Article II Vests Executive Power, Not the Royal Prerogative

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Article II of the United States Constitution vests "the executive power" in the President. For more than two hundred years, advocates of presidential power have claimed that this phrase was originally understood to include a bundle of national security and foreign affairs authorities. Their efforts have been highly successful: among constitutional originalists, this so-called Vesting Clause Thesis is now conventional wisdom. But it is also demonstrably wrong.

Based on an exhaustive review of the eighteenth-century bookshelf, this article shows that the ordinary meaning of "executive power" referred unambiguously to a single, discrete, and potent authority: the power to execute law. This enforcement role was constitutionally crucial. Substantively, however, it extended only to the implementation of legal norms created by some other authority. It wasn't just that the executive power was subject to legislative influence in a crude political sense; rather, the power was conceptually an empty vessel until there were laws or instructions that needed executing.

There was indeed a term of art for the Crown's non-statutory powers, including its various national security and foreign affairs authorities. But as a matter of well-established legal semantics, that term was "prerogative." The other elements of prerogative—including those relating to national security and foreign affairs—were possessed in addition to *"the executive power" rather than as* part of *it.*

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Introduction

What would happen if the President had no qualms about violating the law? Say he is fighting terrorism and wants to deploy wiretaps prohibited by the statutory surveillance framework[1] and an interrogation program that violates federal criminal law.[2] Or imagine he wants to conduct an unauthorized humanitarian intervention, but runs into a statutory time limit requiring him to cease hostilities.[3] What if a statute requires U.S. passports to include a diplomatically provocative term, but the President wants the State Department to leave it out?[4] Different though the stakes and specifics of these questions may be, their underlying structure is identical. In each hypothetical, a presidential policy—to wiretap, torture, bomb, or scriven—is prohibited by existing legislation. In each hypothetical, the prohibition is too clear to be finessed by clever statutory interpretation. And in each hypothetical, lawyers have to decide what will give way. Does the statute constrain the president? Or does executive power trump the statute?

A leading scholarly view—shared by at least one current member of the Supreme Court[5] and asserted with increasing persistence by the executive branch itself[6]—is that

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[1] Cf. Joint Inspectors General, Unclassified Report on the President's Surveillance Program 11, 13 (July 10, 2009) (quoting an unreleased OLC memo's assertion that the Foreign Intelligence Surveillance Act "'cannot restrict the President's ability to engage in warrantless searches that protect the national security'").

[2] Cf. Office of Legal Counsel, Memorandum to William J. Haynes II, Department of Defense General Counsel, Military Interrogation of Alien Unlawful Combatants Held outside the United States 18–19 (Mar 14, 2003) ("[I]f an interrogation method arguably were to violate" federal statutes criminalizing assault, maiming, and war crimes, those statutes "would be unconstitutional as applied in this context").

[3] Cf. Dep't of Def. & Dep't of State, Report from the Administration to Congress: United States Activities in Libya 5 (2011) ("The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution…").

[4] Cf. Zivotofsky v. Kerry, 576 U.S. ___ (2016) (permitting the administration to ignore a statute that entitled a Jerusalem-born U.S. citizen to have his passport list his place of birth as "Israel").

[5] *Zivotofsky*, 576 U.S. at __ (Thomas, concurring in part and dissenting in part) ("Founding-era evidence reveals that the 'executive Power' included the foreign affairs powers of a sovereign State.… This view of executive power was widespread at the time of the framing of the Constitution.").

[6] See, e.g., Office of Legal Counsel, Authority to Use Military Force in Libya (Apr. 1, 2011) ("This independent authority of the President … derives from the President's 'unique responsibility,' as Commander in Chief *and Chief Executive* for 'foreign and military affairs,' as well as national security…. [U]nder 'the historical gloss on *the "executive Power"* vested in Article II of the Constitution,' the President bears the 'vast share of responsibility for the conduct of our

cases like these often turn on the President's constitutional possession of "the executive power." Usually called the Vesting Clause thesis, this view is said to date to a post-Ratification pamphlet written by Alexander Hamilton.[7] It rests on a simple claim about the original understanding of the Constitution. Specifically: "the executive power" was a term of art for a particular bundle of substantive powers held by the British Crown. In the same way that bestowing agency, guardianship, or bailment powers would convey a well-understood package of powers to an agent, guardian, or bailee, the vesting of "executive power" is said to have conveyed a bundle of authorities usefully associated with kingship.[8]

From that starting point, the Vesting Clause thesis derives the following rule: the constitutional President was understood to possess the same powers and privileges as the eighteenth-century British Crown, except where specifically limited by other provisions of the Constitution. In its strongest form—which suggests that any limitation or reassignment would require very clear constitutional text—the Vesting Clause thesis yields a powerful presumption of indefeasible[9] presidential authority in the arenas of

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foreign relations,' … and accordingly holds 'independent authority "in the areas of foreign policy and national security."'") (citations omitted; emphasis added); Brief for the United States, *Zivotofsky v. Kerry*, No. 13-628 ("The President's recognition power is further grounded in the Constitution's assignment of the bulk of foreign-affairs powers to the President. Article II provides that *'[t]he executive Power* shall be vested in a President of the United States of America.' …") (emphasis added); Brief for the United States, Trump v. International Refugee Assistance Project, No. 16-1436 ("'The exclusion of aliens is a fundamental act of sovereignty' that both is an aspect of the 'legislative power' and also 'is inherent in *the executive power* to control the foreign affairs of the nation.') (emphasis added). Cf. Youngstown Sheet & Steel v. Sawyer, 343 U.S. 579 ("The [government's] contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that 'the executive Power shall be vested in a President…'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'").

[7] Pacificus No. 1 (1793) ("The enumeration [of specific presidential authorities later in Article II] ought therefore to be considered as intended merely to specify the principal articles implied in the definition of executive power [in the Vesting Clause]; leaving the rest to flow from the general grant of that power….").

[8] Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 561 n.69 (1994) ("'[T]he executive Power' … is probably not so much a type of power as it is a grab bag of many specifically enumerated powers, all of which we think of as belonging to the Executive."). The standard title for this claim is unhelpful. The first sentence of Article II is definitely a "clause" that "vests" something. The question is *what* was vested. In the body of this article, I will refer to the dominant view as "the Royal Residuum thesis," to differentiate it from other possible readings of the Vesting Clause.

[9] This article shows that the Vesting Clause is incapable of giving rise to *any* substantive foreign affairs authority, much less an indefeasible one. I note that here because in principle, you could

foreign affairs and national security. In a world where originalism is so influential, that's a big deal—especially since executive branch interpretation often proceeds either out-of-sight or without a clear path to judicial review. Certainly the thesis loomed large in the real-world version of each controversy flagged above.

This article lays the foundation for demonstrating that, as a historical claim about the document adopted by the Founders, the Vesting Clause thesis is wrong. Historically speaking, there *was* a term of art for the basket of non-statutory powers held by the British Crown. But that term was "royal prerogative." Article II's reference to "the executive power," by contrast, referenced only one specific item in a very long list of royal authorities. Specifically, it meant the narrow but potent authority to carry out projects defined by a prior exercise of "the legislative power." As even the leading English theorist of royal absolutism explained—with unmistakable disdain—the "executive power" was nothing more than "a power of putting [the] laws in execution."[10] To be clear, even radical Whigs knew that the Crown had other powers besides the merely "executive." But as a matter of well-established legal semantics, those powers were possessed *in addition to* "the executive power" rather than as *part of* it. For this reason, the first sentence of Article II simply cannot bear the weight of the Vesting Clause thesis. It vests executive power, not the royal prerogative.

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adopt the Vesting Clause thesis while also believing that powers conveyed by the Vesting Clause are defeasible by legislative action—that is, that they are "good" only in *Youngstown* Zone Two. And indeed, a great many non-originalists do just that. See *Youngstown Sheet & Steel v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, concurring) (defining Zone Two as presidential action that has been neither authorized nor prohibited by Congress). But with few exceptions, modern residuum theorists view the suite of authorities as indefeasible—that is, good even in *Youngstown* Zone Three, see 343 U.S. at 634 (loosely defining Zone Three as presidential action that has been prohibited by Congress). This is not surprising: "If the President really has constitutional authority [under some express grant of power] to engage in certain conduct, it is very unclear why Congress should be allowed to limit its exercise, much less to make its exercise turn on the approval of other governmental actors." Gary Lawson, What Lurks Beneath: NSA Surveillance and Executive Power, 88 B.U. L. Rev. 375, 393 (2008). See also, e.g., Robert J. Delahunty & John C. Yoo, Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause, 91 Tex. L. Rev. 781, 856 (2013); Saikrishna B. Prakash & Michael D. Ramsey, Foreign Affairs and the Jeffersonian Executive: A Defense, 89 Minn. L. Rev. 1591, 1593 (2005) [hereinafter Prakash & Ramsey, The Jeffersonian Executive]; Saikrishna Prakash, Regulating Presidential Powers, 91 Cornell L. Rev. 215, 227, 236 (2005). For the most usefully rigorous classification of the clashing taxonomies in play here, see Saikrishna Bangalore Prakash, A Taxonomy of Presidential Powers, 88 B.U. L. Rev. 327, 328 (2008).

[10] Robert Filmer, *The Anarchy* 136 (1648) ("By these words of legislative, nomothetical and architectonical power, in plain English, [is understood] a power of making laws. And by gubernative and executive, a power of putting those laws in execution by judging and punishing offenders.").

If this is right, then three conclusions follow.

- First, the opening sentence of Article II vested exactly what it says: the power to execute the law, both by enforcing its negative prohibitions and by carrying out its affirmative projects. This was a mighty charge for a majestic office, and the manner of its delegation caused much anxiety. But it extended only to the implementation of substantive legal requirements and authorities that were created somewhere else. It wasn't just that the use of executive power was subject to legislative influence in a crude political sense. Rather, the power itself was fundamentally derivative. It was incapable of providing even a *defeasible* source of independent substantive authority, let alone one that was immune from legislative revision.
- Second, the Vesting Clause thesis gets the original default rule of constitutional preeminence backwards. Far from presuming that law cannot bind the President on questions of national security and foreign affairs, the Founders' Constitution presumed that the President must obey duly enacted statutes in those areas too—unless some other grant of Article II authority specifically rebutted that presumption. The contrary claim isn't just wrong; it's conceptually confused.
- Third, arguments that the President possesses a free-floating and indefeasible foreign affairs power cannot rest on historical claims about original understanding. They must rest instead on some form of what originalists call living constitutionalism—and in particular on a meticulous demonstration that such powers have in fact emerged over time.

Because the Vesting Clause thesis is so entrenched in our constitutional culture, we must uproot it systematically, first by examining the intellectual currents of the late eighteenth century, and then by attending to what the Founders actually said and did before, during, and after the ratification debates. This article is the keystone of that project. Left for another day is an examination of how the standard understanding of executive power was reflected—as it demonstrably was—in discussion and debate throughout the Founding and early Republic. But the indispensable foundation for that forthcoming work is laid here: however vigorously canonical commentators disagreed about the best allocation of government powers, the eighteenth-century *grammar* of that debate—both conceptually and semantically—was well-established. Absent some evidence that the Founders ignored this background and adopted a basically unprecedented meaning of "executive power," the Article II Vesting Clause would have been understood as vesting the wholly derivative authority to execute the laws, and nothing else.

The Article is organized as follows. Part I outlines three competing views of the Article II Vesting Clause: the "Cross-Reference" theory, the "Law Execution" theory, and the "Royal Residuum" theory. Part II surveys the political history and theoretical backdrop for eighteenth-century debates about the separation of powers. Part III turns to the legal semantics of constitutional law proper. It shows that the standard term for the bundle of non-statutory powers held by the Crown was "royal prerogative," and that "executive power" referred to one distinct branch of the prerogative: the authority to execute the law. Part IV explores the reasons that residuum proponents have misunderstood the historical evidence. Part V concludes with a survey of Founding-era dictionaries, showing that they offer unanimous support for reading "executive power" as "the power to execute."

I. Three Views of the Vesting Clause

To a lay audience, the questions we started with may seem easy: surely the President isn't above the law? But under the U.S. Constitution, the legislative code only frames the question about legality; it doesn't necessarily answer it. Consider by contrast a jurisdiction where the answer really is that simple. In the United Kingdom, statutes control the Crown. Full stop. Whether courts trace the origins of the proposition to dictum from the Case of Proclamations,[11] the statutory abrogation of royal suspension and dispensation,[12] or the evolution of political conventions after the Glorious Revolution, the principle of legislative sovereignty has now been established for centuries:

> [T]he most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme…. Parliament can,

[11] See R (Miller) v. Sec'y of State, [2017] UKSC 5, paras. 44 (S.Ct.) ("In the early 17th century Case of Proclamations (1610), 12 Co Rep 74, Sir Edward Coke CJ said that 'the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm'. Although this statement may have been controversial at the time, it had become firmly established by the end of that century.").

[12] See R (Miller) v. Sec'y of State, [2017] UKSC 5, paras. 40-47 (S.Ct.) ("It is possible to identify a number of seminal events in this history, but a series of statutes enacted in the twenty years between 1688 and 1707 were of particular legal importance. Those statutes were the Bill of Rights 1688/9 and the Act of Settlement 1701 in England and Wales, the Claim of Right 1689 in Scotland, and the Acts of Union 1706 and 1707 in England and Wales and in Scotland respectively.").

> by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation...."[13]

There is thus no such thing as an indefeasible residuum of royal power that is immune from legislative interference: the Crown simply cannot act in defiance of the statutory framework.

It's more complicated in the United States. American sovereignty is famously divided—first between the federal government and the states, and then among the branches of federal government itself. It's not just that no single entity possesses unitary authority over the coercive power of the state. Even if the political institutions were to act in perfect cooperative concert, they still couldn't exercise genuinely plenary control—not even as a collective. That's because all of them are bound by the U.S. Constitution, which puts some kinds of policy choices completely off limits—such that sovereignty (whatever exactly that means) resides not in any set of political institutions, but "in" the reified American people (whoever exactly they are) on terms that are currently defined by the Constitution itself (whatever exactly that is).

The point here isn't the metaphysics of nationhood, but the pragmatics of turf wars. No American political entity possesses anything like Parliament's plenary authority and legal supremacy. To the contrary, at the federal level, the Constitution parcels out discrete legal authorities—and only those authorities—to the various players in the system. Like a corporation's founding charter or an international organization's constitutive treaty, the Constitution conveys only those powers that the stakeholders choose to convey. This gives rise to a foundational principle of American governance: any federal action that cannot trace its authority to some constitutional grant of power is, by definition, ultra vires.

And that brings us back to the questions outlined above. Unlike the U.K. Prime Minister, the American President can't figure out whether he gets to act without legislative authorization—much less in contradiction of a statute—by making grand inquiries about the locus of sovereignty. Instead, the conversation begins with a smaller-

[13] R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) (High Court decision; overruled on different grounds by U.K. S.Ct.); see also A.V. Dicey, Introduction to the Study of the Law of the Constitution 38 (1915) ("Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament"). Scholars now debate only whether Parliament could adopt radically different internal "manner and form" rules restricting its own future ability to enact legislation. Compare W.I. Jennings, The Law and the Constitution (1933) (yes) with Dicey, supra (no, at least implicitly). The U.K. courts do apply a clear statement rule to these questions: statutes do not bind the crown unless that feature is either express or a necessary implication of their structure and function. R. (Black) v. Secretary of State for Justice [2017] UKSC 81; [2018] A.C. 215.

bore question: is there some particular constitutional grant of presidential authority over this kind of wiretapping, torturing, bombing, or scrivening?[14] If he there isn't, then he can't.[15] That conclusion follows necessarily: either he has no legal authority at all (and so lacks the power ab initio) or he has only statutory authorization (and so his power is necessarily limited by the statute's restrictions). Either way, the President can't ignore the law.

So for questions like ours, the enumeration problem is central: what powers does the Constitution grant to the President? Well, it's a grab bag—and not a terribly big one. Article II begins by vesting "the executive power" in the President.[16] After specifying the details of eligibility and election, the Constitution then names the President "commander in chief of the Army and Navy of the United States" and of the state militias "when called into the actual service of the United States."[17] In the realm of foreign affairs, the President has the power to "make treaties" if two-thirds of the Senate concurs, to "receive ambassadors and other public ministers," and to "nominate" and "appoint" U.S. diplomats with senatorial consent.[18] On "extraordinary occasions," the President has the authority to convene both houses of Congress.[19] Finally, the President has an overarching obligation to "take care that the laws be faithfully executed" and must take an oath to "preserve, protect and defend the Constitution of the United States."[20] When it comes to the provisions of Article II plausibly bearing on the questions at issue, that's more or less it.[21]

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[14] Note that even if the answer is yes, the power in question might still be subject to at least certain kinds of statutory restraint. But presidentialist claims about preclusive power over wiretapping, torturing, bombing, or scrivening don't even get off the ground without at least pointing to a constitutional enumeration that starts the argument.

[15] Of course, the statute might be unconstitutional for reasons other than that it interferes with an indefeasible power of the president. Perhaps it violates some provision of the Bill of Rights. Or perhaps it exceeds the legislative authority granted by Article I to the national government.

[16] U.S. Const. art. II, § 1.
[17] U.S. Const. art. II, § 2.
[18] U.S. Const. art. II, § 3.
[19] U.S. Const. art. II, § 3.
[20] U.S. Const. art. II, § 3.
[21] To focus analytical attention, I am including only those powers that could plausibly be relevant to a presidential power to wiretap, torture, bomb, or scriven. Omitted from this list are the President's pardon power; the president's power to make various kinds of appointments of judges and other officers of the United States; and the president's power to "require the opinion, in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." U.S. Const. art. II, § 2. I also haven't mentioned the President's conditional veto, which is an authority granted him in his capacity as a participant in the legislative process. See U.S. Const. art. I, § 7.

This Article focuses on the first of these enumerations. Its text has all the romance of a human resources circular: "The executive power shall be vested in a President of the United States of America." Yet this first sentence of Article II presents what Gary Lawson calls "one of the most important questions of any kind, on any subject, under the Federal Constitution."[22] That's because "the executive power" is the last best hope of Presidents who want to take action without legislative authorization.[23] (The other enumerations are of course relevant to—and possibly preclusive of—statutes touching on the kinds of activities they authorize.[24] But the universe of such activities is not large.)

There are at least three ways to understand Article II's reference to the executive power. The first is what I will call the "Cross-Reference" theory, which understands "the executive power" as a content-free referent to the rest of Article II. This thin reading of the Vesting Clause has been embraced by Supreme Court justices,[25] legislators,[26] and a

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[22] Lawson, supra note 9, at 383. (2008) See also Michael McConnell, The President Who Would not be King 148 (manuscript) ("one of the most contested questions in constitutional law.").

