives in the principality with popular support finds himself alone there, and around him has either no one or very few who are not ready to obey" (*The Prince*, IX, 39). And, as advice to the prince, Machiavelli writes: "A prince should also show himself a lover of the virtues, giving recognition to virtuous men, and he should honor those who are excellent in an art. Next, he should inspire his citizens to follow their pursuits quietly, in trade and in agriculture and in every other pursuit of men, so that one person does not fear to adorn his possessions for fear that they be taken away from him, and another to open up a trade for fear of taxes" (XXI, 91). If Machiavelli is serious about this advice, doesn't this prince already sound tamed? See, below, chapter 3, section c.

⁹⁶ In his conception of presidential leadership, Hamilton's logic is strikingly similar to some descriptions of the presidency recently emerging out of positive political theory. Moe (1990) writes: "The key point here is simply that the president can make lots of important structural choices on his own, without going through the legislative process. Some of these can be reversed by legislative action later on. But because the American separation-of-powers system makes legislative victories quite difficult to achieve, regardless of who is trying to achieve them, this is unlikely. The result is that the president has a trump card of tremendous consequence for the structure of public bureaucracy. He can act unilaterally in many matters of structure, while Congress must go through a difficult process of legislation—in which the president gets to participate and, if he disagrees, to veto. Moreover, if Congress does not act (with presidential participation and consent) to design and create a new public agency, the president can subsequently add on new

I will discuss this subject in greater detail in the next chapter; but for now we should reflect some on the following passage in defense of a longer term of office for the president. Hamilton writes: "There would be time enough before it arrived [termination] to make the community sensible of the propriety of the measures he might incline to pursue" (467). Throughout his discussion of these issues, Hamilton is careful never to describe leadership as merely following whatever the public desires. Instead, Hamilton's president will be a leader precisely because he does not follow whatever the public desires but instead dares "to act his own opinion with vigor and decision" (*Federalist* #71, 465). While following that course of action he thinks best, he leads the community by showing them *why* his course of action is best. *The Federalist* denigrates demagoguery, i.e. mere compliance to the whims and vagaries of the people, but to say that it denigrates "leadership" does not seem to do justice to the educational function of all political actors, most especially the president. While running the country through his role in the administration, Hamilton's executive leads the country by, in the first place, improving it and, in the second place, making them "sensible" of the reasons for his actions. It is true that more important than leading the country through words is accomplishing great deeds for them--the "extensive and arduous enterprises." But, even these deeds could be called true leadership insofar as they seek to enhance the good of the people.

structures that, in qualifying the way the legislatively imposed structures work, are more conducive to the president's own interests" (236). Moe continues his description showing how a president's national constituency causes him to think "in grander terms about social problems and interests and to resist specialized appeals" (237). He concludes this line of reasoning: "Presidents are the only players in the politics of structure who are motivated to create a unified, coordinated, centrally directed bureaucratic system" (237).

In fact, it is precisely through "administration" that the president can be dependent on the people for his continuance but independent of their vices and follies. Hamilton attempts to teach the people that, rather than demanding mere compliance to their wishes, they should demand results from the course of action that he chooses. Prospectively, they may make mistakes about what will be good for them; but, retrospectively, they make far fewer mistakes about what has benefited them. If a president wishes to continue in office, he must have the expertise to improve their lives. In short, he must lead them well to continue to lead them at all.⁹⁷

In Wilson's case, his failure to understand the leadership potential of presidential administration robs the presidency of its real source of power within the system. For instance, Wilson's "rhetorical" leadership undid his attempts to pass the League of Nations (Tulis 1987, 145-61). Rather than making the compromises necessary to get it passed, he attempted to coerce Congress into passing it by going over their heads directly to the people. The Hamiltonian insight can be seen in a comment made by one Senator to Senator Henry Cabot Lodge, the principal force behind the defeat of the League. Senator

⁹⁷ The psychological mechanism that insures republican responsibility and safety discussed in *The Federalist's* treatment of executive power does not work as well when presidents can only be reelected for two terms. In fact, Hamilton indicates at least two serious problems with the frequent changes that result from limiting presidential terms. He writes: "To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity and desert; and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing that the dismissal of his predecessor has proceeded from a dislike of his measures; and that the less he resembles him, the more he will recommend himself to the favor of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new President to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government" (*Federalist* #72, 469). See Skowronek (1993) for a history of the presidency that essentially begins from this insight. Second, Hamilton writes: "An ambitious man, too, when he found himself seated on the summit of his country's honors, when he looked forward to the time at which he must descend from the exalted eminence for ever, and reflected that no exertion of merit on his part could save him from the unwelcome reverse; such a man, in such a situation, would be much more violently tempted to embrace a favorable conjecture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty" (471).

James Wilson said: "Suppose that the President accepts the treaty with your reservations. Then we are in the League, and once in, *our reservations become purely fiction*."⁹⁸ It might be argued that if Wilson had better understood the potential for executive power through administration, he would have understood that the Senate's legal reservations would be meaningless once the president had the power to administer and conduct their behavior in the League. Wilson could have pretended to accede to Congress's demands and then used his administrative power to accomplish what he wanted. In doing so, he would lead the people both by making them sensible of the wisdom of the League and placing them in an alliance that would benefit them in the long run.

k. Conclusion

Hamilton's executive is more than just a component of his system of government; it is the real substance of the system. Through the new politics of administration in which governing takes place not so much through legislation itself but through the expert initiation and implementation of law, an executive can improve society in a permanent and lasting way. Moreover, by sustaining the political community in times of crisis, often and especially against the people's own errors, the executive can secure for himself "lasting monuments of their [the people's] gratitude" (*Federalist* #71, 465).

As *Pacificus*, Hamilton will spell out his argument for executive power even further, revealing just how central it is to his understanding of government. But, while Madison will claim that Hamilton as *Pacificus* contradicts Hamilton as *Publius*, a close reading of *The Federalist* seems to show that *Pacificus* is simply more explicit about that which *Publius* had chosen to leave implicit. As I have attempted to show, he had good

⁹⁸ This quotation can be found in Barber (1992, 38; italics mine).

reason to do so. To point to an executive power limited by nothing other than executive prudence would be a dangerous tool in the hands of an imprudent executive, to say nothing of the controversial nature of such a teaching in a constitutional republic.

Chapter 3

Hamilton's Treatment of Ambition: An Ambitious Accommodation And the Redefinition of Political Virtue

"The Pride, Ambition, and Turbulency of private Men have sometimes caused great Disorders in Commonwealths, and Factions have been fatal to States and Kingdoms."
-John Locke

The place of ambition in politics has recently become a central preoccupation of political scientists. Most notably, rational choice theorists typically place ambition at the center of their models of political behavior.⁹⁹ For rational choice theorists, this ambition typically encompasses only the desire politicians have to win office, secure reelection, and, possibly, advance to higher offices.¹⁰⁰ While this assumption about ambition often explains congressional behavior well, it seems unsuitable in its explanation of presidential behavior. Simply put, while one might model a president or a presidential contender in terms of winning office and reelection, these models fail once a president reaches his second term and, by definition, cannot incorporate a desire for higher offices. Even rational choice theorists seek a more subtle understanding of political motivations when explaining presidential behavior.¹⁰¹

This is not to say, however, that presidential scholars possess a superior account of presidential ambition. They too focus on ambition but, following Neustadt, tend to

⁹⁹ Among the many studies that do this, see Mayhew (1974), Abramson, Aldrich, Rohde (1987) and Schlesinger (1991). This is in contrast to those rational choice theorists who attempt to place economic motivations at the center of their motivational matrix.

¹⁰⁰ I realize that rational choice theorists often claim, following Riker, that their theory only applies to means and admits of any kind of end. Thus, as Riker argues at one point, one could have a rational choice theory of someone's attempt at suicide (1990, 173). But, it seems that while they admit this theoretically, their studies, at least in political science, typically posit "generalizable" ends like reelection, securing political influence, etc. They do not typically incorporate the political principles that seem to motivate the highest types of statesmen.

¹⁰¹ See, for instance, Moe (1993).

limit their investigations to the means by which presidents secure their power while in office. They assume presidential ambition but, implicitly, limit its reach only to furthering the respective president's power. Where rational choice theorists understand a political actor's actions as instrumental means to an assumed end—most frequently, reelection—presidential scholars tend to limit their analysis to the accumulation of power on its own, thus implying that the end is indistinguishable from the power itself. As Hoekstra (1989) shows through an examination of Lincoln, Neustadt's model obscures from us the guiding *intentions* of some presidents, their "ends," because it focuses too much on their strategy without sufficiently accounting for the principles that inform that strategy. Hoekstra writes: "Neustadt's analysis offers us terms within which to understand the prudential elements in Lincoln's choice leading to the Proclamation, though perhaps not the guiding principles on behalf of which prudence was exercised" (294).¹⁰²

It is only in Skowronek's recent seminal work that there is some realization that the more proper question is much broader: "How do presidents go about the task of fashioning their places in history?" (1997, 18). Presidential ambition is somehow deeper and broader than the typical ambition of political actors. This is not to say that all presidents have the ambition to secure their place in history; this question, however, points us in a much better direction than Neustadt. It could explain, for instance, why a president might choose to forego the accumulation of power in some situation for the sake of his future legacy. Skowronek makes room for a grander ambition that seems more suited to those men who ascend to the height of political power in America.

¹⁰² See Fishman (2001) for a nice discussion of the limited purview of the three dominant presidential scholars: Neustadt, Barber, and Edwards. See, also, Hoekstra (1997)

However, to say that they are motivated by more than mere power is not to say that they are not motivated for power. Therefore, one might reasonably respond that Neustadt's analysis only shows the ambitious president *how* to secure his place in history. To some degree this is true: to secure a place in history, a president must understand how to maximize that power necessary to achieve his goals. But Neustadt also makes a claim regarding presidential ends: "The purposes of Presidents are not to be confused with their intentions at the start; these are a matter, rather, of responses to events" (170). Whatever were their initial intentions, presidents' purposes become a series of reactions. Their optimum strategy, then, is to secure the most power possible within this morass of events. But in abstracting from their intentions, Neustadt's analysis might make us fail to see those "moves" that were not reactions but decisive steps toward their grander ends. For instance, in Neustadt, Lincoln's Emancipation would appear to be nothing more than the able exercise of that power Lincoln already possessed and a step toward securing more power for the future. Moreover, Neustadt's simple assumption of power-maximization would cause us to lose sight entirely of the reflective statesmanship that characterized Lincoln's use of power throughout the Civil War.¹⁰³ In chapter five, I will argue that Lincoln's end, to maintain republican self-government through a crisis, caused him to refrain from wielding certain powers, the emancipation of the slaves at an earlier stage of the war, that were otherwise available to him. Whatever the merits of my argument

¹⁰³ Hoekstra (1989) writes: "Neustadt provides us with an account of the prudential and strategic calculations which are necessary but not sufficient for the highest forms of statesmanship; the ends sought by presidents are reduced to 'responses' to events, an understanding of which may be adequate for relatively ordinary presidents but hardly seems able to grasp a Lincoln, whose evolving purposes not only helped spur secession and alter the terms on which the Civil War was fought, but also, in his own view ultimately challenged the 'the dogmas of the quiet past' and sought to reshape the foundations of the American regime" (288-89).

regarding Lincoln may be, surely Neustadt's assumption removes from our consideration those grander ends that might lead a president to put the accumulation of power aside.

Douglas Adair, in his famous essay "Fame and the Founding Fathers," asks a similar question about the adequacy of assumptions of short-term self-interest. Adair wrote this essay in response to historians who, like recent political scientists, had come to define political motivations by "self-interest." Adair claims that historians like Beard and McDonald possess a far too restrictive definition of "self-interest" (4) and fail properly to understand the founders' motivations. He does not, however, claim that the founders were selfless men dedicated only to securing a stable, free, and lasting government. Instead, the concept of "self-interest" must be broadened to incorporate those political projects undertaken, not for temporary political aggrandizement, but out of a desire to secure one's fame. Quoting Hamilton, Adair writes:

"The desire for reward is one of the strongest incentives for human conduct." But there are rewards and rewards; and the different rewards, the different ends men strive for, control to a degree the means they employ to win their ends. The specific reward striven for thus affects behavior (10)

Real fame, an immortal place in history, seems only to arise when one's name is attached to truly grand political projects, e.g. the founding of an entirely new government dedicated to principles to which no government in human history had even been dedicated. To comprehend the amazing breadth of the ambition of the founders, we must incorporate and understand their dedication to those grand ends that would secure their enduring fame. Their utility functions, to use the parlance of rational choice, included the desire to create something that would immortalize them.¹⁰⁴

¹⁰⁴ Here, we need not, it seems, abandon rational choice theory so much as expand its range. In fact, such expansion has already been implied by some of Aldrich's recent work. Aldrich (1994) points to the

This, however, raises the question: as important as this discussion is to an understanding of the founders, can it teach us anything about the presidency? Or, as Tulis (1987) argues, did the founders, as shown through *The Federalist*, defend "a theory of governance that would not require and did not provide support for the statesmanship of founders after the founding?" (111). According to Tulis, fearing the dangers of popular demagoguery, the founders attempted to ensure that their government would foreclose the avenues for too much popular leadership. Did the founders create a system that, in failing to make room for great statesmanship, does not provide the opportunities for immortal fame that seemed to motivate its creators? Perhaps our most impressive president himself understood well the grand ambition of which Adair spoke and understood well that the founders possessed such ambition. And Lincoln said:

This field of glory is harvested, and the crop is already appropriated. But new reapers will arise and they, too, will seek a field. It is to deny, what the history of the world tells us is true, to suppose that men of ambition and talents will not continue to spring up amongst us. And, when they do, they will as naturally seek the gratification of their ruling passion, as others have done so before them. The question then, is, can that gratification be found in supporting and maintaining an edifice that has

importance of what he calls "long-term" arguments in understanding some political outcomes. Aldrich (1995) also shows how crucial political ideas were to creation of the early party system (5, 68-82). The emphasis on "means-ends" strategizing in rational choice theory makes it extremely useful in understanding political outcomes. A problem arises, however, when it attempts to limit all political inquiry to an investigation of means and forecloses a discussion of ends by claiming, as Riker (1984) does, that political actors merely attempt to "win on whatever is the point at issue" (15). This foreclosure fails to account for those instances in which their distinctive ends determine those means they will be willing to use. Thus, in Aldrich's example of Democratic senators who chose to vote for an institutional rule that seemed to impede their short-term interests, a failure to incorporate their distinctive political ideas, their ends, their "long-term" arguments, might lead us to dismiss their actions as a strategic mistake. Instead, the desire to win on some point can best be understood in light of certain political beliefs which lie behind that desire. And these theoretical arguments may follow from a self-interested commitment to those political projects that secure enduring fame (although, I will raise, in the course of my argument, a problem with understanding the desire for fame as merely following from what might be called a grander self-interest). To restate, the strategizing then occurs within the context of the attempt to actualize certain political principles. In contrast, by focusing on means and assuming a more restricted view of ends, rational choice theory will consistently fail to account for those political decisions that follow from a political actors' fundamental political principles. Of course, in the context of an institution like Congress in which ends are often in fact more restricted, this is not much of a danger. In discussing the presidency, it seems a more pressing difficulty.

been erected by others? Most certainly it cannot. Many great and good men sufficiently qualified for any task they should undertake, may ever be found, whose ambition would aspire to nothing beyond a seat in Congress, a gubernatorial or a *presidential chair*; but such belong not to the family of the lion, or the tribe of the eagle. What! think you these places would satisfy an Alexander, a Caesar, or a Napoleon?--Never! Towering genius disdains a beaten path.¹⁰⁵

This early Lincoln (the speech was delivered when Lincoln was in his late twenties) seems to think the presidency does not provide a place for those men--the Alexanders, Caesars, and Napoleons--who seek the heights of immortal glory.

For Lincoln and Tulis, popular government must exclude such men precisely because of the danger they pose to the republican form. In fact, in Lincoln's speech, the founders themselves would be incompatible with the government they created. He claims:

Then, all that sought celebrity and fame, and distinction, expected to find them in the success of that experiment. Their all was staked upon it:--to display before an admiring world, a practical demonstration of the truth of a proposition, which had hitherto been considered, at best no better, than problematical; namely, the capability of a people to govern themselves. If they succeeded, they were to be immortalized; their names were to be transferred to counties and cities, and rivers and mountains; and to be revered and sung, and toasted through all time (82).

But these same types, immortalized by the American regime, now pose a grave threat to it. The people must now "be united with each other, attached to the government and laws, and generally intelligent, to successfully frustrate [their] designs" (83). The people must vigilantly exclude the same types of men who had inspired and transformed them in the past.

¹⁰⁵ From "The Perpetuation of our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois January 27, 1838" in Basler (1946, 82-83).

According to Lincoln, these types pose such a danger to a republican regime because their morality is not intrinsically republican. Their ambition is not, so to speak, within the regime. In fact, they know no morality other than their own thirst for fame. "It will have [distinction], whether at the expense of emancipating slaves, or enslaving freemen" (83). Adair also mentions but does not explore the moral neutrality of a thirst for fame. He writes: "It must be won by a person who imposes his will, his ideas, for good or *ill*, upon history in such a way that he will always be remembered" and "it can produce actions on occasion that are memorable because of their superlative wickedness or their vice" (15; *italics mine*). Accordingly, a people dedicated to the republican form should never depend on men who look first to their own glory. Their thirst for fame might serve the people in extraordinary times when opportunities for establishing noble and grand projects exist; but that same thirst will destroy the people in ordinary times when these same "fame-hunters" find only a secure republic.

At the advice of Lincoln, must we return then to the ambition of the rational choice theorists and the presidency scholars, to those "whose ambition would aspire to nothing beyond a seat in Congress, a gubernatorial or a presidential chair?" Are we left with an alternative between the small ambition of men who are satisfied with mere political offices and the towering ambition of men who see "no distinction in adding story to story, upon the monuments of fame, erected to the memory of others?" (83). Before retreating from the search for an ambition that is greater than mere self-interest but still within the regime, we should consider what I will argue is Hamilton's thematic treatment of ambition throughout his writings as Publius. In these, I will argue Hamilton does two things. First, he points to the way in which the regime can fulfill a somewhat more

moderate ambition that is greater than the rational choice theorists' but less than Lincoln's "fame-hunters." And second, he attempts to redirect *and* reconstitute the ambition of the towering genius (or at least someone near him in the rank of ambition) toward the presidency and public service for the people within the administrative republic. I will concentrate much more on the second aspect of his argument.

a. *"Perverted" and "dangerous" ambition*

The first mention of ambition in *The Federalist* occurs in a pejorative context.

Hamilton writes:

Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of man in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments; and the *perverted ambition* of another class of men, who will either hope to aggrandize themselves by the confusions of their country or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government (*Federalist* #1, 4; italics mine).

This type of man, who prefers displaying himself in the confused world created by a "subdivision of empire" and within the small confederacies that are spawned by such a division, has a "perverted" ambition. In the first place, they prefer "their own emolument and advancement to the public weal" (*Federalist* #59, 388). But Hamilton's criticism is more incisive than that they are insufficiently public-spirited. The real "perversion" is its provincialism and lowness. The standards of ambition itself—regardless of its public-spiritedness—make these men look unimpressive. To be impressive, ambition must be directed toward the achievement of something greater, something for which the ambitious

man will be and should be esteemed. In this first mention of ambition, it is not ambition which is criticized but its low and unworthy forms. In short, Hamilton's first mention of ambition points to a better, a non-"perverted," form.

In fact, one of the benefits of the Union is that it effectually crushes these low provincial forms of ambition, or at least restrains their power. Hamilton writes:

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States, who may acquire credit and influence enough, from leaders and favorites, to become the despots of the people (*Federalist* #85, 568).

By extending the sphere of government and thus reducing the power of state government, it curtails the ability of "little despots" to have much as much power in their provincial state capitals.¹⁰⁶ One might be able, at the state level, to become the proverbial "big fish in a small pond" without being particularly impressive; but, according to Hamilton, by extending the orbit of the Union and giving power over such things as war, commerce, and finance to the national government, it compels the people to make a wiser choice for their leadership. Given the stakes, the people will be more discerning in their choice.

Next, Hamilton turns, just a couple of paragraphs later, from a critique of the internal insufficiencies of a certain kind of ambition to a critique of the external dangers of another kind of ambition. Hamilton writes: "A *dangerous ambition* more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government." He continues: "Of those men who have overturned the liberties of republics, the greatest number have begun

¹⁰⁶ Robert Penn Warren's novel *All The King's Men* shows well this petty demagoguery at the state level.

their career by paying an obsequious court to the people; commencing demagogues and ending tyrants"(5-6).¹⁰⁷ The prior type of ambition was insufficient in that it was not directed at truly worthy ends; this type of ambition is dangerous because it seeks absolute power. As we saw in Lincoln's argument, this type of man often needs the people's support to show its impressiveness but does not ultimately care about their welfare. This man cannot be satisfied with the republican convention that demands that men rule and *be ruled* in turn; he cannot be ruled by any man and will go so far as to enslave the people to prove they can never rule him.

b. Classical ambition

To understand why this is so, we should return to one of Aristotle's classic statements on the differences between absolute kingship and republican government. In Aristotle's argument, the republicans say:

Concerning so-called absolute kingship, on the other hand (this is where the king rules in all matters according to his own will), some hold that it is not even in accordance with nature for one person among all the citizens to have authority, where the city is constituted out of similar persons (*Politics*, 1287a1 8-13).

Similar persons should receive similar honors and, since a republic is by definition a people who are equal in their claim to political rule, no one man should hold political power. "Hence it is not more just [for equal persons] to rule than to be ruled, and it is therefore just [that they rule and be ruled] by turns" (1287a1 17-18). The crucial

¹⁰⁷ See Tulis (1994) who notes, in footnote seven (119), that *The Federalist* literally begins and ends with a discussion of the danger of demagoguery. In fact, my argument here might be understood as an attempt to trace the movement from the "dangerous ambition" in *Federalist #1* to the "lesson of moderation" in *Federalist #85*. That is, the lesson is not only directed at those "sincere lovers of the Union" who should be put "upon their guard against hazarding anarchy, civil war, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE" but also at those ambitious men who might have, absent this political education, sought political power through demagoguery and tyranny. Perhaps, this is why we now see the "perhaps?"

difference then is that the man who wants absolute kingship does not understand himself as equal. Aristotle writes: “If it is harmful for their bodies if unequal persons have equal sustenance and clothing, it is so also [for their souls if they are equal] in what pertains to honors” (1287a1 14-15). Because he understands himself as greater than the rest, the ambitious man wants what the republicans seemingly cannot allow him: permanent political rule.¹⁰⁸

In Aristotle’s formulation, however, the ambitious man’s “thirst for distinction” is less clearly amoral than it was for Adair and Lincoln. For them, the ambitious man wants nothing more than an immortal name. He will do whatever is necessary to secure such immortality—whether good or ill. According to Aristotle, the ambitious man wants rule, first and foremost, because he understands himself as superior in soul to the people. His desire for rule stems from a desire to show himself through rule. By ruling, he reveals his soul as superior to those who do not rule. While this means that the ambitious man needs political rule, “as if they were sick persons who were always made healthy by ruling” (1279a1 14-15), it also implies that there is somehow a moral desire to show oneself as impressive through that rule. In fact, his desire for rule has its roots in morality because it stems from a belief that justice itself demands that the superiority of his soul receive the greatest honor possible: permanent political rule.

In other words, in the best natures, this desire for permanent political rule is not at all tyrannical. Steven Forde (1989) shows this well in his book on the relation between

¹⁰⁸ Newell (1983) investigates the treatment of ambition in classical political theory in Xenophon’s *Education of Cyrus*. He recommends Xenophon because “while Plato and Aristotle generally mute the ambition for individual political supremacy in favor of virtuous citizenship within a small, self-governing community, the *Education of Cyrus* takes as its explicit theme how one supremely talented and aggressive ruler can satisfy his craving for recognition by improving the material welfare of millions” (889-90).

Alcibiades' political ambition and the Athenian regime. Alcibiades' desire to rule the Athenians does not stem from a desire to enslave them. Instead, he wants to rule them because, as he says openly, he thinks he deserves to rule them. Moreover, it is precisely the impressiveness of the Athenian people, i.e. their political capacity to use reason to deliberate in public assemblies, which causes Alcibiades to long to rule *them*, rather than another less political people. If the Athenians, in contrast to less impressive peoples, find him worthy enough to give him rule over them, then he will have proved to himself and the world his truly great worth. But, according to Forde,

One of the most significant lessons to be drawn from his career is that political aspirations, when given the freest rein, when allowed to appear in their greatest and most uncompromising form, prove self-defeating or destroy the object of their longing in the very act of attaining it (208).

Ultimately, at the very moment that a political people voluntarily gives complete and unqualified supremacy to the ambitious man they become apolitical; for that reason, the truly political ambition can no longer find such rule satisfying (209). Notwithstanding this difficulty, we learn from the classics that political ambition, rather than tyrannical ambition, does not simply want distinction; it wants to be worthy of distinction, both through its rule and through the people that it rules.

If this is true, ambition would be more malleable than it had appeared in Lincoln's argument. In Lincoln's argument, ambition is ungovernable: it always directs itself only at distinction, however and wherever it can find it. For the classics, political ambition stems from a moral desire to be impressive. This would seem to mean that if you can shape the morality of the ambitious man, you can also shape the trajectory of his ambition. In Forde's analysis, the crucial problem facing the Athenians' appropriation of Alcibiades into their regime stems from the lack of restraint that the Athenian regime

itself practiced. Alcibiades' ambition is unfettered because the Athenians themselves were unfettered. Recognizing no limits on their own imperial lust, they could expect no limits on the most the ambitious of their citizens. Forde writes: "Only by placing external, conventional restraints on political ambition can it be prevented from thus overreaching itself" (209). But this would seem to imply that, given a different kind of regime with the presence of such external constraints, political ambition can be managed.

With this in mind, Hamilton's argument in *Federalist #1* takes on a different form. We might understand it as the beginnings of a political education. He teaches the people to beware of all ambitious men who flatter them too much. Such men are often interested not in their welfare but in the power that their support promises them. The people will naturally stigmatize "an enlightened zeal for the energy and efficiency of government...as the offspring of a temper fond of despotic power and hostile to the principles of liberty"; but they must learn that the true despot most often claims, not a zeal for energy and efficiency, but a "zeal for the rights of the people" (5). Hamilton concludes this discussion by calling on the people to be on "your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth" (6).¹⁰⁹ By teaching the people to beware of those men who influence their decision by anything other than the truth, Hamilton improves the quality of the people to whom the ambitious will appeal. He begins the constraining of political

¹⁰⁹ It should impress us how, despite its role as an instrument of persuasion, this account remains so balanced. Hamilton never says, as he might have given his own zeal, that all those claiming a "zeal for the firmness and efficiency of government" are free of the "dangerous ambition," just that it more often lurks in those speaking to the people. Or, Hamilton here, unnecessarily, adds that you should guard against any argument, "from whatever quarter," that influences your decision based upon things other than the truth-- i.e. if a Federalist attempts to persuade you through excessive fear, guard against him as well.

ambition by improving the quality of its audience, forcing it to offer truth, not flattery. Ultimately, if the ancients are right, such improvements will also appeal to the ambitious themselves.

c. Ambition and modern liberalism

Of course, it is not only the ancients who treat ambition. Hamilton's failure to denigrate ambition itself in this first *Federalist* should be a striking reminder of that which Mansfield's *Taming the Prince* showed so well: liberalism's relation to the ambitious is more complex than it first appears. At first, it appears Hamilton simply denigrates all political ambition. After all, the liberal state seems to call for laws to rule. And the political ambition of which Lincoln, Adair, and even Aristotle speak is not compatible with a secure constitutional state. But Hamilton denigrates not the ambition of men who want to rule but the ambition of men who do not want to rule an extensive republic and warns against not the ambition of all men but the ambition of men who flatter the people too much. In fact, there is ultimately a closer connection between the people and the ambitious prince even or precisely in liberalism than might be comfortable for many Whigs, past or present.

To see this, we might start by considering Machiavelli's teaching to the ambitious prince:

He who comes to the principality with the aid of the great maintains himself with more difficulty than one who becomes prince with the aid of the people, because the former finds himself prince with many around him who appear to be his equals, and because of this he can neither command them nor manage them to suit himself. But he who arrives in the principality with popular support finds himself alone there, and around him has either no one or very few who are not ready to obey (*The Prince*, IX, 39).

According to Machiavelli, the people are a more trustworthy source of power for the prince because they expect much less of him (they only want "not to be oppressed") while the other "greats" will always machinate against him (they want "to oppress"). The ambitious prince finds that his security and power best rest in founding upon the people. There is a happy coincidence between the interest of the prince in rule and the interest of the people in allowing him rule so long as he leaves them alone.

On the face of it, Machiavelli's argument appears to have little to do with modern liberalism. This appears to be nothing more than the advice given to a pre-modern prince to best secure his power. The people may not be oppressed but they will not be encouraged to thrive as they are in liberalism. But then in one of the oddest--because so liberal--passages in *The Prince*, Machiavelli advises:

A prince should also show himself a lover of the virtues, giving recognition to virtuous men, and he should honor those who are excellent in art. Next he should inspire his citizens to follow their pursuits quietly, in trade and in agriculture and in every other pursuit of men, so that one person does not fear to adorn his possessions for fear that they be taken away from him, and another to open up a trade for fear of taxes (XXI, 91).

The wise prince should do more than simply found upon the people; he should also encourage the people in quiet pursuits such as trade and agriculture and give them the freedom to display their possessions without fear of them being taken away. This passage reads like a guidebook for liberalism, except that, in the mouth of Machiavelli, liberalism is a device of the prince to secure his power best.

In the enlightenment tradition itself, we find an almost off-hand paragraph within Locke's treatment of property in his *Second Treatise of Government* that further develops this theme.¹¹⁰ Locke writes:

This shews, how much numbers of men are to be preferd to largenesse of dominions, and that the increase of lands and the right imploying of them is the great art of government. And that Prince who shall be so wise and godlike as by established laws of liberty to secure protection and incouragement to the honest industry of Mankind against the oppression of power and narrownesse of Party will quickly be too hard for his neighbours (V, 42, 297-98).

Here, the prince who secures the liberty and industry of the people will be most cherished by them and least susceptible to the attacks of his "neighbours." Once again, liberalism, the security of the life, liberty, and property of the people, is not a device of the people to protect against the ambitious but a device of the ambitious which uses the people as protection against the rest of the ambitious.

In short, there seems to be no natural reason why the ambitious must threaten the liberal state. In fact, for both Machiavelli and Locke, the liberal state can be the tool of the ambitious to secure the power they most want. As we see in Lincoln's early writings, Whigs worried about the threats that the ambitious of any kind pose to the freedom and industry of the people. But, perhaps because it was thought that the people could never secure themselves against the ambitious, a certain strand of liberalism, represented here by Machiavelli and Locke, tries to incorporate the ambitious by teaching them that it is in their best interest to support the liberal state.

¹¹⁰ Mansfield (1989, chapter 13) traces the development of Machiavelli's new executive power through modern liberalism, arguing that the law and formal institutions one can find in Locke and Montesquieu were, "while accepting much of Machiavellian morality...directed against the extreme political conclusion demanding space for *uno solo*" (314).

The treatment of ambition found in the ancients, however, differs from what I have argued can be found in Machiavelli and Locke. Where the ancients find the moral roots of political ambition in a desire for just acclaim, the moderns merely teach the ambitious that their true interest in distinction lies not in mere tyranny but in a liberal re-founding. The problem of the moral neutrality of ambition remains for the moderns. As Machiavelli states so starkly: “One cannot *call* it virtue to kill one’s citizens, betray one’s friends, to be without faith, without mercy, without religion; *these modes can enable one to acquire empire, but not glory*” (*The Prince*, VIII, 35; italics mine). The key for Machiavelli and even for Locke in the passages that I have cited is not to *be* moral because the desire for power stems from a desire to be worthy of such power, but to *appear* moral because the desire for glory cannot be satisfied unless such appearances are maintained. Machiavelli writes: “But it is necessary to know well how to color this nature, and to be a great pretender and dissembler; and men are so simple so obedient to present necessities that he who deceives will always find someone who will let himself be deceived” (XVIII, 70).

This reading of Machiavelli’s intentions is suggested by Strauss (1958) in a passage that I will quote in its entirety because it is too rich and subtle to be paraphrased:

The manner in which Machiavelli achieves the transition from neutrality in the conflict between the tyranny and the republic to republicanism, from selfishness to devotion to the common good, or from badness to goodness reminds one of the action of Plato’s *Republic*. In the first book of the *Republic* Thrasymachus questions justice, i.e. he raises the question as to whether justice is good. Glauco and Adeimantus are perplexed by the argument, at least to the extent that they are thoroughly displeased with Socrates’ apparent refutations of Thrasymachus’ contention. After Glauco and Adeimantus have restated Thrasymachus’ thesis, Socrates does not immediately turn to refuting it directly. Instead he begins to found a city in speech or to help Glauco and Adeimantus to found a city in speech. Within that speech he takes for granted the goodness of justice which had

become thoroughly questionable. What does he mean by this? The assertion that injustice is good means that the life of the tyrant is the best life for the best man because the pleasure deriving from authority or honor is the highest or the all-comprehensive pleasure. By suggesting to his young companions that they should together found a city, Socrates appeals from the petty end of the tyrant to the grand end of the founder: the honor attending the tyrant who merely uses a city already in existence is petty in comparison with the glory attending the founder and especially the founder of the best city. The founder however must devote himself entirely to the well-being of his city; he is forced to be concerned with the common good or to be just. Desire for glory appears to be that passion which, if its scope is broadened, transforms the lover of tyranny, to say nothing of the lover of bodily pleasures, into a lover of justice. In Plato's *Republic* this transformation proves to be only the preparation for the true conversion from badness to goodness, the true conversion being the transition to philosophy itself; this conversion is effected by the understanding of the essential limitations of everything political. In Machiavelli the transformation of man through the desire seems to be the only conversion; the second and higher conversion seems to have been forgotten (289).

In accordance with what I have suggested already, it seems that the second “true conversion from badness to goodness” in Plato is only possible because the “desire for glory” only “appears” to be the passion which transforms the tyrant into a lover of justice. In fact, it is not the desire for glory that is transformative but the realization that the apparent tyrannical desire stems from a love of justice itself. In other words, Socrates does not make his interlocutors love justice as a means to achieving glory. Instead, he shows them that their desire for glory actually stems from their deeper love of justice. Even if they are attracted to the life of the tyrant, they cannot believe along with Thrasymachus that injustice is good.¹¹¹ They might be attracted to the life of the tyrant precisely because they are superior natures who care so deeply about justice. The second conversion to philosophy is made possible because, by showing them their deeper love of

¹¹¹ For a fascinating study of Book I which shows that, in his way, Thrasymachus also cares deeply about justice, see Stauffer (2001, 57-121).

justice, he can push them toward attempting to understand that for which they care most. To see this transformation occur before one's eyes, one might consider the *Alcibiades I*. By the end of his conversation with Socrates, the superlatively ambitious Alcibiades says: "I shall begin at this moment to take trouble over justice" (135e 3-4).

By contrast, to take trouble over justice would seemingly be impossible for the student of Machiavelli. His best readers do learn to appear just so as to win glory; but because the roots of their love of glory are never sought, they can never take seriously the possibility that they too love justice. The trouble they take over justice can only amount to understanding conventional opinions about justice well enough to know how to manipulate them.

To return to the political ramifications of these teachings: the problem, it seems, with the modern solution is ultimately that it is far more difficult to constrain the mere ambition for glory within a liberal state once founded. As we shall see, Hamilton attempts to do just that by teaching the ambitious that their glory can best be won by serving the people's interest in public projects that improve their condition. But, in the course of his treatment of ambition, Hamilton also uses the ancient understanding of the desire political ambition has to be *intrinsically* worthy of the rule it is given, a desire that is both more and less amenable to the liberal state. It is more amenable because it is more interested in the people's educated recognition of the worthiness of its power and rule, thus implying that it will be less likely to fool and flatter the people merely to win power. It is less amenable because it is often directed at what it finds to be more impressively political goals, such as reforming a people toward virtue. And these goals are simply incompatible with the ends of a liberal state.

d. Worthy and immortal ambition

The question becomes: how do either the ancient or the modern treatments of ambition relate to the American presidency?¹¹² We saw previously that ambition could either be perverted because it does not set its sights sufficiently high or, if it sought heights, it could be dangerous because it plays upon the passions of the people while seeking tyranny. But the dangerous kind of ambition seems to suffer from the same deficiency as one of the perverted kinds of ambition: it bases itself on the confused passions of the people. By denigrating its perverted form, does Hamilton teach the ambitious to seek acclaim and recognition from an educated and truth-loving people? After all, Hamilton is teaching the people not to listen to or trust the flattering demagogues who, in truth, seek tyranny over them. Might he not also be educating the ambitious: serve within a regime constituted by this more enlightened people who will truly recognize you for your service.

In this context, consider the following passage from *Federalist #71*, one of the essays that explicitly treat the presidency:

It is a just observation, that the people commonly intend the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always reason right about the means of promoting it. They know from experience that

¹¹² I will not attempt to prove that Hamilton had these treatments in mind when discussing ambition, although he was clearly familiar with Machiavelli's writings (see McNamara 1999). I would say, however, that some sort of Machiavellian, quasi-liberal arrangement between the ambitious man and the people seems to inform Hamilton's understanding of the presidency. Theodore Roosevelt shares this view of the presidency, although he seems to understand it to be something new: "My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power" (1958, 198).

they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, *by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it* (465; italics mine).

Here, Hamilton continues his educational project. While flattering the people (they "intend the public good"), he also teaches them that they "sometimes err" and that they are especially prone to err when listening to their parasitic flatterers. He teaches the people: anyone telling you that you never err is simply flattering you, beware of their ambitions.¹¹³

But, as I have said, Hamilton does more than merely teach the people, he also teaches the ambitious. The preceding passage teaches the ambitious indirectly because, while teaching the people who to be wary of, it also reminds the ambitious what they truly want from political rule. As much as they seek to *possess* the people's confidence, they even more seek to *deserve* to possess the people's confidence. They want the people's confidence not simply because they want power but because they think they deserve to possess the people's confidence; they think they are worthy of the people's confidence. In *Federalist* #72, Hamilton repeats this language:

There are few men who would not feel much less zeal in the discharge of a duty, when they were conscious that the advantages of the station with which it was connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of *obtaining*, by *meriting*, a continuance of them (470; the italics are in the original).

Both these passages differ from both Machiavelli's and Locke's advice to the ambitious. Machiavelli and Locke merely taught the ambitious that, to achieve political glory, the

¹¹³ My treatment of *The Federalist* as an educational project which teaches the people a "lesson of moderation" about their own inclinations is obviously insufficient. See Manzer (2001) for further discussion of *The Federalist* as an effort to cultivate an enlightened people.

ambitious must become concerned for the common good which is best produced by the liberal state. Though more concerned with the common good, their real desire remains glory. By contrast, Hamilton's teaching possesses the insight of the ancients. The ambitious do not merely want political glory. They want to *merit* political glory and be worthy of its possession. Even if they had not yet made clear to themselves what they wanted from political power, it is possible that Hamilton's argument would broaden their ambition. In their hearts, they know that their ambition for political power stems from a moral desire to deserve that which they will possess. When shown that mere flattery of the people in order to "possess" their confidence is merely sycophantic, they may then strive to do what is necessary to "deserve" the people's confidence.

This same desire to deserve the people's confidence will also create a desire to create a worthy audience capable of recognizing their true desert. Once the politically ambitious recognize that they want political rule not because they merely want power but because they want to be recognized for their outstanding virtue, they will also realize only a political people sufficiently virtuous themselves can give them the kind of recognition they want. One wants recognition from men who, though not great themselves, understand greatness when they see it. To receive recognition from a people who are insufficiently enlightened to distinguish between false usurpers who pretend greatness and the truly great cannot satisfy. Thus, only by arising from a people who can understand the difference, sustaining their understanding, and even improving them can these men hope to be satisfied.

Hamilton immediately shows them what would be necessary. He writes:

When occasions presents themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom

they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure (465).

The truly impressive men will be those who make themselves worthy of the people's enduring confidence and gratitude by serving them even "at the peril of their displeasure." The truly ambitious should desire not to be a sycophant to the people's temporary whims for the sake of mere political power but to be a guardian of the people's true interests. By doing so, they demonstrate to themselves and the world the virtues of "courage and magnanimity." Only a sufficiently political people can understand the difference and, even if not immediately, will ultimately reward those who were their true guardians and look askance at their mere flatterers. By promising to the politically ambitious lasting monuments that attest to their virtue, Hamilton tugs at that part of them which ultimately drives their ambition: a desire to be recognized for superior virtue. Again, whether intended or not, this rhetoric is strikingly ancient in its treatment of virtue. It is not a mere "deal" between the people and the prince as it seems to be in Machiavelli and Locke. Such deals do not do justice either to the people's republican desire that the people, as a people, be virtuous or to the ambitious desire to be recognized by a worthy people for one's worthiness.

However, to assume that those concerned with virtue would be more inclined to support the liberal regime may be a bit too sanguine. In fact, it might be said that liberalism attempted the happy accommodation between prince and people precisely because the ambitious prince threatened liberalism. This may be especially true when the

prince is driven by virtue. As I have mentioned already, the ancient solution is, in a certain way, more amenable to the liberal regime because it is ultimately concerned with moral impressiveness. But that very same concern might lead a man most concerned with virtue to destroy tepid liberalism and instantiate a regime that truly displays virtue—thus demonstrating his own outstanding virtue. Consider what Theodore Roosevelt (1900) writes of Oliver Cromwell's rule:

There certainly never was a more extraordinary despotism than this: the despotism of a man who sought power, *not to gratify himself*, or those belonging to him, in any of the methods to which all other tyrants have been prone; *but to establish the reign of the Lord, as he saw it* (213; italics mine)

A man most concerned with morality may be attracted to politics because it offers him the opportunity to achieve moral change on the largest and most authoritative scale. Ceaser (1990) writes: "The political law is the moral cause that most immediately and directly determines the sum of moral causes, and it is the cause to which people are most attracted when attempting to change society" (48). Politics had always been the arena in which those most concerned with societal virtue could change society with the authority that can only exist in its coercive realm. Liberalism makes a conscious decision to avoid such moral coercion and the wars that it invites by significantly reducing the legitimate powers of government. As Jefferson states so eloquently, government now exists to secure the right to life, liberty, and property; and, it could be said, in making this claim, he implies it does *not* exist to "establish the reign of the Lord." In retreating from the moral neutrality of modern ambition and finding in Hamilton a treatment of ambition that reminds of ancient virtue, we have introduced an even graver problem. In the name of virtue itself, the ambitious man might smash the liberal regime.

Knowing this, however, makes Hamilton that much more pessimistic about the possibility of an amoral accommodation between the prince and the people. Precisely because the prince is concerned with virtue, he will not be satisfied with being given power in exchange for protecting the people's freedom. If the liberal accommodation does not provide a moral account of its virtue to the politically ambitious, it will fail because the politically ambitious will seek to destroy that which cannot satisfy their moral desire. Hamilton's appeal to the ambitious through "ancient" arguments is more than a moralization of their amoral ambition. It is, instead, a "re-moralization" of their understanding of whence worth and desert lie.

In a recent article on Hamilton, Michael Rosano (2003) argues that Hamilton rejects classical republican and Christian principles in favor of Machiavelli's effectual truth, Hobbes's concept of power, Lockean liberty, and his own science of politics. Hamilton's liberal conception of human nature as passionately self-interested grounds his political science. But Hamilton's synthesis of alternatives in modern political thought displays its limits by depending on nobility and philanthropy. Classical and Christian virtue thus infuse his conception of human nature and bolster the Republic (72-73).

Rosano rightly points to Hamilton's dependence on "Classical and Christian virtue," but seems to imply that such dependence is an unseen and accidental result of the political insufficiency of the liberal account. Hamilton relies on these, without realizing that in so doing he indicates that his "science" is not, in fact, so scientific. I would suggest that Hamilton knew well the limits of a "science of politics." Unlike some of his peers who had greater hopes for the success of well-constructed governments, Hamilton was considerably more pessimistic about institutional arrangements on their own insuring

stability.¹¹⁴ Political ambition, even or especially when it is concerned with virtue, poses a constant threat even to the best constructed government. For this reason, Hamilton consciously creates “a love of fame” that is subordinate to “a love of liberty” because he understands that the ambitious always have some notion of political virtue which motivates their political action. In other words, Hamilton thinks that insofar as the liberal accommodation between the prince and the people did not call upon the prince to be virtuous per se, it would not succeed *within* a constitutional republic. Hamilton rejects not the accommodation itself but the assumption that it can succeed while remaining morally neutral about the ends of political ambition. Of course, the accommodation between prince and people might satisfy the happy man who can found the liberal state. After all, according to Lincoln, this is what satisfied the founders’ somewhat amoral ambition.¹¹⁵ But can it satisfy the man who merely builds stories onto that which is founded by others?

How does one go about solving this problem? The short answer might be that the problem is, in the final analysis, insoluble. Hamilton, however, attempts a solution by doing more than merely redirecting the politically ambitious toward service to the regime. He also attempts to reconstitute political ambition itself by redefining political virtue. Since their political ambition finds its roots in their notion of virtue, Hamilton

¹¹⁴ The context of Hamilton’s discussion of the “science of politics” indicates as much. His argument is not, as Rosano implies, that politics no longer needs virtue. Instead, it is only that a better understanding of the efficacy of various institutional arrangements, i.e. “the regular distribution of power into distinct departments; the introduction of legislative checks and balances,” etc., considerably improves a republican government’s chance of success.

¹¹⁵ In this context, it is useful once again to return to Lincoln’s Lyceum speech. Lincoln seems to echo the latter view of the ambitious man when he says: “Distinction will be his paramount object, and although he would as willingly, perhaps more so, acquire it by doing good as harm; yet, that opportunity being past, and nothing left to be done in the way of building up, he would set boldly to the task of pulling down” (Basler, 83; italics mine). In the first place, Lincoln’s ambitious man seems more concerned with distinction than with virtue: it is his “paramount object.” But Lincoln seems here to remain agnostic, “perhaps more so,” about the connection between doing good or being virtuous and the desire for distinction.

may be able to accommodate them to his regime if he can convince them that serving it fulfills that which political virtue demands. In other words, by introducing “ancient” notions of merit and deserving and thus “attuning” the politically ambitious to their own deepest desires, Hamilton can mold their ambition to suit the regime. Ideally, the moralization of ambition has the advantages both of avoiding the dangers that are consequent from an unbridled love of fame and of altering the moral trajectory of those whose desire to display their outstanding virtue through political rule would otherwise have destroyed the regime.

e. A moderate ambition, a redirected ambition

Stepping back some from the heights of immortality and the worthiness of true leaders, I turn to the other direction in which Hamilton takes his readers. He points not only to the reconstitution of grand ambition to direct it toward serving the regime, but also to the usefulness of the regime for those with a more moderate ambition that still goes beyond the mere ambition to be reelected. In *Federalist #17*, Hamilton writes:

The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository (101).

This new Union holds out alluring projects to the ambitious that state governments cannot offer. However, these are objects, the regulation of commerce, the management of finance, even the negotiation of foreign policy that might satiate the more moderate but would leave the Alexanders, Napoleons, and Caesars hungry for more.

But as we have seen in Lincoln's Lyceum Speech, the more moderately ambitious can rest satisfied with a seat in Congress or the presidential chair; but those from "the family of the lion or the tribe of the eagle" would rather tear down the regime that exists than rest satisfied with mere service to it. According to Lincoln, some will simply refuse to tread on the path beaten by others. Lincoln's speech leaves us only with this bifurcation.¹¹⁶ By contrast, Hamilton wants, somehow, to incorporate exactly these men into the regime both by giving them the opportunity for the "extensive and arduous enterprises" that would satiate them and by taming or, more precisely, reconstituting their ambition itself. To show that such integration is possible consider the following passage from Hamilton's defense of presidential re-election: "If the exclusion were to be perpetual, a man of *irregular ambition*, of whom alone there could be reason in any case to entertain apprehension, would, with infinite reluctance, yield to the necessity of taking his leave forever of a post in which his passion for power and preeminence had acquired the force of habit" (*Federalist* #72, 473-74; italics mine). Hamilton thinks that men of irregular ambition could occupy the presidency and exercise (or exorcise) their passion for power and preeminence.

Throughout his arguments as Publius, Hamilton warns against the dangers that the ambitious pose to the regime. In fact, the current Constitution is defensible, in part, because it will better withstand the designs of the ambitious. For instance, Hamilton writes:

If that plan should not be adopted, and if the necessity of the Union should be able to withstand the *ambitious* aims of those men who may indulge magnificent schemes of personal aggrandizement from its dissolution, the probability would be, that we should run into the project of conferring supplementary powers upon Congress, as they are not constituted; and

¹¹⁶ See Jaffa (1959, 183-232) for an alternative account of this speech.

either the machine, from the intrinsic feebleness of its structure, will moulder into pieces, in spite of our ill-judged efforts to prop it; or by successive augmentations of its force and energy, as necessity might prompt, we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert (*Federalist* #22, 140; italics mine).

But what happens to the ambitious if the Constitution is ratified? It does not seem possible that they simply disappear. The Constitution, if it is to be successful, must find a way of “dealing” with such men. In brief, rather than working for the regime's dissolution, they are incorporated into the regime.

Moreover, as we have seen, much of the power of the ambitious comes from the people themselves. For this reason, it is not insignificant that the prior passage, which points to the relation between the ambitious and the regime, is followed almost immediately by a defense of a Constitution that is ratified by the people. Hamilton writes: “The Fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority” (141).¹¹⁷ At least one of the reasons that the ambitious will be compelled to work within and for the Constitutional Union might be that the people will see an attack upon the Constitution as

¹¹⁷ Just before this conclusion, Hamilton makes an argument that is not insignificant in the debate concerning “states’ rights” that led up to the Civil War and persists to this day in scholarship about the Constitution. “It is not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. *However gross a heresy it may be to maintain that a party to a compact has a right to revoke that compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority*” (*Federalist* #22, 141; italics mine). See also Lincoln’s First Inaugural (Basler, 579-88).

an attack upon themselves. If ratified by the people, the government created by the Constitution will, at the highest level, belong to the people. This significantly reduces the possibility that a demagogue can appeal to the "rights of the people" while seeking to undermine the regime.

As it stands, this solution still does not quite escape the "Lincoln problem," i.e. the inability of the regime to keep the "super"-ambitious from tearing it down for their own glory, because it does not yet show *why* they should work within the regime. Even given a regime that "makes room" for these men, it is still not clear what would prompt them to work within the space that has been created. After all, what extraordinarily ambitious man wants to "work within a space" that has been created by others? To put it another way and thus return to the discussion of Machiavelli: even if it can be shown to the potential tyrant that he should be a founder, it is something else entirely to show either to the potential tyrant or founder that he should be president. Moreover, even if such men were truly more concerned with displaying their virtue by achieving fame than simply with achieving fame, it would still not follow that occupying an office created by other men would satisfy this need.

As pressing a problem might be the question upon which the anti-Federalists, among others, concentrated. Their concern was not so much the destruction of the Constitution by a man outside of it, but the internal dangers of constituting such a strong executive power. In the Convention, Mr. Butler said:

It had been observed that the Executive power is in a constant course of increase. This was certainly the case in G.B. Gentlemen seemed to think that we had nothing to apprehend from an abuse of the Executive power. But why might not a Cataline or a Cromwell arise in this Country as well as in others (*Notes*, 63).

Benjamin Franklin made one of his few remarks in the Convention on this subject when he points out that, while "the first man put at the helm will be a good one. No body knows what sort may come afterwards. The Executive will be always increasing here, as elsewhere, till it ends in Monarchy" (*Notes*, 65-66).¹¹⁸ To make the problem as stark as possible, even if Hamilton can succeed in integrating the ambitious man into the regime, this is no guarantee that he will not destroy that same regime from within. Even if you make Cromwell president, we cannot be sure that he will now merely preserve and invigorate the Constitutional republic.¹¹⁹

f. The need for reconstituted ambition

It would be sensible to respond to the prior problem by simply citing Congress's power of impeachment. After all, what danger does an executive pose to the constitutional system if the system itself possesses the power to remove him? In the first place, this response, however, assumes what the founders could not assume: the enduring stability of the rules established by the Constitution. We no longer take the problem of executive usurpation as seriously because the Constitution has been so extraordinarily inviolable since its creation. Even the seceding Southerners claimed their actions could be justified constitutionally; in other words, even the debate about an action that could fundamentally destroy the Union took place, for the most part, within the limits set by the Constitution.

¹¹⁸ The first is an obvious reference to George Washington.

¹¹⁹ It is in response to this problem, I think, that Hamilton's solution most clearly differs from Madison's solution. Hamilton thinks we must accept the problem by integrating the uniquely ambitious but reconstitute the direction or the ends of his ambition. Madison thinks we must avoid the problem by limiting the power of the executive branch. On this, maybe Lincoln offers an interesting integration: accept the problem but invigorate the people politically to guard against executive tyranny.

Nonetheless, the power of impeachment was seen as "a bridle in the hands of the legislative body upon the executive servants of government" (*Federalist #65*, 425).¹²⁰ It is interesting, however, to note the manner by which the Senate bridles the President. In explaining why the power of impeachment should not rest with the Supreme Court, Hamilton tells us that impeachment is not a matter of legality. Instead, "the punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender" (426). Hamilton continues:

After having been sentenced to a *perpetual ostracism from the esteem and confidence*, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his *fame* and his most valuable rights as a citizen, in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune (426; italics mine).

In other words, the process of impeachment and the process of a criminal trial are two different kinds of action with two different kinds of goals—therefore the same people should not have control of both. The goal of impeachment is not assigning criminal responsibility but ostracism from the esteem and confidence of the people and the consequent stripping away of a man's fame.

In the context of this discussion, this argument points to the inextricable connection between a desire for fame and the occupancy of the executive branch. The power of impeachment is a real power not just for the legal reason that it insures the stability of the system by removing from power those who threaten it but also, and more

¹²⁰ This paper, in which Hamilton defends making the Senate the Court of Impeachment, seems to be one of those places where it becomes clear that Hamilton does not support this aspect of the new Constitution. We should at least become suspicious that this is the case given his conclusion: "But though one or the other of the substitutes which have been examined, or some other that might be devised, should be thought preferable to the plan, in this respect, reported by the convention, it will not follow that the Constitution ought for this reason to be rejected" (428).

importantly, for the psychological reason that it holds that man most concerned with fame in check. The assumption underlying this discussion is that the executive will be concerned with his fame and thus will want to maintain and enhance the esteem and confidence of the people in him. Yet again, though he is concerned with his fame, Hamilton moralizes his concern by emphasizing the desire for the “esteem” of the people. Richard Nixon enjoys “fame” but no esteem.

Previously, Hamilton argued that the government ratified by explicit consent of the people possesses an intrinsic legitimacy. Here again, we see the connection between this popular legitimacy and the ambitious man. The ambitious man will lose the esteem and confidence of the people once it is demonstrated to them that he has violated *their* constitutional order. As their creation, the people love the Constitution more than any ambitious man. For this reason, the “playing field” has been significantly narrowed for the ambitious man. He can no longer appeal to the rights of the people over and above everything else; he must now appeal to the rights of the people as they are embodied by the constitutional order. That is, the ambitious man must work through the Constitution rather than against it.¹²¹

Even given the hurdle posed by the people's attachment to the Constitution, isn't it still imaginable that the “irregularly” ambitious could, while appealing to the people's true interests, overrun such attachment and create a popular despotism? The Constitution might ameliorate this danger but does it eliminate it? Hamilton responds to something like this question at the conclusion of *Federalist* #27. Here, he argues forcefully that the new Constitution will in fact become the “SUPREME LAW of the land” and that the

¹²¹ In this light, consider Roosevelt's court-packing plan. As popular as Roosevelt was following his landslide reelection, the people balked at his seemingly “unconstitutional” proposal (Caldeira 1987). For a broader discussion of Roosevelt's various “unconstitutional” proposals, see Skowronek (1997, 313-24).

legislatures, courts, and magistrates "will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*" (169; italics in original). But then he does admit that it is still "possible, by an injudicious exercise of the authorities of the best government that ever was, or even can be instituted, to provoke and precipitate the people into the wildest excesses" (170).

No Constitution, no matter how perfect its institution, can possibly prevent the provoking of the people into "wild excess." Does this leave Hamilton pessimistic about the possibilities of insuring stability? Here we turn to the final piece of his argument. In this same discussion, Hamilton responds to the previous problem with: "But though the adversaries of the proposed Constitution should presume that the national rulers would be insensible to the motives of public good, or to the obligations of duty, I would still ask them how the *interests of ambition*, or the views of encroachment, can be promoted by such a conduct (170; italics mine). In other words, the previous insight shows that it not enough merely to design perfect institutions in which ambition is "made to counteract ambition" (*Federalist #51*, 337).¹²² Instead, one must also show that, though possible, it is not in the "interests of ambition" itself to drive the people to "wild excess." In short, one must do more than control ambition no matter its ends, one must also discuss the ends of ambition itself and show why those very ends will be limited. Given that this passage indicates Hamilton believed it possible, the question becomes: how can it be achieved?

¹²² Following Adair's classification mechanism, I ascribe this paper and this argument to Madison. It may be significant that Hamilton never makes this kind of argument in defense of the Constitution, i.e. he never claims that the system is so designed as to make any ambition safe because counteracted by another's ambition.

g. Reconstituted ambition actualized within the presidency

To begin to answer this question, we must revisit some of the passages that have already been cited. From his first discussion of ambition in *Federalist #1*, Hamilton has attacked ambition not by the standards of moderation but by the standards of ambition itself. A certain type of ambition was "perverted" because it did not set its sights sufficiently high. While another type of ambition was criticized from the perspective of the regime, i.e. those demagogues who become tyrants are "dangerous," Hamilton also points to an internal critique of this kind of ambition: insofar as it seeks to possess the people's confidence without deserving the people's confidence, it is not worthy and should bring no enduring fame. This begins the education of the ambitious to a more impressive but, nonetheless, safer ambition.

After having shown the ambitious the direction whence true worth lies, Hamilton now shows them those projects in which they can engage in the new regime to fulfill their ambition. Hence, the passage already cited from *Federalist #17*, which, I have said, shows the more moderately ambitious what they can accomplish, actually claims more. Hamilton writes: "Commerce, finance, negotiation, and war seem to comprehend *all* the objects which have charms for minds governed by that passion [ambition]" (101; italics mine). Has Hamilton made the claim so strong, i.e. "all", to entice the ambitious? After all, it should have become quite clear even in the very first paper that Hamilton understood the range of objects toward which the ambitious can direct themselves. It seems implausible that they merely want the people's confidence simply so as to engage in "commerce, finance, negotiation, and war", or "busywork for the executive."¹²³

¹²³ For this phrase, I must thank Ross Corbett who used it to describe my argument regarding the "projects" which Hamilton wants ambitious executives to pursue.

For such objects to entice the ambitious, Hamilton must redefine the very notion of political virtue which the ambitious will then want to fulfill. To return to the discussion of virtue, prior to our liberal politics, political virtue had typically meant the instantiation of some idea of virtue in a political regime. Pre-liberal ambitious men had wanted to imprint their notion of virtue on the *polis* in which they lived. In the best cases, they wanted to do so not out of a tyrannical desire for power but out of a virtuous desire to "show themselves" through political action. These virtuous men saw no necessary disjunction between their own virtue and the virtue of the rest of those in the regime. In other words, they simply did not accept the liberal notion that virtue need not extend beyond oneself to be called virtue. In fact, they thought that virtue could only be called such if it attempted to actualize itself by effecting the souls of others; one can have the most far-reaching effects by assuming political rule.¹²⁴

To begin his political education, Hamilton pejoratively recasts this prior understanding of political virtue in the following passage:

They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the *vanity*, to the *conceit*, and to the *obstinacy* of individuals, who have credit enough to make their passions and their caprices interesting to mankind (*Federalist* #70, 458; italics mine).

This same desire, to show oneself by instantiating one's notion of virtue on a regime, is now not called virtue but, instead, vanity, conceit, and obstinacy. Moreover, in the

¹²⁴ Although liberalism has substantially affected our views of virtue, we still have some experience with this more expansive notion in the proselytizing religions. These religions do not accept that one can be virtuous without doing anything to help the souls of others. The difference would be that, excepting political Islam, they still, for the most part, maintain the liberal separation of Church and State. For this reason, they do not understand their virtue to necessitate political action or political rule.

context of the passage, their opposition to the existing order stems not from virtue but is rather "in their estimation, an indispensable duty of self-love" (458). Those who oppose the ratification of the Constitution and the existing order after ratification do so out of the lowest motives, though they pretend higher motives. The ambitious had thought that their desire to show themselves to the world through political rule had stemmed from their internal virtue. On the great stage of politics, they can reveal to the world (and to whatever lies beyond the world) that they are internally virtuous. Much of that internal virtue is shown by their great dedication to the virtue of others. Now Hamilton provides a psychological account of the ancient notion of virtue that calls into question all of its claims upon virtue itself. It is motivated not by dedication to others, which still remains the height of real virtue, but by "self-love" or the lowest kind of selfishness.