[23] E.g., Ed Corwin, The President: His Office and Powers 10 (1944) (noting the tendency in constitutional interpretation to "regard[] the 'executive power' clause as an always available peg upon which to hang any and all unassigned powers relating to foreign commerce"); Lucius Wilmerding, The President and the Law, 67 Poli. Sci. Q. 321, 333 (1952) ("The defenders of residual power [argue, for example, that] the President has been granted by the Constitution itself a legal power to act in emergencies. If it be asked where in the Constitution this power is to be found, the questioner is referred to the opening sentence of Article II…."); Charles C. Thach, Jr. The Creation of the Presidency: A Study in Constitutional History, 1775-1789, 138 (1922) ("[W]hether intentional or not, [the Vesting Clause] admitted an interpretation of executive power which would give the president a field of activity wider than that outlined by the enumerated powers.").

For originalists, the practical importance of this escape valve has only increased since work by Marty Lederman, David Barron, and Ingrid Wuerth has demonstrated that the Commander-in-Chief power was historically subordinate to legislative instructions on military policy, strategy, and tactics alike. David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008); Ingrid Brunk Wuerth, International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered, 106 Mich. L. Rev. 61 (2007).

[24] Take a statute prohibiting presidential nomination of ambassadors. Most people would think the president legally entitled to ignore that statute and nominate ambassadors to his heart's content. It should be noted that—strangely to modern ears, and at obvious odds with our assumptions about constitutional textualism—a persistent thread in the Founding debates suggests that at least some of the president's textual powers could be eliminated by statute.

[25] *Youngstown Sheet & Steel*, 343 U.S. at 641 (Jackson, J., concurring) ("I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."); id., at 632 (Douglas, J., concurring) (similar). The majority opinion in *INS v. Chadha* gestures at this view as well: "When the Executive

number of academics.[27] On this view, the term is a convenient lexical handle for a grab bag of powers. The full contents of that grab bag are set out in the remainder of Article II. And nothing else goes in the bag. While this approach reads the vesting clause as substantively prefatory, it does leave the clause with one significant job: clarifying that the listed powers belong to the President and no one else. That specification is more significant than it might seem. Repulsed by even the suggestion of kingship, some early state constitutions vested such powers in a committee rather than in one individual[28]—producing exactly the kinds of indecision, ineffectiveness, and delay that you would expect. And so on the Cross-Reference theory, a muscularly centralizing Constitution responded by using the vesting clause to preclude the possibility of devolution to governance by committee.

The second understanding, which I will call the "Law Execution" theory, gives the opening clause its own independent substantive content. On this view—which has found support among Presidents,[29] Supreme Court justices,[30] and scholars[31]—"the executive

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acts, it presumptively acts in an executive or administrative capacity *as defined in Art. II*." 462 U.S. 919 (1983) (emphasis added).

[26] Daniel Webster, 9:1 Debates in Congress 463 ("By the executive power conferred on the President, the Constitution means no more than that portion which it itself creates, and which it qualifies, limits, and circumscribes").

[27] Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 49 (1994); Robert G. Natelson, The Original Meaning of the Constitution's Executive Vesting Clause: Evidence from Eighteenth-Century Drafting Practice, 31 Whittier L. Rev. 1, 35 (2009); Robert J. Reinstein, The Limits of Executive Power, 59 Am. U. L. Rev. 259, 307-308 (2009). See also Corwin, supra note 23, at 177; Louis Henkin, Foreign Affairs and the U.S. Constitution 13-14 (1972).

[28] E.g., Penn. Const., Sec. 3 (Sept. 27, 1776) ("The supreme executive power shall be vested in a president and [12-person] council"), in The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America (1909); Vt. Const., Sec. III (July 8, 1777) in id. ("The supreme executive power shall be vested in a Governor and [12-person] Council"); Md. Const. (Nov. 11, 1776) in id. (executive council with veto over various executive functions); New Hampshire Const. (Jan. 5, 1776) in id. (adding a council to the existing legislature, but no chief magistrate). See also, e.g., Del. Const., Art. 7 (chief magistrate elected by legislature) in id.; Ga. Const., Art. II (Feb. 5, 1777) (governor selected by legislature), in id.; S.C. Const., Art. III (Mar. 26, 1776), in id. (chief magistrate elected by legislature); Cf. N.Y. Const., Art XXIII (Apr. 20, 1777) in id. (vesting appointment power in a council)

[29] Cf. William Howard Taft, Our Chief Magistrate and His Powers 140 (1916) ("The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise…. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.").

power" is exactly what it sounds like: the power to execute the law. The executive power thus authorizes the President to bring that law—which before execution exists only on paper—into effect in the real world. Sometimes this might mean coercing obedience from private parties, like ticketing jaywalkers. Other times it might mean implementing an affirmative project of the legislature, like picking up the garbage. Either way, the executive power enables the President to spearhead the project of connecting legal imperative to physical reality: "Interpreting a law enacted by Congress to implement the legislative mandate," the Supreme Court tells us, "is the very essence of 'execution' of the law."[32] And no other provision of the Constitution gives it to the President as an affirmative enforcement authority rather than as a Take Care compliance obligation.

The third understanding is what I will call the "Royal Residuum" theory.[33] (It's often called the Vesting Clause Thesis, but that is an unhelpful description. All three theories have a Thesis about what is Vested by the Clause.) As described above, this understanding takes "the executive power" as a term of art referring to a well-understood bundle of authorities that went well beyond the specific enumerations elsewhere in Article II. "Because supreme executives in [many] countries had a similar basket of powers," residuum theorists argue, "it became common to speak of an 'executive power' that

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[30] E.g. Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (equating the executive power with "energetic, vigorous, decisive, and speedy execution of the laws.").

[31] E.g., Michael P. Van Alstine, Executive Aggrandizement in Foreign Affairs Lawmaking, 54 UCLA L. Rev. 309 (2006); Wilmerding, supra note 23, at 334. For some legal historians who appear to embrace this view with much less elaboration, see, e.g., M.J.C. Vile, Constitutionalism and the Separation of Powers 32 (1998); Francis Wormuth, The Origins of Modern Constitutionalism 61 (1949); William B. Gwyn, The Meaning of the Separation of Powers 5 (1965). See also possibly Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545 (2004) (discussed at greater length infra); but see Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L. J. 1725, 1778 (1996) ("[T]he Vesting Clause should not be read to grant the executive branch a prepackaged set of powers.").

[32] Bowsher v. Synar, 478 U.S. 714, 732 (1986). Michael McConnell draws a nice distinction between "executing a *law* and executing a *power*." As he puts it, "[t]he former entails carrying into effect policies set by the lawmaker, and the latter entails both the making of policy and its execution." McConnell, supra note 22, at 31 (manuscript).

[33] I am open to other suggestions for the name of this third understanding. On one hand, residuum proponents may feel this stacks the deck by associating their position with monarchy. On the other hand, its royal roots are literally the only theory on which the President possesses such power, such that objectively this title is a simple descriptive observation about a necessary logical step in the claim. I welcome suggestions for an alternative that is both distinctive, substantively significant, and accurate.

encompassed an array of powers commonly wielded by monarchs."[34] Here's a typical modern description of what went in the basket:

> Traditionally, the 'executive power' was understood at the time of the framing as including the power of war and peace, and all external relations of the nation…. The President was left with whatever remained of the traditional 'executive power' in matters of war, peace, and foreign affairs, diminished to a significant extent, but not completely, by the re-allocation of some very important, traditionally executive, powers to Congress.[35]

Leaning heavily on two eighteenth-century writers to whom I will return below,[36] these writers conclude that "[b]y using a common phrase infused with that meaning, the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power."[37] For judges who subscribe to these claims, the doctrinal implications are straightforward: "the 'executive Power' vested in the President by Article II includes the residual foreign affairs powers of the Federal Government not otherwise allocated by the Constitution."[38]

The Royal Residuum thesis has been remarkably successful. Besides express support from Supreme Court justices,[39] prominent federal legislators,[40] leading executive branch

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[34] Saikrishna Prakash, Imperial from the Beginning 31 (2015). Residuum theorists often note that law execution is among the authorities conveyed by the Article II Vesting Clause. E.g. Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 704 (2003) [hereinafter Prakash, Essential Meaning] ("the phrase 'executive power' comes from the principal or essential power of an executive—the power to execute the law").

[35] Michael Stokes Paulsen, Youngstown Goes to War, 19 Const. Comment. 215, 237-238 (2002). See also John Yoo, The Powers of War and Peace 19 (2005) (citing "political theory" and "Anglo-American constitutional history" to assert that "the executive power was understood at the time of the Constitution's framing to include the war, treaty, and other general foreign affairs powers").

[36] See infra, Part III.D (discussing Montesquieu and Rutherforth).

[37] Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 234 (2001) [hereinafter Prakash & Ramsey, Executive Power over Foreign Affairs].

[38] *Zivotofsky*, 576 U.S. at __ (Thomas, concurring in part and dissenting in part).

[39] *Youngstown Sheet & Steel*, 343 U.S. at 641 (Vinson, J., dissenting) (joined by Reed & Minton); Zivotofsky, 576 U.S. at __ (Thomas, concurring in part and dissenting in part).

[40] E.g. Sen. Kyl, 107th Congress, 2nd Session, Vol. 148, No. 41 ("[T]he President's powers include inherent executive authorities that are unenumerated in the Constitution. Thus, any ambiguities in the allocation of a power that is executive in nature--particularly in foreign affairs-should be resolved in favor of the executive branch.").

officials,[41] and at least one president,[42] it is easily the dominant historical account among modern commentators.[43] Certainly the historical claim is expressed with sufficient frequency and confidence that, particularly in the wake of its seminal modern summation by Saikrishna Prakash and Michael Ramsey,[44] I had long assumed at least some version of it to be correct. The consequences of that success are stark, at least for originalists

[41] E.g, Bradford Berenson, former Associate Counsel in White House Counsel's Office, *in* Hearing on Congress's Constitutional Power to End a War, S. Judiciary Comm , 110th Cong. (2007) ([T]he "Vesting Clause provides the President a vast reserve of implied authority to do whatever may be necessary in executing the laws and governing the nation"); Barr Memo 2018.

[42] Theodore Roosevelt, An Autobiography 357 (1903) ("The most important factor in getting the right spirit in my Administration … was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers…. [I]t was not only [the President's] 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….").

[43] In addition to the citations above, see, *e.g.,* Gary Lawson & Guy Seiman, The Jeffersonian Treaty Clause, 2006 U. Ill. L. Rev. 1 (2006) ("the 'executive Power' also includes foreign affairs powers that are not otherwise allocated to specific institutions by the Constitution"); McConnell, supra note 22, at [] ("'[E]xecutive' power in the British system was whatever governmental power was left after subtracting the powers of the Parliament and of the courts."); Phillip R. Trimble, International Law: United States Foreign Relations Law 21 (2002) ("The Framers well understood the concept of executive power in British practice, and they carefully and literally parceled out its components to different branches of the new government, but they retained the residual executive power in the President. Unless the Vesting Clause is meaningless it incorporates the unallocated parts of Royal Prerogative."); Charles J. Cooper, What the Constitution Means by Executive Power (symposium) 43 U Miami L. Rev. 165, 177 (1988) ("[T]he founding generation understood executive power as conferring a broad authority that extended beyond the mere execution of the laws" and included "the conduct of foreign relations"); Eugene V. Rostow, President, Prime Minister, or Constitutional Monarch? (1989) ("The international powers of the nation are … to be deduced … their matrix in international law… In this [area]…, Congress is entrusted with specified legislative powers and the President with 'the' executive power of the United States, save for a number of exceptions noted in the document itself…."); Robert F. Turner, Repealing the War Powers Resolution (1991) (""); John C. Yoo, Treaty Interpretation and the False Sirens of Delegation, 90 Cal. L. Rev. 1305, 1309 (2002) ("Article II's Vesting Clause establishes a rule of construction that any unenumerated executive power, such as that over treaty interpretation, must be given to the President."); Michael D. Ramsey, The Textual Basis of the President's Foreign Affairs Power, 30 Harv. J.L. & Pub. Pol'y 141 (2006) ("The eighteenth-century meaning of "executive" power included foreign affairs powers as well as the more familiar power to execute the law. Thus, Article II, Section 1 of the U.S. Constitution—which states that "the executive Power shall be vested in a President"—grants, in eighteenth-century terms, the power to execute the law plus foreign affairs powers.").

[44] Prakash & Ramsey, Executive Power over Foreign Affairs, supra note 37, at 253-54.

willing to stick with the full logical consequences. If the Vesting Clause really is a royal residuum, then the President is endowed—it would seem indefeasibly—with those aspects of kingly authority that have not been reallocated to other actors.

Take, for example, the now-retracted memo in which the Office of Legal Counsel advised George W. Bush's Defense Department that it could torture suspected terrorists without legal consequences for committing war crimes. The Vesting Clause was front and center in explaining why the relevant criminal statutes would be unconstitutional as applied to torture by federal officials:

> First, we discuss the constitutional foundations of the President's power, as Commander in Chief and Chief Executive, to conduct military operations during the current armed · conflict.… The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause and by the Commander-in-Chief Clause.... [T]he structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President. Article II, Section I makes this clear by stating that the 'executive Power shall be vested in a President of the United States of America.'"[45]

In the same vein, the Office of Legal Counsel later advised the Attorney General that, because of the president's "unique responsibility, as Commander in Chief and Chief Executive, for foreign and military affairs as well as national security," Barack Obama had constitutional authority to initiate the use of force against Libya without congressional approval.[46] And Justice Thomas argued that the Vesting Clause, standing alone, justified presidential defiance of a statute that required the U.S. to issue a passport listing "Israel" as the place of birth for a young boy born in Jerusalem.[47]

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[45] Office of Legal Counsel, Memorandum to William J. Haynes II, Department of Defense General Counsel, Military Interrogation of Alien Unlawful Combatants Held outside the United States 18–19 (Mar 14, 2003) (devoting most of the first paragraph of a section titled "Commander-in-Chief Authority" to Vesting Clause arguments); see also id. at 11 ("Because both '[t]he executive power and the command of the military and naval forces is vested in the President,' the Supreme Court has unanimously stated that it is '*the President alone* [] who is constitutionally invested with *the entire charge of hostile operations*.' Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added).").

[46] Office of Legal Counsel, Authority to Use Military Force in Libya 6 (April 1, 2011) (internal quotations omitted) (citing the Vesting Clause, the Commander-in-Chief Clause, and "the historical gloss on the 'executive power' vested in Article II").

[47] Zivotofsky, 576 U.S. at __ (Thomas, concurring in part and dissenting in part).

To be sure, the Royal Residuum has met strong resistance as a basis for modern *doctrine*—certainly it has never commanded a majority on the Supreme Court. The principal textual criticism has been the redundancy it creates within Article II.[48] Other resistance has focused either on disputing the size of the historical bundle or contesting its methodological relevance today. As a historical matter, there are ongoing disputes even among proponents of the Royal Residuum about just how far the package of powers was understood to extend.[49] There is likewise at least some disagreement among advocates of the theory about whether the royal residuum sits in *Youngstown* Zone Two or Zone Three—that is, whether its contents were defeasible by an otherwise appropriate act of Congress.[50] And as a methodological matter, some critics deny that the original understanding (even where discernible) should decide modern separation of powers controversies. They emphasize, with strong support in Supreme Court doctrine, that considerations like functionalism and evolving historical practice also play an important role.[51]

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[48] If "the executive power" presumptively includes the military and diplomatic authorities of the king, for example, then why should the Constitution specify the President's role as the Commander in Chief or his authority to receive ambassadors? Residuum theorists have responses to some, but not all, of these surplusage concerns. For example, they explain Article II's specific reference to the President's treaty power and appointments power (both of which were included in the royal prerogative) as being instances not of redundancy, but of qualification of the residuum. I tend to think the Framers were not the superhumanly "fastidious draftsmen" of our fondest imaginings. Raoul Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1 (1972).

[49] See, e.g., Calabresi & Prakash, supra note 9, at 569 n.108 ("Professor Calabresi … emphasizes that any constitutional residuum that exists is very limited in scope and reflects the fact that the President's powers are necessarily something of a historical grab bag of anomalies that could not be given to anyone else."). Cf. Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 22 (1993) ("Defenders of the 'residuum' position must be awarded the palm…. The real question, however, is the size of the palm."); Harold Hongju Koh, The National Security Constitution 76 (1990) (discussing "that nebulous grant" of executive power).

[50] As noted in the Introduction, this article focuses on the content of the powers conveyed by the vesting clause, rather than the subsequent question of whether any such powers are defeasible. If the president has no inherent power to wiretap, bomb, torture, or science, it follows a fortiori that he can't do so in violation of a statutory prohibition. For residuum theorists who appear to view at least some Vesting Clause authorities as defeasible, see Monaghan, supra note 49, at 23 ("an acceptable residuum argument ... provides no basis for a claim that the President can disregard the will of Congress…."); McConnell, supra note 22; see also Roosevelt, supra note 42, at [] ("limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers").

[51] *Zivotofsky v. Kerry*, 576 U.S. __ (2015); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). See generally *Youngstown Sheet & Steel*, 343 U.S. at 610-611 ("[A] systematic, unbroken, executive

Among constitutional originalists, however, the residuum thesis remains dominant. At most, criticism of the historical claim—exemplified by the work of Martin Flaherty and Curt Bradley[52]—challenges particular bits of evidence offered by residuum theorists and argues that the Founders had more amorphous and varying views than residuum theory recognizes.[53] The real mistake of residuum theory, Flaherty and Bradley argue, is what they consider an ahistorical decision to seek an "essential" definition of executive power in the first place. In their view, that whole enterprise is misconceived from the get-go, partly because of "complexity within eighteenth century political theory" and partly because "the constitutional Founders were [demonstrably] functionalists, willing to deviate from pure political theory and essentialist categories."[54] As Flaherty has written

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practice, long pursued to the knowledge of the Congress and never before questioned … may be treated as a gloss on 'executive Power' vested in the President by s 1 of Art. II."); Taft, supra note 29, at [] ("Executive power is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution."). Cf. Robert Scigliano, The President's "Prerogative Power" , in Inventing the American Presidency 247 (Cronin, ed., 1989) ("This is not the place to settle the dispute between Hamilton and Madison over the scope of the executive power—whether it relates to the execution of the laws … or whether it relates also to foreign affairs. I merely observe that Hamilton's conception has largely won out in the practice of American government.").