Much earlier, in *Federalist #1*, Hamilton offers a lesson in moderation to the ambitious who believe virtue itself demands that they convert the people to their notion of political right. Hamilton writes:

So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being right in any controversy (4)

Because judgment is fallible, moderation must guide our consideration of questions of moral right and wrong. For this reason, "the intolerant spirit which has, at all times, characterized political parties" must also be moderated. Neither party can or should be sufficiently confident of its rightness to be intolerant of the views on the other side.

Moreover, each party is often more influenced by "ambition, avarice, personal animosity,

party opposition, and many other motives not more laudable than these” than either side would like to admit. And finally, Hamilton announces the crux of his argument against the instantiation of virtue throughout the regime: “In politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution” (5). In short, the new “modern” virtue must learn a virtuous moderation in the pursuit of virtue. Cromwell might have thought himself the apostle of God, displaying to the world his superior religiosity by creating an English people who would show to the world their dedication to Christianity. If true, such might be worthy of acclaim. Hamilton would claim that, both because his motives might have simply been ambition and his proselytizing ineffectual, he does not deserve such acclaim.

With this in mind, we might reconsider the passage already discussed that calls upon the executive to look to the people’s interests over and against their inclinations. A man who, to win power, merely gratifies the people’s inclinations can never free himself from the suspicion that he is merely ambitious and self-serving. To display true virtue, a man has to show that the interests of others take precedence over his own. By risking the displeasure of the people while serving them, a president displays precisely this kind of virtue. In displaying such virtue, he believes that he confirms to himself and to the world that he deserves the political power that has been given him. Thus, Hamilton implies that it is *only* in a republican government that a man can display the courage in the political realm to look away from his own good and toward the good of others. Because the president depends upon the people for continuance in political power, his unwillingness to flatter them confirms his virtue.

This is not to say that men who display such virtue do not desire some type of reward for their behavior. The desire of reward is better thought of, however, as a desire to merit a reward. They want enduring fame and immortal monuments because they have deserved such through their virtuous rule. Therefore, Hamilton claims “the desire of reward is one of the strongest incentives of human conduct” (*Federalist* #72, 470). In Rosano’s heretofore mentioned discussion, such a statement sounds like the cold calculation of a man with an amoral desire for the “reward” that fame brings. But the context of the passage emphasizes that the reward desired, continuance in office, is one that he wants to obtain, “by meriting.”

We might consider Hamilton’s famous passage from *Federalist* #72 in this same manner: “The love of fame, the ruling passion of the noblest minds,...would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit” (470).¹²⁵ If Hamilton is merely a Machiavellian, the claim makes little sense. Why would a “love of fame” necessarily prompt a man to undertake what sounds like such hard work? Could he not pursue fame in a variety of other pursuits? For instance, Lincoln’s ambitious man pursued fame, not through enterprise for the public benefit, but through tearing down the existing order. Hamilton can make this claim because his introduction of the notion of desert has allowed him to judge the pursuits to which ambitious men dedicate themselves. According to Hamilton, the reward of real fame

¹²⁵ The passage is actually in the subjunctive voice: “Even the love of fame, the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit.” The context of this passage, which establishes the necessity of a firm possession, the presidency with a constant possibility of reelection, for the undertaking of such projects will be discussed shortly.

should be only bestowed upon those who undertake “extensive and arduous enterprises for the public benefit.”¹²⁶

These projects are deserving of reward for the same reason that looking to the people’s interests over and against their inclinations was. The president who pursues such projects does so knowing that they will require “considerable time to mature and perfect.” In fact, the danger of not giving the president enough time in office would be that he would not be “allowed to finish what he had begun.” In this manner, the context of Hamilton’s discussion makes clear that these projects are not immediately popular. They do not immediately satisfy the people’s wishes and thereby increase the ambitious man’s power. Instead, they require the virtue to turn away from temporary popularity for the sake of the people’s long-term interests. While remaining virtuous, these enterprises are different than the ancient notion of virtue because they are within the confines of the new administrative state and the new politics of limited ends.¹²⁷ Rather than being matters of public virtue, they are matters of public work.

¹²⁶ Consider the following passage which also points to the worthiness of those projects in which the president can engage: “Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require *other talents*, and a different kind of *merit*, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make a successful candidate for the distinguished office of President of the United States” (*Federalist* #68, 444; italics mine).

¹²⁷ Tulis (1994) writes: “Hamilton called this new American politics a politics of ‘administration,’ distinguishing it from the traditional politics of disputed ends. If politics were transformed and narrowed in this way, thought Hamilton, demagogues would be deprived of part of their once powerful arsenal of rhetorical weapons because certain topics would be rendered illegitimate for public discussion. By constituting an American understanding of politics, the founding would also reconstitute the problem of demagoguery” (95). I substantially agree with Tulis except that I would go further: the transforming and narrowing of politics reconstitutes the definition of political virtue. However, perhaps this is what Tulis means by “constituting an American understanding of politics.” See, also, Flaumenhaft (1981).

Does Hamilton, then, simply hope that these papers would have such a far-reaching effect that they would reconstitute the very notion of virtue?¹²⁸ If this were the case, Hamilton would not be the political realist we often take him to be. Instead, while Hamilton might have some grounds to think his argument will have some effect on some ambitious men and might have other grounds to think that the whole thrust of modern republicanism has substantially foreclosed the possibility of "virtue politics" already, he would still be basing a good deal of his reasoning on hope, something which Hamilton repeatedly warns against when constructing a good government.

Hamilton seems to think that, regardless of his arguments, the office itself, as it is created by the Constitution,¹²⁹ will cue ambitious men to undertake these kinds of public works. The key for Hamilton is that the office combines a representation of the people with a constitutional duty to serve the people. Because true political ambition wants more than merely to gratify the people's wishes, the emphasis on the office's *constitutional* duties will remind its holders that they should look away from what might satisfy their temporary desire for power and toward what true service requires. His representative position means that the president leads the people, but his constitutional

¹²⁸ Hamilton may have had grounds for more than just hope insofar as his argument in *The Federalist* can be seen as part of a modern, Lockean political "project" that had begun long before. See, for instance, Pangle (1988), Zuckert (1994) (2002), and Rosano (2003). For an alternative view, see, for instance, Wood (1991). For an excellent collection of essays which examines the intellectual sources behind the formation of the Constitution from a variety of perspectives, see *How Democratic is the Constitution* (1980).

¹²⁹ The precedent of a two-term limit established by Washington poses a significant challenge to this argument. Given a limit of two terms, there is not the time to "mature and perfect" public works and there is always the danger that a man approaching "inevitable annihilation" "would be much more violently tempted to embrace a favorable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty" (*Federalist* #72, 471). In historical terms, the two-term limit has created a problem within the limited politics of administration that Hamilton also discusses: "To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity and desert; and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing that the dismissal of his predecessor has proceeded from a dislike of his measures" (*Federalist* #72, 469). See Skowronek (1997, 21). See, above, chapter 2, section j.

position also calls upon him to serve those he leads. Were it not for that aspect of his ambition which demands virtue--looking away from his own immediate good and toward the good of others--he would ignore the Constitution's mandate. But the Constitution reinforces the intrinsic aspect of ambition which thinks first of service to others thereby creating an office that will avert, to some degree, the problem of demagoguery.

Moreover, since the regime itself provides him with "honors," he has less reason to seek to undermine the regime in search of honor and more reason to accomplish those things, within the existing regime, which will provide him with more honor. Not only does it honor him for his service, but the "game's playing field" also provides him with a great deal of "space" for truly enduring projects. Just as the game of basketball cues even its most outstanding participants to play according to the existing rules, the new game of constitutional politics will cue even its most ambitious men to play according to the rules laid out by the new politics of administration. By providing so much room for these ambitious men within it, i.e. by giving them an object for which to strive, with which to maintain themselves, and within which to excel, the constitutional system also gives itself a constitutive power over them.

To see this, let me turn to a discussion *Federalist #76* where Hamilton points to the salutary power that the system will have over the very character of the president.

Hamilton writes:

A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate, to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its cooperation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate (496).

In the first place, Hamilton claims that the mechanism is good because it is impossible to imagine that the executive could corrupt a majority of the members of the Senate. In other words, the first argument is a classic liberal institutional argument. The institutional mechanism guards against the malicious effects of a president who would be inclined to attempt to corrupt members of the Senate; it provides safety against even the worst kind of ambition. But this second argument points to another, and perhaps more important, psychological effect of the necessity of Senate cooperation. It makes the man "bigger" but more moderate and, perhaps, more virtuous than he might otherwise be.

Immediately before, Hamilton points to an understanding of human nature that is more "realistic," but, again, not necessarily what we often think of as the liberal understanding of human nature. Hamilton claims that the "supposition of universal venality in human nature is little less an error in political reasoning, than the supposition of universal rectitude" (495). In fact, rather than creating a system that, to paraphrase one liberal political philosopher, would work even for devils, Hamilton writes: "The institution of delegated power implies, that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence" (495). By trusting the ambitious president with such enormous power but making him work within a constitutional system, the executive office brings forth such virtue--albeit a new liberal virtue that seeks to create "enterprises" that improve the overall public good.¹³⁰

Historically, the ambitious and powerful president might send fleets around the world or

¹³⁰ This attempt to create a "liberal virtue" resembles Hume, a thinker to whom Hamilton was much indebted. For an account of Hume's creation of liberal virtue, see Manzer (1996). Manzer concludes: "Politically speaking thus, Hume saw no need to choose between the political improvements of modernity and the grandeur of the ancients. Indeed he would probably have shared Alexander Hamilton's view that such improvements could only enhance the luster of 'bright talents and exalted endowments' by freeing them from the gloom which engulfed ancient politics" (355).

undertake a "war" against big corporations (both of which Teddy Roosevelt, perhaps one of our most ambitious presidents, did), but he does not undertake massive land distribution or attempt to purge the insufficiently virtuous.

h. Conclusion

It is often said about the founding, and about modern political thought more generally, that political ambition is treated as a morally neutral phenomena. In this way, rational choice theory simply mirrors a dominant strain of modern thought.¹³¹ It can be directed, as in Lincoln's Lyceum address, either at harm or good--all it wants is distinction. The key is then to engineer a regime in which any kind of political ambition can, almost accidentally, produce good politics. Hamilton points at the problem of this arrangement, the same problem Lincoln saw: the excessively ambitious will want to tear down the regime and no institutional mechanisms can stop them. And he points at its ultimate solution: reconstitute the ends of the ambitious man toward tasks for the good of the regime. Give him a playing field big enough for him to "show himself," but establish certain ground rules of the game. By doing so, you turn his passion for power and preeminence into an advantage for the regime.

For Hamilton, then, limited government is not accomplished by limiting government. Instead, limited government can only be accomplished by reconstituting the ambition of the political actors themselves. One limits government by changing the ambition of political actors within it toward accomplishing goals within a limited government. Ambition is not just made to counteract ambition. Instead, the goals of

¹³¹ See Brogan (1996) for an interesting argument which links rational choice theory to other modern attempts to form political order "in the absence of a divine or natural order" (804).

ambition are changed. In fact, Hamilton thinks along with Wilson that government, by its nature, cannot be limited. Unlike Wilson, however, Hamilton understands the importance of limiting the goals of those within the government, thus avoiding demagogic appeals and "virtue" politics. These goals are limited *constitutionally*, but in a manner that differs from the typical way we think of constitutional politics. The Constitution does not serve as a brake upon action which would otherwise be taken; Hamilton thinks no document can ever be sufficient simply to restrain political action. Instead, the Constitution controls behavior by guiding it toward action that is in accord with constitutional intentions: the happiness and security of the people. It does so, in part, by calling upon its highest representative, the president, to guide the people toward their true interests and away from their harmful inclinations. It calls upon the president to exercise virtuous leadership by representing the people without pandering to them. In contrast to Wilson who would do away with constitutions entirely, Hamilton outlines a position within which the Constitution remains essential because only it can cue political actors to do more than merely represent the people's wishes.

This analysis then shows us something not only about the treatment of ambition and the presidency but about modern republicanism more generally. Weinberger (2003) explains well the difference between ancient and modern republicanism:

In classical republicanism, the political order relies on citizen virtue and public spiritedness. The citizen's participation in politics and dedication to the common good are ends in themselves. The republican political order, one could say, exists for the sake of citizen virtue, and private life is fulfilled by means of public obligations. In such an order war is not an evil, but rather the stage for honor, glory, and above all, civic virtue. In modern republicanism---based on Machiavelli's harsh, antiutopian realism--the political order is sustained by institutional arrangements with *no* dependence on political virtue or public spiritedness (351; italics mine).

My only quarrel would be with this "no." This analysis of Hamilton's treatment of ambition shows us that at least he well understood the need not only for successful institutional arrangements but also for political virtue. The key is then to make the argument and design the institution so as to create a new kind of political virtue that sustains and invigorates the modern republican political order.

My argument does not imply that Hamilton abandoned modern principles in favor of ancient notions of virtue.¹³² Hamilton learned from the moderns that a deal could be struck between the ambitious prince and the relatively sedate people. The people would give the prince his power and the prince's political ambition would be satiated. In the American Constitution, as I have suggested throughout, the presidency serves as the opportunity for the truly ambitious to exercise their passion for power and preeminence. The presidency offers to the Ceasers, Alexanders, and Napoleons a chance to rule within a republic that does not destroy the republic itself. But, as we saw in Lincoln's speech, this accommodation might not ultimately satisfy such men. For this reason, Hamilton thought something more must be done to satisfy the ambitious.

Hamilton thought this "deal" must be accompanied by a redefinition of political virtue itself. Whether he learned it from the ancients or not, Hamilton, perhaps because he knew something about his own soul, knew that the prince wants more than power over a relatively sedate people. He wants to achieve a deserving fame for the nobility of his political rule; he wants to deserve the rewards that the people can offer him. And for

¹³² My argument in this chapter resembles arguments such as Velasquez (1996). He writes: "The study of American politics and America's modern philosophical roots are replete with discussions about the primacy of institutional arrangements, all of which are important. But their importance should not conceal from us the extent to which {sic} Founders understood the edifice as resting upon a rightly exercised moral sense" (220). Although I would say that, at least in this argument, Hamilton focuses on virtue only insofar as he is realistic about the real roots of political action and not because he is concerned about the moral quality of the regime itself. His discussion of virtue still arises out of his institutional realism and not despite it.

precisely this reason, his political ambition is both more and less amenable to the well-established liberal state than it appears in Machiavelli and Locke. If political virtue can be successfully redefined as service for the public good, the Ceasers become Roosevelts. But if the politically ambitious most concerned with virtue cannot be satisfied by the accommodation, liberalism collapses.¹³³

¹³³ The success of the American Constitution might suggest that the modern accommodation, supplemented by the Hamiltonian redefinition, has succeeded. This may be so. Although it might also be suggested that the modern accommodation has succeeded not by accommodating the politically ambitious to its principles, but by effacing political ambition itself. We have neither Ceasers nor Roosevelts but George Bushs and Al Gores.

Chapter 4

Locke, Hamilton, and Madison on Executive Prerogative and Representation

"It will be said, that we don't propose to establish Kings. I know it. But there is a natural inclination in mankind to Kingly government. It sometimes relieves them from Aristocratic domination. They had rather have one tyrant than five hundred. It gives more of an appearance of equality among citizens, and that they like."

"The executive will be always increasing here, as elsewhere, till it ends in monarchy."
—Benjamin Franklin

Having seen the insufficiency of both the Wilsonian and the modern presidency scholars' accounts of the Constitution's executive, we turned to Hamilton's arguments in *The Federalist* in search of something more adequate. In Hamilton, we found the articulation of a powerful executive who provides the essential and otherwise lacking energy in the new politics of administration in a government of limited ends, an executive who also possesses some kind of discretionary power to preserve the regime in a time of crisis. Hamilton also directs the most ambitious, the "irregularly" ambitious who in ages past would have posed a fundamental threat to the new regime, toward service for the regime in the office of the presidency. I have never argued, however, that Hamilton's was the only understanding of executive power during the founding. Instead, Hamilton is useful to us first and foremost because he shows us the potential constitutional power of the office--a power that many modern presidency scholars have lost sight of by viewing the founders through essentially Wilsonian eyes.

Understanding the potential power of the Constitution's executive is important not just to scholars of the presidency; it is important to every citizen within a republic created by this Constitution. Moreover, examining the question of executive power in this

Constitution has implications for an even more fundamental question: what is the relation between one powerful man and any constitutional republic? It is because we have, to a certain degree, lost sight of this deeper question that we overemphasize the weakness of the Constitution's executive. We are much more comfortable with the relation between one powerful man and a democracy. So long as the powerful man simply represents and works for what the people want, we worry little about the power itself. Because we have come to accept Wilson's formulation of the president as a sort of "tribune for the people," we have trouble bearing the "checks and balances" on presidential power. Why not give the president the power to accomplish what he and the majority of people who elected him want?

In the last chapter, we saw that Hamilton understood that the relation was not so simple. The people are often inclined to something that is not in their interest, thus requiring a president sufficiently distant from them, both psychologically and institutionally, to risk their displeasure so as to serve their interest. Alternatively, the "irregularly" ambitious might seek, not to work within the regime, but to overturn the regime in the name of their superior virtue. In doing so, they almost always found themselves not against the people but upon them, claiming to serve as their "voice." In Hamilton's formulation, the irregularly ambitious will first become demagogues and then tyrants. The Constitution is needed to direct the irregularly ambitious away from demagoguery and toward public service. Thus, as powerful as Hamilton's president seems, his is not Wilson's president. Wilson seeks to sweep away all institutional barriers to the exercise of presidential power, whereas Hamilton thinks those institutional barriers

necessary to the cultivation of a president who represents, while refining, the people's true interests.

Perhaps, one might respond that, of course, Hamilton thought the relation was not so simple: he is the alleged monarchist among the founders who, according to the Jeffersonians, sought to frustrate the people's will as much as possible in favor of aristocratic interests. In this vein, one might argue that Hamilton sought a strong president not to serve the people but to serve the "aristocratic class" over and against the true representative of the people: Congress. Hamilton and Wilson might be similar in both seeking a powerful president but they are wholly dissimilar in the ends to which they want that power directed.¹³⁴ As for Hamilton's discussion of the president representing the people's true interests, this is nothing more than the echo of a mixed regime in which the monarch cares for, or, to put it more starkly, pretends to care for the people's interest while looking out only for the interest of himself and his class.¹³⁵ Is this, then, the correct characterization of Hamilton's project?

¹³⁴ In his other seminal work, *Progressive Democracy*, Croly (1914 1998) accepts Hamilton's "aristocratic leaning" but notes that "the nationalism of Hamilton...was more democratic, because more constructively social than the indiscriminate individualism of Jefferson" (54-55). Immediately before, he wrote: "The mere fact that the Federalists were nationalists and were seeking to give integrity to the political system tended to convert them into involuntary democrats. Those ingredients in the national political system which in their development have proved advantageous to democracy, are in point of fact more often of Federalist than of anti-Federalist origin." I agree except, despite what the Jeffersonians will claim, I am not sure that, in truth, the Federalists were any more "aristocratic" in their leanings than the anti-Federalists. See Ford (1920, 357-73) for an adept discussion of Hamilton's democratic leanings.

¹³⁵ Locke writes: "In Absolute Monarchies indeed, as well as other Governments of the World, the Subjects have an Appeal to the Law, and Judges to decide any Controversies, and restrain any Violence that may happen betwixt the Subjects themselves, one amongst another. This every one thinks necessary, and believes he deserves to be thought a declared Enemy to Society and Mankind, who should go about to take it away. But whether this be from a true Love of Mankind and Society, and such a Charity as we owe all one to another, there is reason to doubt. For this is no more, than what every Man who loves his own Power, Profit, or Greatness, may, and naturally must do, keep those Animals from hurting or destroying one another who labour and drudge only for his Pleasure and Advantage, and so are taken care of, not out of any love the Master has for them, but Love of himself, and the Profit they bring him" (*ST*, VII, 93, 328). Throughout *The Second Treatise*, Locke both provides fuel for a manly republican hatred of absolute monarchy and anything that resembles it, i.e. executive power, and points to the absolute necessity of fairly

Perhaps the best way to answer this question is to turn to the first significant public division within the Federalist coalition: the debate between Madison and Hamilton, writing as Pacificus and Helvidius, concerning executive power. This debate also shows us an alternative understanding of the Constitution's executive; in fact, the modern presidency literature seems to have looked to the Madisonian alternative for their view of the founders' president. The existence of a significant and early, 1793, debate between Madison and Hamilton, the two principle authors of *The Federalist*, suggests the impossibility of a coherent and unified founding intention for executive power. As Mansfield writes: "In the American Constitution the office of executive permits and encourages a continuing dispute about the nature of executive power" (278).¹³⁶

How does this dispute answer the question as to the nature of Hamilton's project? At first blush, the dispute does not seem to touch upon this question; instead, it centers on the president's role in foreign policy: is the executive the "agent of intercourse" with foreign nations? And, as such, does he have significant discretionary powers over the conduct of our nation's foreign policy? For good reason, much of the previous scholarship focuses on this aspect of the debate. In answering these questions, Madison and Hamilton reveal fundamentally different notions of executive power, insofar as one admits of a kind of prerogative (although Hamilton is careful never to use the term, see chapter 2, section h) and the other vehemently denies it.

extensive executive power for a stable regime. Here, we see Locke paying homage to manly republicanism.

¹³⁶ See Mansfield (1989, 275-78). As I have said once before, to the whole of Mansfield's argument in *Taming the Prince*, especially to his treatment of Locke, I am deeply indebted. Perhaps my only correction to his treatment of this debate between Madison and Hamilton would be that Madison does not attack the proclamation but the grounds upon which Hamilton had justified the issuance of the proclamation (see Schmitt 2000).

But, I will argue, their posture toward prerogative necessarily follows from a more fundamental posture each holds concerning the relation of the executive to the people. Paradoxically, it is the seemingly more democratic Madison who holds a less democratic view of executive power and the seemingly less democratic Hamilton who is, on this issue, more democratic. Madison's argument against executive power stems from, what we might call "anti-Federalist" concerns about "elective tyranny." Hamilton's argument for a more powerful executive and his flirtation with executive "prerogative" stem from a greater confidence in an executive elected by the people.

In a recent article on this debate, Schmitt (2000) notes that, following Hamilton, the Federalists sought popular support for Washington's action. Schmitt writes:

Under Hamilton's understanding of 'the executive power,' the president retains broad formal authorities to initiate new policies and to do so without Congress' sanction. Yet it was precisely Hamilton, the author of this position, who appears most concerned with bolstering the exercise of these discretionary authorities with extra-constitutional, popular support. The treasury secretary might have told himself that this was a one-time effort, which did not involve the president directly, and was justified by the extraordinary dangers and politics of the days. But, the fact remains, Hamilton and his Federalist allies helped open the door to a form of presidential politics that was never quite shut again. Although the attempt to use public opinion in this fashion was bound to happen sooner or later given the underlying character of the regime, the surprise is that this precedent was set so quickly and, interestingly, set first by the Federalists and not the Republicans (143-44).

The argument of this chapter is that, while Schmitt is correct about the nature of Hamilton's actions, he is wrong to find it surprising or think it a "one-time effort." Instead, Hamilton's notion of executive power allows for and may even require an

executive who seeks popular support for his actions.¹³⁷ In this context, consider again what Hamilton wrote in *Federalist* #71:

Between the commencement and termination of such a period, there would always be a considerable interval...in which he might reasonably promise himself, that there would be time enough before it arrived, *to make the community sensible of the propriety of the measures he might incline to pursue* (467; italics mine).

The need for popular support does not mean that the executive becomes a slave of the public's inclinations but rather an educator and true leader of the people.

By contrast, while Madison wants to constrain a *democratic* executive, his fears of executive power stem from a desire to maintain a limited constitutional democracy. In other words, he is a democrat; but his democratic argument against executive power finds its source in a manly unwillingness to be ruled by any man and a republican and absolute insistence on true self-rule. Thinking that, without limited constitutionalism, democratic republicanism tends to devolve into factionalism or tyranny, Madison wants his democrats to insist on their own limitations, especially in the executive power.

Before entering the debate itself, we must first turn to Locke. A discussion of Locke is not artificially imposed on this debate: Madison himself introduces Locke (along with Montesquieu) in the first letter in response to Hamilton. Madison tells us that we cannot look to "the most received jurists" because their eyes were too much on monarchical governments. Then he writes that even writers such as Locke and Montesquieu "who have discussed more particularly the principles of liberty and the

¹³⁷ Walling (1999) makes something of the same argument in another context. He writes: "In his defense of Washington's initiatives during the Whiskey Rebellion, however, he turned this dependence [upon the people] into a political advantage. The executive could have not only the constitutional but also the moral authority to preserve the Republic from harm because he was the only elected member of the government who could claim to act for the people as a whole. By republicanizing the basis of the executive's authority, Hamilton thereby increased his ability to act energetically" (127).

structure of government...both of them too are evidently warped by a regard to the particular government of England" (56). According to Madison in the footnote, Locke's "chapter on prerogative shows, how much the reason of the philosopher was clouded by the royalism of the Englishman" (56). But Madison exempts the "profound Locke" some from this criticism by noting that "had he not lived under a monarchy...or had he written by the lamp which truth now presents to lawgivers, the last observation [the unification of the federative and the executive power] would probably never have dropped from his pen" (56).

Considering how indebted the founders were to both Locke and Montesquieu, why must Madison ascribe their arguments regarding executive power to some royalist confusion? To answer this question adequately, we must better understand Locke's argument.¹³⁸ An examination of Locke is also imposed upon us because, while this debate might be said to occur within the school of Locke, we do not have the same facility with him as Hamilton and Madison.

a. Locke's Prerogative

It is not without reason that Madison ascribed to Locke a clouded mind and a warped judgment on the subject of executive power: his treatment of the matter seems to contradict itself at every turn. While Madison might have made the preceding argument solely for rhetorical reasons, i.e. he wants to distance the American understanding of executive power as much as possible from any royalist implications, it is also possible that he really does think Locke confused and clouded on the subject. Locke gives various

¹³⁸ An even fuller answer to this question would also require an examination of Montesquieu but this is beyond the confines of this paper.

and even conflicting definitions of executive power, its relation to the rest of government, and the "prerogative" power with which it is endowed. At times executive power is treated as properly subordinate to the legislative, other times as rightfully equal to it, and, in some cases, as necessarily superior to it. While it might be possible to extract from this variety a nuanced but consistent account of executive power, such is clearly not self-evident.

The complexity of Locke's argument would require another chapter, if not an entire book, to do justice to its nuances. For this reason, I will only sketch those aspects of his argument most relevant to the debate between Madison and Hamilton. For this reason, my treatment is meant to be suggestive rather than definitive. My understanding of Locke in this section is perhaps best introduced by Mansfield's provocative suggestion at the beginning of his much more authoritative chapter on Locke:

With John Locke we come to the constitutional executive we think we know...But what exactly is a constitutional executive? It is often thought to be an executive subordinate to the constitution. But could it not also be considered an ambivalent, submissive recognition of the need for a strong executive? What then is the precise relationship between the constitution and this executive power? Locke's political science shows that the modern constitution and the modern executive are mutually dependent and yet antithetical. Each needs and opposes the other (181).

Mansfield's argument, which posits both the opposition of the executive to "constitutionalism" and the need of constitutionalism for such an executive, appears initially incongruous with Locke's argument. In chapter VII on political or civil society while describing the resignation of the "Executive Power of the Law of Nature"--the power in the State of Nature to punish those others who transgress the Law of Nature--to civil or political society, Locke writes:

For hereby he authorizes the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require; to the Execution whereof, his own assistance (as to his own Decrees) is due. And this puts Men out of a State of Nature into that of a Commonwealth, by setting up a Judge on Earth, with Authority to determine all the Controversies, and redress the Injuries, that may happen to any Member of the Commonwealth; which *Judge is the Legislative, or Magistrates appointed by it* (ST, VII, 89, 325; italics mine).

At first, it appears that the legislative power is simply supreme and the "magistrates," as legislative appointees, simply execute the will of the legislative power.

While this reading is complicated some by the dual uses of the term "legislative" power in Locke, it is not contradicted by it. Locke sometimes uses the term to describe the basic power the people possess to establish a civil society and place themselves under the rule of law. As such, the "legislative" power could create any form of government it wants: democracy, oligarchy, monarchy, hereditary monarchy, elective monarchy, or a mixed form of government (ST, X, 132, 354).¹³⁹ But he also sometimes uses the term to describe a more specific legislature, i.e. a Senate or a Parliament (VII, 94, 329), that governs the people in a more immediate way. For example, in chapter XII, Locke invites his readers to come to the latter conclusion regarding the "legislative" power when he writes:

The Legislative Power is that which has a right to direct how the Force of the Commonwealth shall be employ'd for preserving the Community and the Members of it. But because those Laws which are constantly to be Executed, and whose force is always to continue, may be made in a little time; therefore there is no need, that the Legislative should be always in being, not having always business to do (XII, 143, 364).¹⁴⁰

¹³⁹ See also, VIII, 105, 337 for at least one place where Locke indicates that the people may, with good reason, not choose to place themselves in a democracy

¹⁴⁰ See also XII, 149, 366-67 where he goes so far as to separate the legislative from the people's power, implying that the legislative is simply the legislature. Locke writes: "There can be but one Supream Power, which is the Legislative, to which all the rest are and must be subordinate, yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them." In the first case, we may in the end be able to extract a consistency from Locke by noting that he first speaks of the

The preceding passage is followed soon after by a description of the executive as that "Power always in being, which sees to the Execution of the Laws that are made" (XII, 144, 365). Again, in the description of the relation between the executive and the legislative powers, Locke implies and invites his readers to conclude a subordination of the executive to the legislative power: the executive appears to be nothing more than the executor of legislative will.¹⁴¹ Myers (1998) writes: "It would seem that the Lockean constitution thus reduces the executive to the status of a clerk—a 'mere executor,' in Machiavelli's usage" (222).¹⁴²

In this same vein, Locke emphasizes the supremacy of those laws passed by the legislature of which the people are made aware and within which the people are always governed. "Whoever has the Legislative or Supream Power of any Commonwealth, is bound to govern by establish'd standing Laws, promulgated and known to the People, and not by Extemporary Decrees" (IX, 131, 353; see also XI, 137, 359).¹⁴³ Locke appears to

"legislative power", i.e. that which the people possess no matter the type of political regime (X, 132, 354), and then speaks of the "legislative", i.e. that which, like Senate and Parliament, makes laws but needs not "be always in being." In the second case, we may be able to do the same by noting the joining of the Legislative to the "Supream Power" and then the subsequent separation of the two to speak of the lesser legislature while still calling it the legislative. However, while such a reading may, in the final analysis prove correct, it is also clearly the case that, by using both terms in such close proximity and apparently interchangeably, Locke has invited his readers to conclude that the "legislative" is superior to the executive.

¹⁴¹ While arguing for the necessity that the founders had to follow their own path in creating the executive, Burns (1965) summarizes well Locke's treatment of executive power: "Locke had preached the rights of popular assemblies against kings, but he had been vague about the place of the executive in a republican system; he had written about an executive 'prerogative' that, the more one studied it, seemed to give the executive an almost bottomless reservoir of power" (5).

¹⁴² Myers also points to the inadequacy of this first appearance. He goes on to argue that the "deepest rationale for Locke's division of governmental powers" is a teaching of "moderate rationalism." "The reason that is adequate to govern us, that is capable of impartially judging the claims of the general and the particular or the many and the few or one, emerges more reliably from the interaction between two institutional powers than from the actions of a single individual or body" (224-25).

¹⁴³ In this context, Locke often discusses the danger of "Absolute Arbitrary Power," a seeming redundancy but two terms that, in a completely different context, Locke actually separates: "Absolute Power, where it is necessary, is not Arbitrary, by being absolute" (XI, 139, 361). I note this only because Locke will later speak of prerogative as "arbitrary" power but never calls it absolute thus again rescuing a coherence from

claim only a society governed by standing law, as passed by the legislature, can be called civil or political. In such a society, the people need not worry about their government arbitrarily taking their property because such actions would not be in keeping with the government's end: the "Peace Safety, and publick good of the People" (IX, 131, 353). The legislature, elected by the people, passes laws for their own good and those known laws regulate all that happens within the political community.

The first step Locke takes away from this position occurs in his discussion of the distinction between federative and executive power--a distinction that becomes quite important in the debate between Madison and Hamilton.¹⁴⁴ He separates the two powers as "distinct in themselves" but says they are "hardly to be separated, and placed, at the same time, in the hands of distinct persons" (XII, 148, 366). The executive power manages the municipal laws within a society; the federative power manages the "security and interest of the publick without." Here Locke claims that the federative power "is much less capable to be directed by antecedent, standing Laws, than the Executive" (XII, 147, 365-66). For this reason, it should be left to the "Prudence and Wisdom" of its possessors. Thus, at least in the relations with anything outside of a political society, the executive, who should possess both powers, is given significantly more discretion to govern outside of standing law. But, while he has discretion in the relations with other countries, he is still bound by the standing laws within a society.

the argument. The real problem is not simply arbitrary power, or even simply absolute power, but absolute *and* arbitrary power.

¹⁴⁴ Madison will insist upon the strict separation of the executive from the federative power. Hamilton will imply that the executive necessarily possesses both powers, albeit with certain exceptions in the federative power given to Congress for the sake of republican safety. You can begin to see why this debate occurs "within the school of Locke."

However, Locke's reason for the need for discretion calls into question the very claim he makes about the susceptibility of executive power, as distinct from federative power, to be directed by such standing laws. Locke writes:

For the Laws that concern Subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth (XII, 147, 366; italics mine).

First, it is strange that the need for discretion is justified in regard to foreigners within a society rather than foreign relations with other societies. Federative power had been that power that preserves a society's interest "without," not "within," but foreigners, though from "without," are "within" a society.¹⁴⁵ Second, the reasoning itself seems unsound. Foreigners, especially those with strong allegiances to other countries, would surely be prone to a variety of "designs and interests." The Frenchman in Great Britain who seeks the restoration of James as king of England and vassal of France must surely be "left" to the prudence of King William or Queen Anne. But, Locke also indicates at other places that it is not just "foreigners" with such "designs and interests": "The Pride, Ambition, and Turbulency of *private* Men have sometimes caused great Disorders in Commonwealths" (XIX, 230, 418; italics mine). Or, Locke writes: "Often...it shall please a busie head, or turbulent spirit, to desire the alteration of government. 'Tis true, such Men may stir, whenever they please" (XIX, 230, 417). Why, then, would discretion be required for foreigners but not for such men? What would make the relations with unruly and "ambitious" citizens any different? By providing such an unsound reason for a

¹⁴⁵ See VIII, 122, 349 for the status of foreigners.

distinction between the prudence required of federative power and the subordination imposed upon executive power, Locke quietly suggests that this same prudence would also be required of executive power.¹⁴⁶

In the next chapter after having raised the possibility of a "Supream Executive Power" which somehow shares supremacy with the Legislative (XIII, 151-52, 368-69), Locke points again, this time more openly, to the necessity of executive discretion. In this case, the question revolves around the power "of Assembling and dismissing the Legislative." Anticipating the quite appropriate question as to whether this power makes the executive superior to the Legislative, Locke claims that it "gives not the Executive a superiority over it." Why not? In his answer, Locke's logic seems only to indicate why the executive is not superior to the Legislative power, i.e. the power the people possess to dissolve the current government and form a new one, and does not show that the executive is not superior to the legislature. Locke claims this power

is a fiduciary Trust, placed in him, for the safety of the People, in a Case where the uncertainty, and variableness of humane affairs could not bear a steady fixed rule. For it not being possible, that the first Framers of the Government should, by any foresight, be so much Masters of future Events, as to be able to prefix so just periods of return and duration to the Assemblies of the Legislative, in all times to come, that might exactly answer all the Exigencies of the Commonwealth; the best remedy could be found for this defect, was to trust this to the prudence of one, who was always to be present, and whose business it was to watch over the publick good (XIII, 156, 371).

In defending the executive's right to assemble and dismiss the legislature, Locke makes the most radical case yet for executive power. The executive is subordinate only to the

¹⁴⁶ For an alternative account of this passage that states well the underlying logic of Locke's rule of law, see Resnick (1992). He writes: "The rule of law provides a stable set of expectations to which men can orient their action actions. Formal rules with predictable outcomes are less dangerous than an interventionist government's attempting to judge actions on the basis of concrete substantive values. The direction of domestic affairs is not to be left to the prudence and skill of the rulers" (113). In theory, Locke would agree with this claim. It seems, however, that the problem of maintaining order during the inevitable exigencies that are coeval with politics demands a discretionary governmental institution.

public good over which it is his business to watch. Moreover, it seems almost uniquely his business because the legislature cannot watch over the public good while it is not in session. In defending the executive's inferiority to the legislative, Locke actually points to his superiority to the legislature.

Moreover, we have a new case for executive power that appears to contradict Locke's argument for the superiority of settled standing law. That same reasoning Locke uses concerning the necessity of a prudent response to current exigencies when determining the assembling and dismissing of the legislature could also be applied to many other situations. Can't we envision laws created by the legislature which, if applied by the executive, would harm the public good? Once we admit of both executive prudence in response to current exigencies and the inadequacy of a fixed rule in response to a variable world, has this not opened the door for significant latitude for the executive in his application of the law? While we can still say that the executive is bound to a concern for the public good, we can no longer say he is bound by the law.¹⁴⁷

We can now see that Locke's chapter on prerogative is not, as Madison suggests, the product of a reason clouded by royalism. It is, instead, another step in the direction in which Locke has been leading his careful readers. While this direction might imply some form of "royalism," it arises by no means from an unreasonable attachment to his King. In this chapter, Locke introduces reasoning that goes even further in the direction of a need for executive discretion. Although, interestingly, he leaves for a later chapter the

¹⁴⁷ See Dunn (1969, chapter 11) for another account of the place of prerogative in Locke's political thought. Dunn rightly notes: "Though one of its defining characteristics is its legally unregulated character, what is totally unregulated is only the mode of its exercise, not the limits within which this exercise may take place, nor for obvious reasons the identity of the man who exercises it. The extent of its legal authority is determined by the constitution, that is, by the 'original contract' as modified through time by legitimate acts of the legislature" (150-51).

almost off-hand suggestion that prerogative is "arbitrary" and leaves only to implication the suggestion that the executive may have to do some nasty, even unjust, things precisely so as to maintain the public good.¹⁴⁸

According to Locke in this chapter, because "many things there are, which the Law can by no means provide for," the executive must possess discretion in his maintenance of the public good. In fact, "'tis fit that the Laws themselves should in some Cases give way to the Executive power" because, apparently, only it can execute the fundamental law of nature and government which is that "all the Members of the Society are to be preserved."¹⁴⁹ If such were the full extent of Locke's argument for prerogative, we would not be lead to Mansfield's conclusion. The laws would admit of the need for prerogative and prerogative would be outside of but not against those laws. An example of this type of prerogative would be something like the power to pardon. It seems nearly incontrovertible that healthy laws would allow an executive to possess the power to pardon a man who, in Locke's example, pulls "down an innocent Man's House to stop the Fire, when the next to it is burning" (XIV, 159, 374-75).

The next definition of prerogative, however, goes further. Locke writes: "This Power to act according to discretion, for the publick good, without the prescription of the Law, *and sometimes even against it*, is that which is called Prerogative" (XIV, 160, 375; italics mine).¹⁵⁰ By the end of this same section, Locke hides the prior claim by writing "there is a latitude left to the Executive power, to do many things of choice, which the

¹⁴⁸ Rahe (1992) concludes similarly: "It is remarkable just how much the English philosopher was willing to concede to Thomas Hobbes's argument for one-man rule" (474).

¹⁴⁹ We see, then, that, in allowing for significant executive discretion to preserve a society and in embodying such a flexible discretion in the fundamental law itself--the Constitution--Hamilton has learned well from Locke. See, above, chapter 2.

¹⁵⁰ Locke later writes: "Prerogative can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good" (XIV, 164, 377).

Laws do not prescribe."¹⁵¹ By redefining prerogative without the inclusion of the previous italicized passage, Locke obscures the radical nature of the power. But what does it mean to say that the executive can act against the law?

Consider the prior example of pardoning the man who pulls down an innocent man's house to stop a fire. The executive pardons this man for his superior prudence in recognizing the need to break one law to halt a greater conflagration. But it would be bizarre for the executive to possess the discretion to pardon this man's discretionary act but not the discretion to act in the same manner. In short, will there not be times when an executive must pull down an innocent man's house so as to stop a fire? In chapter XVIII, Locke writes: "It being safer for the Body, that some few private Men should be sometimes in danger to suffer, than that the head of Republick should be easily, and upon slight occasions exposed" (XVIII, 205, 402). In light of this, we can make explicit what Locke leaves implicit: for the sake of the public good, Locke recommends the "suffering" even of some men who are innocent. To take a recent example, in Locke's implicit teaching, if the executive knew of the possibility of some terrorists among a large group of men but did not know who was innocent and who guilty, it would be wise and prudent to arrest all the men knowing some of them are innocent. If "even the guilty are

¹⁵¹ Locke uses this language of "free choice" on two occasions in discussing prerogative in this chapter. To say the least, it is a strange way of describing what has appeared to be not a matter of "free choice" but a matter of compulsion. That is, the argument for prerogative seems to be that there are exigencies that arise in the commonwealth in which a concern for the public good *compels* an action that is outside of or even against the law. So, in perhaps our most famous case of "prerogative," it was Lincoln's concern for the public good that compelled him to suspend the writ of habeas corpus. To say that doing so was a matter of free choice for Lincoln would cast him in a much more tyrannical light. Understanding why Locke uses this language is beyond the confines of this paper and, at this point, my own imagination. One suggestion: perhaps, and by this I mean *perhaps*, its use suggests a freedom possessed by the executive in what he claims as compelled prerogative; such a reading has radically tyrannical implications for the place of executive power in Locke's constitutional system (see XVIII, 199, 398-99). In fact, if this reading were correct, it would seem improper even to speak of the *place* of executive power in the constitutional system. Virtually, the whole government would be executive. In fact, it seems to be the anticipation of such a possibility that causes Madison so forcefully to resist any enlargement of executive power.

to be spared" for the preservation of all, so too even the innocent are to be condemned for that same end.

This reading both complicates and explains two aspects of Locke's argument. It complicates Locke's defense of prerogative insofar as he claims that it seeks the preservation of "all the Members of the Society." If some members of society must be arbitrarily arrested for the sake of everyone else, then there is a tension between that individual's good and the common good. But this complication also explains Locke's almost off-hand description of prerogative in a later chapter as "an Arbitrary Power in some things left to the Prince's hand to do good, not harm to the People" (XVIII, 210, 405).¹⁵² Throughout, an arbitrary power has been defined as any claim made by the government or by a father upon someone else's life, liberty, and property.¹⁵³ In this off-hand comment connecting prerogative power to arbitrary power, Locke confirms what we have come to suspect. The executive must act not only outside the law, and not even only against the law, but arbitrarily, i.e. for the public good, he must occasionally do things which violate some citizens' inviolable right to their life, liberty, and property.

If prerogative must, of necessity, encompass occasional uses of arbitrary power, then the people had better be vigilant in their watchfulness of the executive. After all, Locke had written previously that government "ought not to be Arbitrary and at Pleasure" because such would keep the rulers "within their due bounds, and not to be tempted, by the Power they have in their hands, to imploy it to such purposes, and by such measures,

¹⁵² Compare this with XIV, 163, 377 where Locke writes: "If Men were so void of Reason, and brutish, as to enter into Society upon such Terms [those of a herd working for the pleasure of a master], Prerogative might indeed be, what some Men would have it, an Arbitrary Power to do things hurtful to the People." Apparently prerogative is arbitrary but not hurtful.

¹⁵³ See, for instance, XIX, 221-222, 412. For a specific discussion that seems to call a father's claim to a power over the life and death of his children arbitrary, see XV, 170, 381.

as they would not have known, and own not willingly" (XI, 137, 360)¹⁵⁴ Locke shows both the need for arbitrary power and the real danger it poses. But Locke seems, at times, hopeful that such arbitrary power will not create rulers who encroach too far on the people's lives, liberty, and property. Admittedly, the people are not "scrupulous" or "nice" in determining what is and is not prerogative, i.e. as long as the power aims at the "benefit of the community" they do not question its real necessity. But, Locke claims:

If there comes to be a question between the Executive Power and the People, about a thing claimed as a Prerogative; the tendency of the exercise of such Prerogative to the good or hurt of the People, will easily decide that question (XIV, 161, 375).

Locke will later claim again and more forcefully: "In a matter where the Law is silent, or doubtful, and the thing be of great Consequence, I should think the proper Umpire, in such a Case, should be the Body of the People" (XIX, 242, 427).¹⁵⁵

But how much security does the people's decision actually give a state? Or, more precisely, how much security does the people's judgment give to an individual upon whom the executive's arbitrary prerogative has imposed? To the second question, we can answer: not much. Consider what Locke writes in a later section:

For till the mischief be grown general, and the ill designs of the Rulers become visible, or their attempts sensible to the greater part, the People, who are more disposed to suffer, than right themselves by Resistance, are not apt to stir. *The examples of particular Injustice, or Oppression of here and there an unfortunate Man, moves them not* (XIX, 230, 417-18; italics mine).

¹⁵⁴ See also VIII, 111, 342-43. See Velvel (1970). Written in the heat of Vietnam and amidst the fervent cries against "presidential war," Velvel argues: "There are times when civil disobedience should be permitted as a means for obtaining constructive change" (215). In this, he seems to echo Locke. If the president acts outside his authority in a manner that does not satisfy the people, they must step in directly to stop him.

¹⁵⁵ Two sections before, Locke writes: "Who shall be Judge whether the Prince or Legislative act contrary to their Trust? This, perhaps, ill affected and factious Men may spread amongst the People, when the Prince only makes use of his due Prerogative. To this I reply, The People shall be Judge" (XIX, 240, 426-427). In this case, the prince and the legislative seem equal to each other and equally watched over by the people.

If the people are judge of what is due prerogative and they are not moved except by visible and sustained injustice and oppression, the occasional man unjustly oppressed by the executive has little hope for recourse to the people's judgment. So long as the executive does not arbitrarily impose himself upon the "greater part" of the people, he is free to impose himself on the occasional man's life, liberty, and property--whether it is for the common good or not.¹⁵⁶ If Locke is right, in our times, the occasional Arab stripped by the executive power of his liberty, possessions, and even his life would not bother us much so long as such attempts are not made upon the greater part of the people.

We have now migrated quite a distance from a society regulated by standing and well-promulgated law that succeeds in removing from the government's hands all arbitrary power. On the one hand, prerogative has been revealed as absolutely necessary to the maintenance of a stable society. On the other hand, it has been implied that, because prerogative is also necessarily arbitrary, it possesses extraordinary latitude to impose on some people--even if such imposition cannot possibly be justified by the common good. For this to be safe, the people need to be vigilant in watching over prerogative; but they are not.¹⁵⁷

The only upshot of Locke's treatment of prerogative seems to be that it must look to the good of the people, it must "represent" the people. Josephson (2002) writes: "The prerogative of the executive is limited by the principle of popular consent" (232).¹⁵⁸ But even this turns out to have its dangers. Such representation implies that "prerogative is

¹⁵⁶ Such dangers are not an abstract problem. Much earlier Locke writes of earlier ages: "There was *then* no stretching Prerogative on the one side to oppress the People" (VIII, 111, 342-43; italics mine).

¹⁵⁷ The prior implication that the executive has "free choice" in such imposition now becomes that much more startling.

¹⁵⁸ Unlike this account, Josephson finds that "the resistance of the people is a significant constraint on the exercise of executive prerogative" (238).

nothing but the Power of doing good without a rule" (XIV, 166, 378). Rightfully, it is the power to act outside of and even against the law so as to effect the people's best interests. But this means "That the Reigns of good Princes have been always most dangerous to the Liberties of their People" (XIV, 166, 378). A good prince who justly uses his "due prerogative" leaves a precedent that a bad prince can then use "for the harm of the People" (XIV, 166, 378). The bad prince comes to think of prerogative not as something to which he only has a right if he means the good of the people but as something to which he has a right as such, no matter how he intends it. Lincoln used his prerogative to effect the good of the people: the survival of the Union. Citing Lincoln as a precedent, Nixon claims his prerogative as a matter of constitutional right ("if the President does it, it isn't illegal"), regardless of whether he effects the good of the people.

In assessing Locke's treatment of the executive's place in his constitutional system, I would not overstate much to say that Locke's executive not only opposes the system, he subverts it. At this point, one might reasonably ask why Locke includes prerogative at all. Pangle (1987) summarizes well what would require an even longer treatment of Locke to show adequately:

But Locke insists that in the final analysis this problem inherent in executive prerogative is inescapable or intrinsic to civil society; the problem is not one that can be entirely circumvented by the right sort of constitutional framework. If a constitution fails to designate an executive endowed with full prerogative, a day will surely come when that prerogative will be seized, by unconstitutional force, or ceded, by anticonstitutional popular clamor--and these sad expedients will be reasonable, because any constitution that fails to provide for such prerogatives is a constitution that has abdicated its responsibility to provide the powers needed by a government prepared to meet the crises that can rationally be expected (261).

In Hamilton's treatment of ambition (chapter 3) and in his argument that a constitution must possess those powers requisite for its self-preservation, he articulates the same principle that causes Locke to incorporate prerogative. If you do not incorporate it into the constitution, it will necessarily arise outside of it. In fact, by not initially incorporating prerogative, the constitution will effectively destroy itself.

But as necessary as this power might be, that same power constitutes a permanently arbitrary feature of this supposedly non-arbitrary constitution. But that formulation still remains too legalistic. Locke, the consummate legalist, indicates that the problem goes deeper than a legal tension between the need for arbitrary power and a government that is not arbitrary. Instead, executive power threatens the very existence of a constitutional system because the people will often look to the executive over and against the legislature to effect the public good without a rule.¹⁵⁹

Having seen the real interest of the people in constitutional forms and their actual willingness to resist the encroachments of prerogative, Locke's statements about monarchy in his chapter "Of the Beginnings of Political Societies" reveal the depth of the threat of executive power to a constitutional system. According to Locke, in past ages the people chose monarchy because "it was sufficient to procure and preserve to Men all

¹⁵⁹ Isaiah Berlin (1997) writes of the people's relation to FDR: "They felt that his heart was in the right place, and they did not, therefore, if they gave it a thought, care whether his political appointments were made under the influence of bosses or for personal reasons, or thoughtlessly; or whether his economic doctrines were heretical or whether he had a sufficiently scrupulous regard for the opinion of the Senate or the House of Representatives, or the prescriptions of the United States Constitution, or for the opinions of the Supreme Court. These matters were very remote from them. They knew that he would, to the extent of his enormous energy and ability, see them through. There is no such thing as long-lived mass hypnotism; the masses know what it is that they like, what genuinely appeals to them" (634). Consider Corwin's statement: "The implication of [Roosevelt's assumptions of power in World War II] seemed to be that the President owed the transcendent powers he was claiming to some peculiar relationship between himself and the people--a doctrine with a strong family resemblance to the leadership principle against which the war was supposedly being fought" (quoted in Orren and Skowronek 1995, fn 2). See Shogan (1999) for a view of Roosevelt as a usurper whose lack of constitutional scruples set a dangerous precedent for future presidents' adherence to the Constitution.

the Political Happiness they sought for, in Society." The people accepted this monarchy because it was "most obvious and simple" and "best suited to their present State and Condition" (VIII, 107, 338-39). In this history, it appears that the people only came to limit their King once he imposed himself on them too much. They desired to "find out ways to restrain the Exorbitances, and prevent the Abuses of that Power which they having intrusted in another's hands only for their own good, they found was made use of to hurt them" (VIII, 111, 343). The "dispute about Priveledge" arose because of attempts to "oppress the People." But there is then no attachment of the people to a constitutional system as such. In fact, they would rather a monarchy so long as that monarchy does not oppress them. Their constitutionalism arose out of oppression; if a monarch, or an executive, does not oppress them, they might abandon their constitutionalism.

This reading obscures the attempt by Locke to "historicize" these peoples who were willing to submit to monarchy: they wanted a more "obvious and simple" ruler because they were a simpler people. If Locke's later discussion had indicated a more advanced people who are truly attached to constitutionalism as such, my reading would not be justifiable. Instead, he later writes, without historical distinctions:

This power [prerogative] whilst employed for the benefit of the Community, and suitably to the trusts and ends of the Government, is undoubted Prerogative, and *never* is questioned. For the People are *very seldom*, or *never scrupulous*, or nice in the point: they are *far* from examining Prerogative, whilst it is any *tolerable* degree imploy'd for the use it was meant; that is, for the good of the People, and not *manifestly* against it (XIV, 161, 375; italics mine)

The words that I have italicized in the prior passage tell the whole story of Locke's understanding of the people's relation to prerogative. As long as to a "tolerable" degree, the executive aims at the good of the people, or, more precisely, he does not "manifestly"

act against their good, the people are "very seldom," or, more accurately, "never scrupulous" in their examination of such actions. The executive can wield as much power as he wants, so long as he does not make manifest intentions that are against the good of the people.

b. Hamilton's Executive

If Hamilton understood and accepted Locke's argument about executive power, his attempt to redirect and reconstitute the ambition of executives is essential; if the people will not be vigilant, the executive must be responsible. From his argument as *Pacificus*, we cannot be sure that Hamilton would accept Locke's understanding, as it has been articulated here (or for that matter that he would accept my articulation of Locke's argument), of the relationship between executive power and a constitutional system. We can, however, see that Hamilton is willing to go much further down the road toward Locke's executive than Madison. In contrast to his alleged monarchist and thus, so they claim, unrepresentative inclinations, Hamilton's willingness to give the executive significant latitude stems from his acceptance of the executive as the representative of the people. He accepts the upshot of Locke's argument: that the executive should represent the people.

To see this, it is most useful to begin our examination from the conclusion of the last letter. Hamilton writes: "Kings and princes speak of their own dispositions; the magistrates of republics, of the dispositions of their nations" (*Pacificus*, VIII, 52). This statement might seem a mere rhetorical flourish if not for a prior discussion of this same distinction. In the fifth letter, Hamilton develops an argument against any gratitude

toward the French people for their help in the revolutionary war by claiming that Louis XVI did so by his sole disposition. While he was "the constitutional agent of the nation," "his will alone was active, that of the nation passive" (V, 36). France can only claim gratitude for their actions "on the score of their having been rendered by their agent with their means" (V, 37). He might have been the agent of France's interests, but he did not represent the disposition of the French people.

By contrast, Washington did represent the disposition of the American people when he issued his proclamation of neutrality. In doing so, he acted in "conformity with republican propriety" (VIII, 51). Earlier, Hamilton argues that the Constitution intends a general grant of executive power, "interpreted in conformity with other parts of the constitution, and with the principles of free government" (I, 10). The general grant of executive power does not mean unrestricted executive power; it means the president can use executive power in his capacity as representative of the people's interests. I treat this aspect of Hamilton's argument first because it is easy, given Hamilton's reluctance to make this aspect of his notion of executive power that explicit, to forget. Once forgotten, Hamilton's argument does sound like it would appeal to the "foreigners and degenerate citizens among us, who hate our republican government" (Helvidius, I, 53) because it gives an unrepresentative executive, a quasi-monarch, so much power.

We have already seen in the second chapter that Hamilton's argument as *Pacificus* applies as much to domestic law as to relations with foreign nations, at least inasmuch as it allows for executive "interpretation." Hamilton writes: "He, who is to execute the laws, must first judge for himself of their meaning" (I, 15). The executive is "the power, which is charged with the execution of the laws, of which treaties form a part" (I, 9). Does

Hamilton then, share, Locke's understanding of executive prerogative insofar as, while he clearly admits of it in foreign relations, he also implies it necessary in domestic matters?

From these essays alone it would be impossible to answer this question. We have previously seen that Hamilton seems to think the executive best suited to attend to those circumstances which require a "mitigation of the rigor of law." This, of course, would only point to Locke's pardoning power and does not necessarily imply that the executive also should possess the power, to take the most extreme case, to act against the law so as to preserve the political community. I have surmised this conclusion by combining Hamilton's argument regarding whose prudence is superior with his instrumentalist understanding of the Constitution. Thus, I have argued that Hamilton points not to what might be called "governmental prerogative" but only to executive prerogative.

In Hamilton's argument as *Pacificus*, we have even more grounds to come to this conclusion. Hamilton writes:

The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable, that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference (I, 10).

The cases of executive power cannot be enumerated because, as in Locke, the executive responds to those exigencies that the wise legislator knows he cannot predict beforehand. The executive is the founders' agent of future prudence.

By contrast, the legislature is strictly bound by the prudence of the founders. He later writes that the legislative exceptions to the "general executive power", the participation of the senate in the making of treaties and the power of the legislature to

declare war, "are to be construed strictly, and ought to be extended no further than is essential to their execution" (I, 14). The legislative powers are specifically granted, "all legislative powers herein granted shall be vested in a congress of the United States," while the executive power is left general, "the *executive power* shall be vested in a president of the United States." Where the executive power is to be general and unspecified, the legislative power is to be strictly construed and specified.

This does not mean that Hamilton would disagree with that reading of the "necessary and proper" clause that allows for implied legislative powers granted to Congress. It means only that such implied powers are granted only to Congress in their facility as a *law-making* body. They can make new *laws* necessary to the execution of those laws that already exist; but, apparently, they do not have the power to *act* in those areas where their own laws do not speak. Moreover, it is the executive's role to interpret their laws in his execution of them and to "establish an antecedent state of things" which ought to weigh in their making of new laws (I, 13).

For Hamilton, as for Locke, "self-preservation is the first duty of a nation" (III, 25). "Rulers are only trustees for the happiness and interest of their nation" (IV, 32). This means that, before constitutional scruples, must always come actions that are dictated by national interest. A constitution is nothing but a means for the self-preservation of a nation; it ceases to be applicable when it obstructs self-preservation. Because it is insufficiently wise and prudent, the legislature must be bound by the Constitution. But, if all were simply bound by the Constitution, the Constitution would become a "suicide pact" and no longer an instrumental good toward a higher end. With his executive authority, the president seeks the people's common good. And while

Hamilton never uses the term "prerogative," his understanding of executive power seems to encompass the power to "seek the public good without a rule."

In Locke's conception, this necessary concession to executive power devolves into a virtually limitless executive government that can effect all manners of oppression upon the people so long as it is not manifestly against their interest or imposed upon the greater part of them. Does Hamilton tread this same path? Perhaps. But perhaps his repeated emphasis on the executive's province and duty being "to preserve to the nation the blessings of peace" (I, 14; see also 12) puts him well-short of Locke.¹⁶⁰ Consider this passage from a letter of Lincoln's to Herndon in response to Herndon's suggestion that the president possesses a power to engage in preemptive war:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood (*Collected Works*, Volume I, 451-52).

The danger of kingly oppression comes not from prerogative per se, but from the prerogative to involve a people in wars while pretending their good.¹⁶¹ Hamilton makes explicit that the president does not possess this power: the Constitution itself has made this explicit by excepting from executive power, which otherwise could have rightfully claimed it, the power to commence war. He writes: "The legislature *alone* can interrupt

¹⁶⁰ Although Madison claims: "If a free people be a wise people also, they will not forget that the danger of surprise can never be so great, as when the advocates for the prerogative can sheathe it in a symbol of peace" (IV, 90).

¹⁶¹ Madison writes: "War is in fact the true nurse of executive aggrandizement" (Helvidius, IV, 89)

them [the blessings of peace] by placing the nation in a state of war" (I, 14; italics mine).¹⁶²

As powerful as the executive might appear in Hamilton's formulation--and we are insufficiently aware of the tension between executive power and republican government if he does not appear powerful--he still remains bound by the people's interest and by those "exceptions and qualifications" expressed in the Constitution. As representative of the people's interests, Hamilton means more than merely acting as the "constitutional agent" of the government: he claims that Louis XVI acted as such but did not, therefore, represent the people. He means a kind of representation that truly seeks their disposition, seeks to act, insofar as prudence dictates, in accordance with that disposition, and educates them as to the propriety of those necessary actions that are incongruous with their inclinations. The president must take actions which are, apparently, "extra-constitutional" insofar as he acts as the agent of prudence within the government outside of a limited Constitution. Although the wisdom of this Constitution is that it admits of such prudence, thereby giving the executive constitutional sanction for actions that appear outside of the Constitution. But his support for those actions should, while not simply, be somehow popular. For this reason, Hamilton's actions in soliciting popular support for Washington's proclamation followed from his principles regarding the relation between executive power and the people.