Note here, however, that even the Supreme Court's discussion of evolving practice appears to lash that practice to the textual hook of "executive power": "[T]he historical gloss on the 'executive Power' … has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (citation omitted).

[52] E.g., Bradley & Flaherty, supra note 31, at 551-552 (2004) (rejecting "executive power essentialism," defined as "the proposition that the Founders had in mind, and intended the Constitution to reflect, a conception of what is 'naturally' or 'essentially' within executive power"); Flaherty, Most Dangerous Branch, supra note 31, at 1774, 1729 (1996) ("seek[ing] to construct a narrative of constitutional development based not solely or even principally on primary materials, but rather on the wealth of historical scholarship that has recently been devoted to the Founding").

[53] See also, e.g., Natelson, supra note 27, at 35 (arguing that a structural comparison to power-granting charters from the Founding era supports the Cross-Reference Theory of executive power); Reinstein, supra note 27, at 307-308 (2009) (arguing that the Constitution's explicit textual allocation of other royal prerogatives supports the Cross-Reference Theory of executive power). Given the lead their work takes in challenging the affirmative evidence offered by residuum theorists, I am especially grateful to Curt and Marty for their close read and comments on this article. While this article suggests that they have erred in some important respects, they have the "music" of the Founding right—our bottom line on the separation of powers framework is quite close—and I have immense respect for the precision and care of their work.

[54] Bradley & Flaherty, supra note 31, at 551-552. This commitment frames their work as a careful series of engagements with individual elements of evidence previously offered by residuum

elsewhere, "the sweep of events [following the American Revolution] belies the assumption that the formalist conception was a constant and renders improbable the notion that it became the consensus."[55] It verges on law office history to suggest otherwise.

In practice, this fundamentally equivocal criticism reduces to a caution flag of uncertainty, contingency, and historical contestation[56]—a sort of standard historian's warning that likely underwhelms executive branch lawyers and judges who must reach a binary yes-or-no decision. As Aziz Huq's generally sympathetic account explains:

> the leading work [criticizing the Royal Residuum and associated theories] finds the text inescapably ambivalent. Such work instead situates the Constitution in what is described as a fluid, contested, and unstable eighteenth-century debate about the appropriate internal organization of government…. In consequence, [these scholars] decline to draw a strong conclusion from the Constitution's text, preratification practice, or Founding-era interpretative conventions about the precise contours of each branch's authority.[57]

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theorists, seeking in each instance to show how that evidence does not necessarily bear the weight of residuum theorists' argument. They aim, in other words, to negate or at least problematize the affirmative evidence offered by residuum theorists, and in particular to reject "a conception of 'executive power' as a defined category that can be distinguished from legislative powers." *Id.* at 592.

[55] Flaherty, Most Dangerous Branch, supra note 31, at 1774, 1729 (1996); see also id. at 1734 (defining formalism as "Formalist catechism posits three discrete branches, each exercising one of three distinct powers…. No less importantly, formalist precepts consider legislative, executive, and judicial powers, which mark the proper domains of their respective branches, to be readily identifiable.").

[56] This helps explain, I think, what was for me one wholly unexpected reaction to this project: some people's gut-level conviction that the answer identified here is just too simple. I chalked it up as idiosyncratic the first time someone noted that although they hadn't read the piece closely, they were certain the Founders could not possibly have shared a common understanding of "executive power." Then that experience repeated itself several times. Articles of faith, it's fair to say, run deep on both sides of the debate.

[57] Aziz Z. Huq, Separation of Powers Metatheory, 118 Colum. L. Rev. 1517, 1530-31 (2018) (citing Bradley and Flaherty, along with Peter Strauss, Lawrence Lessig, and Cass Sunstein). See also, e.g. Lawson & Seidman, supra note 43, at [] ("[T]he term 'executive Power' clearly did not have a single, well-defined, universally understood meaning in the founding era; that much has been more than amply demonstrated by Professors Bradley and Flaherty…. [But] [a]t the risk of engaging a 144-page discussion in a few sentences: it does not suffice to say, as Professors Bradley and Flaherty convincingly say, that 'executive Power' was a messy, contested concept in the late eighteenth century…."); Victoria F. Nourse & John P. Figura, Toward A Representational Theory of the Executive the Unitary Executive, 91 B.U. L. Rev. 273, 290 n.18 (2011) (endorsing

It is here that this Article takes up the baton, going beyond previous work in two ways. First, in the scope and systematic treatment of the evidence reviewed. In contrast to a brief engagement with four or five works of early modern political theory, this Article relies on more than a thousand contemporaneous published texts by hundreds of commentators, with a research methodology that involved reviewing every instance of the word root "exec-" and reading most of the texts cover to cover with the topic of presidential power squarely in mind. That immersion in the evidence enables the second distinctive feature of this project: the confidence with which this Article can not only refute the residuum thesis, but also offer an affirmative replacement theory that is both historically and theoretically coherent—and that cannot be caricatured as so much carping about a thicket of contestation and uncertainty

To be clear, this Article does not engage non-originalist arguments for a Vesting Clause residuum. The thesis defended here rests neither on the mistaken textualist premise that the Constitution must be read to avoid surplusage, nor on a contestable methodological commitment to custom and tradition as a source of constitutional meaning. Instead, the Article targets the Royal Residuum thesis as a descriptive historical assertion about the semantic content of a standard eighteenth-century legal concept. In that respect, the piece begins by agreeing with residuum theorists—thereby diverging sharply from Bradley and Flaherty—that the Founders *did* "have in mind, and intend[] the Constitution to reflect, a conception of what is 'naturally' or 'essentially' within executive power.'"[58] This project will show, however, that the meaning was

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Bradley and Flaherty's thesis "that executive-power essentialism 'errs ... in its presumption that America's constitutional practitioners mechanically applied European political and legal theory'"). For better or for worse, Prakash and Ramsey put it more pointedly: "[W]hile Bradley and Flaherty devote much energy to the Constitution's creation, … [o]n the most important points they either concede our view, make only conclusory statements, or say nothing." Prakash & Ramsey, The Jeffersonian Executive, supra note 10, at1591, 1593.

As I will show, Bradley and Flaherty seem wrong in concluding that the Founders had contested, uncertain, or otherwise difficult-to-pin-down views on the conceptual content of "the executive power" as a specific authority of government. But the effective substance of what could be read as their ultimate (though unsubstantiated) conclusion—namely, that residuum theorists have not amassed enough evidence to dislodge what would otherwise appear to be the meaning of a word whose root is "execut-"—is certainly consistent with the meaning that I affirmatively establish here. See also id. at 581 n.146 ("We do not necessarily disagree with Professor Prakash that the term "executive power" might have been understood by the Founders to refer generically to the authority to implement the laws."); but see Flaherty, Most Dangerous Branch, supra note 31, at 1778 ("[T]he Vesting Clause should not be read to grant the executive branch a prepackaged set of powers.").

[58] Bradley & Flaherty, supra note 31, at 551-552 (rejecting this claim). See also id. at 685 ("There are a number of weaknesses in Madison's analysis [as Helvidius]…. First, Madison, atypically for

unambiguously limited to Law Execution. And it will offer a fully worked-out explanation of how that authority operated in an integrated constitutional context.

II. Political Theory

The Article's methodology is motivated by a metaphor: standing in front of James Madison's bookshelf and pulling texts off the wall to ask, what was the foundation on which the Founders were building? First, normatively: what did the canonical works of political, philosophical, and legal theory have to say about the main functions and dangers of government, particularly its head magistrate? Second, semantically: what words did the canonical authors use to describe the different functions and powers of governance?

I have not, of course, literally identified every book in Madison's possession or limited myself to the holdings of one man. Rather, the man and his bookshelf stand in for the educated American public and the corpus of materials from which its understandings were drawn. That said, the bookshelf conceit is not entirely metaphorical. We know a lot about what the Founders were reading, partly from statistical analysis of citations in political debates and the contemporary press,[59] and partly from inventories of real bookshelves, often in the form of library catalogs, probate records, and purchase orders.[60] On the background of such evidence—as processed by decades of painstaking work by archivists and intellectual historians—American historian Jack Rakove sketches the scholarly consensus about "those intellectual sources of influence that shaped the mental world of the revolutionary generation":

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him, relies on essentialist reasoning… Madison talks as if there are pure categories of executive and legislative power, and he simply disagrees with Hamilton about what those categories should look like."). I'm with Madison here in two ways. I too think there were pure categories of executive and legislative power. And I too simply disagree with the residuum theorists about what those categories should look like.

[59] Donald S. Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought, 78 Am. Pol. Sci. Rev. 189 (1984).

[60] Trevor Colbourn, The Lamp of Experience (1966); David Lundberg and Henry F. May, The Enlightened Reader in America, 28 Am. Q. 262 (1976); Minor Myers, Jr., A Source for Eighteenth-Century Harvard Master's Questions, 38 William & Mary Q. 261 (1981). See also, e.g., Herbert A. Johnson, Imported Eighteenth-Century Law Treatises in American Libraries 1700-1799 (1978); Eldon James, Legal Treatises Printed in the British Colonies and the American States Before 1801 (1934). See also Loren E. Smith, The Library List of 1783: Being a Catalogue of Books, Composed and Arranged by James Madison, and others, and Recommended for the Use of Congress in 1793 (1969) (unpublished dissertation) *at* http://scholarship.claremont.edu/cgu_etd/87/.

> There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone. They were also well-versed in the richly polemical literature of seventeenth- and eighteenth-century English politics; the moral philosophy and faculty psychology of the Scottish enlightenment; the disquisitions on public law of such European authorities as Grotius, Pufendorf, and Delolme; and, one might add *en passant*, the inheritance of English jurisprudence. American thinking about politics was no doubt also shaped by reading in the classics, the legacy of Newtonian science, and even the emphasis on sympathy in eighteenth-century philosophy and literature (which resonates strongly in their notions of representation). All of these writings shaped the intellectual context in which the Framers and Ratifiers acted. Whether we think of these ideas as big concepts whose evolution can be traced in a classic history-of-ideas mode, or as elements of ideologies like republicanism or liberalism, or as competing Foucauldian discourses, it seems evident that they were essential elements of the original language of American constitutionalism.[61]

The consequence for any intellectually serious version of originalism is clear. Confronted by a question about the Founders' constitutional arrangement, we must start by turning to material like this to "reconstruct the underlying assumptions and concerns and the manifest events and experiences that presumably explain both authorial intentions and Ratifier understandings."[62]

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[61] Jack N. Rakove, Fidelity Through History (or to It), 65 Fordham L. Rev. 1587, 1598-1599 (1997). For two classic accounts of intellectual influences on the Founders, see Bernard Bailyn, The Ideological Origins of the American Revolution (1967), and J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975). For a good summary of the tradition surrounding the legal treatises relied on so heavily in this Article, see A.B.W. Simpson, Rise and Fall of the Legal Treatise, 48 U. Chi. L. Rev. 632 (1981). For a marvelously detailed survey of key Founding era sources, including some of the sources relied on in this project, see William Baude & Jud Campbell, Early American Constitutional History: A Source Guide (2017).

[62] See also Jack N. Rakove, Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism, 48 San Diego L. Rev. 575, 581-582 (2009) (Some "fairly obvious" "bodies of evidence … set the intellectual and political background upon which the Framers and ratifiers acted," including "the sources that shaped the vocabulary and grammar of political discussion, or the traditions and texts that historians sometimes describe as political languages. Machiavelli, Hobbes, Locke, Harrington, Montesquieu, Hume, Blackstone, and other authorities would all have their place here. So would other modes of reasoning associated, say, with classical learning, or common law jurisprudence, or the Commonwealth or Real Whig tradition for which Trenchard and Gordon remain the most representative figures.").

None of this will necessarily lead to a straightforward interpretive conclusion in any case. Madison's bookshelf was stocked with wildly varying visions of political legitimacy and good government. And that variation was well-suited to the tumult and uncertainty faced by the Founders themselves. They had shattered their relationship with the English sovereign. They had experimented with a variety of new forms of governance. And they were facing the challenge of writing a new constitutional charter that would both empower and constrain a national government in a way never before achieved. Forget the vexations of federalism, the Founding generation was profoundly uncertain even about how to structure the national entities in their own right—and how best to allocate responsibilities and authorities among them once created.

This article does not resist that standard picture of contestation and uncertainty.[63] There is no question that—like the intellectual legacy to which they were heir—the colonists, revolutionaries, Philadelphia drafters, ratification polemicists, and state ratifiers expressed radically diverging views on the allocation of national power. There is no question that the Constitution's terms are abstract and incomplete in most respects, and nowhere more so than the allocation of foreign affairs powers. And it is obviously the case that both the ratifiers themselves and the politicians of the early Republic disagreed on a great many particular problems of application—if and when those problems even occurred to them in the first place.

And yet.

Even amidst this intellectual chaos-slash-ferment, some things were clear. If the Founders' *goals* were often irreconcilable, the *words* they used to describe and debate their proposals, criticisms, and counter-proposals were—at least on some points—strikingly consistent. Of particular relevance here is how their disputes about institutional structure were consistently framed around what they often called the "complete" or "perfect" triad of legislative, executive, and judicial power as three conceptual phases in the life-cycle of

[63] As Martin Flaherty has argued, we should be skeptical of any account that would require us to set aside the professional historical consensus about the Founders' legal-political culture. Martin Flaherty, History Lite in Modern American Constitutionalism, 95 Colum. L. Rev. 523 (1995) (citing canonical work by, *inter alia*, Willi Paul Adams, Bernard Bailyn, Edward Corwin, Jack P. Greene, Forrest McDonald, J.G.A. Pocock, Jack Rakove, John Philip Reid, and Gordon Wood). On this score, Flaherty is clearly correct that the historiography "reveals … people groping as best they could toward a workable conception of government from which only broad purposes can safely be inferred." He is also surely right that "the complex, messy, and at times contradictory ferment in constitutional thinking renders it unlikely at best that, by 1787, Americans had reached a consensus on the doctrine in anything like the precise, thoroughgoing manner that modem formalists prescribe." Flaherty, Most Dangerous Branch, supra note 31, at 1755. See also id. at 1775 ("What strikes anyone who examines the era in any depth, especially those historians who have devoted years to the exercise, is its complexity, contradictions, and, at times, confusion.").

law. This article shows that formulation to have been a straightforward reflection of standard eighteenth-century understandings. If that's right, then the negotiated settlement of the Article II Vesting Clause *did* have a clear meaning. That meaning is the one that leaps off the face of the text: "the executive power" meant "the power to execute." My hope is that even unsympathetic readers will wind up finding this hard to un-see.

A. The Historical Background

The Founders came of age in the aftermath of a long constitutional struggle in the mother country. It's a fool's errand to offer even the most apologetically caveated summary of England's multi-century wobble toward parliamentary supremacy. But the political imaginary of that struggle was deeply entrenched in the Founders' minds, by way of school rooms, the political press, and widely published histories from authors across the political spectrum.[64] So we should begin by chalking out some rudimentary context for the legal and political concepts that are discussed in depth below.[65]

The American Founders told themselves a story of English constitutionalism in which Parliament (and especially the Commons) led the struggle to wrest individual freedom from increasingly oppressive monarchs.[66] The path to that outcome was winding. While many Americans followed the English Whigs in imagining that Parliament's institutional identity was central to the "ancient liberties" of England,[67] it is now understood that English parliaments emerged not so much as institutions in their own right as ad hoc

[64] Histories and memoirs of the great struggle abounded. Among the most important were Catherine Macaulay, The History of England (1783), David Hume, The History of England (1778), Oliver Goldsmith, The History of England (1771), Henry St. John, Lord Viscount Bolingbroke, Remarks on the History of England (1743), and Edward Hyde, Earl of Clarendon, The History of the Rebellion (1704).

[65] For some seminal accounts of the historical emergence of parliamentary sovereignty over the Crown, see Jeffrey Goldsworthy, The Sovereignty of Parliament (1999); Glenn Burgess, The Politics of The Ancient Constitution (1993); Margaret Judson, Crisis of the Constitution (1949); J.W. Allen, English Political Thought: 1603-1660 (1938).

[66] Hamilton's Federalist 71 offers a typical summary: "[The] British House of Commons, from the most feeble beginnings, from the mere power of assenting or disagreeing to the imposition of a new tax, have by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government; while they raised themselves to the rank and consequence of a coequal branch of the Legislature; … [T]hey have been able in one instance to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments as well in the church as State …"

[67] Glenn Burgess, The Politics of The Ancient Constitution (1993); J.G.A. Pocock, The Ancient Constitution and the Feudal Law. A Study of English Historical Thought in the Seventeenth Century (1957).

gatherings summoned by the Crown, especially when approval for taxation was needed.[68] During the long transition to modernity, a complicated variety of economic, religious, and political developments led parliamentary elections and debate to channel larger and more systematic ideological disputes among members of the British political elite.[69] And Parliament—or at least, significant factions within Parliament—began to develop a more particularized sense of institutional identity once assembled. With the arrival of the Stuarts in 1603, tensions between the Crown and Parliament as such increasingly crystallized around suspicion of the new dynasty's Catholic sympathies; dissatisfaction with the costs of court, government, and military adventures; and anxiety about the new King's pretensions to a divine-right absolutism.[70]

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[68] Thus, the famous words of Magna Charta: "No scutage or aid shall be imposed on our kingdom, unless by common counsel of our kingdom. And for obtaining the common counsel of the kingdom before the assessing of an aid or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons." For an excellent recent account of how the medieval English parliament evolved, see J. R. Maddicot, The Origins of the English Parliament (2014). See also K. B. McFarlane, England in the Fifteenth Century: Collected Essays 1-20 (1981); F. W. Maitland, The Constitutional History of England 177-190 (1926). For a classic though now disfavored "Whig history" account sketching a more institutionally cohesive view of medieval parliaments—one that more closely matches the Founders' sense of historical development than the modern historiography sketched in main text—see William Stubbs, Constitutional History of England in its Origin and Development (1875).

[69] For a good review of some of the social, economic, cultural, and religious pressures during this period, see Conrad Russell, The Crisis of Parliaments: English History 1509-1660 (1971). Historians disagree on the extent to which Parliament developed a genuinely oppositional identity during the Tudor period. For works emphasizing the cooperative nature of Parliament's relationship with the Tudor crown, see, e.g., G.R. Elton, The Parliament of England, 1559-1581 (1986), J.S. Roskell, "Perspectives in English Parliamentary History," in 2 Historical Studies of the English Parliament 296 (1970). For works giving more emphasis to an emerging sensibility of institutional conflict, see, e.g., Jennifer Loach, Parliament Under the Tudors (1991); J.E. Neale, Elizabeth I and her Parliaments (1957); Josh Chafetz, "In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation": Late Tudor Parliamentary Relations and their Early Stuart Discontents, 25 Yale J. L. & Hum. 181 (2013).