If this is correct, what now differentiates Wilson's executive from Hamilton's? The difference might best be expressed as follows. For Hamilton, as an agent of a republican limited constitution, the executive must necessarily represent the people's

¹⁶² There might still be militarily defensive actions for the sake of peace that would fall within executive prerogative insofar as they do not place the nation in a full-blown "state of war."

interests; his constitutional duty is to represent the people's interests. For Wilson, the president as president must represent the people's interests outside of or despite a limited constitution. While Hamilton's executive acts "outside" of a limited Constitution, he does so as its agent. Just as it seeks the happiness and interest of the people so does the executive: he acts contrary to its words only to fulfill its intentions. In doing so, he remains within the Constitution. When Wilson's executive acts despite the Constitution, he does so as its condemner. As the voice of the people, he is forced to act outside his prescribed constitutional role because the Constitution was not wise or prudent enough to make him the voice of the people. In Hamilton, the nature of the president's representation is fundamentally changed by its having been "constitutionalized," i.e. the president, first and foremost, seeks the people's true happiness and interests rather than their temporary and foolhardy inclinations. In Wilson, there is no "constitutionalization," and thus no brake upon the representation of the people's inclinations, whatever they might be.

c. Madison's Executive

First, we should realize that Madison's objections to Hamilton concern entirely the theory with which Hamilton justified Washington's proclamation rather than the proclamation itself. Madison writes: "There is the less pretext in the present case, for hunting after any latent or extraordinary object, because an obvious and legal one is at hand, to satisfy the occasion on which the proclamation is issued" (V, 95).¹⁶³ Madison

¹⁶³ In fact, based upon their mutual support for Washington's proclamation, Schmitt (2000) argues that Madison allows at least discretion if not prerogative in a constitutional "back door." "In carrying out what Helvidius describes as an essential ministerial role in maintaining the legal status quo, Washington was authorized to wield authorities that were themselves not simply ministerial, nor minimal" (135).

thinks there was sufficient power within the president's ministerial role to justify the proclamation. Madison writes: "These [a preceding list of the reasons Washington has the authority] surely might have been sufficient grounds for the measure pursued by the executive: and being legal and rational grounds, it would be wrong, if there be no necessity, to look beyond them" (Helvidius, V, 95).¹⁶⁴

Second, Madison's insistence upon the limitation of executive power in the American Constitution follows from Madison's basic distrust of an elected executive.

Madison writes:

As the personal interest of an hereditary monarch in the government, is the only security against the temptation incident to the commitment of the delicate and momentous interests of the nation, which concern its intercourse with the rest of the world, to the disposal of a single magistrate, it is a plain consequence, that every addition that may be made to the sole agency and influence of the executive, in the intercourse of the nation with foreign nations, *is an increase to the dangerous temptation to which an elective and temporary magistrate is exposed; and an argument and advance towards the security afforded by the personal interests of an hereditary monarch* (IV, 91-92; italics mine).

Madison here makes a radical distinction between those same powers that provide security in a hereditary monarchy but constitute a "dangerous temptation" for an elective magistrate.¹⁶⁵ In other words, Madison's argument against a powerful executive hinges on his being elected and temporary. In this, Madison's argument should remind us of the

See also Scigliano (1981) who also emphasizes that Madison does not limit the executive as much as it first appears.

¹⁶⁴ I cite this second claim only because while it seems to be a mere restatement of what he has already said, it actually contains slightly different logic. Perhaps it is mere rhetoric but Madison here seems to allow for a necessity ("if there be no necessity") that would justify Hamilton's arguments: if there was a necessity, it might be right to look for new legal and rational grounds. As we shall see, this seems to be a different argument than that which we find in the rest of these letters, according to which the executive bears no responsibility for responding to exigencies, i.e. necessity does not and cannot compel extra-legal action.

¹⁶⁵ Madison makes a similar argument in the Constitutional Convention (see *Notes*, 79).

argument made in the Constitutional Convention that the executive, as it was constituted, would end up an "*elective* tyranny." The anti-Federalists attacked the executive from two seemingly opposed positions. On the one hand, they claimed that the Constitution had created a monarchy in which the Senate and the President would work together to subvert democracy. But, on the other hand, their rhetoric sometimes attacked not the monarchical nature of the executive but that he was *too* democratic and thus would evolve into a tyrant who founds himself on the people. Madison here seems to be in this second camp. Unlike in Hamilton, "the legislature is the only competent and constitutional organ of the will of the nation (V, 95).

Locke has shown us that there is always the danger that the people will not remain vigilant in constraining executive power. He has even suggested that the people would rather a single man "do the publick good without a rule" than insist upon legislative government. Locke, knowing its inevitability, takes those steps necessary to make the enlarged executive power as conducive as possible to the safety and happiness of the people. So too Hamilton, sensing that in a democracy, as he once wrote, the question of government would evolve into who was to be elected president next, attempts to make that president's power fit within a government of limited ends. Madison simply does not trust this solution in a democracy.

Instead, he insists upon executive constraint. Madison writes: "The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed" (I, 57). Madison insists on that understanding of executive power which we first encountered in Locke. Madison would claim the executive need no

prudence or wisdom to preserve society over and against legislative imprudence or foolishness. His trust and sanction demands the execution of legislative law "even if turbulent citizens should consider its so doing as a cause of war at home, or unfriendly nations should consider its so doing as a cause of war abroad" (II, 73). In contradistinction to Locke and Hamilton, "the executive has no other discretion than to convene and give information to the legislature on occasions that may demand it; and whilst this discretion is duly exercised, the trust of the executive is satisfied, and that department is *not responsible for the consequences*" (II, 73-74; italics mine). Even if the executive thinks a situation demands discretion on his part, his constitutional role allows him only to convene the legislature so it can take action. Madison explicitly tells us that he is not responsible for legislative stupidity or inaction. For Madison, Lincoln's suspension of the writ of habeas corpus would be a clear constitutional violation. His constitutional discretion only allowed him to convene the legislature sooner so that they could choose those actions they deemed appropriate given the situation. Rather than convene the legislature early, Lincoln chose to suspend the writ of habeas corpus in March of 1861 and wait for legislative sanction for his actions in July.¹⁶⁶ Of course, the power to suspend the writ of habeas corpus is explicitly placed in Article I not Article II, implying that only Congress possesses such an extraordinary and arbitrary power. Apparently, Madison has good constitutional grounds for his denial of a more extended executive discretion. In fact, the clause preventing the suspension of the writ of habeas corpus "unless when in cases of rebellion or invasion the public safety may require it" is the only explicit allowance for governmental discretion over and against the known laws.

¹⁶⁶ See Arnhart (1979) for this same criticism of Lincoln. Arnhart also integrates Locke's treatment of prerogative but claims that the Constitution did not in any way integrate Lockean prerogative.

The fact that this clause occurs in the Article on Congress has an important bearing on this question of prerogative. The Constitution seems to side with Madison in denying the executive prerogative and giving it to Congress. The "take care" clause, the oath, and even the so-called general grant of executive power require a certain interpretation that, as an interpretation, will always be subject to dispute. While it requires an argument to show that these clauses grant the executive a degree of discretion, it requires no argument to see that the habeas corpus clause explicitly grants such discretion to Congress.¹⁶⁷

Madison's indictment of Locke and Montesquieu should be understood within his vindication of the new American understanding of government.¹⁶⁸ Madison claims: "Our own reason and our own constitution are the best guides" (I, 56). Those received jurists who preceded the American model were confounded by living in a monarchy in which "all powers are confounded in the sovereignty of the prince" (I, 56). As we saw in Locke, once we grant the executive discretion for the sake of national preservation, the downward slope toward executive government is slippery and steep. Madison, and, according to him, the Constitution insist on denying to the executive any discretion, except insofar as he can convene the legislature in emergencies, precisely so as to avoid that slope. And so Madison thinks Hamilton's whole argument regarding the "executive" nature of relations with foreign nations "is pregnant with inferences and consequences, against which no ramparts in the constitution could defend the public liberty, or scarcely the forms of republican government" (II, 64). This new republican government

¹⁶⁷ That being said, the constitutional power to convene both houses "on extraordinary occasions" and "in case of disagreement between them, with respect to the time of adjournment" to adjourn them "to such time as he shall think proper" sounds much like the argument Locke makes concerning executive prudence over and against the legislature but in service of the legislative power.

¹⁶⁸ See Rosen (1999) for a discussion of the ways in which Madison thought he had improved upon the modern political philosophers.

establishes "landmarks of power" so as to avoid the dangerous encroachments of one branch of government upon another and the government itself upon the people.¹⁶⁹ The "forms" of government are essential because only they can ensure that the ends of government remain limited.

Madison takes up his pen to object to Hamilton because he thinks the reasoning dangerous to these forms. Madison writes:

Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislative, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or, as will hereafter appear, perhaps claimed as a concurrent right by the executive (II, 64-65).

According to Madison, Hamilton's reasoning would lead to an executive that can claim almost all aspects of this government of separated powers as his own power. In such a system, "no citizen could any longer guess at the character of the government under which he lives" and "the most penetrating jurist would be unable to scan the extent of constructive prerogative" (II, 65). In Madison's conception, citizens can now "guess" at the character of their government because they have certain "landmarks" that establish how far government goes and where it stops. The legislature is given only limited

¹⁶⁹ Madison writes: "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuse of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place obliged it to control itself" (*Federalist* #51, 337).

legislative powers which strictly demarcate what they can and cannot do. The executive is given a limited ministerial role which is politically independent of the legislature only so as to enforce constitutional limitations. In Madison's conception, he is the "agent" of a limited Constitution and so cannot be dependent on a legislature that might design to encroach upon the Constitution. But his independence should not allow him to pursue a "constructive prerogative" that would subsume all other aspects of this government.

Again, it is important to note that, while this debate revolves around the executive's control over foreign policy, both Hamilton and Madison seem to realize that it has implications for the character of the whole government, both in its domestic and foreign relations. In matters of foreign policy, Madison illustrates the inevitable extension of prerogative and thus the necessity of its complete disavowal. He writes:

Should the prerogative which has been examined, be allowed, in its most limited sense, to usurp the public countenance, the interval would probably be very short, before it would be heard from some quarter or other, that the prerogative either amounts to nothing, or means a right to judge and conclude that the obligations of treaty impose war, as well as that they permit peace (IV, 87).

The fact that this debate revolves around foreign policy is no accident: "war is in fact the true nurse of executive aggrandizement" (IV, 89). Moreover, in this Constitution, the executive will have the most power in war and the most to gain from war.¹⁷⁰ But this power gained through war would extend to the administration of the rest of the government. For the same reasons that we saw in Locke, it is extraordinarily difficult to grant to the executive extraordinary power and discretion in foreign policy but restrain

¹⁷⁰ "In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense it. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle" (IV, 89)

and restrict his power in domestic matters. An executive who becomes great through war might have, so long as he continues to intend the public good, great power domestically as well. For all these reasons, Madison wants to stop these encroachments before they start. If left unrefuted, "some of the inferences [in *Pacificus*] could not be repelled at all. And the least regular of them must go smoothly down with those who had swallowed the gross sophistry which wrapped up the original dose" (IV, 88-89). Walling (1999) writes: "Madison worries that if he gave Hamilton an inch, then some executive might later take a mile" (150).

But Madison well understands that the threat of executive encroachment remains a constant possibility. He is surprised not by Hamilton's argument but "that so extravagant a tenet should be hazarded *at so early a day*" (I, 55; italics mine). The extension, or at least attempted extension, of executive power is inevitable in a democracy, or, perhaps, any government.¹⁷¹ The executive power is after all the natural place toward which the ambitious, who always want more power, gravitate. The surprise is only that these attempts are being made so shortly after ratification.

Madison must overcome, however, our intuitive sense that the executive does seem the natural home of that prudence required by any good constitutional order. Locke claims:

For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all persons (*ST*, XIV, 160, 375).

¹⁷¹ Consider what Franklin said in the Convention: "The Executive will be always increasing here, as elsewhere, till it ends in Monarchy" (*Notes*, 65-66). See, above, chapter 3, section e.

Imagine a legislature responding to the crisis precipitated by the World Trade Center attacks. Only the executive could respond with the dispatch and resolve to such a situation; moreover, he had to make decisions, i.e. shoot down commercial air-planes, which could never have been provided for by law. Legislatures are slow and prone to excessive deliberation.

Moreover, that sense of responsibility to which the executive is susceptible because his office is unified¹⁷² would not apply to a numerous and disunified legislature. Madison has claimed that the executive is not responsible if his failing to use discretion results in public disorder: because he does not possess the power to use his discretion, he cannot be held responsible for failing to use it. It follows that those exigencies which demand discretion must be met by legislative action. It is the legislature which will be responsible for not reacting. But, for all the reasons that executive unity produces a sense of responsibility, i.e. there is someone to blame if something goes wrong, the legislature is not the natural home for such responsibility. Every legislator can blame every other legislator and the people will not know whom to hold accountable. Finally, at a more fundamental level, is a law-making body the natural home of discretionary action?

Nonetheless, Madison has good reason to withhold from the executive any power of prerogative. Though Hamilton appears to be the more faithful follower of Locke, perhaps Madison understood him better. Because, while Locke might have shown us the necessity of prerogative to good government, he also revealed the radical incompatibility of such a power with a non-arbitrary constitutional government. Madison may withhold from the executive any prerogative precisely because Locke has shown him the

¹⁷² See *Federalist* #70, 460-461.

implications of such prerogative. Locke, however, seems to think this problem insoluble except through the vigilance of the people. As we have seen, however, the people are not at all vigilant, allowing the executive to do as he pleases and wield as much power as he wants so long as he does not manifestly act against their good.

But Madison wants this people to be more vigilant in maintaining the forms of government than Locke's people had been.¹⁷³ Madison knows well that this might be the first but it will not be the only attempt to stretch the forms of government and remove the "landmarks" of power. Thus, Madison writes:

A people, therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution, *cannot be too watchful* against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power (IV, 87-88; italics mine).

This free people must also be a "wise people" and so must disarm those extensions of executive power that would destroy their freedom (IV, 90). Where Locke's people accepted executive prerogative so long as it aimed at their good, Madison wants them to insist upon the maintenance of those constitutional forms about which Locke claimed they are never scrupulous. They can never be "too watchful" about the maintenance of these forms, regardless of whether the executive claims he intends only their good. For Madison as for Locke, it is only a wise people that can possibly restrain executive prerogative. But where Locke is pessimistic about the possibility of such restraint, Madison seems more optimistic.

¹⁷³ "The people who are the authors of this blessing, must also be its guardians. Their eyes must be ever ready to mark, their voice to pronounce, and their arm to repel or repair aggressions on the authority of their constitutions" (*Writings VI*, 93)

In this commitment to an absolute restraint upon executive power, we see Madison at his most republican.¹⁷⁴ Though couched in the language of constitutionalism, his argument reminds of the manly republicans we encountered in Aristotle's politics who refuse, as a point of honor, to submit to the rule of any man. This manly republicanism is best glimpsed at the beginning of Madison's argument where he attacks Hamilton's argument as a piece "read with singular pleasure" by those "who hate our republican government" (53). Such rhetoric reminds of the more general Jeffersonian attack on Hamilton as a monarchist bent on importing a non-republican form of government into the new Union. While democratic in its insistence on self-rule and its aversion from the "kingly" rule implied by Hamilton, this rhetoric is not wholly honest about the grounds of the disagreement with Hamilton. If I am right that the crucial issue for Madison revolved around the democratic character of the executive, then it is Madison, not Hamilton, who does not trust the people. He fears "elective tyrannies" but cannot say so; instead, he blames the opposition for attempting to create unelected monarchs. As we will see in the next chapter in the discussion of the disagreement between the Whigs and the Democrats, the rhetorical task was made much easier for the Jeffersonians because they had an opponent who could credibly be accused of aristocratic airs.

But it is important to disentangle the rhetoric from the substance of Madison's argument. The fear of Hamilton's executive does not stem from his monarchism; it is precisely because he is elected by the people that Madison does not trust him. Only a

¹⁷⁴ For a strong statement of Madison as a republican committed to self-government, see Carter and Kobylka (1990). They write: "In short, his vision was not that of isolated economic individuals united by ties of self-interest, but of an active dialogic enterprise of self-governing citizens united by common allegiance to shared political truths" (33)

Congress held strictly accountable to a limited Constitution can be trusted with governmental rule. The Federalists' interest in making the president more than just a slave to the inclinations of the people allowed Madison to obscure the real grounds of his attack. We should also say, however, that such distrust of elective tyrants does not prove that Madison was the real aristocrat.

d. Conclusion

In this debate, we seem to have two solutions to the problem of executive prerogative, both based on a certain understanding of Locke. In fact, the terms of the debate can be said to have been framed by Locke. If they understood him in the manner that I have sketched, Locke shows to both Madison and Hamilton that executive prerogative, at its best, coexists uneasily with constitutionalism and, at its worst, subverts the whole enterprise. The difference between them can be understood as contrasting solutions to the problem they have learned from Locke.

Hamilton attempts to solve the problem by openly giving to the executive more extensive power. By being open about the need for extended executive power and setting a precedent whereby the use of that power is justified to the people, Hamilton thinks he can "popularize" the executive branch, thereby making him, on the one hand, more dependent on the people and, on the other, more solicitous of their true interests. Moreover, by openly avowing the instrumentality of this system of government, you force the executive to be instrumental as well. The danger of executive prerogative might be greatest when the executive must pretend submission to constitutional forms that do not admit of discretionary activity to preserve society. As Madison writes in *Federalist*

#41: "It is vain to oppose constitutional barriers to the impulse of self-preservation." It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." A constitution should always admit of its own preservation. To limit executive power and prevent a response to certain exigencies, you create constitutional barriers to that which only necessity compels. In such a situation, an executive might still respond but, in the process, lose respect for the document that stood in his way. Insofar as you have criminalized his discretion, he also loses the incentive to be responsible in its use. By proclaiming the Constitution as instrumental and telling the executive he can be the "interpreter" of those laws which he will execute, you give the executive more discretion but you also make him more responsible for it.

In short, Hamilton's whole system of government could be understood as a solution to the Lockean problem. He knows the inevitable extension of executive power and takes those steps necessary for such power to be safe. He gives the executive enough power constitutionally to satiate his ambition and preclude him from seeking power by overturning the constitutional system. He also reconstitutes the ambition of the executive to avoid that danger that comes from the potential arbitrariness of his "prerogative": a man more attuned to the public good and desirous of acclaim from the public will be less likely to act arbitrarily except in those cases in which necessity compels him. Finally, he makes the executive a representative of the people and speaks frankly of the necessity for his discretion, thus submitting him to the people's judgment and making him more responsible to them.

By contrast, Madison solves Locke's problem by foreclosing any executive prerogative whatsoever. He then calls upon the people to be vigilant in their watchfulness of executive overreaching. Given the necessity of some sort of executive power but the tension between it and a constitutional democracy, only such vigilance will sufficiently constrain it. If Schmitt (2000) is right, Madison then allows discretion through a "back door," forcing the executive to be discreet in his use of discretion. However, this begs the question: does this not leave Madison open to the charge of opposing constitutional barriers to the impulse of self-preservation? By doing so, has he not compelled an executive to become a usurper of power only so as to preserve the regime?

Although Madison might respond that Hamilton's alternative solution is no longer republican. If we take the extreme formulation of Hamilton's argument, i.e. purely executive government is all that is conducive to a government of limited ends, we see that, in solving the problem of ambition and in popularizing executive power, the people no longer rule themselves. Instead, they allow themselves to be ruled by an executive who, in the final analysis, will always place his own interests above theirs. As we have seen, such a system is not a vindication of republican self-government but becomes only a happy accommodation between the "prince" and the "people." If you allow me rule, I will provide for you the security, freedom, and prosperity that you want. Moreover, Madison is not as hopeful as Hamilton about the security provided by executive government. Did we not learn in Locke that the people will not be vigilant in watching over executive prerogative and so the executive will have significant freedom to use his power arbitrarily? Perhaps Madison thinks that once you tell the people that the door

must be opened slightly to allow for some prerogative, it can never be closed again. Any hope that a people would have been vigilant is lost because they have already accepted the fundamental inadequacy of self-rule.

Chapter 5: Abraham Lincoln, the Whiggish Hamiltonian

"The Reigns of good Princes have been always most dangerous to the Liberties of their People." -John Locke

In returning to the founding for a better notion of executive power, we are now miles away from his being too far constrained by constitutional limitations. Instead, we have learned that the Constitution leaves the executive power ambiguous as to its extent and that it allows for a constitutional executive who comes closer to subsuming the rest of the government than vice versa. Even Madison's argument, precisely in its strenuous rejection of the executive as an organ of the national will and of anything that resembles executive prerogative, reveals much about the tendencies of this executive power. Why be vigilant if the Constitution clearly restricts the executive to a mere executor of legislative law? Such vigilance is only required because the Constitution is insufficient in restraining executive extension.¹⁷⁵

Moreover, this problem extends beyond this Constitution: it has its roots in the very nature of democratic politics. The people are all-too-willing to let one man rule them and he is all-too-eager to take and wield that power the people are willing to give up. Subsequently, even if the good executive to whom the people give up their rule and their rules does not abuse his trust, his heirs might take that extensive power, which he has--perhaps rightfully--earned, to abuse them. In fact one might say that, without a

¹⁷⁵ William Henry Harrison, one of our presidents most dedicated to the Whig ideal, said in his inaugural address: "I too well understand the dangerous temptations to which I shall be exposed from the magnitude of the power which it has been the pleasure of the people to commit to my hands not to place my chief confidence upon the aid of that Almighty Power which has hitherto protected me" (72). Perhaps he is fortunate to have died before succumbing to the temptations.

vigilant people, the Constitution could never be strict enough to restrain an improperly ambitious executive.

Hamilton attempts to solve this problem in a different manner. Like Madison, he wants to use government to secure those individual goods that all the founders, and even the anti-Federalists,¹⁷⁶ thought so important. But, rather than calling upon the people to be vigilant in their watchfulness of the "irregularly ambitious," he calls upon these same men to redirect their ends, walking them down that path whence true glory lies.

One might argue that determining whose solution is superior turns on the question of whether Locke is right. If Locke is right and the people, as a people, will never be sufficiently vigilant to prevent an executive, "of free choice,"¹⁷⁷ from claiming extensive prerogative, then our bets are better placed upon reconstituting the ambition of those men who are apt to so claim. But if Locke is wrong and this people, this sufficiently more enlightened freer people (after all their minds are not clouded by the "royalism" that, according to Madison, clouded the mind of even the great Locke), can be sufficiently vigilant in their restriction of executive power, then perhaps we should not be so rash in counting upon the psychology of men who have never been apt to rest satisfied with mere "public service."¹⁷⁸

But has Madison led us properly? More precisely, has not Madison's argument foreclosed from us even the service of those ambitious men who, being well-disposed towards this Constitution and thinking well of the people, would not destroy their liberty

¹⁷⁶ See Storing (1981). Or, consider, Huyler (1995). He writes: "The question on which Federalist and anti-Federalist divided was whether the Constitution contained sufficient safeguards to prevent the national government from infringing on the liberty and property of the people" (274-75).

¹⁷⁷ We are now in a place to see that that "free choice" might be the real problem in a constitutional republic.

¹⁷⁸ In this chapter on Lincoln, his words should once again ring in our ears: "What! think you these places would satisfy an Alexander, a Caesar, or a Napoleon?--Never!"

to satiate their own ambition? In other words, as it stands we appear to be left with two unsatisfactory answers to that problem posed to us by Locke.

On the one hand, Hamilton's argument gives us up to the ambition of men who have not always been altogether trustworthy, hoping that the psychological mechanism of constitutional government ensures our safety. Even the argument that I have made for the executive's "representation" of the people does not escape Locke's insight. That is, the people will accept whatever the executive claims as prerogative so long as it is not manifestly against their good. A clever executive could go far in deceiving the people as to his intentions while wielding his power in whatever manner he likes.¹⁷⁹ Rather than escaping the arbitrary power of our rulers, we have, instead, only given such arbitrary power constitutional sanction, albeit only in response to necessity. But, are we sufficiently wise to judge what is and is not necessity? Or can we be duped by those rulers who claim--and according to Machiavelli and Locke all we need is a claim--to have our best interest at heart?

On the other hand, Madison has taught this people to be over-watchful (they cannot be "too watchful") of any claims by any executive to a need for any discretion whatsoever. Moreover, he has taught them that the Constitution itself precludes executive energy: his natural sphere extends only to executing the laws passed by the legislature. As Helvidius, we might say that Madison articulates the first view of the

¹⁷⁹ Here, it serves us to remember Machiavelli's advice to princes: "A prince should thus take great care that nothing escape his mouth that is not full of the above-mentioned five qualities and that, to see him and hear him, he should appear all mercy, all faith, all honesty, all humanity, all religion. And nothing is more necessary to appear than this last quality. Men in general judge more by their eyes than by their hands, because seeing is given to everyone, touching to few. Everyone sees how you appear, few touch what you are; and these few dare not oppose the opinion of many, who have the majesty of the state to defend them; and in the actions of all men, and especially of princes, where there is no court to appeal to, one looks to the end. So let a prince win and maintain his state: the means will always be judged honorable, and will be praised by everyone. For the vulgar are taken in by the appearance and the outcome of a thing and in the world there is no one but the vulgar" (*The Prince*, XIII, 70-71).

Constitution according to which one of its forms becomes an end in itself; by contrast, it would not be too rash to say that we never find in *The Federalist* a defense of the Constitution that is not intrinsically instrumentalist: this document is a good because it produces higher goods--the stability of this nation and the protection of the people's life, liberty, and property. Madison might reasonably respond to this charge that his restraint of executive power is instrumentalist. If he does not call upon the people to restrict the executive power now, those goods that the Constitution now protects will not remain protected. But what if a crisis truly demands executive discretion but a people, irrationally attached to constraining this power, imprudently declaim and, even, prevent such discretion? Has he not then paved the way for a defense of the Constitution's forms over and against any considerations of necessity? Has he not, in some situations, forced even the wise and prudent executive to usurp power and undermine the Constitution only to preserve the nation?

Mansfield (1989) argues that the Constitution remains ambivalent about the extent of executive power. It allows for either the limited interpretation of Madison or the extensive interpretation of Hamilton. The executive power will be as powerful as it needs to be given the demands of the political situation. But, Madison's argument, on its own, does not admit of the ambivalence that Mansfield ascribes to the Constitution's executive power. Constitutionally, the executive is simply a very limited organ within the government and can never rightfully claim any power outside of his natural sphere.

Without entering into a constitutional debate as to the adequacy of these two conceptions of the Constitution's intent, Madison's claim can and should be evaluated politically. Is this description of the Constitution's intent the most salutary method for

preventing executive excess? I would submit that it is not. Insofar as the people believe that the Constitution proscribes extensive executive power, they will have less incentive to agitate against it. Why mount a political argument against that which has already been provided for by constitutional rules? Or to the extent that one does mount an argument, it always turns into a legal matter of constitutional intent rather than a political matter of rightful executive subordination.

In this chapter, I will investigate whether Lincoln's words and deeds, both as president and, earlier in his political career, as a Whig party member, point us to a more adequate response, than we get from either Hamilton or Madison, to the problem of executive rule in a democracy posed to us by Locke. Both his words and his political career itself seem to combine Madison's wise insistence that, in a democracy, the executive remain subordinate to the legislature with Hamilton's prudent call for the executive, in a time of crisis, to act outside the constitutional forms to fulfill constitutional intent: the preservation of the political existence of the nation. Moreover, in contrast to Madison, he shows us a limitation of executive power that is political rather than constitutional. And, in contrast to Hamilton, he does not allow the people merely to give up their rule to those rulers who claim to represent them.

a. Lincoln's controversial legacy

It should seem strange, at first, to choose Abraham Lincoln as the paradigmatic example of the wise use of executive power. This is a man about whom James Bryce wrote: "Abraham Lincoln wielded more authority than any single Englishman has done

since Oliver Cromwell" (*The American Commonwealth*, I, Chapter 6, 58).¹⁸⁰ Wendell Phillips denounced Lincoln as an "unlimited despot" and described his government as a "fearful peril to democratic institutions." One scholar called Lincoln a government in himself or "an absolute,...uncontrollable government; a perfect military despotism."¹⁸¹ Another scholar called him "a tyrant who would preside over the destruction of the Constitution in order to gratify his own ambition"(Anderson 1982, 193). Even Randall, whose seminal study of the constitutional problems under Lincoln concludes with a relatively favorable view of his behavior, writes:

Lincoln...was driven by circumstances to the use of more arbitrary power than perhaps any other President has seized. Probably no President has carried the power of proclamation and executive order (independently of Congress) so far as did Lincoln. It would not be easy to state what Lincoln conceived to be the limit of his powers. He carried his executive authority to the extent of freeing the slaves by proclamation, setting up a whole scheme of state-making for the purpose of reconstruction, suspending the *habeas corpus* privilege, proclaiming martial law, enlarging the army and navy beyond the limits fixed by existing law, and spending public money without congressional appropriation (513-14).

Randall also reminds us that "some of his important measures were taken under the consciousness that they belonged within the domain of Congress" and that, under his authority, judicial functions were seized as well (514). Historians might debate the intent or the extent of Lincoln's extraordinary use of executive power, but none debate that it happened.¹⁸²

¹⁸⁰ Bryce actually makes this point in the course of an argument about the constitutional weakness of presidential power. "In quiet times the direct legal power of the president is not great, but his influence may be great if he combines tact with courage" (58) Abraham Lincoln is different because "in troublous time it is otherwise, for immense responsibility is then thrown on one who is both commander in chief and the head of the civil executive" (58). Bryce is correct to note this difference but, as I have argued throughout, I'm not sure that in quiet times the executive is as legally weak as he asserts.

¹⁸¹ Both Philips and the scholar Joel Parker are quoted in Randall (1951, 1-2).

¹⁸² See Neely (1991) for the most recent and perhaps the most authoritative account of Lincoln's use of executive power during the Civil War. He finds that, though there were abuses, these were more the

The quotation from Bryce comparing Lincoln to Cromwell is quite apt because it is a passage from Theodore Roosevelt's book on Cromwell that best captures both the necessity and the danger of Lincoln's actions during the Civil War:

In great crises it may be necessary to overturn constitutions and disregard statutes, just as it may be necessary to establish a vigilance committee, or take refuge in lynch law; but such a remedy is always dangerous, even when absolutely necessary; and the moment it becomes the habitual remedy, it is a proof that society is going backward. Of this retrogression the deeds of the strong man who sets himself above the law may be partly the cause and partly the consequence; but they are always the signs of decay (54).

Roosevelt's argument should remind us that even if we find the long list of "constitutional problems" under Lincoln acceptable, even constitutionally acceptable (given a broader Hamiltonian definition of a constitution), we should remember that, once a society is compelled to resort to executive power for its preservation, it may have taken a step backwards. In other words, as powerful as a Hamiltonian or Lockean executive might be and as much good as he might accomplish by being so powerful, a democratic people that must resort to such power may begin seeking it and, at least so Madison and Roosevelt would claim,¹⁸³ lose the ability to rule themselves responsibly.