[70] A classic account of the interwoven causes is Conrad Russell, The Causes of the English Civil War (1990). For accounts focusing on the religious element, see, e.g., England's Wars of Religion, Revisited (Charles Prior & Glenn Burgess, eds. 2011); David Cressy, England on Edge: Crisis and Revolution, 1640-1642 (2006). For accounts emphasizing the politics of nationhood and state formation, see, e.g., Austin Woolrych, Britain in Revolution: 1625-1660 (2002); Jonathan Scott, England's Troubles: Seventeenth Century English Political Instability in European Context (2000). For accounts exploring socio-economic change as a principal factor, see, e.g., Lawrence Stone, The Causes of the English Civil War: 1529-1642 (1965). For a dated but still classic account emphasizing the institutional-constitutional features typical of "Whig History," see Samiel Rawson Gardiner, The First Two Stuarts and the Puritan Revolution (1888).

The end of the resulting struggle is well known. Certainly by the middle of the eighteenth century, the legislative institution of "the King-in-Parliament" had been recognized as conceptually sovereign and legally supreme over all competing institutions, and the Crown's direct participation in statutory enactment had been reduced to an empty formality.[71] The intermediate steps were complicated.[72] Over the course of the 1600s, the king clashed with (some) judges and (many) parliamentarians over royal interference with parliamentary privileges; over the promulgation of proclamations purporting to have the force of law; over judges' authority to interpret the law differently from the Crown; and over Parliament's power to restrict the operations of the Crown and its apparatus of government. It took a civil war, a republican interregnum, and a tentative royal Restoration before the Glorious Revolution of 1688—involving the flight of James II and Parliament's installment of William and Mary in his place—led to a formal settlement that entailed (it quickly became clear) the total capitulation of any claim to constitutionally indefeasible royal authority.

Certainly by the Founding period, it was well-settled that English law had no separation of powers doctrine in the sense that American lawyers understand it today. The Crown simply had no powers that the legislature was bound to respect. The analogy to common law is almost exact. Eighteenth-century students of English law learned, correctly, that "the law" required contracts to include at least a peppercorn in consideration.[73] But—notwithstanding aggressive statutory interpretation and occasional vague rumblings of judicial review[74]—they also learned that if "the common law and a

[71] Recall that under English constitutional theory the Crown was itself "a constituent part of the supreme legislative power." William Blackstone. By the Founding, the royal negative was absolute in theory but defunct in practice—1708 marked the last time it was used against a bill that had passed both houses of Parliament. 18 H.L. Jour. 506 (1707). But see Walter Bagehot (Queen would have to sign the bill enacting her death warrant). For a terrific account of key legal conflicts between Parliament and the sixteenth- and seventeenth-century English Crown, see Josh Chafetz, Congress's Constitution (2018).

[72] For a recent survey of this period, see Peter Ackroyd. *Rebellion: The History of England from James I to the Glorious Reovlution* (2015).

[73] Compare *Pillans & Rose v Van Mierop & Hopkins*, 3 Burr 1663 (1765) (challenging the doctrine) with *Rann v. Hughes*, 7 T.R. 350 (1778) (reaffirming it).

[74] Closely related to the problem of parliamentary sovereignty vis-a-vis royal prerogative is the problem of parliamentary sovereignty vis-a-vis natural law. But with some exceptions—see Goldsworthy, supra note 65—the two issues are typically explored as separate questions. For a concise discussion of the historiography of the relationship between Parliament and natural or fundamental law, see Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843, 849-865 (1978). See also Trevor Allan, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (1993); J.W. Gough, Fundamental Law in English Constitutional History (1955).

statute differ, the common law gives place to the statute."[75] William Blackstone, whose landmark treatise on English law probably influenced the Founders more than any other single source, generalized the point: "[T]here is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no."[76] Indeed, the English treatises taught that not just common law, but all of English *constitutional* law existed only at the continued sufferance of Parliament: "Parliament …. can change and create afresh even the constitution of the kingdom and of parliaments themselves."[77]

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[75] William Blackstone, 1 Commentaries on the Laws of England, Intro., Sec 3, p.89. (6th ed. 1780).

[76] 1 Commentaries, Intro., Sec 3, p.91. For expressions of this view from both sides of the Founding debates, see, e.g., Wilson, Pennsylvania Ratifying Convention ("It has not been, nor, I presume, will it be denied, that somewhere there is, and of necessity must be, a supreme, absolute and uncontrollable authority…. Blackstone will tell you, that in Britain it is lodged in the British parliament."); Agrippa XII, Massachusetts Gazette (Jan. 15, 1787) ("A legislative assembly has an inherent right to alter the common law, and to abolish any of its principles, which are not particularly guarded in the constitution."). For a concise discussion of both the original sources and the modern debate about Blackstone's views on parliamentary supremacy, see J.W. Finnis, Blackstone's Theoretical Intentions (1967) ("The methodology of the Commentaries has been ignored in recent discussion. But reflection on it establishes, contrary to received interpretations, both that Blackstone's interest in natural law was real and sustained, and that his definition of municipal law was free from any reference to natural law.").

[77] 1 Commentaries, Ch 2, p.161 ("[Parliament] can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority on earth can undo."); Henry Finch, A Description of the Common Laws of England 56 ("The Parliament hath an absolute power in all cases as to make laws…. And if the parliament itself err, as it may, this may not be reversed in any place but in Parliament."). See generally Julian Hoppit, A Land of Liberty?: England 1689-1727 (2010) ("[E]very political society had to have a final arbiter. Few dissented that in the English case, absolute authority resided only in legislative action, that is the agreed deliberation of Crown, Peers … and Commons."); Paul Langford, A Polite and Commercial People: England 1727-1783, 704 (2010) ("It would be difficult to exaggerate the overwhelming importance of Parliament in eighteenth-century England, hackneyed though it is as a historical theme.").

This all led some commentators to conclude that England didn't actually *have* a constitution in any legally significant sense. See, e.g. Anonymous, Four Letters on Interesting Subjects, Letter IV (1776) ("The truth is, the English have no fixed Constitution… [T]he legislative power, which includes king, lords and commons, is under no[restrictions]; and whatever acts they pass are laws, be they ever so oppressive or arbitrary"); A Countryman II, New Haven Gazette, (Nov. 22, 1787), *at* http://rotunda.upress.virginia.edu/founders/RNCN-02-03-02-0004-0010-0009 ("The famous English Magna Charta is but an act of Parliament, which every subsequent Parliament has had just as much constitutional power to repeal and annul as the Parliament which made it had to

By the time of the American Revolution, this had long since been true of royal authority in particular.[78] The previously sacrosanct *jus regium* of "dispensing with penall Lawes"[79] was the first item in the crosshairs of the Bill of Rights that defined the Glorious Revolution.[80] Starker still was the 1701 Act of Settlement's dictation of succession and marriage rights,[81] which even many pre-Civil-War Parliamentarians had understood as "inseparable prerogatives of the Crown and king."[82] The seismic implications of stripping

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pass it at first."); James Wilson, Speech at Pennsylvania Ratifying Convention, 3 DHRC 361 (Lloyd version), *at* http://rotunda.upress.virginia.edu/founders/RNCN-02-02-02-0003-0002-0005-0004-0002 ("The British constitution is just what the British Parliament pleases."); Thomas Paine, Rights of Man (1791) (British political arrangement is "merely a form of government without a constitution").

[78] See generally, e.g., David Lieberman, "The Mixed Constitution and the Common Law," in The Cambridge History of Eighteenth Century Political Thought (2016) (noting the persistence of Jacobitical dissent, but emphasizing the "near complacency mid-[eighteenth-]century commentators displayed in treating once fiercely contested issues concerning the nature and authority of England' monarch and parliament"). See also Peter Jupp, The Governing of Britain 1688-1848, pp. (2006), for a discussion of the organic emergence of conventions around parliamentary supremacy in the decades following the Glorious Revolution.

[79] Edward Bagshaw, The Rights of the Crown of England (1660). Cf., e.g., *Case of Non Obstante* (1606) ("No Act can bind the King from any Prerogative which is sole and inseparable to his person, but that he may dispense with it by a Non obstante; … and this solely and inseparably is annexed to his person; and this Royall power cannot be restrained by any act of Parliament.").

[80] Bill of Rights 1689 (stating as its first substantive provision that "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal"); Robert Atkyns, An enquiry into the power of dispensing with penal statutes 3 (1689) ("[S]everal acts of Parliament have been made in divers cases, with express clauses inserted in those acts, to make void all non obstantes to the contrary of those laws (which one would have thought would have been strong enough) and yet they all came to nothing: for the Judges heretofore have resolved that if the King grant a dispensation from such Laws, mentioning the very law, that presently the force of the law vanishes") (discussing the controversial approval in *Godden v. Hales* of James II's Test Act dispensations).

[81] Act of Settlement (1701) ("That the most excellent Princess Sophia, Electress and Duchess Dowager of Hanover … be and is hereby declared to be the next in succession, in the Protestant line.").

[82] Coke, in Parliament, 3 December 1621, III:1213 ("[I]nseparable prerogatives of the Crown and king. Marriage and leagues, war and peace, they are arcana imperii and not to be meddled with. If they were a petition of right that required an answer, I would never prefer it or give my consent to the preferring of it"). See also Conference with the Lords in the Painted Chamber, 8 March 1621, III: 1201 ("I will not meddle with the King's prerogative, which is twofold: 1, absolute, as to make war, coin money, etc.; or in things that concern meum et tuum, and this may be disputed of in courts of parliament."). Coke's ambiguous formulations—"not to be meddled with" and "I will not meddle with"—may of course not have been an accident.

such "prerogatives absolute" were well understood; earlier generations' search for a theory to justify and describe some essential core of indefeasible royal authority simply ended.[83] This radical reworking of English parliamentary theory was thoroughgoing. The prerogative was demystified.[84] It was no longer subdivided into aspects that were indefeasible ("prerogative absolute," "jus majestatis," or "prerogative indisputable") and those that were not ("prerogative disputable" or "jus praerogativae").[85] And it was shorn

[83] See, e.g., *Campbell v. Hall* (1774) (recognizing full defeasibility of King's foreign affairs prerogative). See also, e.g., David Hume, "Essay VI," in *Essays Moral, Political, and Literary* ("The share of power, allotted by our constitution to the house of commons, is so great, that it absolutely commands all the other parts of the government. … For though the king has a negative in framing laws; yet this, in fact, is esteemed of so little moment, that whatever is voted by the two houses, is always sure to pass into a law, and the royal assent is little better than a form").

[84] Algernon Sidney, Discourses Concerning Government (1698) (describing the royalist position that "the prerogative [is] the Royal Charter granted to kings by God."); Parliament Records, 26 April 1628, III:1267-1268 ("His Majesty's prerogative 'intrinsical' … is a word we find not much in the law. It is meant [by the Lords' use of this phrase] that intrinsical prerogative is not bounded by any law, or by any law qualified. We must admit this intrinsical prerogative an exempt prerogative, and so all our laws are out. And this intrinsical prerogative is entrusted him by God and then it is due jure divino, and then no law can take it away….We cannot yield to this."); Filmer(? or possibly Holbourne — authorship disputed), Free Holders Grand Inquest (1679) (resting claims about the king's powers on "invincible reason from the nature of monarchy itself, which must have the supreme power alone"); Bagshaw (dividing "Jus Regium" into "Jus Majestatis," which "is that which belongs to him as King, common to him, with other Princes, by the Law of Nature and Nations" and "Jus Praerogativae" which "is that which belongs to him as King of England, and given to him by that Law alone"); Philip Hunton, A Treatise Of Monarchy 4-5 (denying a divine "*scriptum est*" for "the endowing this or that person … with Soveraignty over a Community"). For more on the mystical aspects of the prerogative, see, e.g., Paul D. Halliday and G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 600-603 (2008); Francis Oakley, Omnipotence, Covenant, and Order; and of course Ernst H. Kantorowicz, The King's Two Bodies.

[85] See, e.g., Henry de Bracton, Book 1, Chapter 24, I:441-443 ("[T]hose things, which are of jurisdiction and of peace, and those things, which are annexed to justice and to peace, pertain to nobody unless to the crown and to the royal dignity, nor can they be separated from the crown, since they constitute the crown itself … Those things, however which are called privileges, although they pertain to the crown, may nevertheless be separated from the crown, and be transferred to private persons."); *Case of Penal Statutes*, 7 Co. Rep. 36 (this confidence and trust is so inseparably joined and annexd to the Royal person of the King in so high a point of sovereignty that he cannot transfer it to the disposition or power of any private person or to any private use, for it was committed to the King by all his subjects for the good of the commonwealth"); *Case of Non Obstante, or Dispensing Power*, Reports, Part 12, p.I:423 ("No Act can bind the King from any Prerogative which is sole and inseparable to his person…. But in things which are not incident solely and inseparably to the person of the King, but belong to every Subject, and may be severed, there an act of Parliament may absolutely bind the King"); Coke, In the Committee of

of its extralegal pretensions.[86] Following the lead of the parliamentarian jurist Edward Coke, English law had worked its way from the milder proposition that "the Common law hath so admeasured the prerogatives of the King, that they should not take away, nor prejudice the inheritance of any man"[87] to the more radical conclusion that "the King hath no Prerogative, but that which the Law of the Land allows him."[88]

Grievances, 19 Feb 1621, III:1199 (There is prerogative indisputable, and prerogative disputable. Prerogative indisputable, is that the king hath to make war: disputable prerogative is tied to the laws of England; wherein the king also hath divers prerogatives as nullum tempus."). See generally Glenn Burgess, The Politics of The Ancient Constitution 115-144, 161-162 (1993) (describing Jacobean consensus regarding a "duplex notion of kingship" grounded in the distinction between "legal (or ordinary) prerogative" and "absolute (or extraordinary) prerogative").

[86] On this score, Locke struck confusion into generations of American constitutional commentators by using the *English* legal term "prerogative" to name the discretionary conceptual space wherein governing magistrates under *any* system of social organization might sometimes feel compelled to go beyond the laws. In this regard, compare Bolingbroke's narrowing of the Lockean formulation to include only unauthorized (rather than prohibited) action. Bolingbroke, Freeholder's Political Catechism (1733) ("Q. *What do'st thou mean by the Royal Prerogative?* A. A Discretionary Power in the King to act for the Good of the People where the Laws are silent, *never contrary to Law, and always subject to the limitations of law.*" (second emphasis added). Locke famously included both unauthorized and prohibited action within his definition. Compare also the Earl of Strafford's formulation when defending himself against charges of treason, in particular by arguing that he had been following the King's command. 8 Rushworth, Historical Collections of Private Passages of State 182 (March 26, 1641) ("[T]he prerogative … as long as it goes not against the Common Law of the Land … is the Law of the Land, and binds, so long as it transgresses not the Fundamental Law of the Land, being made provisionally for preventing of a Temporary Mischeif, before an Act of Parliament can give a remedy.").

[87] Coke, 2 Institutes 886 ("the best inheritance that the Subject hath, is the Law of the Realme"); see also Case of Proclamations, Reports, Part 12, I:486-487 (1610) ("[T]he King by his Proclamation, or other waies, cannot change any part of the Common Law, or Statute Law, or the Customs of the Realm").

[88] Case of Proclamations, Reports, Part 12, p.I:486-487 (1610). Even before the Glorious Revolution, Hale—no mild proponent of royal authority—was cautiously but unmistakably embracing the point: "[T]hose rights which the king hath are in him absolutely, perpetually and hereditarily, whereby as he or his issues inheritable cannot, upon any pretence whatsoever either of abuse in him or public good of the state, either be deprived of the whole power regal, which is a deposition, or of any spark of that gem, any prerogative or power which he hath in right of his regality, *without his consent*"—i.e., unless enacted as a statute without his veto. Matthew Hale, *Rights of the Crown*. See also the publisher's preface to the 1800 edition of Hale's *Pleas of the Crown*, which noted that "upon the restoration, of which he was no inconsiderable promoter, [Hale] was not for making a surrender of all, and receiving the king without any restrictions; on the contrary, he thought this an opportunity not to be lost for limiting the prerogative, and cutting off some useless branches, that served only as instruments of oppression."

Never again could a King say "you neither mean [to] *nor can* hurt my prerogative."[89] To the contrary: William and Mary recognized the full implications of the Glorious Revolution by "solemnly Promis[ing]" at their coronation to "Governe the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same?"[90] Eighteenth-century legal commentators thus blandly contrasted the King's "diverse prerogatives which the law gives unto him" with the sovereign supremacy of parliament's "absolute power in all cases … to make laws," noting that "if the parliament itself err, as it may, this may not be reversed in any place but in Parliament."[91] Even political theorists who were generally sympathetic to monarchy felt no need to hedge:

> [T]hough in [the King's] political capacity of one of the constituent parts of the Parliament, that is, with regard to the share allotted to him in the legislative authority, the King is undoubtedly Sovereign and only needs alledge his will when he gives or refuses his assent to the bills presented to him; yet in the exercise of his powers of Government, he is no more than a

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The royalist Bagshaw was to the same effect. See Bagshaw, supra note 79 ("I shall in the next place handle the second weapon of the Crown, by which the People of the Realme is governed in the time of Peace, viz. The Lawes of the Land, by discussing the sixth and last conclusion, which is this. That this Kingly Government be according to the Law of the Land, … by legal, not by arbitrary power …. For the Crown of England is so encircled with good Laws, that it is scarce possible for a King of England to fall into Tyranny, for he neither speaketh, nor acteth, nor judgeth, nor executeth, but by his Writt, by his Laws, by his Judges, and Ministers, and both these sworne to him to judge a right, and to execute justice to his People…. So that by all I have said it plainly appears, that the King in respect of his Duty and Office, in respect of his Oath, in respect of the Dignity and Honour of his Crown, and the good of his People, is to Governe them by the Laws of the Land").

[89] Charles I, Response to the Petition of Right (June 7, 1628) (emphasis added). See also George Moore, Records of Parliament (1601) ("We know the power of her Majesty cannot be restrained by any Act: why, therefore, should we thus talk? Admit we should make this statute with a non obstante, yet the Queen may grant a patent with a non obstante, to cross this non obstante.").

[90] An Act for Establishing the Coronation Oath, 1 William & Mary sess. 1, c. 6, pmbl. Thanks to Andrew Kent for this reference.

[91] Finch, supra note 77, at 57, 59. Goldsmith's vision of the Long Parliament choosing which elements of prerogative to keep and which elements to chuck was typical: "Hitherto we have seen the commons in some measure the patrons of liberty and of the people; boldly opposing the stretches of illegal power, or reprising those claims which, tho' founded on custom, were destructive of freedom … Had they been contented with resting here, after abridging all those privileges of monarchy which were capable of injuring the subject, and leaving it all those prerogatives that could benefit, they would have been considered as the great benefactors of mankind, and would have left the constitution pretty nearly on the same footing on which we enjoy it at present." Goldsmith, History of England III:239 (1771).

> Magistrate, and the laws, whether those that existed before him, or those to which, by his assent, he has given being, must direct his conduct, and bind him equally with his subjects.[92]

This hard-won legacy of subjecting the Crown to the rule of law was key to the Founders' self-image as heirs to a revolutionary tradition of liberty, seized by "that patriotic spirit which prompted the illustrious English barons to extort Magna Charta from their tyrannical king, John."[93] However much the Founders otherwise disagreed, they tended to share the view that the spirit of parliamentary liberty was less corrupted in the New World than in the home country, and to think any new government would be measured by its ability to embody and protect that spirit.[94]

B. The Execution Problem

On this historical backdrop, the legal and political theory on Madison's bookshelf was as varied and quarrelsome as the Founding generation itself. Within the array of contested values and competing priorities, it's hard to identify any single concern as dominant. But the need for vigorous execution of the law loomed especially large. That was certainly true in the ineffective politics of the post-revolutionary Confederation. And it was every bit as central to the writings on Madison's bookshelf.

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[92] Jean de Lolme, The Constitution of England, Ch. 5 (G. Robinson, London 1784) ("Mais, au lieu qu'en sa capacité politique de l'un des ordres du parlement, c'est-à-dire, par rapport à la portion qui lui compète de la puissance législative, il est souverain, & n'allegue que sa volonté lorsqu'il donne ou refuse son consentement; chargé de l'administration publique, il n'est que magistrat, & les loix, soit celles qui existoient avant lui, soit celles auxquelles par son assentiment il a donné l'existence, doivent diriger sa conduite, & l'obligent aussi bien que ses sujets."). On de Lolme's monarchical sympathies, see Iain McDaniel, Jean-Louis DeLolme and the Political Science of the English Empire, 55 Hist. J. 2, 30-38 (2012). For typically stirring American rhetoric on this point, see Patrick Henry's speech to the Virginia Ratifying Convention: "[I]f the King of England attempted to take away the rights of individuals, the law would stand against him.—The acts of Parliament would stand in his way—The Bill, and Declaration of Rights would be against him. The common law is fortified by the Bill of Rights." Patrick Henry, Virginia Ratifying Convention (June 19, 1788), DHRC at http://rotunda.upress.virginia.edu/founders/RNCN-02-10-02-0002-0008-0001.

[93] Tar & Feathers #2, Independent Gazetteer, (Oct 2, 1787), DHRC at http://rotunda.upress.virginia.edu/founders/RNCN-02-02-02-0002-0002-0012-0005.

[94] J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975); Gordon Wood, The Creation of the American Republic (1969); Bernard Bailyn, The Ideological Origins of the American Revolution (1967). For an account emphasizing the Founders' interest in establishing an independent executive branch, see Eric Nelson, The Royalist Revolution (2013).

A defining challenge for governance theorists was how to close the gap between law and reality. Like the classical philosophy[95] and Christian theology[96] on which it drew, English jurisprudence had long marked a distinction between law's content in theory and its enforcement on the ground. By the Founding era, the classic English formulation was summarized in Matthew Hale's pathbreaking treatise:

> [W]e must observe a threefold effect of law. (1) The obligation on conscience. (2) The penalty. (3) The irritation or making void of an act done contrary to the direction of the law. The first proceeds from the directive power of the law; the two latter from the coercive power of the law.[97]

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[95] E.g., Plato, *The Laws*, Book 3 ("And when the soul is opposed to knowledge, or opinion, or reason, which are her natural lords, that I call folly, just as in the state, when the multitude refuses to obey their rulers and the laws; or, again, in the individual, when fair reasonings have their habitation in the soul and yet do no good, but rather the reverse of good"); Aristotle, *Nichomachean Ethics* ("[A]rguments … in themselves [are not] enough to make men good…. [W]hile they seem to have power … to make a character which is gently born, and a true lover of what is noble, ready to be possessed by virtue, they are not able to encourage the many to nobility and goodness. For these do not by nature obey the sense of shame, but only fear, and do not abstain from bad acts because of their baseness but through fear of punishment… What argument would remold such people?").

[96] Punishment for violating God's law was a central concern in many strands of the first Anglo-American Great Awakening. E.g., Wesley, On the Sermon on the Mount, First Sermon (1755) ("the Lord our Governor, whose kingdom is from everlasting, and ruleth over all; the great Lawgiver, who can well enforce all his laws, being 'able to save and to destroy,' yea, to punish…"), Jonathan Edwards, God's Sovereignty in the Salvation of Men ("The justice of God requires the punishment of sin"); Jonathan Edwards, Safety Fulness, and Sweet Refreshment in Christ ("Every jot and tittle of the law must be fulfilled, heaven and earth shall be destroyed, rather than justice should not take place; there is no possibility of sin's escaping justice.").

Relatedly, the uncertain relationship between sin and consequence was one of the oldest and hardest problems of Judeo-Christian theology. See, *e.g.*, Pierre Jurieu (1688) *De Pace inter Protestantes*, Sec. 71 ("According to the Will of a Legislator God cannot permit Sin: For that would be, as if he should declare Sin to be Lawful, which implies a Contradiction. But God as Decreeing Events does at least permit Sin; that is, he does not do all he can to hinder it from being … all Laws are about possible things. But God that he may execute his Decreeing Will, prepares and sets in order the Means."); Augustine, City of God I:8 ("For if every sin were now visited with manifest punishment, nothing would seem to be reserved for the final judgment; on the other hand, if no sin received now a plainly divine punishment, it would be concluded that there is no divine providence at all."); Job 38:4 (KJV) ("Who is this that darkeneth counsel by words without knowledge? … Where wast thou when I laid the foundations of the earth? Declare, if thou hast understanding.").

[97] Matthew Hale, Prerogatives of the King 176 [hereinafter Hale, Prerogatives of the King]; see also id. at 14 ("There are three powers in law (1) potestas coercens or coactiva. (2) potestas

This distinction between directive and coercive (or "coactive") power had long been central to discussions of governance and administration. Directive power was understood as that quality of rules which makes them legally binding on their objects. But both in theory[98] and in practice,[99] not all rules can be enforced against the people to whom they are directed. As the leading seventeenth-century theorist of royal power had it, "[g]overnment as to coactive power was after sin, because coaction supposeth some disorder, which was not in the state of innocency"[100] The problem of disobedience thus

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directiva, (3) [potestas] irritans actus contrarios."). The "irritans" power included the ability of courts to refuse to give effect to unlawful acts, including those of the Crown. See, e.g. Parker, *Observations* (1642) ("in all irregular acts where no personall force is, Kings may be disobeyed, their unjust commands may be neglected, not only by communities, but also by single men sometimes"). While Hale's works on royal power appear not to have been published until the twentieth century, they were kept in the library at Lincoln's Inn, where they served as a standard teaching and research reference for many including Blackstone, who cited Hale extensively. Their influence might be analogized to the Hart & Wechsler teaching materials before their publication.

[98] The classic example was the Crown. "The King as to His own person, is not to be forcibly repelled in any ill doing, nor is He accountable for ill done, law has only a directive, but no coactive force upon his person." Parker, Observations on His Majesties Late Answers (1642). See also Hale, Prerogatives of the King 176 ("Regularly the king is subject to the first power of the laws whereby he is bound in conscience to observe all such laws as either by the common law or statutes extend to him…. (2) Regularly the king is not subject to the penalty of law, at least where the penalty is personal. So that acts by him done or omitted contrary to the tenor of those laws or customs, which he is bound to observe in conscience, yet make him not liable to any personal loss or damage."). Thomas Aquinas was a typical British referent. Aquinas, *Summa Theologica*, Q. 96, Art. 5, Reply to Obj. 3 ("The sovereign is said to be 'exempt from the law,' as to its coercive power; since … law has no coercive power save from the authority of the sovereign…. [This does not mean that] the sovereign is … exempt from the law, as to its directive force; but [that] he should fulfill it to his own free-will and not of constraint.").

[99] See, e.g., your local highway.

[100] Filmer, The Anarchy 145 (1648) ("[A]s for directive power, the condition of human nature requires it, since civil society cannot be imagined without power of government. For although as long as men continued in the state of innocency they might not need the direction of Adam in those things which were necessarily and morally to be done, yet things indifferent [i.e., acts neither commanded nor forbidden by God]—that depended merely on their free will—might be directed by the power of Adam's command."). For the identical point from the opposite end of the political spectrum, see Parker Observations (1642) ("Man being depraved by the fall of Adam grew so untame and uncivill a creature, that the Law of God written in his brest was not sufficient to restrayne him from mischiefe, or to make him sociable, and therefore without some magistracy to provide new orders, and to judge of old, and to execute according to justice, no society could be upheld. Without society men could not live, and without lawes men could not be sociable, and without authority somewhere invested, to judge according to Law, and execute according to judgement, Law was a vaine and void thing.").

required government to have not only the power to formulate rules directing people's behavior, but also the power to force people to comply.

In addition to a power of making rules, then, any not-perfectly-virtuous society required a power of enforcing rules—a power of execution. *Bracton*, the great medieval English treatise, was unequivocal: "it is of no use to make laws, unless there is some one to maintain them."[101] The immensely influential Edward Coke exhorted similarly in his much-admired Charge at the Norwich Assizes: "The life and strength of the Laws, consisteth in the execution of them: For in vaine are just lawes Inacted, if not justly executed."[102] This observation became a standard opening move for virtually any ambitious discussion of law and government.[103] Daniel Defoe's formulation serves well as a précis of conventional eighteenth-century wisdom: "the Vigour of the Laws consists in their Executive Power: Ten thousand Acts of Parliament signifie no more than One single

[101] Bracton, Book 1, Chapter 24 I:441-443. See also id., I:3 ("Nor does it suffice [for a judge] to have jurisdiction unless he has the power of coercion…. If laws should fail, justice will be thereupon exterminated"). For a terrific overview of the historiography on the source known as *Bracton*, see Thomas McSweeney, English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law, 84 Temp. L. Rev. 827, 831-836 (2012).

[102] Coke, "Speech & Charge at Norwich Assizes," *Works*, p.II:530-531).

[103] See also, e.g., Cowell, *Institutes*, Book 1, Tit 1, para. 3 (observing, in an overview of "the Law publique, which appertaineth to the very Constitution of a Commonwealth," that "it is requisite likewise, that there be Magistrates ordained [so that] the Laws may be put in execution; for it were little purpose that there should be Lawes, if there were not some to govern by those laws."); Kames, "Hereditary and Indefeasible Right of Kings, *in Essays Upon Several Subjects*, ("A society of any extent cannot be without government. The members must have laws to determine their differences, and they must have rulers to put these laws into execution."); Pufendorf, Law of Nature and Nations ("passing laws which you are unable to put into effect is a hollow exercise"); Pufendorf, On the Duty of Man and Citizen, Ch. 9, para. 6 ("[I]t is in vain that laws are passed, if the rulers allow them to be violated with impunity, it is accordingly their duty to have charge of the execution of the same"); Burlamaqui, Principles of Natural and Politic Law, Ch. 4, para. 6 ("In a word the right of executing the laws of nature, and of punishing those, who violate them, belongs originally to society in general, and to each individual in particular; otherwise the laws, which nature and reason impose on man, would be entirely useless in a state of nature, if nobody had the power of putting them in execution, or of punishing the violation of them"); Hobbes, *Leviathan* ("Lawes are of no power to protect them, without a Sword in the hands of a man, or men, to cause those laws to be put in execution"); Beccaria, Of Crime and Punishment, Chapter 1 (explaining entire book as confronting the following problem: "Laws are the conditions under which men, naturally independent, united themselves in society…. But it was not sufficient only to establish [laws]; it was also necessary to defend [them] from the usurpation of each individual…. Some motives, therefore, that strike the senses, were necessary to prevent the despotism of each individual from plunging society into its former chaos. Such motives are the punishment established against the infractors of the laws.").

Proclamation, unless the Gentlemen in whose hands the Execution of those Laws is placed, take care to see them duly made use of."[104]

Metaphors for the point were varied and colorful: the motion of bodies, the speaking of thoughts, and the voicing of melodies. The famous cartoon Leviathan on the frontispiece of Thomas Hobbes's masterwork drew on a long tradition of such corporeal imagery, its author describing "Publique Ministers … that have Authority … to procure the Execution of Judgements given" as giving "service answerable to that of the Hands, in a Bodie naturall."[105] Other commentators deployed more musical analogies, observing that "Lawes without execution, be no more profitable, then belles without clappers,"[106] or that "the law … is indeed an excellent instrument to make harmony and concord in the commonwealth, but the best Lute that ever was made could never make music of itself alone, without the learned hand of the lute player."[107] The point was visceral: the laws must "follow every subject, as the shadow follows the body"[108]—for "what a livelesse fond thing would Law be, without any judge to determine it, or power to enforce it."[109]

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[104] Daniel Defoe, The Poor Man's Plea. In Relation to all the Proclamations, Declarations, Acts of Parliament, &c. which have been, or shall be made, or publish'd, for a Reformation of Manners, p. 125 ("[W]ithout [the] Concurrence [of the Gentry of England, which had an important role in the execution of law], all the Laws, Proclamations, and Declarations in the World will have no Effect").

[105] Hobbes, Leviathan**.** See also Rousseau, Social Contract Book III, Ch 11 ("The principle of political life dwells in the sovereign authority. The legislative power is the heart of the state. The executive power is the brain, which sets all the parts in motion. The brain may become paralysed and the individual still live. A man can be an imbecile and survive, but as soon as his heart stops functioning, the creature is dead"); Davies, Reports of Cases in Ireland 5-6 (1615) ("Again, the law is nothing else but a rule which is made to measure the actions of men. But a rule is dead, and measures nothing, unless the hand of the architect do apply it."); Jean Bodin, Six Books of Commonwealth 7 (London, Bishop 1604) ("[A] commonweale cannot long stand if it be quite or [sic] long time destitute of those ordinary actions which concerne the preservation of the peoples welfare, as the administration and execution of justice, the providing of victuals, and such other things necessary for the life of man; no more than can a man long live whose mind is so strongly ravished with the contemplation of high things, that he forgetteth to eate or drinke, and so suffereth the bodie with hunger and thirst to perish, or for lack of rest to die.")

[106] John Poynet, A Short Treatise of Politick Power (1556); see also Althusius, Politica Ch 29 Sec 14 (1617) ("Law should be accurately and precisely executed. For law without execution is like a bell without a clapper. It would be as if the magistrate were mute or dead.").

[107] Davies, Reports of Cases in Ireland 5-6 (1615).

[108] Beccaria, Of Crimes and Punishments, Ch 35 (1767).

[109] Parker, Observations. Cf. Bramhall, The Catching of Leviathan 569 (1658) ("[Hobbes] taketh the laws of nature to be laws and no laws: Just as *a man and no man, hit a bird and no bird, with a stone*

The legal and political writings inherited by the Founders were fairly obsessed with execution. The treatise known as *Bracton* returned metronomically to the pairing of judgment and execution—in terms both practical[110] and jurisdictional.[111] Later authors likewise framed their inquiries as an exploration of administrative mechanisms for putting parchment law into effect. The introduction to John Davies's seminal work on Irish common law celebrated the King, not so much for bestowing the substance of English law upon the lucky nation of Ireland as for creating an administrative apparatus to implement it.[112] Coke prefaced the first volume of his Reports by explaining that its publication was prompted "when I considered how by her Majesties princely care and choice, her Seates of Justice have beene ever for the due execution of her Lawes."[113] And Francis Bacon's *Elements of Common Law* were framed around an appeal to a set of royal reforms—compared by the author to those of the Byzantine emperor Justinian—aimed at facilitating the execution of law.[114] This idea recurs persistently in legal treatises,[115]

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and no tree, on a tree and no tree, not *laws* but *theorems*, laws which required not *performance* but *endeavors*, laws which were silent and could not be put in execution in the state of nature.").

[110] E.g., Bracton, "Of Actions, Of The Power of Justices", Woodbine II:308 ("Justices[']… jurisdiction is extended to all matters necessary to determine the suit, so far as judgment and the execution of judgment are concerned"); "Of Exceptions" IV:278 (similar).

[111] E.g., Bracton, "Of the Assise of Novel Disseisin", III:46 ("The plaint ought to be made to him who has jurisdiction, as the prince, and not to everyone who has jurisdiction unless he also has coercion, so that he may order execution of his judgment. [And so] [n]ot to an archbishop or a bishop or other [ecclesiastics], [even] though they have jurisdiction in some matters, [because] they have neither cognisance nor coercion with respect to lay fee…. If [they] demanded execution [by the sheriff], the sheriff would disobey them with impunity"); *Bracton*, "Of Exceptions", IV:249 (similar); Richard Burn, 4 The Justice of Peace and Parrish Officer 42 (1785) (similar).

[112] John Davies, Reports of Cases in Ireland 1 (1615) ("King John made the first division of Counties in Ireland, published the laws of England, and commanded the due execution thereof in all those Counties which he had made; [and] erected the courts of justice…. And to that end, when himself in person came over to Ireland the second time … he brought with him many learned persons in the law, and other Officers and Ministers of all sorts, to put the English laws in execution.").

[113] Coke, *Reports*, Part 1. See also id, part 9 (describing constitutional law of England as structured around the goal "That the Subject might be kept from offending, that is, that Offences might be prevented both by good and provident Laws and by the due Execution thereof").

[114] Francis Bacon, Elements of Common Law 5 (1630) ("Your Majestie's reign having been blessed from the highest with inward peace, and falling into an age wherein if science be increased, conscience is rather decayed, and if men's wits be great, their wills be greater, and wherein lawes are multiplied in number, and slackened in vigour and execution"). Bacon's constitutional survey of English government focuses on the various actors' power to "to execute" law and justice. *Id*, Book 2 (sheriffs, Hundreds, Justices of the Peace, Judges of the Assizes); see

reported caselaw,[116] and theoretical writings,[117] and eighteenth century statute books are dotted with provisions aimed at "the more effectual execution of … Laws."[118]

C. Execution: The King's Defining Role

The practical need for a constitutional cudgel was obvious. Luckily for the English, they had one ready at hand: the King.[119] The standard formulation emphasized that "two things are necessary for a king who rules rightly, arms forsooth and laws, by which either time of war or of peace may be rightly governed, for each of them requires the aid of the other."[120] The English treatise writers tended understandably to focus on the second:

> For this is true freedome in a Prince, to be loved at home, and feared abroad, to be able to defend his own people at home from oppression and violence by his Laws, without the help of an Army; to keep and conserve all his Subjects in happy peace, by a sword made of Parchment and Paper in his Laws, and not by a Sword made up of Iron and Steel in his Armies.[121]

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also Francis Bacon, New Atlantis 22 (1626) ("The governor assisteth, to the end to put in execution, by his public authority the decrees and orders").