Thus, even if it could be shown that Lincoln used this necessary but extraordinary extension of executive power as responsibly as possible, dangers for republican self-government still abound. For instance, Neely (1991) describes how the Lincoln administration began using its enlarged military power, seized in the course of the war, to prosecute those who were pursuing designs of fraud and corruption, crimes which, while they might have been made possible by the war, had little to do with the prosecution of

product of inefficiency within the new complexities of modern war than of zealous intent to act as an arbitrary dictator.

¹⁸³ In light of Roosevelt's other writings about executive power, it should strike us as odd that, in this case, he is on the side of those against its extension.

the war itself. The following description of the reasons for using martial law in these cases from Associate Judge Advocate Levi C. Turner captures well the logic by which a people abdicates self-government in favor of executive power:

Claim Agents, who advise and aid in the manufacture of false & fraudulent amounts against the Govt. and present them for payment--and obtain payment--*violate no existing Law of Congress, and cannot be punished unless they have violated some state Law to punish forgery & forging.*

A military officer makes out a false account for subsistence...and certifies to it--if he has not vouchers and it gets the approval of the Adj General, it is paid. The officer takes his money (from \$500 to \$10,000) and then resigns. *There is no law of Congress or of any State authorizing the arrest & punishment of such plundering. And citizens cannot be punished for presenting fraudulent accounts, unless in so doing they violate some State law against forgery & forging.*

A fraudulent & plundering military or civil officer can be reached and punished, while in the public service, by Laws now existing--but having filled their pockets they resign, and *are then beyond the reach of military or civil Laws...*

Persons, all over the country, are engaged in procuring bogus substitutes and aiding & promoting desertions.

I know of no Law of Congress that provides for the *prompt & remedial punishment* of such infamous agents--It is true a citizen who encourages and aids desertions can be indicted and tried in criminal courts--*a process so slow and inefficient, that prosecutions for aiding desertions seldom occur, and convictions never.*¹⁸⁴

There are no nefarious intentions behind this decision to enlarge the executive power by using martial law to prosecute defrauders. Instead, the insufficiency of Congressional law and the inefficiency of criminal courts led to the use of that which is neither insufficient nor inefficient. For Turner, the use of the executive power followed from a desire to see these defrauders receive their just deserts and not escape through legal loopholes and inefficiency.

¹⁸⁴ This is quote in Neely (1991, 93-94; italics mine).

Unlike Congressional law and even the criminal courts that mete out these laws, the executive power has a much greater degree of discretion. It can, promptly and efficiently, punish injustice where it sees it without worrying so much about legal niceties. It becomes extraordinarily difficult for a democratic people to insist on self-government through their legislature when a prudent executive is able to accomplish better ends through his discretion. What people can insist on adherence to the laws of the legislature when defrauders can go free through those same laws? We might even say that the inherent inefficiency and insufficiency in law itself points toward an inevitable extension of that governmental power which possesses the discretion necessary to correct these defects.

Neely's book on the use of the executive power during the Civil War bears this point out. Neely claims that, while conscription had the power to shake American society and provoked numerous bloody conflicts throughout the North, "civil liberties, as the Lincoln administration, handled them did not" (233). In fact, to the extent that there were "mass indignation rallies" and "heated rhetoric," they occurred only in response to what were perceived as purely partisan uses of the enlarged executive power. The issue of civil liberties did not provoke more widespread dissent precisely because, for the most part, the Lincoln administration used its power to effect justice in cases like the one discussed above. Neely writes:

At its worst, the system tended to spread, imposing military justice and discipline to new areas often merely for convenience' sake--in the ill-governed western territories, in policing liquor-sellers near the Union camps, or in punishing fraudulent government contractors. At its very worst, the system even indulged in routine torture of civilian prisoners well behind the lines (234).

Governmental officials used the suspension of the writ of habeas corpus to act decisively in response to perceived illegality. To a large degree, Lincoln, who had more important things on his mind than liquor-sellers and defrauders, did not pay attention to these actions by his subordinates. No one complained much about such uses of the executive power because very few are attached to legal forms as such, no matter the consequences for those protected.¹⁸⁵ In fact, this power of the executive to do the public good without a rule or to effect extra-legal justice might even be more appealing, when used for good, than waiting for the outcome of the complicated system of legal justice.

We should now remind ourselves of Locke's claim: "The Reigns of good Princes have been always most dangerous to the Liberties of their People" (*ST*, XIV, 166, 378). Even those historians who denounce the executive system of justice that existed during the Civil War as a result of the widespread suspension of the Writ of Habeas Corpus claim Lincoln's "leniency" made the system better.¹⁸⁶ And those who defend the suspension and the system it created emphasize Lincoln's "greatness of character" (Bernard 1951). Nonetheless, the danger remains that a people who becomes accustomed to the wise justice that flows from a prudent executive will be insufficiently attentive when an imprudent and avaricious executive uses this extensive power for other ends.

b. The Whigs

Let us return to the beginning, to Lincoln's thoughts on executive power prior to his becoming president and, even before that, to the Whig argument against executive power. The story of Lincoln's earlier thoughts on executive power and his subsequent

¹⁸⁵ Who, watching the show *Law and Order*, roots for the judge who throws out the taped confession because it was not obtained through the proper legal channels.

¹⁸⁶ See, for instance, Sprague (1965).

behavior as president seems to provide political historians and political scientists alike with that which we all crave: political hypocrisy. For instance, Burns (1965) writes: "in the crucible of civil war Abraham Lincoln overrode his Whig heritage and provided a pragmatic, opportunistic Presidency in the fullest Hamiltonian tradition" (34). According to this view, through his deeds, Lincoln effectively disavows everything he had said about presidential restraint prior to becoming president. A more generous view of Lincoln admits that this reversal was forced upon him by circumstances. A less generous view claims Lincoln grabbed for as much power as possible, revealing himself as the basest of hypocrites.

Without yet assessing this view of Lincoln,¹⁸⁷ let us examine the letters and speeches which can show us the content and the extent of his Whiggish notion of executive power. Moreover, the investigation of Lincoln and the Whigs will help us better to flesh out the alternative (to the Federalists) "founding" and early-nineteenth century view of the executive's place in our republic. We know that Hamilton, both in his arguments as Publius and Pacificus and in his activity as Secretary of the Treasury under Washington, understood the executive to be the primary agent of the legislative agenda in an administrative state. Moreover, for Hamilton, in all of his actions the executive represents the people's interests to a far greater extent than many scholars had

¹⁸⁷ In fact, a real assessment of this claim would require an extensive examination of the historical record itself. Was Lincoln, in truth, compelled by circumstances to use his executive power in a manner that went against his principled predisposition? For instance, was Lincoln in truth *compelled* to proclaim without the consent of Congress--because they were not in session--an increase in the army and the navy? Binkley (1947) asks "Why could not Congress have convened within the interval of almost three weeks between the firing on Fort Sumter and the issuing of the proclamation increasing the army?" (112). As I will argue, he remains, somehow, a Whig because he always cites compulsion for such action. But to determine whether such claims are mere lip-service, I'd have to devote an entire book to examining the historical record. For instance, in this case, an able historian, William Lee Miller, claims that congressional norms prevented Lincoln from convening Congress earlier: all the election returns weren't yet in. If such is the case, Lincoln comes to sight not as a usurper but as a man who, in attempting to preserve the Union, merely did what necessity demanded.

realized. But we have not yet seen the alternative view of the president's involvement in the legislative agenda.

The alternative view, the Whig view, seems to be a direct descendent of the view of the Jeffersonian-Republicans. In fact, when Jefferson began trying to establish an alternative paper to the Federalists' *Federal Gazette*, he claimed he was "trying to get another weekly or half-weekly paper set up..., so that it might go through the states, and furnish a *whig* vehicle of intelligence."¹⁸⁸ Binkley (1947) writes:

Not only were his [Washington's] political opponents, the Republicans, generally pro-French in sympathy but they had come to be the chief exponents of legislative 'sovereignty.' That any branch of the government other than Congress should seek to determine the public policy was held to be in violation of sound constitutional interpretation (41).

The chief difference between the Jeffersonians and the Whigs seems to be the object of their attacks.¹⁸⁹ As we have seen, Hamilton, and in this he represents the dominant Federalist opinion, attempted to maintain some distance between the president and the people. Such distance would allow the president to represent the people's interests without becoming a slave to their inclinations. Such distance also meant, especially with an aristocrat like Washington as president, that decorum would and should shroud the office. The decorum would give to the president a stature that might prompt him, psychologically, not simply to follow the people's wishes. This distance, however, allowed the Jeffersonians to attack the Federalists as monarchists.¹⁹⁰

¹⁸⁸ Quoted in Laracey (2002, 50).

¹⁸⁹ I am speaking, here, only of these two parties' intellectual similarities on the role the executive should play in the government. There were many differences between their views on other aspects of constitutional government. Most notably, the Whigs were closer to the Federalists in their understanding of the Constitution having given Congress implied powers; the Jacksonians agreed with the Jeffersonians in, for the most part, denying that Congress possessed implied powers.

¹⁹⁰ We should remember Hamilton's words on such attacks: "It has aptly been observed, that Cato was the Tory--Caesar the whig of his day. The former frequently resisted--the latter always flattered, the follies of

In attacking the Federalists for being monarchists, the Jeffersonians acted as populists.¹⁹¹ It is, to repeat, a democratic insistence on being ruled by no man, even one who claims to "represent" them. Contrary to a certain opinion among scholars which holds that the anti-Federalists and the Jeffersonians were a precursor to Jacksonians and even Wilsonians, there was a distinct change that occurred in democratic ideology, at least on this question, sometime between Jefferson/Madison and Jackson/Van Buren. In his recent book, Laracey (2002) attempts to establish the former intellectual lineage. He claims they all thought "the role of elected government officials was simply to carry out the majority will of the people on key political decisions. I call this the Democratist philosophy for obvious reasons" (13). He is right that, for the most part, they all did share this understanding of democratic government. But he misses entirely that it was the anti-Federalists and the Jeffersonians who most vehemently argued against a strong executive, even if popularly elected. For the same reasons, Laracey is wrong to trace the intellectual heritage of the Whigs to the Federalists. While they might have possessed some of the same constituents, the Whigs were as democratic as the Democrats, if not more so. They thought Congress was better suited to democratic governance, a principle that they most assuredly did not share with the Federalists. While Jefferson's practices as president might not have followed this insistence on deference to the legislature,¹⁹² both

the people. Yet the former perished with the Republic, the latter destroyed it. No popular government was ever without its Catalines and its Caesars. These are its true enemies" (quoted in Flaumenhaft 1992, 168).

¹⁹¹ Ford (1898 1967) says the following of Jefferson and his colleagues: "Men who in the constitutional convention had descanted upon the evils of democracy, and had tried to leave as little room as possible for popular control over the government, cast aside their scruples when the only practicable way of maintaining their influence was to stir up the people against the government" (106).

¹⁹² It would require another book to show Jefferson's behavior as president. On the one hand, he maintained the appearance of legislative deference, which seems to indicate that he thought such appearances were important. On the other, he acted quite energetically "behind the scenes" in the legislative arena. Marshall presciently said of him before he came to power: "Mr. Jefferson appears to me to be a man who will embody himself with the House of Representatives. By weakening the office of

Madison and Monroe did follow it.¹⁹³ In sketching the alternative view of the Whigs, we will also see the view of the Jeffersonians.¹⁹⁴

In the first place, the Whigs took a very different view of the proper relations between the President and Congress domestically than had Hamilton. Where Hamilton had understood the proper place of the executive to be the center of the government, both initiating law and taking responsibility for its implementation, the Whigs, and the Jeffersonian-Republicans before them, had a much more limited view of the executive's place in the government. But whereas the Jeffersonian-Republicans worried about the monarchical tendencies of the Federalist taste for executive power, the Whigs worried about the demagogic tendencies of the Jacksonians. Given the overwhelming democratic inclinations of the American people, this difference means that the Whigs had a much more daunting rhetorical task. To attack the Federalists as monarchists was easy for the Jeffersonians. The Federalists may not have wanted monarchy. But the combination of their open argument for a vigorous executive with their attempts to establish some distance between this executive and the people sounded enough like monarchy that many people would not take the time to notice the difference. Even if the Jeffersonians had the same worries as the Whigs about demagogic executives claiming to represent all of the people, their adversary allowed them to obfuscate such anti-democratic concerns behind a quite democratic attack.

President, he will increase his personal power" (quoted in Binkley 1947, 51). See Johnstone (1978, chapter 3) for an extensive discussion of Jefferson's understanding of executive power.

¹⁹³ This difference would make sense of what is, as it stands, a striking anomaly in Laracey's book. His table on page 146 rightly has Madison and Monroe, supposed "Democratists" who would believe in a strong and public executive, as occupying the category of those presidents who did not "go public."

¹⁹⁴ While the Jeffersonians might have been precursors to the Whigs, the Federalists were not precursors to the Jacksonians. While they shared Jackson's conception of a strong executive power, they would have revolted at its demagogic tendencies. They wanted able representation that did not become mere popular flattery. It would be more correct to say that neither party wanted the populist executive that existed under Jackson, was revived by Polk, and came into its own in the modern presidency after Wilson.

By contrast, the Whigs were faced with opponents that they could never accuse as monarchists.¹⁹⁵ Nonetheless, they shared the Jeffersonian-Republican worry about too much executive power. In 1818, long before he became president, the later Whig Clay had said of Jackson:

Beware how you give a fatal sanction, in this infant period of our republic, scarcely yet two-score years old, to military insubordination. Remember that Greece had her Alexander, Rome her Caesar, England her Cromwell, France her Bonaparte, and that if we would escape the rock on which they split, we must avoid their errors.¹⁹⁶

Howe (1979) then writes:

When Jackson became president, his avowedly partisan distribution of the 'spoils' of office, his confrontation with the Supreme Court over Cherokee rights, his unprecedented use of the veto (and pocket veto), and, finally, the 'Bank War,' all combined to revive these fears. By the end of 1833 Clay was charging that 'we are in the midst of a revolution, hitherto bloodless, but rapidly tending toward a total change of the pure republican character of the government' (88).

For some Whigs, the demagogue--about whom the founders had worried--had quickly arrived in the person of Andrew Jackson.¹⁹⁷ Schlesinger (1945) writes: "While the newly enfranchised and chauvinistic masses regarded the military hero with wild enthusiasm, to the old aristocracy, raised on classical analogies, no figure could seem more dangerous to

¹⁹⁵ Howe (1979) tells us: "They tried...to stigmatize their rivals as Tories, but that label could not be made to stick" (88).

¹⁹⁶ This passage is from Howe (1979, 87-88).

¹⁹⁷ The demagogic tendencies of Andrew Jackson do not fit neatly with Tulis's account of the nineteenth-century presidency, according to which demagoguery was strictly prohibited by constitutional norms that everyone accepted at the time. See Bessette (1994, chapter 7) for a discussion of Jackson as a nineteenth-century precursor to the populism of Wilson (although consider Bimes and Skowonek 1996 for an alternative view of Wilson's populism). On this point, Laracey (2002) is quite good. He argues that there were two competing partisan conceptions about the proper place of the executive in the constitutional order. "This fundamental disagreement over the meaning of a 'republican form of government' underlay the competing conceptions of going public among presidents, and thus determined whether presidents chose to go public or not. Each partisan-based philosophy had different implications for presidents going public" (13-14). See the aforementioned Inaugural Address of William Henry Harrison for a nice presentation of Whig views about executive power (*Inaugural Addresses of the Presidents of the United States*, 71-87).

the republic" (38). Of course, as we shall see when we explore Lincoln's speech on the question of presidential leadership, the Whig fears of Jackson were, at least so they claimed, a little more elevated than mere aristocratic grumbling about the hoi-polloi getting their man. Daniel Webster observed that this kind of presidency had a "strong tendency to make [the incumbent] consider himself, in some vague sense, the representative of the American people, clothed with a certain undefined authority, as if he were above the Constitution."¹⁹⁸

Madison and Jefferson could fend off the expansion of executive power because those who wished to expand it could be branded as monarchists. Given the new Jacksonian *democratic* expansion of executive power,¹⁹⁹ even present historians, like Howe and Schlesinger, now brand the Whigs, who may possess the same spirit as the Jeffersonians, as the aristocrats and monarchists. Given this problem, how could the Whigs succeed in limiting the executive power in a democratic country?

c. The case against an activist president in legislation

In his inaugural address, William Henry Harrison said the following:

It is preposterous to suppose that a thought could for a moment have been entertained that the President, placed at the capital, in the center of the country, could better understand the wants and wishes of the people than their own immediate representatives, who spend a part of every year among them, living with them, often laboring with them, and bound to them by the triple tie of interest, duty, and affection. To assist or control Congress, then, in its ordinary legislation could not, I conceive, have been the motive for conferring the veto power on the President (76).

¹⁹⁸ Quoted in Howe (1979, 89).

¹⁹⁹ See Remini (1967) for an examination of the ways in which Jackson capitalized on the Bank War "to strengthen the executive branch of the government and infuse it with much of the power it enjoys today" (10).

As we saw in our study of Hamilton, it does not seem to have been the case, as Harrison asserts, that there was *no* thought at the founding that the president could be an active player in the legislative arena. While the Whigs have been accused of elitism and anti-democratic tendencies, this argument is not fundamentally anti-democratic. In fact, it sounds more like the arguments of the democratic anti-Federalists before the founding than of any monarchist Tories. They simply thought that representation could better be accomplished by congressional representatives than by a president who is, by nature of his much larger "constituency," necessarily so distant from the people.

According to the Whigs, the veto should be used only as what might be called an "agent of the Constitution." Lincoln argues: "It is chiefly for cases, where they [Congress] are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President" (*Works I*, 502). As quoted by Lincoln in the same speech, General Taylor calls it a "high conservative power" that "should never be exercised except in cases of clear violation of the constitution, or manifest haste, and want of consideration of congress" (503). In this speech, Lincoln objects to the Democratic demand that Taylor announce his intended policies before becoming president. Lincoln, speaking for the Whigs, claims Taylor need have no intended policy as president other than to uphold the Constitution.

Much like the first Federalists and our modern presidency (we no longer have a meaningful split between the parties on this question) the Democrats, by contrast to this Whig position, thought the veto power over legislation implicitly gives to the president a much more active legislative role. Lincoln defends the Whig position:

That this negative should be so combined with platforms, and other appliances, as to enable him, and, in fact, almost compel him, to take the

whole of legislation into his own hands, is what we object to, is what Gen. Taylor objects to, and is what constitutes the broad distinction between you and us. To thus transfer legislation, is clearly to take it from those who understand, with minuteness, the interests of the people, and give it to one who does not, and can not so well understand it (504).

To repeat, the Whig argument against a presidential legislator is not, at least in this form, intrinsically anti-democratic. Instead, on the practical level, it only asserts that the representatives in Congress are better suited to legislate given their proximity to the people than a president who is much more distant. "Can he, in the nature of things, know the wants of the people, as well as three hundred other men, coming from all the various localities of the nation?" (504) On the theoretical level, its spirit may be more democratic because it insists that a local representative, a man who would have shaken nearly all of his constituents' hands if not have had dinner at their houses, should legislate or rule. In so doing, it approaches, as much as is practically feasible in an extended republic, self-rule. Lincoln says: "We prefer a candidate, who, like Gen. Taylor, will allow the people to have their own way, regardless of his private opinions" or "the principle of allowing the people to do as they please with their own business" (504-05).²⁰⁰

Generally, the Whigs stated their case against too much executive power in terms of three things: 1) constitutional fidelity 2) practical expediency and 3) principled objection to one man dictating what all the people do. Noticeably absent in Lincoln's relatively traditional statement of the Whig position is the first argument. He makes the case on the grounds of what best facilitates good legislation and what best constitutes

²⁰⁰ Further evidence of the connection between the Whigs and the Jeffersonians on this question is provided by the quotation from Jefferson with which Lincoln begins this speech: "It must be admitted, however, that, unless the President's mind, on a view of every thing, which is urged for and against this bill, is tolerably clear that it is unauthorized by the constitution; if the pro and the con hang so even as to ballance his judgment, a just respect for the wisdom of the legislature, would naturally decide the ballance in favor of their opinion: it is chiefly for cases, where they are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President" (502). Lincoln also calls the Whig's argument "the true Republican position."

popular representation but he does not claim that the Constitution is definitive on the question of the executive's legislative role.

In a speech on February 15, 1861, Lincoln continues to hold the Whig position and, whereas before he had only omitted a constitutional argument, he now makes explicit that his position is not *constitutional* but only *political*. Lincoln says:

By the constitution, the executive may recommend measures which he may think proper; and he may veto those he thinks improper; and it is supposed he may add to these, certain indirect influences to affect the action of congress. My political education strongly inclines me against a very free use of any of these means, by the Executive, to control the legislation of the country. As a rule, I think it better that congress should originate, as well as perfect its measures, without external bias (Works IV, 214; italics mine).

Because the constitution leaves ambiguous the extent of the executive's role in legislation, it becomes a political decision. Given Lincoln's propensity for making constitutional arguments in other speeches, his failure to do so and his explicit rejection of such an argument can reasonably be taken as important. Lincoln understands what Wilson did not: the Constitution leaves the extent of executive power ambiguous.

Lincoln also might understand what Madison did not: it is best to limit the executive power not by claiming that it's already limited constitutionally but by mounting a political argument against its extension. By admitting the constitutional ambiguity, you encourage more political resistance. Moreover, Lincoln allows that the president is a representative of the people "in a certain sense, and to a certain extent" but rejects the efficacy of his representation. Madison, by contrast, does not mount much of an argument to show that the executive is not efficacious in his representation; instead, he only insists that the people must withhold from themselves executive rule and that the Constitution shows that the executive is a very limited organ of the national will. In other

words, because he relies on a constitutional argument, he does not make a sufficient political argument to control the extension of executive power.

It is not just that the executive power is left ambiguous by the Constitution. As we saw in Locke, there is an almost inevitable extension of executive power especially in relation to the people. In the course of his argument for Taylor's unwillingness to state his political program, Lincoln comes close to admitting this fact. Lincoln says that the expectation of a platform "almost compels" the president to "take the whole of legislation into his own hands." The Whigs must overcome not only constitutional ambiguity but also the people's propensity to look to a national leader who will "represent" them through party platforms and the like. While the question of executive power receives an ambivalent answer constitutionally, in a popular government there is an almost inevitable extension of executive power. The people look to that "most obvious and simple" solution: the rule of one. Hamilton had predicted this when he said that the question of American government would come down to who was to be elected president next. To maintain a president who lets Congress originate and perfect its measures, while acting only as a check upon its excesses, requires an extraordinary political feat.²⁰¹ Can we even imagine a president now running on the non-platform platform of Zachary Taylor?

d. Lincoln's case against military rule

For Hamilton, relations with foreign nations were by their nature executive. For the sake of safety, Congress was only given some specific powers over foreign policy as

²⁰¹ Although it must be admitted that there was a long period of congressional government in the late nineteenth-century. See Burns (1965, 46-57).

exceptions to executive power.²⁰² In a letter to Herndon in which they were debating whether "if it shall become necessary, to repel invasion, the President may, without violation of the Constitution, cross the line, and invade the territory of another country; and that whether such necessity exists in any given case, the President is to be the sole judge" (*Works I*, 451), Lincoln argues that Congress should possess the war-making power. In other words, the question before Lincoln was whether presidents, citing future threat, could engage in preemptive war for the sake of security. Lincoln writes:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their peoples in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood (451-52).

For Lincoln, the Constitution is explicit about this question. A president, at least in regard to war with foreign nations, must be reigned in by more than his impression of what the people's good constitutes. Congress possesses the war-making power because, if it did not, the president could use war to aggrandize himself and oppress the people. Given this statement, the question becomes: does Lincoln implicitly retract this claim when he later claims the good of the people and involves them, without first getting congressional consent, in war? More generally, does he bring oppression upon the people by claiming necessity while abrogating their liberties?

But, as we saw in Lincoln's statements about the executive's role in the legislature, he also does not merely abandon, once he becomes president, his principle against

²⁰² See Loss (1990, chapter 1) for a good discussion of the importance of the oft-forgotten exceptions and limitations upon executive power in *Pacificus*.

executive usurpation through military rule. In the first place, he claims to be merely responding to Southern aggression at the beginning of the war, thus falling within that power possessed by the president to repel sudden attacks. Then, he overturns Gen. Fremont's proclamation freeing the slaves because he thought it "purely political, and not within the range of military law, or necessity" (*Works IV*, 531).

His reasons for this further expand upon the dangers of executive usurpation. He writes:

The proclamation in the point in question, is simply "dictatorship." It assumes that the general may do anything he pleases--confiscate the lands and free the slaves of loyal people as well as of disloyal one. And going the whole figure I have no doubt would be more popular with some thoughtless people, than that which has been done! But I cannot assume this reckless position; nor allow others to assume it on my responsibility. You speak of it as being the only means of saving the government. On the contrary it is itself the surrender of the government. Can it be pretended that it is any longer the government of the U.S--any government of Constitution and laws,--wherein a General, or a President, may make permanent rules of property by proclamation?

I do not say Congress might not with propriety pass a law, on the point, just such as General Fremont proclaimed. I do not say I might not, as a member of Congress, vote for it. What I object to, is, that I as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the government (531-32).

As we shall see, Lincoln maintained throughout the war that his actions were dictated by the strictest necessity, by that by which he was compelled given his preeminent concern for the preservation of the Union and the Constitution. Lincoln here refuses to support Fremont's declaration because he does not think it dictated by necessity. If he were to support the proclamation, he would be guilty of seizing the legislative functions of the government. Throughout the civil war, Lincoln's use of the executive power extended quite far. Here, we see Lincoln refusing to take a step further toward an action he

perceives as simple usurpation. But notice that if military necessity did, in fact, dictate the seizure of the slaves, such action would be justified. While there is a "range of military law, or necessity," at this time at least, General Fremont's declaration does not fall within it.

Notice, however, that Lincoln recognizes the intrinsic appeal of executive proclamations: "going the whole figure I have no doubt would be more popular with some thoughtless people." If Lincoln were just to seize the legislative functions of the government and declare all slaves free regardless of military necessity, a certain portion of the population (and certain historians) would be most satisfied by the intrinsic justice of his act.²⁰³ How can a man concern himself with proper functions when an issue of such decisive import is at stake?

For Lincoln, it is precisely the attraction of such "simple" solutions in a democracy that should make any prudent executive resist them. Legislative functions should be carried out by a legislature. Otherwise, a democratic people loses its capacity for self-government. They turn to the executive for those decisive actions of which they are not capable. They must learn to make themselves capable of decisive action. If they do not, they leave themselves open to what I would call the Cromwell problem. In his most wise book on him, Theodore Roosevelt writes in a passage I have already cited in chapter three:

There certainly never was a more extraordinary despotism than this; the despotism of a man who sought power, not to gratify himself, or those belonging to him, in any of the methods to which all other tyrants have been prone; but to establish the reign of the Lord, as he saw it (213).

²⁰³ Neely writes: "One cannot be certain without public opinion polls, but it seems likely that the most unpopular measure taken by President Lincoln in the first year of the war was his revocation of Fremont's emancipation proclamation for Missouri" (49).

A man, even or precisely with the best of intentions, can allow those intentions to permit him to institute a dictatorship in the name of fulfilling his good intentions (see chapter 3). If Lincoln had simply proclaimed the slaves free, the people might have accepted his proclamation; but they would not have had the experience of choosing, as a united people dedicated to self-rule, to free the slaves. Incidentally, by this account, even if we conclude that Lincoln's Emancipation Proclamation was indeed dictated by strict military necessity, we are still left wanting a legislative decision to free the slaves.²⁰⁴

Although, even in the Emancipation Proclamation, Lincoln explicitly denies that he did it for any considerations other than his official duty. Lincoln writes:

My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it, and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union. I shall do less whenever I shall believe what I am doing hurts the cause, and I shall do more whenever I shall believe doing more will help the cause...I have here stated my purpose according to my view of official duty; and I intend no modification of my oft-expressed personal wish that all men every where could be free (*Works V*, 388-89)

Should he decide to emancipate the slaves by military proclamation, Lincoln denies that doing so will be based upon his "personal wish." Instead, their emancipation will be dictated only by whether or not it accomplishes his task: the preservation of the Union. Again, it is precisely such, at least to our ears, morally cold language that gets Lincoln a certain reputation for not caring about the plight of the slaves. If he cared about the plight of the slaves, so we say, he would never have said that if he could save the union

²⁰⁴ For a discussion of the necessity of the emancipation proclamation, see the Letter to James C. Conkling (*Works VI*, 406-408).

without freeing a slave, he would do it. But Lincoln sounds so morally cold because of his Whiggish worries about a ruler using his power to accomplish his personal wishes rather than his official duties. Lincoln's principles dictated that the executive power could not become a dictatorship of his personal opinions.

Lincoln maintained until the end that he was, first and foremost, an officer of the Constitution and, as such, that he must act according to what would best preserve the Constitution. As I shall discuss in the next session, this meant taking actions that, we might say, preserved the spirit of the Constitution while violating its letter. But we must remember Lincoln maintained that a constitutional principle did guide his actions. By contrast, Richard Loss (1990) writes: "By appealing beyond the Constitution to the Declaration Lincoln cancelled Hamilton's and Washington's emphasis on the supremacy of the Constitution. Lincoln was, hence, a revolutionary figure" (90). This seems to be a misstatement of Lincoln's intentions. He understood himself to be upholding the Constitution.²⁰⁵ He took those actions he believed necessary to do so. And he averred from taking those actions that, while they might have been his personal prerogative, were not constitutionally sanctioned. In 1864, Lincoln writes to Albert G. Hodges:

I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power. I understood, too, that in ordinary civil administration this oath even forbade me to practically indulge my primary abstract judgment on the moral question of slavery. I had publicly declared this many times, and in many ways. And I aver that,

²⁰⁵ Loss immediately dismisses Lincoln's argument that the Constitution is the "picture of silver" framed around the "apple of gold" that is the principle of equality in the Declaration (see *Works IV*, 168-69).

to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery (*Works VII*, 281)

For Lincoln, a constitutional officer, especially one who is not a legislator, cannot "indulge" his abstract moral judgments. As much as Lincoln might have allowed himself significant "discretion" in his use of the executive power, he did not allow himself that discretion which would have destroyed the Constitution itself. He might have been willing to abrogate certain lesser constitutional forms; but he remained a constitutionalist because he was not willing to institute a regime of his own moral "feelings."

e. Lincoln's use of emergency powers

We still must face Lincoln's extraordinary use of the executive power during the Civil War. What was Lincoln's justification for such use? Lincoln made various statements throughout the war justifying the actions that he took. Each pointed to the same Hamiltonian notion of constitutionalism. First and foremost, this means we must understand a constitution as not demanding an adherence to means that would sacrifice its end. It must admit of such actions, whether strictly legal or not, that conduce to its overall preservation. On the question of his arguably unconstitutional expansion of the Army and Navy without approval from Congress, his first statement, given to Congress in Special Session on July 4, 1861, claims:

These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. It is believed that

c
c
F
h
-
26
H
m
of
de
ci
pu
co
an
co
wi
26
pro
the
pro
po
If

nothing has been done beyond the constitutional competency of Congress
(*Works IV*, 429).²⁰⁶

Before this, Lincoln claims it was the duty placed "upon the incoming Executive, to prevent, if possible, the consummation of such attempt to destroy the Federal Union."²⁰⁷

He did all "which a president might constitutionally, and justifiably, do in such a case"

(423). In other words, whether or not his actions were strictly legal, they were constitutional.