[115] Fortescue, *De Laudibus Legum Angliae* 80 (A. Amos transl. 1775) (role of Sheriff). *Cf.* Richard Burn, 3 *The Justice of Peace and Parrish Officer* 1-35 (1785) (role of Justice of Peace)

[116] *Case of the Post-Nati*, 7 Co. Rep. 1a (1608); *Chamberlain of London's Case*, 5 Co. Rep. 63a (1590).

[117] Helvetius, Essays on the Mind 214 (1750) ("[L]aws made for the happiness of all would be observed by none, if the magistrates were not armed with the power necessary to them in execution").

[118] E.g., 13 Geo. 3. Cap. 31 sec. 4 (expanding personal jurisdiction in larceny cases); 26 Geo. 3 3. ch. 8j sec 6 (revising standards of proof in tax evasion cases).

[119] Or Queen, faute de mieux.

[120] *Bracton*, Book 1, Chapter 1, I:3 ("if arms should fail against enemies who are rebellious and unsubdued, the realm will so be without defence, but if laws should fail, justice will be thereupon exterminated, nor will there be anyone to render a rightful judgment"). *See also* Machiavelli, *The Prince* ("The two most essential foundations for any state, whether it be old or new, or both old and new, are sound laws and sound military forces"). Thanks to John Hudson for pointing out that this formulation appears to date at least to Justinian's *Institutes*, still well-known in the eighteenth century. *Institutes* 1 (G. Harris transl., 1756) ("The imperial dignity should be supported by arms, and guarded by laws, that the people, in time of peace as well as war, may be secured from dangers and rightly governed.").

[121] Bagshaw, supra note 79, at104 (1660). See also Fortescue, *De Laudibus Legum Angliae* 2-3 (A. Amos transl. 1775) ("As you divert and employ yourself so much in feats of arms, so I could wish to see you zealously affecte towards the study of the laws; because, as wars are decided by the

The King's role in creating and interpreting law was perhaps seventeenth-century England's most hotly disputed constitutional controversy.[122] But when it came to its execution, everyone agreed that the King—or someone like him—was indispensable:[123]

> [Y]our Majesty is in a double respect the life of our lawes: once, because without your authority they are but libera mortua, and again, because you are the life of our peace, without which lawes are put to silence; and as the vital spirits do not only maintain and move the body, but also contend to perfect and renew it, so your Sacred Majesty, who is anima legis, doth not only give unto your laws force and vigour, but also hath been carefull of their amendment and reforming.[124]

As Chief Justice Silling explained, "it pertains to every king by reason of his office to do justice and grace, justice in executing the laws, &c, and grace in granting pardon to felons."[125] To suggest otherwise was to misunderstand the office: "what is the King himself, but the clear fountain of Justice? And what are the professors of the law but the

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sword, so the determination of justice is effected by the laws"); Glanvill, A Treatise on the Laws and Customs of the Kingdom of England, Composed in the Time of King Henry the Second xxxvi ("The Regal Power should not merely be decorated with Arms to restrain Rebels and Nations making head against it and its realm, but ought likewise to be adorned with Laws for the peaceful governing of its Subjects and its People.") (J. Beames transl. 1810). Of course, the reality didn't always live up to the aspiration. See, e.g., Peter Jupp, The Governing of Britain 1688-1848, p.6 (2006) (noting the spotty nature of law enforcement as actually delegated to the local levels).

[122] See, e.g., Bagshaw, supra note 79 (1660) ("never any Bill passed in Parliament for a Law (the King being within the Realme) by the Lords and Commons alone, without the Kings personall assent in Parliament to the Bill, as he that gave life and being to the Law") (emphasis on lawmaking role).

[123] E.g., William Camden, Discourse on Prerogative (1617) ("Next to the making of laws the execution of them is the most material, which wholly dependeth upon the king, no man having any authority to put any thing into execution but as his deputy."); Althusius, Politica, Ch 29, Sec 14 (1614) ("[C]ommonwealths thrive only so long as good laws, which are the soul of a commonwealth, are respected in them. The magistrate has been constituted for the sake of executing law, and in this sense he is a living law. …"); Milton, *Defense of the English People* ("In short, the parliament is the supreme council of the nation, constituted and appointed by a most free people, and armed with ample power and authority, for this end and purpose; viz. to consult together upon the most weighty affairs of the kingdom; the king was created to put their laws in execution").

[124] Bacon, The Common Law 2-3 (1630).

[125] In re Bagot's Case, 9 E.4.1.b.

conduit pipes deriving and conveying the streams of his Justice to all the subjects of his several kingdoms?"[126]

The King's centrality to the execution of law was practical, to be sure. But it had significant theoretical consequences too—reflected in a number of legal doctrines that turned on the Crown's institutional role in "giving life to law." For one thing, to be out of the King's protection was to be legally defenseless:

> for the Law and the Kings writs be the things by which a man is protected and holpen, and so, during the time that a man in such case is out of the Kings protection, hee is out of helpe and protection by the Kings Law, or by the Kings writ.[127]

This was true not only for those who physically departed the realm, but also for anyone expelled from the body politic in a metaphorical sense, as by a praemunire facias.[128] Even ritual formulations ("The King is dead; long live the King!") recognized that interregnum meant the death of law: "[I]t is a general uncontested rule, that upon the death of a king in actual possession of the crown, his heir is a king ... before his coronation, for without a

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[126] Davies, Reports of Cases in Ireland (1615); See also Bagshaw, supra note 79 (noting "the regard the Law hath to the person of the Supreame Governour, esteeming him the Head of the Law, and the Fountain of Justice"); *Bracton*, Book 1, Chapter 24 I:441-443 ("[T]he crown of the king is to do justice and judgment, and to maintain peace, and without which the crown cannot consist nor hold."); Coke, "Speech & Charge at Norwich Assizes", *Institutes* II:530-531 ("To Kings, Rulers, Judges, and Magistrates, this sentence is proper: you are Gods on earth: when by your execution of Justice and Judgement, the God of heaven is by your actions represented"). For a colonial example, see, e.g., *Godwin et al v. Lunan*, Jeff. 96 (Gen. Ct. Va. 1771) (recording counsel's argument in case brought by churchwardens and vestrymen against licentious minister) (distinguishing "the executive power" from other branches of prerogative and noting of the King that that, "possessing the executive power of the laws, it is his peculiar duty to see such act carried into execution")

[127] "Coke on Littleton," in *Institutes*. Hobbes gave this formulation a nasty twist, at least from the king's perspective: "The Obligation of Subjects to the Soveraign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them." For an even more daring version, see the doctrinally sound but prudentially challenged treason convict quoted in Hale, *Pleas of the Crown*: "the king being convicted by the pope may be lawfully slaughtered by any whatsoever, for this is the execution of the supreme sentence of the pope, as the other is the execution of the law."

[128] "Coke on Littleton," in *Institutes*, Vol 1, Section 199, II:711-713 ("The judgement in a Praemunire is that the Defendant shall be from thenceforth out of the king's protection, and his Lands and Tenements, goods and chattels forfeited to the king, & that his body shall remaine in prison at the Kings pleasure. So odious was this offence of Praemunire, that a man that was attained of the same, might have beene slaine by any man without danger of Law.").

King to execute the laws, Justice must fail, and therefore it is a maxim, that the king never dies."[129]

The king's role as the executor of law was so conceptually central to his identity that it was literally criminal to disrespect it. Thus, to refuse a royal request for assistance with the execution of law was to commit a misprision contempt against the King's prerogative.[130] It was also a crime, not only to accuse the King of failing to execute the law, but even simply to suggest that he might not be doing so with sufficient vigor.[131] It was no accident that the first item in Parliament's Grand Remonstrance complained about King Charles's failure to provide for "the due execution of those good laws which have been made for securing the liberty of your subjects."[132]

D. Toward a Separation of Powers

Whatever the virtues of the kingship as a solution to the execution problem, it didn't take a spitefully anti-Catholic legislature to notice that the crown came with some serious problems as well. One was the possibility that the King might be too hasty. Energy was good, but it had to be bridled, and its enthusiasms tamed—or at least carefully directed. In a carefully abstract vein, the politically conservative Bacon cautioned:

> Boldness is ever blind; for it seeth not dangers and inconveniences. Therefore it is ill in counsel, good in execution; so that the right use of bold persons is, that they never command in chief, but be seconds, and under the direction of others. For in counsel it is good to see dangers; and in execution not to see them, except they be very great.[133]

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[129] Hawkins, Pleas of the Crown I:36 (1716); see also Coke, *Institutes*, Part 3, II:963-964 ("the Crown descend to the rightfull heire, he is Rex before Coronation: for by the Law of England there is no interregnum: … for by the law there is alwayes a King, in whose name the lawes are to be maintained, and executed, otherwise Justice should faile.").

[130] Hale, Prerogatives of King 268-270 (1976) ("the king hath [a] power of commanding the person of any man … in reference to the public service of the kingdom[, either] in point of advice, in point of office or service, [or] in point of safety"); Hawkins, Pleas of the Crown *(*1716) ("misprisions not amounting to misprision of treason" include "refusing to assist [the King] for the good of the public" and "disobeying the king's lawful commands").

[131] Hawkins, Pleas of the Crown (1716) (a "contempt[] against [the King's] person or government" to "charg[e] the government with . . . weak administration"); *see also* id. at I:160 (discussing in further detail).

[132] Grand Remonstrance (1641) (offering some two hundred bits of constructive criticism).

[133] Bacon, "Of Boldness," in *Essays* 53; see also John Locke, Essay on Human Understanding, Chap 30, Sec 4 ("[F]or a man to be undisturbed in danger, sedately to consider what is fittest to be done, and to execute it steadily, is a mixed mode, or a complex idea of an action which may exist."); *id.*, Chap 31, Sec 3 (similar). This distinction between counsel and execution carried

The treatise known as *Bracton*—at least, as inherited by eighteenth century readers—often returned to an equestrian metaphor for the same point: "since the heart of a king ought to be in the hand of God, let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice."[134]

Commentators also worried about other human frailties to which even God's lieutenant might be subject. The most candid urged realism: "no advantage in moral policy can be lasting, which is not founded on the indelible sentiments of the heart of man. Whatever law deviates from this principle will always meet with a resistance, which will destroy it in the end."[135] Sometimes they acknowledged that the King himself could be wicked; popular tropes about Bad King John and humpback'd Richard were often tolerated or even cultivated by subsequent dynastic coalitions.[136] More often, though, these worries were framed in terms of bad advice from "Evil Counsellors, and Corrupt and Arbitrary Ministers of State"[137] who were themselves malicious or just stupid. Other

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through to *The Federalist*. Federalist, No. 70 ("In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department … often promote deliberation and circumspection…. They constantly counteract those qualities in the executive, which are the most necessary ingredients in its composition, vigour and expedition, and this without any counterballancing good.").

[134] Bracton, "Of Actions," Woodbine-Thorne II:305. In a similar vein was Beccaria's anxiety—in work that generally celebrated vigor in execution—about "the unbounded licentiousness of ill-directed power, which has continually produced so many authorized examples of the most unfeeling barbarity." Of Crimes and Punishments.

[135] Beccaria, Of Crimes and Punishments, Ch 2 (1764) ("No man ever gave up his liberty merely for the good of the public. Such a chimera exists only in romances") (discussing "the sovereign's right to punish"). Machiavelli, as usual, was more blunt. *The Prince* 56, 63 ("I deem it best to stick to the practical truth of things rather than to fancies…. Hence it is necessary that a prince who is interested in his survival learn to be other than good…. [I]t is often necessary to act against mercy, against faith, against humanity, against frankness, against religion in order to preserve the state….").

[136] E.g., King John and the Abbot of Canterbury ("I'll tell you a story, a story anon/Concerning a prince and his name was King John/He was a prince and a prince of great might/And he held up great wrong and he put down great right"); Shakespeare, *Richard III*, act 3, scene i, lines 130-131 ("Because that I am little, like an ape, he thinks that you should bear me on your shoulders.").

[137] William Penn, England's Great Interest in the Choice of this New Parliament (1679) ("The Work of this Parliament is … [t]o remove, and bring to Justice, those *Evil Counsellors, and corrupt and Arbitrary Ministers of State*, that have been so Industrious to give the King Wrong Measures, … and Alienate his Affections from his People") (emphasis in original); Grand Remonstrance (noting, "without the least intention [sic] to lay any blemish upon your royal person, but only to represent how your royal authority and trust have been abused," that "those evils under which we have now many years suffered, are fomented and cherished by a corrupt and ill-affected party,"

writers focused on society at large and the factions to which it gave rise, whether religious, regional, socio-economic, or all three.[138]

But this left them on the horns of a dilemma, since even the most ardent parliamentarians recognized the need for a magistracy to execute the law vigorously and predictably. The parliamentarian Henry Parker summarized the problem:

> [After the origin of civil society,] it was soon therefore provided that lawes agreeable to the dictates of reason should be ratified by common consent, and that the execution and interpretation of those Lawes should be intrusted to some magistrate, for the preventing of common injuries betwixt Subject and Subject[.] [B]ut when it after appeared that man was yet subject to unnaturall destruction, by the Tyranny of intrusted magistrates, a mischiefe almost as fatall as to be without all magistracie, how to provide a wholsome remedy therefore, was not so easie to be invented….
>
> [Even] if it be agreed upon, that limits should be prefixed to Princes, and judges appointed to decree according to those limits, yet an other great inconvenience will presently affront us; for we cannot restraine Princes too far, but we shall disable them from some good, as well as inhibit them from some evill, and to be disabled from doing good in some things, may be as mischievous, as to be inabled for all evils at meere discretion. Long it was ere the world could … finde out an orderly meanes whereby to avoid the danger of unbounded prerogative on this hand, and too excessive liberty on the other: and scarce has long experience yet fully satisfied the mindes of all men in it.[139]

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including "the Jesuited Papists," "the Bishops," and "Councillors and Courtiers [who] for private ends have engaged themselves to further the interests of some foreign princes").

[138] E.g., Machiavelli, Discourses on Livy 211-212 (1517); Voltaire, Commentary on Beccaria, Chap 4 ("Would you prevent a sect from overturning the state, imitate the present wise conduct of England, of Germany, of Holland; use toleration. The only methods, in policy, to be taken with a new sect, are, to put to death the chief and all his adherents, men, women, and children, without sparing one individual; or to tolerate them, when numerous. The first method is that of a monster; the second of a wise man"); Parker, Observations ("The composition of Parliaments, I say, takes away all jealousies, for it is so equally, and geometrically proportionable, and all the States doe so orderly contribute their due parts therein, that no one can be of any extreame predominance, the multitude loves Monarchy better then Aristocracy, and the Nobility and Gentry, prefer it as much beyond Democracy.").

[139] Parker, Observations, supra at __. Hamilton picked up this thread in the New York Convention debates: "There are two objects in forming systems of government—Safety for the people, and energy in the administration. When these objects are united, the certain tendency of the system will be to the public welfare. If the latter object be neglected, the people's security will

How indeed to "restrain Princes" from tyranny without "disabl[ing] them" from the vigorous execution of law—which was the whole point of having them in the first place?

The start of an answer came as more of a (hotly disputed) assertion than a solution as such: The King was said to be subject to law. This point goes back to *Bracton*:[140]

> [While the] king has no equal within his realm …. [he] must not be under man but under God and under the law, because law makes the king, … for there is no rex where will rules rather than lex…. And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicegerent on earth he is, … [and who] willed himself to be under the law that he might redeem those who live under it.[141]

Both the manuscript lineage and the best reading of this portion of *Bracton* are disputed; it's at least debatable whether it was an exhortation[142] or a doctrinal statement of present

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be as certainly sacrificed, as by disregarding the former. Good constitutions are formed upon a comparison of the liberty of the individual with the strength of government: If the tone of either be too high, the other will be weakened too much." Alexander Hamilton, [New York] Convention Debates (June 25, 1788), http://rotunda.upress.virginia.edu/founders/RNCN-02-22-02-0002-0010-0001. [review again other reporters on same speech]

[140] Reading him this way probably involved some degree of wishful thinking about Merrie England—not to mention genuine ignorance about what modern scholarship has shown about the text's authorship and repeated revisions. See generally J.L. Barton, The Mystery of Bracton, 14 J. Legal Hist. 1 (1993).

Bracton was an authoritative citation even in the United States. See, e.g., Chisholm v. Georgia, 2 U.S. 419, 464-465 (Did the people of the United States intend to bind the several States by the Executive power of the national Government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of Bracton, his maxim, I believe, has been deemed a good one '*Supervacuum esset leges condere, nisi esset qui leges tueretur*.' 'It would be superfluous to make laws, unless those laws, when made, were to be enforced.'"); A Farmer I, Baltimore Maryland Gazette (Feb. 15, 1788)), DHRC, at http://rotunda.upress.virginia.edu/founders/RNCN-02-11-02-0003-0074 ("Henry Bracton a cotemporary lawyer and judge, who has left us a compleat and able treatise on the laws of England, is thus clear and express—*Omnes quidem sub rege, ipse autem sub lege*, all are subject to the King, but the King is subject to the law."). For more on the re-publication and early modern influence of Bracton, *see*, *e.g.*, Ian Williams, A Medieval Book and Early-Modern Law: Bracton's Authority and Application in the Common Law c. 1550–1640, 79 L. Hist. Rev. 47 (2011).

[141] *Bracton*, Book 1, Chapter 8 (Woodbine-Thorne at II:33).

[142] Bracton, Of Actions, Woodbine II:305-306 ("For he is called rex not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws. Nothing is more fitting

legal obligation.[143] Either way, the notion of a king subject to law persisted. Quoting *Bracton* without citation, Richard Hooker—one of England's first systematic constitutional theorists and in general an enthusiastic monarchist[144]—put it simply: "so is the power of the [English] king over all and in all limited, that unto all his proceedings the law itself is a rule." On Hooker's account, this was England's great boon:

> Happier that people whose law is their king in the greatest things, than that whose king is himself their law. Where the king doth guide the state, and the law the king, that commonwealth is like an harp or melodious instrument, the strings whereof are tuned and handled all by one, following as laws the rules and canons of musical science.[145]

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for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.").

[143] Bracton, Book 1, Chapter 16, I:269 ("[T]he king has a superior, for instance, God. Likewise the Law, through which he has been made king. Likewise [he has] his court, namely, counts, barons, because the counts are so called as being as it were the associates of the king, and he who has an associate, has a master, and therefore if the king be without a bridle, that is without law, they ought to put a bridle upon him"); *Of Actions*, Woodbine II:305-306 ("[S]ince he is the minister and vicar of God on earth, [the king] can do nothing save what he can do de jure … because there follows at the end of the lex the words 'since by the lex regia, which was made with respect to his sovereignty; nor is that anything rashly put forward of his own will,' but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it auctoritas").

[144] For a typical sentiment, see, e.g., Of the Laws of Ecclesiastical Polity, Book 7, Chap 2, Section 6 ("Unto kings by human right, honour by very divine right, is due; man's ordinances are many times presupposedy as grounds in the statutes of God…. So God doth ratify the works of that sovereign authority which kings have received by men.").

[145] Richard Hooker, Of the Laws of Ecclesiastical Polity, Book 7, Chap 2, Section 12-13. Hooker emphasized that this meant "not only the law of nature and of God, but [the] very national or municipal law consonant thereunto." Id. See also, e.g., Fortescue, *De Laudibus Legum Angliae* 26 (1775 transl.) ("A King of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his goverment [sic] is not only regal, but political."). Machiavelli's influential commentary on republics didn't relate to the state of affairs in England, of course, but it nicely crystalized this celebration of legally limited magistracy. E.g., Machiavelli's Discourses. *Discourses on Livy* (1517) ("[T]he states of princes have lasted very long, the states of republics have lasted very long, and both have had need of being regulated by the laws. For a prince who can do what he wishes is crazy; a people that can do what it wishes is not wise."). Note that Machiavelli's defense of the Roman dictatorship relied largely on its legalized nature. *Discourses on Livy*, 74-75 ("So a republic will never be perfect unless it has provided for everything with its laws and has established a remedy for every accident and given the mode to govern it. So, concluding, I say that those republics that in urgent dangers do not take refuge either in the dictator or in similar authorities will always come to ruin in grave accidents").

Certainly counter-narratives existed; the relationship between municipal law and the King was a central point of disagreement between Crown and Parliament during the seventeenth century.[146] By the Founding era, however, there was no question: the Crown was subject to law—or at least, to its directive force.[147]

But that only displaced the question. We can tell the King he is subject to law. But what if he doesn't listen?

> 'T was not difficult to invent Lawes, for the limitting of supreme governors, but to invent how those Lawes should be executed or by whom interpreted, was almost impossible, nam quis custodiat ipsos custodes…?[148]

For that, the writers of the seventeenth and eighteenth century began to explore the idea of separate government powers in the well-ordered commonwealth. There were two steps to this thought.

The first step was recognizing a matter of empirical fact: debates about political legitimacy aside, governance in any moderately sophisticated state requires institutional specialization. In the chain of events that bring law from a thought to an enacted rule to a lived reality, different institutions typically play different roles. The philosopher John Locke's taxonomy of legislative, executive and federative (*i.e.*, foreign affairs and national

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[146] Compare, e.g., Filmer, *Patriarcha* 43-44 ("The prerogative of a king is to be above all laws, for the good only of them that are under the laws," such that "in effect the king does swear to keep no laws but such as in his judgment are upright), with, e.g., Grand Remonstrance ("The most public and solemn sermons before His Majesty were … to advance prerogative above law" and urge that "the government must be set free from all restraint of laws concerning our persons and estates"), and Milton, The Tenure of Kings & Magistrates ("all Kings and Magistrates at their first installment to do impartial justice by Law: who upon those terms and no other, received Allegiance from the people, that is to say, bond or Covenant to obey them in execution of those Lawes which they the people had themselves made, or assented to.").

[147] E.g., Hale, *Prerogatives of the King* (1676) ("as to the directive power of the law, the king is bound by it (1) by his office… [and] (2) by his oath at his coronation"); Finch, supra note 77, at 32 ("Statutes to suppress Wrong, or to take away Frau[d] bind the King although he is not named."). See supra, Part II.A (discussing emergence of parliamentary sovereignty). For one example of Founding citations to Bracton on this precise point, see A Farmer I, *Baltimore Maryland Gazette* (Feb. 15 1788), http://rotunda.upress.virginia.edu/founders/RNCN-02-11-02-0003-0074 ("Henry Bracton a cotemporary lawyer and judge, who has left us a compleat and able treatise on the laws of England, is thus clear and express—Omnes quidem sub rege, ipse autem sub lege, all are subject to the King, but the King is subject to the law—It will hardly then be imagined, that the supreme law and constitution were the grants and concessions of a Prince, who was thus in theory and practice, subject himself to ordinary acts of legislation—But all these things are so amply discussed and the authorities so accurately collected in the publication of my Lord Somers, that a reference must be much more satisfactory than a repetition.").

[148] Parker, *Observations*.

security) powers of the government was the Founders' most important referent. But the descriptive point long predated Locke. Already in the thirteenth century, the treatise known as *Bracton* was groping toward the distinction between a legislative power[149] and an implementing power in its executive and judicial guises.[150] By the sixteenth and seventeenth centuries, the commentary had long since found greater precision. Davies's treatise, for example, opened by explaining that

> in every Commonwealth, when it once begins to flourish, and to grow rich and mighty, the people grow proud withal, and their pride makes them contentious and litigious, so as there is need of many laws to bridle them, and many officers to execute those laws, and many lawyers to interpret those laws, and all little enough; as when a body grows full and gross, it needs more physic than when it was lean[151]

Coke's classic commentary on Littleton used a similarly corporeal metaphor in distinguishing between three phases of law: announcing it; interpreting it; and enforcing it:

> The Law is the rule, but it is mute; The King judgeth by his Judges, and they are the speaking Law, Lex loquens. The processe and the execution which is the life of the Law consisteth in the Kings Writs.[152]

Many others were to the same effect.[153]

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[149] Bracton, Of Actions, Woodbine II:305-306 ("[T]he king, since he is the minister and vicar of God on earth, can do nothing save what he can do de jure . . . nor is that anything rashly put forward of his own will,' 3 but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it auctoritas.").

[150] Bracton, Book 1, Chapter 5 (I:21-23) ("But it is expedient that there should be constituted magistrates of the State, for the effect of right is obtained through those who are appointed to administer it, for it would be useless to have right in a state, unless there are persons competent to administer it."). See also Bracton, Book 1, Chapter 3 (I:13) ("We must see now what is law; and it is to be known that law is [1] the common precept [i.e., the rule] of prudent men in council, [2] the coercion of offences [i.e., the implementation of that rule], which are committed either voluntarily or through ignorance, and [3] the common warrant of the body politic.").

[151] Davies, Reports of Cases in Ireland (1615).

[152] Coke on Littleton, *Institutes*, Vol 1, Section 199 of Institutes, II:711-713.

[153] Hale, for example, distinguished between "*jurisdictio* or *potestas legem ferendi*, or *jurisdictio nomothetica*" and "*jurisdictio legem dicendi* or *distribuendi*." The crucial distinction was between the nomothetical creation of a new forward-looking rule and the executory application of existing rules to past action: "The supreme jurisdiction of parliament acts either *deliberative* where it makes laws or *judicative* when it gives judgment. The first respects the future.... The second respects the past, and is not properly *qua tale* a law but a supreme judgment unexaminable." Hale further divided *jurisdictio legem dicendi* or *distribuendi* into the judicial power ("a power to give judgment")

The second step was prescriptive, and it was at least initially far more controversial. On this account, not only were the powers of government *in fact* distributed among various institutions; they actually *should be* so separated, with each institution at least somewhat independent from the other. The Enlightenment philosopher Cesare Beccaria captured the basic idea:

> The sovereign, who represents the society itself, can only make general laws to bind the members; but it belongs not to him to judge whether any individual has violated the social compact, or incurred the punishment in consequence. For in this case there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused, who denies it. It is necessary then that there should be a third person to decide this contest; that is to say, a judge, or magistrate, from whose determination there should be no appeal; and this determination should consist of a simple affirmation, or negation of fact.[154]

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and the executive power ("a power to compel the parties to come to judgment and to execute the judgment given"). Hobbes more famously noted that "the two arms of a Commonwealth, are Force and Justice, the first whereof is in the King; the other deposited in the hands of the Parliament." The reference to Justice here is to creating laws pursuant to the social compact, not merely to their adjudication, for which Hobbes tended to use the more specific word "judicature" and divide from "execution" of rulings.

For other examples of this distinction between prescription and execution, see, e.g., Gilbert on Evidence 254, (1777) (distinguishing between officers with power to render judgment and officers with power to execute warrants issued thereunder); Helvetius, Essays on the Mind 249 (1750) ("mankind shall consent to lose a small part of that liberty they found so prejudicial in a state of nature, they will enter into conventions with each other, and these conventions will be their first laws; when they have formed laws, they will entrust some persons with the care of seeing them put in execution, and those will be the first magistrates."); Hunton, A Treatise of Monarchy 5 ("In respect of its degrees [government is] *Nomothetical* or *Architectonical*, and *Gubernative* or *Executive*. And in respect of the subject of its residence, there is an ancient and usual distinction of it into *Monarchical*, *Aristocratical*, and *Democratical*"); Parker, Observations (using the standard tripartite formula to discuss society's need for at least three institutions: "some magistracy to provide new orders, and to judge of old, and to execute according to justice, no society could be upheld some magistracy to provide new orders, and to judge of old, and to execute according to justice"); Pufendorf, On the Duty of Man and Citizen, Ch 2 para. 7 ("The power to oblige, that is, to impose an inward necessity, and the power to force or compel by penalties to observe the law, resides exclusively in the lawgiver, and in him to whom has been committed the maintenance and execution of the laws.").

[154] Of Crimes and Punishments, Chapter 27. The Founders were much impressed by Cicero as a classical antecedent in this respect. See, e.g., An Impartial Citizen VI, Petersburg Gazette (13 March 1788) ("Cicero, the most learned, and perhaps the wisest of the ancient Romans … expresses his detestation" of special bills "affecting individuals only" in "the most nervous and energetic language").

This prescriptive assertion had been fiercely contested both in theory[155] and in practice.[156] But by the late eighteenth century, it was received wisdom—certainly among the commentators and legal theorists on whom the Founders most relied, with Blackstone,[157] Locke,[158] and Baron de Montesquieu[159] being the standard referents.[160]

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[155] Hobbes, Leviathan ("There is a Sixth doctrine, plainly, and directly against the essence of a Common-wealth; and 'tis this, That the Soveraign Power may be divided. For what is it to divide the Power of a Common-wealth, but to Dissolve it; for Powers divided mutually destroy each other … [T]his division is it, whereof it is said, a Kingdome divided in it selfe cannot stand.… If there had not first been an opinion received of the greatest part of England, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre.…"); See also e.g. Bodin, Six Books of the Commonwealth (similar).

[156] E.g. *Five Knights' Case* (1627) 3 How St Tr 1.

[157] Blackstone, Commentaries ("It is highly necessary for preserving the ballance of the constitution, that the executive power should be a branch, though not the whole, of the legislature. The total union of them, we have seen, would be productive of tyranny … Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for … they mutually keep each other from exceeding their proper limits"); id. ("In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.").

[158] Locke, Second Treatise on Politics, Chap XII ("[I]t may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage. . . . And thus the legislative and executive power come often to be separated.").

[159] Montesquieu, *The Spirit of Laws*, Book XI, Ch. 6, Book XI, p.181 (S. Crowder, London 1773) ("When the legislative and executive powers [*puissance exécutrice*] are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same march or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers.") ("Lorsque, dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement. Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice.").

[160] See also Jean de Lolme, The Constitution of England, Ch. 10 (G. Robinson, London 1784) ("And the English Constitution has not only excluded from any share in the Execution of the laws, those in whom the People trust for the enacting of them, but it has also taken from them what would have had the same pernicious influence on their deliberations—the hope of ever invading that executive authority, and transfering it to themselves.") ("Et il ne suffisoit pas d'ôter

Jonathan Swift was typical in criticizing Hobbes for "confound[ing] the executive with the legislative power": "all well-instituted states," Swift argued, "have ever placed them in different hands."[161] Even treatises on rather banal topics of private law would signal their intellectual bona fides by reciting the standard point.[162] And commentators—both British[163] and Continental[164]—focused frequently on this separation as a principal cause

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aux Législateurs l'exécution des loix, par conséquent l'exemption, qui en est la suite immédiate; il falloit, encore, leur ôter ce qui eût produit les mêmes effets, l'espoir de jamais s'attribuer cette autorité exécutive.")[*check - Did de Lolme revise between 1784 (English) and 1789 (French), or is this just a particularly free translation?*]; Burlamaqui, "Which is the Best Form of Government?", *Politic Law*, XXXII-XXIII (one way to secure "the most perfect liberty" is "to invest the person, who enjoys the honours and title of sovereignty, with only a part of the supreme authority, and to lodge the other in different hands, for example, in a council or parliament.… With regard to Monarchies, it is proper, for example, that the military and legislative powers, together with that of raising taxes, should be lodged in different hands, to the end that they may not be easily abused.").

[161] Swift, Works 368.

[162] E.g. Jones on Bailments (1796) ("The constitution of Rome was originally excellent; but, … that base dissembler and cold-blooded assassin C. Octavius [imposed a] new form of government [that] was in itself absurd and unnatural; and the lex regia, which concentrated in the prince all the powers of the state both executive and legislative, was a tyrannous ordinance, with the name only, not the nature, of law.…").

[163] Finch, supra note 77, at 21 (translator's preface) ("If the Laws of England do deservedly surpass the Laws of all other Countries in the Perfection of their Nature, the Excellency of their Constitution, and especially in that Spirit of Freedom and Liberty which they breathe upon the Subject; there is yet an unpleasing Peculiarity of Fate attending them, such as perhaps no other Laws whatever are subject to."); Davies (1615) Reports of Cases in Ireland 5-6 ("[English law] doth excell all other Laws in upholding a free Monarchie, which [is] the most excellent [form] of Government, exalting the Prerogative Royall, and being very tender and watchful to preserve it, and yet maintaining withall the ingenious Liberty of the Subject"). For one example of the many North American celebrations of this point, see Curtius I, New York Daily Advertiser (Sept 29, 1787), DHRC __ ("[S]hould [the President] remind of a Government, once justly dear to us—then let us enquire, where, among foreign nations, are the people who may boast like Britons? In what country is justice more impartially administered, or the rights of the citizen more securely guarded? Had our situation been sufficiently contiguous; had we been justly represented in the Parliament of Great-Britain; to this day we should have gloried in the peculiar, the distinguished blessings of our political Constitution.").

[164] Voltaire, *Lettres sur les Anglais,* No. 8 ("The English are the only people upon earth who have been able to prescribe limits to the power of kings by resisting them."); Burlamaqui, "Which Is The Best Form Of Government?" in *Politic Law* ("[I]s not England at present a proof of the excellency of mixed governments? Is there a nation, every thing considered, that enjoys a higher degree of prosperity or reputation?"). Like many early modern commentators (and perhaps along with the British constitution itself), Burlamaqui sometimes conflated mixed government in the sense of social estates with separation of powers in the sense of a tripartite Lockean division. But in context, he is here clearly referencing the separation of powers.

for England's celebrated liberty and prosperity. In Blackstone's famous paraphrase of Montesquieu, England was "the only nation in the world where political or civil liberty is the direct end of its constitution."[165]

III. Legal Doctrine

A. The Umbrella Term for the Crown's Non-Statutory Powers Was "The Royal Prerogative"

That brings us to the late eighteenth-century English constitution and the semantic conventions used by legal treatises and political theorists alike to describe the powers of the Crown. Blackstone's Commentaries are by far the best expositional scaffold, both because they are so good and because they defined the mainstream American understanding of English law. Published over four years beginning in 1765, his multi-volume treatise was as influential in the United States as it was in England—on constitutional questions, perhaps even more so. By this I don't mean that it was influential in shifting the law; if anything, Blackstone was behind the times in his presumably willful silence about the Commons's political dominance of the Crown.[166] But for Americans like

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[165] Blackstone, Commentaries I:1, 143-144 (celebrating the "liberties of Englishmen," the protections they enjoy against "every species of compulsive tyranny and oppression"). See also, delightfully, Montesquieu, *The Spirit of Laws*, Book XI, Ch. 6, Book XI, p.193 (S. Crowder, London 1773 ("Harrington, in his *Oceana*, has also inquired into the highest point of liberty to which the constitution of a state may be carried. But of him indeed it may be said, that, for want of knowing the nature of real liberty, he busied himself in pursuit of an imaginary one, and that he built a Chalcedon, though he had a Byzantium before his eyes.") ("Harrington, dans son Oceana, a aussi examiné quel était le plus haut point de liberté où la constitution d'un État peut être portée. Mais on peut dire de lui qu'il n'a cherché cette liberté qu'après l'avoir méconnue, et qu'il a bâti Chalcédoine, ayant le rivage de Byzance devant les yeux.").

[166] Some have suggested that the Founders' reverence for Blackstone left them "unfamiliar[] with the English developments." Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1 (1972). This may have been true for the less sophisticated. But plenty knew the real state of affairs. For a mere sampling, see, e.g., Gouverneur Morris, 2 Farrand 104 (July 24, 1787) ("the real King [is] the Minister"); Marcus II, *Norfolk and Portsmouth Journal* (Feb. 27, 1788) ("Every body knows that the whole movement of their government, where a Council is consulted at all, are directed by their Cabinet Council, composed entirely of the principal officers of the great departments") (distinguishing "the constitutional ideas" of England with "what the present practice really is"); Civis Rusticus, *Virginia Independent Chronicle* (Jan. 30 1787), DHRC, at http://rotunda.upress.virginia.edu/founders/RNCN-02-08-02-0001-0205 ("The King of England can make peace or declare war; can make treaties, but, whenever the Commons disapprove of the measures by which these have been brought about, we know the consequences. Col. Mason is too well read in parliamentary history, not to know what the effects would have been, had the Commons frowned on those of Hanover, Seville, &c. negociated in the administration of Sir Robert Walpole."); A Farmer V, Baltimore Maryland Gazette (March 28,

James Madison, Blackstone's treatise was the "book which is in every man's hand"[167]—central to pedagogy, drafting, and litigation alike as the standard restatement of the formal constitutional law of England.