Lincoln asks:

Are all the laws, but one, to go unexecuted, and the government itself to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?
(430).

This in response to a question about the "legality and propriety" of his suspension of the privilege of the writ of habeas corpus. Again, Lincoln says he considered the propriety of his actions and deemed it necessary, in fact constitutionally necessary, for him to take those actions which may be of questionable legality--he is silent about the

²⁰⁶ Notably, Lincoln's argument here more resembles Jefferson's justification for prerogative than Hamilton's. For Jefferson, there was also a necessity for executive prerogative, but, so as to avoid the monarchical implications of Hamilton's solution, such actions must always seek the retrospective approval of Congress. Schmitt (1989) writes: "Jefferson presumably believed that if one could revise and scale down the formal, constitutional powers of the president while at the same time granting him, as circumstances warranted, the right to exercise extra-constitutional powers, one would make the use of such powers less likely" (342). See also Fatovic (2003) for a comparison of Hamilton's and Jefferson's conceptions of executive power in light of Locke. Fatovic writes: "The major difference between Jefferson and Hamilton was not over the desirability or the necessity of extra-legal executive action, but over its constitutionality" (6). Although Lincoln may differ from Jefferson, because, as I will argue, Lincoln is not willing to admit the illegality of his actions

²⁰⁷ Throughout this speech, Lincoln impersonalizes his role. The *executive* has a duty, based on the oath, to preserve the Constitution and the *executive* chose those means necessary to accomplish that end. In Locke, the more it seemed the executive was choosing what he considered prerogative, the more tyrannical the prerogative power appeared. Perhaps Lincoln impersonalizes his role to make his use of such extraordinary power look that much more like a kind of mechanical process: the executive only responded to necessity. If he had said, *I* chose to abrogate certain aspects of the Constitution, it would be much more tyrannical.

legality of his actions.²⁰⁸ Lincoln then tries to make a fairly unpersuasive argument that the Constitution is "silent as to which, or who, is to exercise the power" to suspend the privilege of the writ of habeas corpus; it seems fairly self-evident that, as it occurs in Article I, the power resides with Congress.

More persuasive is Lincoln's argument regarding not the framers' document itself, but their intent. Lincoln says:

As the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion (430-31).

As Helvidius, Madison had explicitly denied to the executive such discretionary action as might be necessary when Congress is out of session. Here, Lincoln reveals a much more flexible view of executive power. How could the framers possibly have intended that the president should allow the danger to run its course before Congress could assemble? Such would be an absurd sacrifice of the end of the Constitution for fidelity to the means within the Constitution. Should you be such a strict constitutionalist as to destroy the Constitution in your love for it?

As much like Hamilton as Lincoln sounds, he maintains one substantive and important difference from Hamilton. Like Jefferson, Lincoln thinks it necessary for the executive to seek retrospective congressional sanction for his actions. He claims he never took his actions "beyond the constitutional competency of Congress." Then, in concluding his discussion of this subject in the speech, he says: "Whether there shall be

²⁰⁸ It seems at this point, Lincoln was simply unsure whether his actions were in fact legal. Later, he makes an explicit argument for their legality and drops the seeming distinction between what is legal and what is constitutional. He writes: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation" (*Works VII*, 281).

any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress" (431). In using his discretion, Hamilton understood his executive to be acting in his own constitutional capacity; the executive is not the agent of Congress. He has his own representative and important role in the functioning of the republic. If he uses his discretion, he need not seek congressional approval because such would imply that he is subservient to Congress. Lincoln, by contrast, argues he acted only as the necessary agent of discretion for congressional intent. He acted for Congress because Congress was not able to act.

In this argument, Lincoln combines the important place for executive discretion with what he thinks to be the preeminent role of Congress in our government. It would be inaccurate to say that he abandoned his Whiggish notions of executive power when he claimed such an extensive role for executive discretion. Instead, he always acted in that manner he thought necessary to preserve a nation of congressional law. It might be a quite enlarged notion of executive power; but, unlike Hamilton, it remains a notion that is somehow subservient to Congress.

Perhaps this is why Lincoln makes much more out of the oath than Hamilton had. For Hamilton, executive discretion flows from the executive's necessarily equal, or perhaps even superior, place to Congress in the system of government. The executive power is left general, subject only to certain constitutional qualifications. While Lincoln might admit the same, he does not cite such general power in justifying his seeming constitutional abrogation. Instead, he always puts preeminence upon the oath he swore as an officer of the Constitution, sworn to "preserve, protect, and defend" it. Every justification Lincoln offers looks to the preservation of the Constitution for its grounds.

"By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb" (*Works VII*, 281).

Finally, it might be asked whether Lincoln abandoned his principle, articulated in the letter to Herndon, regarding the dangers of arbitrary prerogative. As though he were responding to such a criticism, Lincoln writes in a published letter to Matthew Birchard and others:

You ask, in substance, whether I really claim that I may override all the guaranteed rights of individuals, on the plea of conserving public safety--when I may choose to say the public safety requires it. This question, divested of the phraseology calculated to represent me as struggling for an arbitrary personal prerogative, is either simply a question who shall decide, or an affirmation that nobody shall decide, what the public safety does require, in cases of Rebellion or Invasion. The constitution contemplates the question as likely to occur for decision, but it does not expressly declare who is to decide it. By necessary implication, when Rebellion or Invasion comes, the decision is to be made, from time to time; and I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy, is the man who holds the power, and bears the responsibility of making it (*Works VI*, 303).

Lincoln explicitly denies here that he has used the claim of public safety to exercise "arbitrary personal prerogative" as did those Kings in the past about whom Lincoln wrote so eloquently. Instead, the question is simply "who shall decide" what shall be done when an invasion or rebellion requires emergency action. Since the president is commander-in-chief of those armed forces which will be necessary to counter the rebellion or invasion, it is natural for him to bear responsibility. While Lincoln never says the Constitution was wrong if it gives Congress the power and responsibility to suspend habeas corpus, he argues that "necessary implication" shows the power should reside with the president.

But might the founders have had good reason not to have given this power to the president? In fact, Lincoln's own argument earlier in his life to Herndon indicates the reason. If given any kind of "prerogative" power, the president could pretend the public safety while endeavoring his own aggrandizement and oppression of the people. The president must be delimited from such discretion to avoid its dangers. Lincoln responds to such criticism in something of the same manner as Locke: "If he uses the power justly, the same people will probably justify him; if he abuses it, he is in their hands, to be dealt with by all the modes they have reserved to themselves in the constitution" (303). Moreover, Lincoln would claim that his situation is different from that situation he had criticized in his letter to Herndon. He has attacked no one preemptively. Discretionary power applies only when a rebellion or an invasion has occurred. It is merely a *reactive* power, whereas Lincoln had warned of the dangers of a *proactive* discretionary power.

Finally, Lincoln always emphasizes that he was *forced* to adopt measures that he otherwise would not have adopted. He writes: "I was slow to adopt strong measures, which by degrees I have been forced to regard as being within the exceptions of the constitution, and as indispensable to the public Safety" (*Works VI*, 264). He only adopted questionable measures, like the Emancipation Proclamation, when they became an "indispensable necessity." In fact, the famous claim of Lincoln's about his powerlessness over events, about which so many historians have argued, occurs in the context of a letter concerning his use of so much discretionary power. He writes: "I claim not to have controlled events, but confess plainly that events have controlled me" (*Works VII*, 282). In other words, it occurs in the context of an attempt to disavow any personal control over executive power. By impersonalizing the events that led to his extraordinary use of

executive power, he avoids any implication that he gave himself personal and, hence, arbitrary control. As we saw in Locke, the use of discretionary executive power can only be justified if it truly has the public good in mind.²⁰⁹ Moreover, it only seems necessary insofar as certain exigencies compel some power to respond decisively and forcefully. In the first place, Lincoln emphasizes such compulsion because he truly did feel that, if he did not act, the Union and its Constitution would be lost. In the second place, he seeks to avoid any precedent by which a future president could look to Lincoln while claiming discretionary power that is less than compulsory.

f. Evaluating Lincoln

In a published letter to Erastus Corning and others, Lincoln justifies his use of executive power in the following paragraph. I will quote it at length because it summarizes well Lincoln's understanding of his actions:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them--in other words, that the constitution is not in its application in all respects the same, in case of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security. The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one. Nor am I able to appreciate the danger, apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by

²⁰⁹ See Scigliano (1989) for an alternative claim that Lincoln is unlike the founders and even Locke in claiming for the executive what Corwin calls "a broad discretion capable even of setting aside the ordinary law in the meeting of special exigencies for which the legislative power had not provided" (253). Also, see Fatovic (2003, fn36) for a critique of Scigliano's argument.

jury, and Habeas corpus, throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life (*Works VI*, 267).

Lincoln here makes a distinction that Hamilton does not make. His extraordinary use of executive power occurred precisely because the situation was extraordinary. It required measures that would not and should not have been forborne in ordinary political times. Unlike Hamilton who understands the executive grant simply to give him a discretionary power, Lincoln thinks such discretion only becomes justified when the nation is sick.²¹⁰ In a time of sickness, you must be given medicine which would not be good for you if you are well. So too, the nation, in a time of sickness, must be given an executive power that would not be good for it if it were well. Again, we see that Lincoln remains a Whig.

But I cannot help but be troubled by Lincoln's last metaphor. He cannot believe that a man will contract "so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life." But does he really not believe this possible? He must have known stories of soldiers who began taking morphine while sick and did not stop once healthy. Isn't there always the danger that those temporary drugs one takes while sick will become addictive and will not be given up once healthy again? Isn't this precisely why doctors now do not give out more pain medication than is absolutely necessary? Doesn't this same danger exist for the nation? That executive power which served them so well not just in preserving the Union but in punishing the defrauders who we encountered in the first section will become addictive. After all, isn't it more expedient and even more just for the power that need

²¹⁰ Although I have argued previously that Hamilton does not simply give the executive a legal prerogative power and so never uses the word "prerogative." See, above, chapter 2, section h.

not worry about legal niceties to administer the republic? Didn't we learn from Locke that the people do contract a strong appetite for emetics even once they are healthy again?

This is not to say that Lincoln was wrong in his actions or in his defense of them. But perhaps we are left with a conundrum out of which there is no easy path. As impressively prudent as Lincoln's actions were, they were so only because Lincoln, himself, was so prudent. He managed to exercise more executive power than any president in history while restoring the people's self-government (perhaps it is no accident that the presidency is never weaker and Congress never stronger than in the thirty years after Lincoln's death). He reestablished those conditions by which they could once again govern themselves. In doing so, he acted as nothing but an agent of the Constitution; his will is absent. But could another executive copy his feat? Lincoln does show us a constitutional principle: the executive power should only become discretionary if compelled by absolute necessity. But necessity remains in the eye of the beholder. What was, in fact, truly necessary for Lincoln might just appear truly necessary for Nixon. Or it might just be claimed as truly necessary by another more devious type.

Conclusion

Perhaps it is no accident that much of the scholarship on the presidency tends to emphasize the constitutional limitations on the office. For the progressives, Wilson's constitutional determinism allowed them an easy optimism about the possibilities of executive power in the future. America's problems could be solved if we could just escape from the weight of an over-restrictive Constitution. For Corwin and those scholars who followed him, constitutional determinism also afforded more optimism about solving the problems of a seemingly ever-increasing executive power. The dangerous demagoguery of the modern president could be averted if we just could return to the more pristine executive of ages past. Creating a fixed past makes the present and future much more manageable.

Where are we, then, if we recover the past and find it much less fixed than we had thought? Instead of one constitutional "intent" for the executive power, we have found at least three (and we have not even discussed either Jefferson's or Jackson's executive). Instead of a single founding argument that would unify our conception of the founders' executive, we have found disagreements about nearly every aspect of what the Constitution's executive should do. Should it be representative of the people or should it merely represent Congress by executing its laws? Should it merely be an "agent of the Constitution" or should it have an active role in legislation? Should it have discretion outside of and even against the law or should it be strictly bound by adherence to the law? Should it incorporate or exclude men of grand ambition? These questions are not merely secondary to what is otherwise agreed upon; they reflect fundamentally different

understandings of what would constitute a safe executive power in a constitutional democracy. Hamilton thinks an enlarged executive within a sufficiently flexible Constitution safest because only it can accommodate the ambitious and avoid constitutional destruction or usurpation. Madison attempts to avoid the problem of executive usurpation entirely by restricting executive power to a much smaller sphere and invigorating the people's watchfulness of executive encroachment. Lincoln invigorates the executive office in response to a crisis while insisting that such invigoration has remained strictly limited by necessity and will not continue once the crisis passes.

Constitutional government tends to invite the deification of the creators of the Constitution and the attempt to return to the idyllic world that they created. Instead of a return to the Garden of Eden, there's a return to the founders' government. The discovery that their world was fraught with as much disagreement as our world denies us such an idyllic return. But, the diversity of constitutional opinions about the proper place of executive power should not make us despair. In fact, it should invite us to reopen the question of executive power in our constitutional republic. It demands that we assess the situation for ourselves, to determine for our time which solution appears most amenable to our regime. The constitutional logics of Hamilton, Madison, Locke, and Lincoln give us the concepts and concerns with which we should begin this assessment. These profound thinkers on this question can be the guides to our age, not because of the authoritativeness of their intent, but because of the prudence and wisdom embodied by their lives and writing.

This need to assess the situation for ourselves may be most healthy for our political situation. Besides inviting deification, constitutionalism also invites

thoughtlessness. Wilson says the Constitution intends the executive to be severely hampered and it does so because of its creators' unthinking devotion to Newtonian mechanics. Our politics, according to Wilson, now demands that we free the executive from his Newtonian prison and unleash his power in the service of the regime. Wilson's somewhat thoughtless dismissal of the founders' solution as excessively Newtonian invites his own somewhat thoughtless solution to escape from that Newtonianism. Constitutional politics has allowed Wilson to be thoughtless in his advocacy because he can offer his rhetorical solution as the great alternative to the constitutional presidency. With a Constitution, Wilson can define his solution against it; without it, his solution must stand more on its own merit. Moreover, in the regime created by constitutional government, Wilson provoked not so much an assessment of the merits of his argument but an analysis of the extent to which it remained faithful to constitutional intent.

This tendency in constitutional government robs politics of much of its vitality because we forget the political arguments in favor of constitutional assessments. I have attempted here to uncover the political arguments because only by so doing can we evaluate the current status of executive power. That being said, I must now answer the question: whose solution seems better?

Hamilton once wrote:

It has been aptly observed that Cato was the tory—Caesar the whig of his day. The former frequently resisted—the latter always flattered the follies of the people. Yet the former perished with the republic, the latter destroyed it (*Papers*, XII, 252).

It could be said that Hamilton attempted to constitute an executive power that would use institutional solutions to insure that the people looked to Cato rather than Caesar for their

guidance and would even attempt to change Caesar into Cato. Hamilton understood well that, failing this, this republican experiment in self-government could degenerate into “mobocracy.” Demagogues would arise who, like Caesar, would appeal to the people while increasing their own power.

Like Benjamin Franklin, Hamilton well understood that the relations between a democratic people and a strong leader were far more natural than all of the “whiggish” fears of strong leadership might have led others to believe. Democracies naturally look to strong leadership. For Hamilton, this meant that one could not, as Madison desired, simply exclude such leaders from the Constitution entirely. To exclude leaders would only allow leaders ultimately to arise outside the Constitution and against the Constitution. Because the Constitution prevents their leadership and, so they would claim, their leadership is necessary for the people’s rights, they would be able to unite the people against the Constitution. What noble document would possibly exclude men so solicitous of the people’s wishes and desires? In this situation, the Constitution loses its constitutive power over these men. They become redeemers of the people over and against an unredeemable Constitution.

Whiggishness in Hamilton’s time was closely allied to a principled stance against executive power. Madison’s argument as Helvidius represents a classic and impressive argument of this Whiggishness. Along with this stance against executive power came a broader stance against too much governmental power. Not only did the Jeffersonians protect the people from executive aggrandizement, they also protected them from governmental overreaching by insisting upon a strict interpretation of the Constitution. They viewed government as a necessary evil among men which, as such,

must be limited insofar as possible while still insuring public safety and tranquility. The Federalists favored a strong executive who oversaw a vigorous national government capable of accomplishing positive goods. The Jeffersonians favored a weak executive whose primary function was to check any constitutional overreaching by Congress, given a much more restricted understanding of constitutional government.

The “Whigs,” however, soon had what some took to be the American Caesar: Andrew Jackson. Justice Story, a close friend and disciple of John Marshall’s, wrote to his wife: “The reign of King ‘Mob’ seemed triumphant.”²¹¹ Robert Remini (1967), in his fascinating book on Jackson’s Bank War, writes:

The General believed in closing the gap separating the people from their government by summoning them to support whatever he wished to do. They responded too. Not simply because he was a popular war hero whom they loved but because the quality of leadership which they so desperately desired in their chief executive was becoming more brilliantly visible in the presidency of Andrew Jackson (66).

While this increase in executive power signaled a departure from Jeffersonian ideals, Jackson did not also abandon the Whiggish attachment to limited government. Thus, as Herbert Croly shows with unsurpassed brilliance, Jackson utilized the increase in executive power to decrease governmental power. Jackson’s increased power allowed him to destroy constructive governmental institutions. The strong executive became a tool of the “Whigs” to maintain limited government. Or, one could say that recreating and maintaining limited government became a tool of the strong executive to increase his personal power. Jackson was the voice of the people against government. The increase in power that this arrangement gave him could remain undetected. For these same reasons, Caesar was the Whig of his day.

²¹¹ Quoted in Schlesinger (1945, 6).

Those men Schlesinger (1945) calls “neo-Federalists” like Henry Clay and Daniel Webster responded to Jackson by invoking Jefferson’s ideal of executive power while remaining dedicated to the Hamiltonian ideal regarding the rest of governmental power. As we saw in Lincoln’s early speeches and letters as a member of the aptly named Whig party, the new Whigs attempted to outflank the Jacksonians by recalling a Jeffersonian model of presidential power. They decried any form of extensive executive power even if it was not what they took to be Jackson’s elective dictatorship.

Hamilton’s model of a strong but responsible elective executive whose institutional responsibility demanded that he remain bound to the people’s interests even or especially when it went against their inclinations lost out to a renewed invigoration of the prerogatives of Congress over and against the Jacksonian executive. Hamilton had devised a plan by which the new Constitution could accommodate the people’s tendency to look to a strong leader while lessening the danger that that leader would merely be using the people to increase his own power. Much of the success of this plan depended on an activist government within which the executive could “do things” for the people to earn their gratitude and appreciation. The Whig model of government as it was articulated by the Jeffersonians could not allow for such activist leadership. Therefore, when this model of government accepted strong leadership in the person of Andrew Jackson, it was only natural that he would only exercise his leadership through destruction. By contrast, the new “Whigs” who did not share the Jeffersonian commitment to limited government could have provided room for an activist leader in the Hamiltonian model. As the name of their political party itself indicates, they did not take this route.

By failing to do so, the Whigs inevitably lost to the Jacksonians on the question of the nature of the republic's executive power. It is simply too much to ask of the people to refuse themselves a representative leader. As Remini's passage implies, the people always "desperately desire" leadership.

With all of this in mind, it is perhaps most unfortunate that the progressive revival of Hamiltonian principles did not include enough of a revival of the Hamiltonian constitutional executive. Croly understood that only Hamilton had provided room for the "constructive statesmanship" that the country needed. But by remaining too Jeffersonian in its rhetoric and its principles, the progressive president became a tribunal of the people's wishes—whether wise or foolish. Hamilton's executive remains constructive precisely because his institutional duty is to regard the common good as opposed to the popular will. The progressive president—especially after ceasing to regard himself even as an agent within the Constitution seeking constitutional ends—would not always look to that same common good. Hamilton's executive is not restricted by a "clause-bound" Constitution; but he is shaped by his constitutional responsibilities. Hamilton's executive is responsible both to the people *and* to their Constitution. The interdependence of these two responsibilities better insures that the executive cannot abuse his power.

The progressive president would be both popular and constructive. He would openly proclaim himself as the Jacksonian representative of the people and, unlike Jackson, he would use his power to make government work for the people. But both the abandonment of a "mechanical" Constitution and the related abandonment of Hamilton's caveat that the executive should represent the people's interests as opposed to their inclinations insured much less responsibility.

Had Herbert Croly rather than Woodrow Wilson won the progressive argument, they might have had a much more “Hamiltonian” notion of the executive’s relation to the people. Although ultimately critical of what he perceived as Hamilton’s lack of faith in the people, Croly is quite complimentary of the Hamiltonian model of leadership. Consider the following praise for the Federalists’ action in insuring the passage of the Constitution: “The American people steered the proper course because their leaders convinced them of the proper course to steer; and the behavior of the many who followed behind is as exemplary as is that of the few who pointed the way” (38). While a convinced democrat, Croly thought only active and responsible leadership could lead the people to what Hamilton might call their better natures. Praising Hamilton, Croly writes:

He was not afraid to incur unpopularity for pursuing what he believed to be a wise public policy, and the general disapprobation under which he suffered during the last years of his life, while it was chiefly due...to his distrust of the American democracy, was also partly due to his high conception of the duties of leadership (45).

For Croly, the crucial step away from Hamilton’s model actually came with Jefferson’s presidency. In a passage that I will quote at length because of its insight into the problem of democratic leadership, Croly writes:

His [Jefferson’s] policy, while in office, was one of fine phrases and temporary expedients, some of which necessarily incurred odium, but none of which were pursued by him or his followers with any persistence. Whatever the people demanded, their leaders should perform...It was to be a government of and by the people, not a government for the people by popular but responsible leaders; and the leaders to whom the people delegated their authority had in theory no right to pursue any unpopular policy. The people were to guide their leaders, not their leaders the people; and any intellectual or moral independence and initiative on the part of the leaders in a democracy was to be condemned as undemocratic. The representatives of a Sovereign people were in the same position as the courtiers of an absolute monarch. It was their business to flatter and obey (46).

If such is the only model of leadership possible in a democracy, it would be wise, if possible, to exclude it entirely. This is essentially the path that Madison and the Whigs followed; the problem, as we have seen, remains that constitutional exclusion does not eliminate the people's desire for leadership. Moreover, constitutional exclusion only creates extra-constitutional leadership, which, as we have also seen, becomes much more dangerously demagogic. Croly argues that even before Jackson, Thomas Jefferson embodied this dangerous form of popular leadership. In short, it is leadership that pretends not be leadership: a model of democratic government that results in irresponsibility and carelessness.

For Hamilton and, as it seems, for Croly, the prudent response is to create a model of responsible leadership, which articulates the people's good without becoming beholden to their inclinations. It would not be too strong to say that this is the most important aspect of Hamilton's argument in *The Federalist*. To avert successfully the problem of demagoguery, the Constitution must allow for responsible and active leadership. Anything else would only produce leaders who could create great personal power for themselves while claiming to speak for the people's interest in freedom from excessive government. A restricted Constitution only produces what Croly calls "a policy of drift" that allows the people to suffer while their leaders blame their suffering on opposition forces who do not care about them. A model of responsible and active leadership would teach the people to demand from their leaders more than inflammatory rhetoric directed against the opposition. Instead, the question before the people in each presidential election would be: have the "projects" of this man improved our situation?

That being said, Lincoln offers us a model of responsible leadership that is neither Hamiltonian nor Jeffersonian/Jacksonian. His impressiveness lies in his almost unworldly ability to use his power only to restore the people's republican self-rule. He did not aggrandize himself while claiming to restore the people's self-rule. Moreover, he understood that real leadership, even in the name of the people's self-rule, sometimes required the pursuit of unpopular policies. He understood what necessity demanded and never claimed more than necessity demanded. The problem, of course, is precisely that such virtue is almost unworldly and, more often than not, only produces irresponsible leaders in the future who cite men like Lincoln as their example. Claiming the need for their prerogative lies outside the Constitution, they have no responsibility to the Constitution in its use. Claiming only to represent the people's self-rule, they have no responsibility to undertake projects for the people. If we could be confident that other leaders would follow Lincoln's model, we might be wise to heed the Madisonian insistence on republican self-rule. But because most will only flatter our belief that we rule ourselves while increasing their own power and allowing the country to drift, the Madisonian model becomes a dangerous elevation of normative purity over practical danger.

In this spirit, Scigliano (1981) writes: "It is well for republicans not to give too much prominence to the monarchical features of their government" (149). He does so after having praised Jefferson for some of his actions as president in which Jefferson used discretion but pretended to the country that he acted with much more restraint. "Fearing the energetic executive, equipped as it is with broad powers, and yet believing that this is what the Constitution had established, he sought—and this would not be the only

occasion—to reform the presidency in order to render it safe for republican government” (139). If this is true of Jefferson’s intentions, Hamilton would reply that *only* if the executive is openly acknowledged as energetic and somewhat discretionary will he be safe for republican government. This does not mean that the president can do whatever he wants; but it does mean that the president and the people should understand the Constitution as empowering him to seek the common good. By hiding the monarchical tendencies of their government, republicans merely force the “monarch” into a pretended compliance with the wishes of the people. In short, the nod to the republican insistence on self-rule does nothing more than make the executive power that much more unsafe. It becomes more unsafe because all of its discretionary activity must now take place outside of public awareness.

Hamilton’s model of constitutional leadership, by contrast, demands that leadership fulfill the intentions of a flexible Constitution before it fulfills the wishes of a fickle people. Such a responsibility is stated openly, thereby teaching the people both to expect from their leaders unpopular measures that will benefit them in the long run and discretionary actions that fulfill constitutional intent. The people’s expectations reinforce to the leader that societal stability and prosperity fall squarely on his shoulders. Where a man in other models of leadership can always secretly abdicate himself of responsibility by citing his representation of the people’s wishes, this man knows that it is his responsibility. And the people know this too.

This model of leadership provides for an acceptance by the people of the necessity that they be led, rather than merely pleased. As we saw in chapters two and three, the success of this arrangement depends upon the leader’s qualified dependence on

the people. Perhaps once he realized nothing other than the democratic form would be accepted by this democratic people, Hamilton set his mind to devising a system that provides the most security and stability to the people. But, as we see in his argument in *The Federalist*, this system depends upon the people's enlightened understanding that they need true leaders rather than mere courtiers.

This, of course, raises the question that I have heretofore avoided: can a people ever be so enlightened? The answer to this question is critical in assessing Hamilton's argument. For his model to be successful, it depends on the people's realization of their own follies. This is in part because the realization of their follies is required for the success of the Hamiltonian leader. In other words, the Hamiltonian leader can only be successful if the people expect that the leader will attempt to educate them as to their true interests; the people will only listen to them if they know themselves well enough not to trust their mere wishes. In addition, the psychological mechanism we saw in chapter three requires an enlightened people to attune the otherwise potential tyrant to serving the people's interests. To make the man who desires power and fame see that he should desire the moral acclaim that goes along with true leadership requires a popular norm that celebrates such selfless men. If the popular norm merely celebrates the man who flatters the people, it requires a man of extraordinary virtue to remain committed to the Hamiltonian model of leadership.

If the people cannot be so enlightened, one might argue that Hamilton has made a dangerous gamble with this new government. He has created an institution whose power and scope provide room for the greatest demagogues who, if insufficiently Hamiltonian in their understanding of the ways in which to use that power, could merely enter the

executive office so as to aggrandize themselves while claiming obsequiousness to the people's wishes. Although even if the people are insufficiently enlightened to avoid such men, Hamilton may still be able to respond to this criticism.

First, the creation of the executive office has little effect on whether such leaders will arise. Demagoguery is an ever-present problem in democratic politics that cannot simply be wished away by providing it with no institutional space. As Locke also shows, doing so will only force the demagogue outside and against that institution that refuses him entrance. In fact, while the ideal arrangement would have an enlightened people who demanded true leadership, failing such, Hamilton might argue that the institutionalization of the demagogue makes him far safer than the alternative. Being forced to take an oath to uphold the Constitution and to serve within an office created by the Constitution may somewhat ameliorate the politics of even the most unreconstructed demagogue. Perhaps such was the case with Andrew Jackson. Though he acted like a demagogue by initiating a kind of class warfare between the rich and the poor, he still stepped down from office. In fact, he even respected the norm that presidents should only serve two terms (a norm about which Hamilton might have been quite critical). And while Croly and Hamilton might argue that he used his power only to destroy constructive governmental institutions, he did not use it to destroy the rich themselves. In short, forcing the demagogue into the constitutional order may not fully reconstitute their ambition; but it may at least make it safer. And, again, the open acknowledgement of the need for leadership that is provided by Hamilton creates a Constitution that cannot be destroyed by "leaders" who claim the Constitution does not provide for them.

Hamilton's model of leadership disappeared quickly--before the end of the term of the first president. Is it not then a bit antiquarian to claim his model can help us better understand the current presidency? Perhaps not. First, there is much to be learned from a consideration of Hamilton about the best mode of constitutional leadership in the present. This is true especially in light of the new exigencies imposed upon the nation by the increased threat of terrorism. And, even if we do not accept the applicability of Hamilton's model, a consideration of the constitutional dialogue that I have presented here gives us the tools by which to think more deeply about the proper role of executive power in the present. For instance, one might argue that Lincoln's reaction to the exigencies imposed by the Civil War, namely openly proclaiming to the people that the crisis demanded action that might not be countenanced in ordinary times, gives us much food for thought about the best reaction to the new crises. In Lincoln's case, by allowing the people to see honestly what he thought the current situation required, he may have prevented an increase in cynicism about government and may also have provided for an end to these extraordinary actions.

Finally, a recovery of Hamilton's model of leadership can be applicable insofar as it recovers a notion of constitutional leadership that would still serve our democracy well. As long as we continue emphasizing the novelty and extra-constitutionality of any kind of leadership in our regime, we fail to provide our leaders with the constitutional guidance that Hamilton thought so important to our safety. We can neither wish away the people's tendency to look for strong leaders nor forget about the danger that those leaders will be demagogues. Hamilton points us down a path of responsible leadership that remains as applicable today as it was in his time.

BIBLIOGRAPHY

- Abramson, Paul, John Aldrich and David Rohde. "Progressive Ambition Among United States Senators: 1972-1988." *The Journal of Politics* 49: 3-35.
- Ackerman, Bruce. 1988. "Neo-Federalism." In *Constitutional and Democracy*. ed. Jon Elster and Rune Slagstad. Cambridge: Cambridge University Press.
- Adair, Douglass. 1974. *Fame and the Founding Fathers*. Indianapolis: Liberty Fund.
- Aldrich, John. 1994. "Rational Choice Theory and the Study of American Politics." In *The Dynamics of American Politics: Approaches and Interpretations*, ed. Lawrence C. Dodd and Calvin Jillson. Boulder, CO: Westview Press.
- Aldrich, John. 1995. *Why Parties? The Origin and Transformation of Political Parties in America*. Chicago: University of Chicago Press.
- Anderson, Dwight G. 1982. *Abraham Lincoln: The Quest for Immortality*. New York: Alfred A. Knopf.
- Aristotle. 1984. *The Politics*. translated by Carnes Lord. Chicago: The University of Chicago Press.
- Amhart, Larry. 1979. "The God-Like Prince: John Locke, Executive Prerogative, and the American Presidency." *Presidential Studies Quarterly*. 9: 121-130.
- Banning, Lance. 1995. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca: Cornell University Press.
- Barber, James David. 1992. *The Presidential Character: Predicting Performance in the White House*. 4th Edition. Upper Saddle River, NJ: Prentice Hall.
- Bates, Robert H. 1990. "Macropolitical economy in the field of development." In *Perspectives On Positive Political Economy*, ed. James E. Alt and Kenneth A. Shepsle. Cambridge: Cambridge University Press.
- Beard, Charles A. 1913. *An Economic Interpretation of the Constitution of the United States*. New York: Macmillan.
- Berlin, Isaiah. 1997. *The Proper Study of Mankind: An Anthology of Essays*. eds. Henry Hardy and Roger Hausheer. New York: Farrar, Straus and Giroux.
- Bernard, Kenneth A. 1951. "Lincoln and Civil Liberties." *Abraham Lincoln Quarterly*. VI, September.
- Berns, Walter. 1992. "On Hamilton and Popular Government." *The Public Interest* 109:

- Bessette, Joseph M. and Jeffrey Tulis. 1981. "The Constitution, Politics, and the Presidency." In *The Presidency in the Constitutional Order*, ed. Joseph M. Bessette and Jeffrey Tulis. Baton Rouge: Louisiana State University Press.
- Bessette, Joseph M. 1994. *The Mild Voice of Reason: Deliberative Democracy and American National Government*. Chicago: University of Chicago Press.
- Bimes, Terri and Stephen Skowronek. 1996. "Woodrow Wilson's Critique of Popular Leadership: Reassessing the Modern-Traditional Divide in Presidential History." *Polity*: 39: 27-63.
- Binkley, Wilfred E. 1947. *President and Congress*. New York: Alfred A. Knopf.
- Brogan, Joseph V. 1996. "A Mirror of Enlightenment: The Rational Choice Debate." *The Review of Politics* 58: 793-806.
- Brown, Robert E. 1956. *Charles Beard and the Constitution: A critical analysis of an economic interpretation of the Constitution*. Princeton: Princeton University Press.
- Bryce, James. 1995. *The American Commonwealth*. Volumes I-II. Indianapolis, IN: Liberty Fund.
- Burns, James MacGregor. 1965 *Presidential Government: The Crucible of Leadership*. Boston: Houghton Mifflin Company.
- Burns, James MacGregor. 1978. *Leadership*. New York: Harper and Row.
- Burns, James MacGregor. 1984. *The Power to Lead: The Crisis of the American Presidency*. New York: Simon and Schuster.
- Caldeira, Gregory. 1987. "Public Opinion and the U.S Supreme Court: FDR's Court-Packing Plan." *American Political Science Review*. 81: 1139-1153.
- Carey, George. 1978. "Separation of Powers and the Madisonian Model: A Reply to the Critics." *American Political Science Review* 72: 151-64.
- Carey, George. 1984. "Publius--A Split Personality?" *Review of Politics*. 46: 5-22.
- Carey, George. 1995. *In Defense of the Constitution*. Indianapolis: Liberty Fund.
- Carter, Bradley Kent and Joseph F. Kobylka. 1990. "The Dialogic Community: Education, Leadership, and Participation in James Madison's Thought." *Review of Politics*. 52: 32-63.

- Ceasar, James W. 1979. *Presidential Selection: Theory and Development*. Princeton, NJ: Princeton University Press.
- Ceaser, James W. 1990. *Liberal Democracy and Political Science*. Baltimore: Johns Hopkins University Press.
- Ceaser, James W., Glen E. Thurow, Jeffrey Tulis, and Joseph M. Bessette. "The Rise of the Rhetorical Presidency." In *Rethinking the Presidency*. ed. Thomas E. Cronin. Boston: Little, Brown and Company.
- Ceaser, James, Joseph M. Bessette, Laurence J. O'Toole, Jr., and Glen Thurow. 1998. *American Government: Origins, Institutions, and Public Policy*. Dubuque, IA: Kendall/Hunt Publishing Company.
- Cheney, Dick. 1990. "Congressional Overreaching in Foreign Policy." In *Foreign Policy and the Constitution*. eds. Robert A. Goldwin and Robert A. Licht. Washington, D.C: The AEI Press.
- Clinton, Robert Lowry. 1994. "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison." *American Journal of Political Science* 38: 285-302.
- Cornell, Saul. 1999. *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*. Chapel Hill: University of North Carolina Press.
- The Complete Anti-Federalist*. ed. Herbert J. Storing. 1981. Chicago: The University of Chicago Press.
- Corwin, Edward S. 1947. *Total War and the Constitution*. New York: Alfred A. Knopf.
- Corwin, Edward S. 1957. *The President: Office and Powers 1787-1957*. New York: New York University Press.
- Corwin, Edward S. 1976. *Presidential Power and the Constitution: Essays, by Edward S. Corwin, Richard Loss, ed.* Ithaca, N.Y.: Cornell University Press
- Croly, Herbert. 1909 1965. *The Promise of American Life*. Cambridge, MA: The Belknap Press of Harvard University Press.
- Croly, Herbert. 1914 1998. *Progressive Democracy*. New Brunswick, NJ: Transaction Publishers.
- Dahl, Robert A. 1956. *A Preface to Democratic Theory*. Chicago: University of Chicago Press.
- Diamond, Martin. 1981. *The Founding of the Democratic Republic*. Itasca, IL: F.E.

Peacock Publishers.

Dunn, John. 1969. *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'*. Cambridge: Cambridge University Press.

Eastland, Terry. 1992. *Energy in the Executive: The Case for the Strong Presidency*. New York: The Free Press.

Eden, Robert. 1983. *Political Leadership and Nihilism: A Study of Weber and Nietzsche*. Tampa, Florida: University Presses of Florida.

Eden, Robert. 1996. "The Rhetorical Presidency and the Eclipse of Executive Power: Woodrow Wilson's *Constitutional Government in the United States*." *Polity*. 28: 357-78.

Eidelberg, Paul. 1968. *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers*. New York: Free Press.

Eidelberg, Paul. 1974. *A Discourse on Statesmanship*. Urbana, Illinois: University of Illinois Press.

Eisenach, Eldon J. 1994. *The Lost Promise of Progressivism*. Lawrence, Kansas: University Press of Kansas.

Epstein, David F. 1984. *The Political Theory of The Federalist*. Chicago: University of Chicago Press.

Ellis, Richard J., ed. 1999. *Founding the American Presidency*. Lanham: Rowman and Littlefield Publishers, Inc.

Fatovic, Clement. 2002. "Constitutionalism and Criminality: Locke, Hamilton, and Jefferson on Discretionary Executive Power." A paper presented at Midwest Political Science Association, April 2003.

Fenno, Richard. 1973. *Congressmen in Committees*. Boston: Little, Brown.

Fisher, Louis. 1991. *Constitutional Conflicts Between Congress and the President, Third Edition*. Lawrence, Kansas: University Press of Kansas.

Fishman, Ethan M. 2001. *The Prudential Presidency: An Aristotelian Approach to Presidential Leadership*. Westport, CT: Praeger.

Flaumenhaft, Harvey. 1981. "Hamilton's Administrative Republic and the American Presidency." In *The Presidency in the Constitutional Order*. eds. Joseph M. Bessette and Jeffrey Tulis. Baton Rouge, LA: Louisiana State University Press.

- Flaumenhaft, Harvey. 1992. *The Effective Republic: Administration and Constitution in the Thought of Alexander Hamilton*. Durham: Duke University Press.
- Forcey, Charles. 1961. *The Crossroads of Liberalism: Croly, Weyl, Lippman, and the Progressive Era 1900-1925*. New York: Oxford University Press.
- Ford, Henry Jones. 1920. *Alexander Hamilton*. New York: Charles Scribner's Sons.
- Ford, Henry Jones. 1898 1967. *The Rise and Growth of American Politics: A Sketch of Constitutional Development*. New York: Da Capo Press.
- Forde, Steven. 1989. *The Ambition to Rule: Alcibiades and the Politics of Imperialism in Thucydides*. Ithaca, NY: Cornell University Press.
- Frisch, Morton J. 1987. "Executive Power and Republican Government--1787." *Presidential Studies Quarterly*. 27: pp. 281-91.
- Genovese, Michael A. 1995. *The Presidential Dilemma: Leadership in the American System*. New York: HarperCollins.
- Goodin, Robert E. 1996. "Institutionalizing the Public Interest: The Defense of Deadlock and Beyond." *American Political Science Review*. 90: 331-43.
- Grant, Ruth W. and Stephen Grant. 1981. "The Madisonian Presidency." In *The Presidency in the Constitutional Order*, ed. Joseph M. Bessette and Jeffrey Tulis. Baton Rouge: Louisiana State University Press.
- Greenstein, Fred. I. 1977. "Change and Continuity in the Modern Presidency." In *The New American Political System*. ed. Anthony King. Washington D.C.: American Enterprise Institute.
- Hamilton, Alexander. 1904. *The Works of Alexander Hamilton: Volumes I-X*. ed. Henry Cabot Lodge. New York: G.P. Putnam's Sons.
- Hamilton, Alexander, James Madison, and John Jay. 1937. *The Federalist: A Commentary on the Constitution of the United States*. New York: The Modern Library.
- Hamilton, Alexander, and James Madison. 1976. *Letters of Pacificus and Helvidius*. New York: Scholars' Facsimiles and Reprints.
- Harlow, Ralph Volney. 1917. *The History of Legislative Methods in the Period Before 1825*. New Haven, CT: Yale University Press.
- Hoekstra, Douglas J. "The politics of Politics: Skowronek and presidential research."

- Presidential Studies Quarterly*. 29: 657-71.
- Hoekstra, Douglas J. 1997. "Presidential Beliefs and the Reagan Paradox." *Presidential Studies Quarterly*. 27: 429-50.
- Hoekstra, Douglas J. 1989. "Neustadt, Barber, and Presidential Statesmanship: The Problem of Lincoln." *Presidential Studies Quarterly*. 19: 184-99.
- Hofstadter, Richard. 1973. *The American Political Tradition and the Men Who Made It*. New York: Vintage Books.
- Holland, Kenneth M. 1984. "The War Powers Resolution: An Infringement on the President's Constitutional and Prerogative powers." In *The Presidency and National Security Policy*. New York: Center for the Study of the Presidency.
- Hook, Steven W., John Spanier. *American Foreign Policy Since WWII*. 15th Edition. Washington, D.C.: CQ Press.
- How Democratic is the Constitution?* ed. Robert A. Goldwin and William A. Schambra. Washington D.C.: American Enterprise Institute for Public Policy Research.
- Howe, Daniel Walker. 1979. *The Political Culture of the American Whigs*. Chicago: The University of Chicago Press.
- Hughes, Emmet John. 1972. *The Living Presidency: The Recourses and Dilemmas of the American Presidential Office*. New York: Coward, McCann & Geoghegan, Inc.
- Huyler, Jerome. 1995. *Locke in America: The Moral Philosophy of the Founding Era*. Lawrence, KS: University Press of Kansas.
- Jaffa, Harry V. 1959. *Crisis of the House Divided*. Garden City, NY: Doubleday and Company, Inc.
- Jillson, Calvin C. and Cecil L. Eubanks. 1984. "The Political Structure of Constitution Making: The Federal Convention of 1787." *American Journal of Political Science* 28: 435-458.
- Jillson, Calvin C. and Rick K. Wilson. 1994. *Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress 1774-1789*. Stanford, CA: Stanford University Press.
- Johnstone, Robert M. Jr. 1978. *Jefferson and the Presidency: Leadership in the Young Republic*. Ithaca: Cornell University Press.
- Josephson, Peter. 2002. *The Great Art of Government: Locke's Use of Consent*. Lawrence, KS: University Press of Kansas.

- Kallenbach, Joseph E. 1966. *The American Chief Executive: The Presidency and the Governorship*. New York: The University of Michigan.
- Kesler, Charles. R. 1984. "Woodrow Wilson and the Statesmanship of Progress." In *Natural Right and Political Right: Essays in Honor of Harry V. Jaffa*. Eds. Thomas B. Silver and Peter W. Schramm. Durham, North Carolina: Carolina Academic Press.
- Ketcham, Ralph. 1984. *Presidents Above Party: The First American Presidency, 1789-1829*. Chapel Hill, NC: University of North Carolina Press.
- Knott, Stephen F. 2002. *Alexander Hamilton and the Persistence of Myth*. Lawrence, KS: University Press of Kansas.
- Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.
- Koenig, Louis W. 1964. *The Chief Executive*. New York: Harcourt, Brace & World, Inc.
- Koritansky, John C. 1989. "Alexander Hamilton and the Presidency." In *Inventing the American Presidency*, ed. Thomas E. Cronin. Lawrence, Kansas: University Press of Kansas.
- Lawler, Peter Augustine. 1987. "The Federalist's Hostility to Leadership and the Crisis of the Contemporary Presidency." *Presidential Studies Quarterly*. 17: pp.711-23.
- Laracey, Mel. 2002. *Presidents and the People: The Partisan Story of Going Public*. College Station, TX: Texas A&M University Press.
- Levinson, Sanford. 1988. *Constitutional Faith*. Princeton, NJ: Princeton University Press.
- Levy, David. 1985. *Herbert Croly of the New Republic*. Princeton, NJ: Princeton University Press.
- Lincoln, Abraham. 1946. *Abraham Lincoln: His Speeches and Writings*. ed. Roy P. Basler. Cleveland, OH: Da Capo Press.
- Lincoln, Abraham. 1953. *The Collected Works of Abraham Lincoln Volumes 1-8*. ed. Roy P. Basler. New Brunswick, New Jersey: Rutgers University Press.
- Locke, John. 1988. *Two Treatises of Government*. ed. Peter Laslett. Cambridge: Cambridge University Press.

- Loss, Richard. 1990. *The Modern Theory of Presidential Power: Alexander Hamilton and the Corwin Thesis*. New York: Greenwood Press.
- Loss, Richard. 1982. "Alexander Hamilton and the Modern Presidency: Continuity or Discontinuity?" *Presidential Studies Quarterly*. 12: 6-25.
- Lowi, Theodore J. 1985. *The Personal President: Power Invested, Promise Unfulfilled*. Ithaca, NY: Cornell University Press.
- Machiavelli, Niccolo. 1998. *The Prince*. translated by Harvey C. Mansfield. Chicago: University of Chicago Press.
- Madison, James. 1902. *The Writings of James Madison Volumes I-IX*. ed. Gaillard Hunt. New York: G.P. Putnam and Sons.
- Madison, James. 1966. *Notes of Debates in the Federal Convention of 1787*. ed. James Koch. Athens, OH: Ohio University Press.
- Mansfield, Harvey C. 1989. *Taming the Prince: The Ambivalence of Modern Executive Power*. New York: Collier Macmillan Publishers.
- Mansfield, Harvey C. 1996. *Machiavelli's Virtue*. Chicago: The University of Chicago Press.
- Manzer, Robert A. 1996. "Hume on Pride and Love of Fame." *Polity*. 28: 333-55.
- Manzer, Robert A. 2001. "A Science of Politics: Hume, The Federalist, and the Politics of Constitutional Attachment." *American Journal of Political Science*. 45: 508-18.
- Mayhew, David. 1974. *Congress: The Electoral Connection*. New Haven: Yale University Press.
- McDonald, Forrest. 1958. *We the people: The economic origins of the Constitution*. Chicago: University of Chicago Press.
- McDonald, Forrest. 1994. *The American Presidency: An Intellectual History*. Lawrence, KS: University Press of Kansas.
- McCarty, Nolan. "Presidential Vetoes in the Early Republic." Working Paper presented at Michigan State University.
- McGuire, Robert A. 1988. "Constitution Making: A Rational Choice Model of the Federal Convention." *American Journal of Political Science* 32: 483-522.
- McNamara, Peter. 1999. "Alexander Hamilton, the Love of Fame, and Modern

- Democratic Statesmanship." In *The Noblest Minds: Fame, Honor, and the American Founding*. ed. Peter McNamara. Lanham, MD: Rowman & Littlefield Publishers, Inc.
- The Messages and Papers of the Presidents, 1789-1897*. ed. James D. Richardson. 1896. Washington D.C.: United States Government Printing Office.
- Miller, Gary J. 1993. "Formal Theory and the Presidency." In *Researching the Presidency: Vital Questions, New Approaches*, ed. George C. Edwards III, John H. Kessel, Bert A. Rockman. Pittsburgh: University of Pittsburgh Press.
- Miller, Joshua. 1988. "The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty." *Political Theory*. 16: 99-119.
- Moe, Terry M. 1990. "Political Institutions: The Neglected Side of the Story." *Journal of Law, Economics, and Organization*. 6: 213-53.
- Moe, Terry M. 1993. "Presidents, Institutions, and Theory." In *Researching the Presidency: Vital Questions, New Approaches*, ed. George C. Edwards III, John H. Kessel, Bert A. Rockman. Pittsburgh: University of Pittsburgh Press.
- Moe, Terry M. and Scott A. Wilson. 1994. "Presidents and the Politics of Structure." *Law and Contemporary Problems*. 57: 1-44.
- Moe, Terry M. and William G. Howell. 1999. "Unilateral Action and Presidential Power: A Theory." *Presidential Studies Quarterly*. 29: 850-72.
- Myers, Peter C. 1998. *Our Only Star and Compass: Locke and the Struggle for Political Rationality*. New York: Rowman and Littlefield Publishers, Inc.
- Neely, Mark E. Jr. 1991. *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. New York: Oxford University Press.
- Neustadt, Richard. 1991. *Presidential Power and the Modern Presidents*. New York: The Free Press.
- Newell, W.R. 1983. "Tyranny and the Science of Ruling in Xenophon's 'Education of Cyrus.'" *The Journal of Politics* 45: 889-906.
- Nichols, David. 1994. *The Myth of the Modern Presidency*. University Park, PA: The Pennsylvania State University Press.
- Nichols, David. 2000. "Republican Empire: Alexander Hamilton on War and Free Government: A Review." *Presidential Studies Quarterly*. 30: pp.209-212.
- Oliver, Frederick Scott. 1923. *Alexander Hamilton: An Essay on American Union*. New

York: G.P. Putnam's Sons.

Orren, Karen and Stephen Skowronek. 1995. "Order and Time in Institutional Study: A Brief for the Historical Approach." In *Political Science in History*. ed. James Farr, John S. Dryzek, and Stephen T. Leonard. New York: Cambridge University Press

Pangle, Thomas L. 1987. "Executive Energy and Popular Spirit in Lockean Constitutionalism." *Presidential Studies Quarterly*. 27: pp. 253-65.

Pangle, Thomas L. 1988. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke*. Chicago: The University of Chicago Press.

Peterson, Paul C. 1981. "The Problem of Consistency in the Statesmanship of James Madison." In *The American Founding: Politics, Statesmanship, and the Constitution*. ed. Ralph Rossum and Gary L. McDowell. Port Washington, NY: Kennikat Press.

Peterson, Paul E. 1994. "The President's Dominance in Foreign Policy Making." *Political Science Quarterly* 109: pp.215-34.

Pious, Richard M. 1979. *The American Presidency*. New York: Basic Books, Inc.

Pyle, Christopher H., Richard M. Pious. 1984. *The President, Congress and the Constitution*. New York: Free Press.

Rahe, Paul. 1992. *Republics Ancient and Modern*. Chapel Hill, NC: University of North Carolina Press.

Rakove, Jack N. 1990. "Making Foreign Policy--The View from 1787." In *Foreign Policy and the Constitution*. Washington D.C.: The AEI Press.

Randall, J.G. 1963. *Constitutional Problems Under Lincoln*. Gloucester, MA: Peter Smith.

Read, James H. *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson*. Charlottesville, VA: University Press of Virginia.

The Records of the Federal Convention of 1787: Volume III, ed. Max Farrand. 1966. New Haven, CT: Yale University Press

Remini, Robert V. 1967. *Andrew Jackson and the Bank War: A Study in the Growth of Presidential Power*. New York: W.W. Norton & Company.

Resnick, David. 1992. "Rationality and the *Two Treatises*." In *John Locke's Two*

- Treatises of Government: New Interpretations.* Ed. Edward J. Harpham. Lawrence, KS: University Press of Kansas.
- Riker, William H. 1984. "The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice." *American Political Science Review* 78: 1-16.
- Riker, William H. 1990. "Political Science and Rational Choice." In *Perspectives on Positive Political Economy*. Ed. James E. Alt and Kenneth A. Shepsle. Cambridge: Cambridge University Press.
- Riker, William. 1996. *The Strategy of Rhetoric: Campaigning for the American Constitution*. New Haven: Yale University Press.
- Roosevelt, Theodore. 1906. *Oliver Cromwell*. New York: Charles Scribner's Sons.
- Roosevelt, Theodore. 1954. *The Letters of Theodore Roosevelt Volumes 1-8*. Cambridge, MA: Harvard University Press.
- Roosevelt, Theodore. 1958. *The Autobiography of Theodore Roosevelt*. Wayne Andrews, ed. New York: Scribner.
- The Roots of Political Philosophy: Ten Forgotten Socratic Dialogues*. 1987. ed. Thomas L. Pangle. Ithaca, NY: Cornell University Press.
- Rosano, Michael J. 2003. "Liberty, Nobility, Philanthropy, and Power in Alexander Hamilton's Conception of Human Nature." *American Journal of Political Science* 47: 61-74.
- Rosen, Gary. 1999. *American Compact: James Madison and the Problem of Founding*. Lawrence, KS: University Press of Kansas.
- Rosenbloom, David H. "Presidential power and the Courts." In *The American Presidency*. ed. Harry A. Bailey and Jay M. Shafritz. Chicago: Dorsey Press.
- Rossiter, Clinton. 1948. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Princeton, NJ: Princeton University Press.
- Rossiter, Clinton. 1960. *The American Presidency*. New York: The New American Library.
- Rossiter, Clinton. 1964. *Alexander Hamilton and the Constitution*. New York: Harcourt, Brace, and World.
- Schlesinger, Arthur M. 1953. *The Age of Jackson*. Boston: Little, Brown, and Company.

- Schlesinger, Arthur M. 1973. *The Imperial Presidency*. Boston: Houghton Mifflin Company.
- Schlesinger, Joseph A. 1991. *Political Parties and the Winning of Office*. Ann Arbor, MI: University of Michigan Press.
- Schmitt, Gary J. 2000. "Washington's Proclamation of Neutrality: Executive Energy and the Paradox of Executive Power." *The Political Science Reviewer* 39: 121:159.
- Schmitt, Gary J. 1989. "Thomas Jefferson and the Presidency." In *Inventing the American Presidency*, ed. Thomas E. Cronin. Lawrence, Kansas: University Press of Kansas.
- Scigliano, Robert. 1981. "The War Powers Resolution and the War Powers." In *The Presidency in the Constitutional Order*, ed. Joseph M. Bessette and Jeffrey Tulis. Baton Rouge: Louisiana State University Press.
- Scigliano, Robert. 1989. "The President's 'Prerogative Power.'" In *Inventing the American Presidency*, ed. Thomas E. Cronin. Lawrence, Kansas: University Press of Kansas.
- Sedgwick, Jeffrey L. 1986. "Executive Leadership and Administration: Founding Versus Progressive Views." *Administration and Society* 17: 411-32.
- Sedgwick, Jeffrey L. 1988. "James Madison and the Problem of Executive Character." *Polity* 21: 6-23.
- Shepsle, Kenneth A. and Mark S. Bonchek. *Analyzing Politics: Rationality, Behavior, and Institutions*. New York: W.W. Norton & Company.
- Shogan, Robert. 1999. *Hard Bargain: How FDR Twisted Churchill's Arm, Evaded the Law, and Changed the Role of the American Presidency*. Boulder, CO: Westview Press.
- Skowronek, Stephen. 1982. *Building A New American State: The Expansion of National Administrative Capacities, 1877-1920*. New York: Cambridge University Press.
- Skowronek, Stephen. 1997. *The Politics Presidents Make: Leadership From John Adams to George Bush*. Cambridge, MA: Belknap Press.
- Skowronek, Stephen. 1999. "Theory and History, Structure and Agency: Comment on D. Hoekstra." *Presidential Studies Quarterly* 29: 672-81.
- Skowronek, Stephen. 2002. "Presidency and American Political Development: A Third Look." *Presidential Studies Quarterly* 32: 743-52.

- Smith, James Allen. 1907. *The Spirit of American Government*. New York: Macmillan.
- Soltan, Karol, Eric M. Uslaner, and Virginia Haufler, eds. 1998. *Institutions and Social Order*. Ann Arbor: University of Michigan Press.
- Spitzer, Robert J. 1988. *The Presidential Veto: Touchstone of the American Presidency*. Albany, NY: State University of New York Press.
- Sprague, Dean. 1965. *Freedom Under Lincoln*. Boston: Houghton Mifflin.
- Stauffer, Devin. 2001. *Plato's Introduction to the Question of Justice*. Albany, NY: State University of New York Press.
- Stettner, Edward A. 1993. *Shaping Modern Liberalism: Herbert Croly and Progressive Thought*. Lawrence, KS: University Press of Kansas.
- Storing, Herbert. 1981. *What the Anti-Federalist Were For*. Chicago: University of Chicago Press.
- Stourzh, Gerald. 1970. *Alexander Hamilton and the Idea of Republican Government*. Stanford, CA: Stanford University Press.
- Strauss, Leo. 1958. *Thoughts on Machiavelli*. Chicago: University of Chicago Press.
- Tarcov, Nathan. 1990. "Principle, Prudence, and the Constitutional Division of Foreign Policy." In *Foreign Policy and the Constitution*. Washington D.C.: The AEI Press.
- Thach, Charles C. Jr. 1923. *The Creation of the Presidency 1775-1789: A Study in Constitutional History*. Baltimore: Johns Hopkins Press.
- Tribe, Lawrence. 2001. "Trial by Fury." *The New Republic*. December 10, 2001: 18-20.
- Tulis, Jeffrey. 1987. *The Rhetorical Presidency*. Princeton, N.J.: Princeton University Press.
- Tulis, Jeffrey. 1991. "The Constitutional Presidency in American Political Development." In *The Constitution and the American Presidency*. eds. Martin L. Fausold and Alan Shank. Albany, NY: State University of New York Press.
- Tulis, Jeffrey. 1994. "The Two Constitutional Presidencies." In *The Presidency and the Political System*, ed. Michael Nelson. Washington, DC: CQ Press.
- Velasquez, Eduardo A. 1996. "Rethinking America's Modernity: Natural Law, Natural

- Rights and the Character of James Wilson's Liberal Republicanism." *Polity*. 29: 193-220.
- Velvel, Lawrence R. 1970. "Undeclared War and Civil Disobedience: The American System in Crisis." New York: Dunellen Co.
- Walling, Karl-Friedrich. 1995. "Was Alexander Hamilton a Machiavellian Statesman?" *Review of Politics*. 57: 419-47.
- Walling, Karl-Friedrich. 1999. *Republican Empire: Alexander Hamilton on War and Free Government*. Lawrence, KS: University Press of Kansas.
- Watson, Richard A. 1993. *Presidential Vetoes and Public Policy*. Lawrence, KS: University Press of Kansas.
- Wayne, Stephen J. 1983. "Approaches". In *Studying the Presidency*, ed. George C. Edwards and Stephen J. Wayne. Knoxville, TN: The University of Tennessee Press.
- Weaver, David R. 1997. "Leadership, Locke, and the Federalist." *American Journal of Political Science* 42: 420-446.
- Weinberger, Jerry. "Pious Princes and Red-Hot Lovers: The Politics of Shakespeare's *Romeo and Juliet*." *The Journal of Politics* 65: 350-75.
- White, Leonard D. 1948. *The Federalists: A Study in Administrative History 1789-1801*. New York: The Free Press.
- White, Leonard. D. 1958. *The Republican Era: A Study in Administrative History 1869-1901*. New York: The Free Press.
- Wildavsky, Aaron. 1966. "The Two Presidencies." *Transaction* 7-14.
- Wilson, Woodrow. 1893. *An Old Master and Other Political Essays*. New York: Charles Scribner's Sons.
- Wilson, Woodrow. 1908. *Constitutional Government in the United States*. New York: Columbia paper back edition.
- Wilson, Woodrow. 1925. *College and State: Educational, Literary, and Political Papers (1875-1913) Volumes 1-2*. New York: Harper and Brothers Publishers.
- Wood, Gordon S. 1969. *The Creation of the American Republic*. New York: W.W. Norton & Company.
- Wood, Gordon S. 1991. *The Radicalism of the American Revolution*. New York:

Vintage Books.

Zentner, Scot J. 1994. "Liberalism and Executive Power: Woodrow Wilson and the American Founders." *Polity*. 26: 579-99.

Zuckert, Michael P. 2002. *Launching Liberalism: On Lockean Political Philosophy* Lawrence, KS: University Press of Kansas.

Zuckert, Michael P. 1994. *Natural Rights and the New Republicanism*. Princeton, NJ: Princeton University Press.

MICHIGAN STATE UNIVERSITY LIBRARIES



3 1293 02504 4284