The key to Blackstone's conceptual structure is his careful division of two distinct issues. First, the timeless *powers* of government in the abstract. Second, the contingent and particular *entities* among which those powers happened to be divided in mid-eighteenth-century England.

Blackstone thus begins by dividing the law-related powers of governance into two interlocking categories, each of which depends on the presence of the other to form a meaningful whole:

> (1) the "legislative … authority," defined as "the right … of *making* … the laws"; and
>
> (2) the "executive authority," defined as "the right … of *enforcing* the laws"[168]

Paraphrasing Montesquieu, Blackstone then explains that the genius of the English constitution was to vest these conceptual powers in two separate institutions:

1788) ("I must insist that [the British government] was hardly a government at all, until it became simplified by the introduction and regular formation of the effective administration of responsible ministers, on its present system."); Federalist 76 (discussing actual political relationship between Commons and the Crown); George Nicholas, Virginia Convention Debates (June 4, 1788), DHRC at http://rotunda.upress.virginia.edu/founders/RNCN-02-09-02-0004-0006-0001 ("[T]he House of Commons …. entirely controul the operation of government, even in those cases where the King's prerogative gave him nominally the sole direction"). For more on the robust transatlantic legal culture, see, e.g., Mary Sarah Bilder, Colonial Legal Culture and the Empire (2008); Daniel Hulsebosch, Constituting Empire (2005).

[167] Madison, Virginia Ratifying Debates (June 18, 1788), http://rotunda.upress.virginia.edu/founders/RNCN-02-10-02-0002-0007-0001. Even Blackstone's sharpest critics acknowledged—indeed, were motivated by—the pervasiveness of his influence. See Jefferson letter ("[T]he honeyed Mansfieldism of Blackstone became the students' hornbook, [and] from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.").

[168] Blackstone, Commentaries I:2, 146 (emphasis in original). This classification of two discrete conceptual powers of government persists as an organizing principle throughout the book. E.g., *id.* I:9, 338 ("Of Subordinate Magistrates") ("In a former chapter of these Commentaries we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only; namely the supreme legislative power or parliament, and the supreme executive power, which is the king: and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.").

> In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's own independence, and therewith of the liberty of the subject.
>
> With us therefore in England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.

This roadmap in place, Blackstone proceeds to a consideration of the two *politically distinct* entities to which these two *conceptually distinct* powers were separately entrusted.

He starts with Parliament—the political entity vested with the legislative power. The treatise's second chapter surveys the basic elements of that entity's identity, structure, and powers. The structural discussion describes the entity's constituent parts: King, Lords, and Commons. Blackstone describes the varying process by which particular human beings were selected to fulfill the role of each part. He then explores the basic operations of the entity as a real-world decisionmaker: how Parliament was convened, the process by which it passed laws, and the process by which those laws were handed off for execution. Having explained Parliament's constitutional structure, Blackstone then turns to its substantive authorities, entitlements, and privileges. First among these was of course the legislative power itself: the authority to enact forward-looking rules of legal compulsion. But the suite of powers and authorities held by Parliament also included the legislators' right to speak freely on the floor of parliament, and a more general immunity from arrest while actively engaged in parliamentary service.

With Parliament sorted, Blackstone then turns in his third chapter to the political entity vested with the executive power: "The Person of the King." Over the next two hundred pages, Blackstone conducts a methodical analysis of the structural and institutional characteristics of the Crown. First, he describes the process by which "the English nation … mark[s] out with precision, who is that single person"—i.e., the rules of "the royal succession."[169] Then he describes the constitution, legal rights, and juridical relations of the individuals and institutions appurtenant to the Crown: in particular "The King's Royal Family"[170] and "The Councils Belonging to the King," from "the high

[169] Blackstone, Commentaries 1:3, 190-217.

[170] Blackstone, Commentaries I:4, 218-226.

court of parliament" and "the peers of the realm" to "the judges of the courts of law" and the "privy council."[171] The treatise then turns to "The King's Duties," especially "the duty … to govern his people according to law," with close attention to the historical evolution of the coronation oath.[172] Only after this lengthy discussion of the Crown's institutional characteristics does Blackstone finally arrive at the question of most interest for modern purposes: a discussion of the substantive "rights and capacities which the king enjoy[s] alone."

This suite of substantive authorities had a name: "The King's Prerogative."[173] As discussed above, by Blackstone's time, the prerogative long since been consigned in its entirety to what American constitutional lawyers would call *Youngstown* Zone 2. That is to say, it represented a residual and defeasible authority for Crown action in areas that Parliament—or more precisely the "King-in-Parliament"—had not (yet) chosen to occupy. Like the common law more generally, the prerogative as described by Blackstone thus provided the default rule of decision for questions of Crown authority—until Parliament chose, by contrary or supplementary legislation, to displace it.[174]

The first royal authority was—as we have already seen—the "supreme executive power," specifically defined as "the right of enforcing the laws."[175] The full list of Crown

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[171] Blackstone, Commentaries I:5, 227-232.

[172] Blackstone, Commentaries I:6, 233-236.

[173] Blackstone, Commentaries I:7, 239. See also id., I:3 ("It matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute."). Blackstone further classifies the direct royal prerogative into three principal sub-categories: those that pertain to "the king's royal character"; those that pertain to "his royal authority"; and those that pertain to "the royal income." Id., I:7, 240. The middle category in turn includes two aspects: those that "respect … this nation's intercourse with foreign nations" *and also* those that "respect … this nation's … own domestic government and civil polity." Id., I:7, 252; see also id. I:7, 260). The last category includes the King's "ordinary revenue"; Blackstone also includes his discussion of the King's "extraordinary revenue" in the same chapter, but makes clear that the latter references non-prerogative powers of taxation that are granted by statute. Id., I:8, 306-337. Other writers similarly distinguished between different categories of prerogative. See e.g., Coke, In the Committee of Grievances (Feb 19, 1621) (distinguishing "prerogative indisputable" and "prerogative disputable"); Ellesmere, Rights of the King (similar); Hale, Prerogatives of the King 145 (drawing a distinction between the king's "powers" and "prerogatives", with the latter defined as those which conduce to his "support and dignity").

[174] For more on parliamentary supremacy, see *supra*, Part I.A.

[175] Blackstone's chapter-opening formulation for this particular authority was strikingly similar to the Article II vesting clause: "The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen…." Blackstone, *Commentaries*, Chapter 3. He was not the only prominent writer who pre-figured the Founders' various formulations in Article II. See, e.g.,

prerogatives, however, goes on (and on). It's worth setting out the full inventory. As the footnotes to the list will attest, Blackstone was not innovating. He was just the latest consolidator of Anglo-American constitutional commonplaces:

- the sovereign and sacred nature of the royal person;[176]
- a personal immunity from suit; [177]
- a personal exemption from the rules of laches and negligence;[178]
- the "sole power of sending ambassadors to foreign states, and receiving ambassadors at home"
- the power "to make treaties, leagues, and alliances with foreign states and princes"
- "the sole prerogative of making war and peace"[179]
- "the prerogative of granting safe-conducts"
- the right to be "a constituent part of the supreme legislative power" with "the prerogative of rejecting such provisions in parliament, as he judges improper";[180]

Hulme, An Historical Essay on the English Constitution, (1771) ("There were three things essentially necessary to form a Saxon government…and these were a court of council, a court of law, and a chief magistrate….[The] chief magistrate, who was vested with the executive authority to administer the constitution to the people; and whose duty it was to take care that every man within his jurisdiction paid a due obedience to law"). Some writers suggested that the power to execute the law was a separate branch of authority from those powers denoted as royal prerogative. E.g., Bolingbroke, Remarks on the History of England 82 (1743) ("A King of Great Britain is that supreme Magistrate, who has a negative Voice in the Legislature. He is entrusted with the executive Power, and several other Powers and Privileges, which we call Prerogatives, are annex'd to this Trust.") That distinction makes no analytical difference for present purposes; either way, "executive power" meant the execution of laws rather than a shorthand for the full suite of royal authorities.

[176] See also Hale, Prerogatives of the King ("the king in case of such acts done contrary to the directive power of the law is not subject to the coercive power of the law in respect of the sacredness and sublimity of his person").

[177] See also Anon, for Almon, Letter re Libels, Warrants, and Seizures (1764) ("The King can do no wrong"); Hale, Prerogatives of the King 14 ("This is one of the principal reasons of the maxim in law that the king can do no wrong").

[178] See also "J. Surrebutter", A Pleader's Guide: A Didactic Poem ("How long soe'er a Cause is stay'd / By Orders, Rules, and Motions Made / On points by learned Counsel mooted / The KING can never be nonsuited.").

[179] See also Anon, for Almon (1764) Letter re Libels, Warrants, and Seizures ("treaties of peace and war"); Hale, Prerogatives of the King ("power of peace and war").

[180] See also Bagshaw, supra note 79 ("never any Bill passed in Parliament for a Law (the King being within the Realme) by the Lords and Commons alone, without the Kings personall assent in Parliament to the Bill, as he that gave life and being to the Law"). Hale flipped the formulation, though to the same practical effect. See Prerogatives of the King (concluding that "the power

- the role of "the generalissimo, or the first in the military command"; [181]
- the "sole power of raising and regulating fleets and armies"
- "the prerogative of appointing ports and havens"[182]
- "the erection of beacons, light-houses, and sea-marks"
- "the power . . . of prohibiting the exportation of arms or ammunition out of this kingdom under severe penalties"
- "the right of erecting courts of judicature"[183]
- the ultimate role of prosecutor[184]
- the power of "pardoning offenses"[185]
- the "prerogative of issuing proclamations" that "enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary"[186]
- "the sole power of conferring dignities and honors"[187]
- "the prerogative of erecting and disposing of offices"[188]

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legislative resides in the king alone, though so qualified that he cannot enact a new law without the advice and assent of the three estates assembled in parliament"). Cf. Parker (1642) Observations on His Majesties Late Answers 6 ("the Law had trusted the King with a Prerogative to discontinue Parliaments").

[181] See also Hale, Prerogatives of the King (discussing king's powers under martial law and jus belli); Bagshaw, supra note 79 ("the chief command of the Militia").

[182] See also Coke, Reports Part 9, Ch 3 ("chief Ports of the Sea"); Hale, Prerogatives of the King XXI, ("ports and havens, and the power of appointing, opening and shutting of them").

[183] See also *Bracton*, Book 1, Chapter 24, I:441-443 ("he has likewise justice and judgment, which are juris dictions, that of his own jurisdiction, as the minister and vicar of God, he may award to each what is his own").

[184] *See also* Anon, for Almon, Letter re Libels, Warrants, and Seizures (1764) ("the direction of crown prosecutions").

[185] See also Bagshaw, supra note 79 ("the pardoning of Offences") (1660).

[186] See also Hale, Prerogatives of the King ("For proclamations, it is the prerogative of the [king] and those only who derive it from him, either as his ministers or by custom, to make open proclamation The king nevertheless cannot by these make or introduce a new law or add a new penalty to an old law or abrogate any law"); Case of Proclamations, Reports, Part 12, p.I:486-487 (1610) ("[A] thing which is punishable by the Law, by fine and imprisonment, if the King prohibit it by his Proclamation, before that he will punish it, and so warn his Subjects of the peril of it, there if he commit it after, this as a Circumstance aggravates the Offence; But he by Proclamation cannot make a thing unlawful.").

[187] See also Bagshaw, supra note 79 ("the giving of Honour"); Coke, Reports, Part 9, Ch 3 ("Honors").

[188] See also, e.g., Bagshaw, supra note 79 ("the making of Judges and Officers"); Bracton II:306-307 (1260) (Woodbine-Thorne) (Since he cannot unaided determine all causes [and] jurisdictions,

- "the prerogative of conferring privileges upon private persons"[189] such as converting aliens into citizens, or "erecting corporations"
- "the establishment of public marts, or places of buying and selling, . . . with the tolls thereto belonging"[190]
- "the regulation of weights and measures"[191]
- the power to coin money and "give it authority, or make it current"[192]
- the role of 'supreme governor of the national church"[193]
- the right to "all the lay revenues, lands, and tenements . . . which belong to an archbishop's or bishop's fee"
- the right to "send one of his chaplains to be maintained by [each] bishop"
- the right to "all the tithes arising in extra parochial places"
- the right to a share of the profits of the lower clergymen
- the right to all of "the rents and profits" of various types of crown lands
- all "profits arising from the king's ordinary courts of justice"
- the right to all whale and sturgeon caught near the English shore[194]

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that his labour may be lessened, the burden being divided among many, he must select from his realm wise and God-fearing men … who will judge the people of God equitably). Cf. Hale, Prerogatives of the King 105 ("the weight, multiplicity and variety of the occasions and emergencies of a kingdom doth necessarily require assistances adhiberi saltem in regiae sollicitudinis adminiculum, [dum] licet non in imperii participationem."); *id* at 268-270 ("the king hath [a] power of commanding the person of any man … in reference to the public service of the kingdom[, either] in point of advice, in point of office or service, [or] in point of safety"); Anon, for Almon, Letter re Libels, Warrants, and Seizures (1764) ("appointments to offices in the state").

This prerogative was the focus of Charles I's response to the Petition of Right: "The Parliament requests of the King, That all great Officers of State, by whom publike affaires shall be transacted, may be chosen by approbation, or nomination of the great Councell. The King … conceives, He cannot perform the Oath of protecting His people if He abandon this power, and assume others into it. … He should remain, but the outside, the picture, the signe of a King").

[189] See also Cowell, Institutes, Book 1 Tit 22 ("may grant privileges at pleasure, as to single persons, as to Corporations and Colleges, provided they become not injurious to a third person").

[190] See also Hale, Prerogatives of the King ("places of public trade, fairs and markets").

[191] See also Hale, Prerogatives of the King ("weights and measures").

[192] See also Bagshaw, supra note 79 ("the coyning of Money"); Hale, Prerogatives of the King ("money and coin").

[193] Cf. Hawkins, Pleas of the Crown (1716) (recognizing "appealing to Rome from any of the King's Courts" as a praemunire felony "against the prerogative of the crown"); Hale, Prerogatives of the King ("his power ecclesiastical").

[194] See also *The Case of Swans*, Reports, Part 7, I:235 (all white Swans not marked, which having gained their natural liberty … might be seised to the King's use by his prerogative, because … a

- the right to certain goods washed up on the land from shipwrecks;[195]
- the right to silver or gold mines[196] and various other categories of "treasure-trove" that are discovered[197]
- the right to "goods stolen, and waived or thrown away by the thief in his flight"
- the right to "valuable animals as are found wandering" without an apparent owner;[198]
- the right to any other "goods in which no one else can claim a property";[199]
- the right to lands and goods forfeited in punishment for various offenses;[200]
- the right to lands escheated for a defect in either the testament or the heirs
- "the custody of idiots" and their estates.[201]

The royal prerogative, as it was understood in the Founding era, thus comprised a long list of separate and highly particularized legal authorities within a well-understood framework of English constitutional law. There was no overarching theoretical coherence to it; it was just "stuff the King can do," so long as Parliament didn't tell him otherwise.

Nor did the authorities on this list originate with Blackstone. He was just describing, in the fashion of a modern nutshell, his own generally unremarkable take on what amounted to black letter administrative law. The particular authorities varied somewhat from summary to summary, but the gist was remarkably consistent, as was the use of the legal term "prerogative" to *name* this grab bag of powers that originated in the crown itself

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Swan is a Royal fowl; … and so Whales and Sturgeons are Royal Fishes, and belong to the King by his Prerogative."); Bracton, Book 1, Chapter 24, I:441-443 ("large fish, sturgeon, whales, which are said to be nobody's property"); Hale, Prerogatives of the Crown.

195 See also Bracton, Book 1, Chapter 24, I:441-443 ("wreck of the sea"); Coke, Reports, Part 9. Ch 3 ("Wreck"); Hale, Prerogatives of the Crown ("Bona vacantia, wreck").

196 See also Hale, Prerogatives of the King ("mines and minerals, and therein his seignory in case of royal mines, tin and lead").

197 See also *Bracton*, Book 1, Chapter 24, I:441-443 ("treasure trove"); Coke 3. Part 9 of *Reports* ("Treasure found") Hale, *Prerogatives of the Crown* ("bona vacantia, … treasure trove").

198 See also Hale, *Prerogative of the King* ([animals] ferae naturae).

199 See also *Bracton*, Book 1, Chapter 24, I:441-443 ("Likewise by the occupation and apprehension of the goods of another, as if a thing be cast away or left as abandoned"); Hale, *Prerogatives of the Crown*.

200 See also Coke, *Reports*, Part 9, Ch. 3 ("Chattels of Felons and Fugitives"). Hale, *Prerogatives of the Crown* ("Bona confiscata et forisfacta, (i) per exigent, (ii) per utlary, (iii) per fugam, (iv) per false appeal, ou omission in appeal, (v) per premunire, (vi) per felony de se vel de alio").

201 See also Hale, *Prerogatives of the Crown* ("Custodiae, (i) infantium, (ii) fatuorum, (iii) temporalium").

rather than from some parliamentary grant of authority.[202] To be sure, eighteenth-century writers regularly used "prerogative" the same loose sense we use it today—as a generic power, privilege, entitlement, or even just a general id-like willfulness.[203] But as a term of art in the context of constitutional law, "prerogative" had a very specific meaning: "all powers, pre-eminences, and privileges, which the Law giveth to the Crowne."[204] The writers are both precise and explicit about what was for them a schoolboy distinction between "the prerogative" as the basket category for royal power, and "the executive power" as *one specific authority among a great many* in that basket.[205] They even used the same terminology when describing the chief magistrates of other nations.[206]

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[202] See, e.g., Camden, *Discourse on Prerogative* (cataloguing list of prerogative powers); Hale, *Prerogatives of the King* (same); Coke, *Institutes* (same); Coke, *Reports*, Part 9 (same, as part of constitutional law discussion of "the whole frame of the ancient Common Laws of this Realm"); James Wilson, Considerations On The Nature And Extent Of The Legislative Authority Of The British Parliament (1774) (similar); *Bracton*, Book 1 Ch 24, I:441-443 (similar); de Lolme, *Constitution of England*, Chapter V (similar); Bacon, *The Common Law*, Ch 14-18 (similar).

[203] *Compare* Bobby Brown, "My Prerogative," in *Don't Be Cruel* (MCA 1988) ("They say I'm crazy / I really don't care / That's my prerogative / … Why don't they just let me live (Tell me why) / I don't need permission / Make my own decisions (Oh) / That's my prerogative / It's my prerogative") *with*, *e.g.*, Staunford, *Exposition of the King's Prerogative* (1567) ("prerogative is as much to saye a privilege or preeminence that any person hath before another whiche as it is tollerable in some, so it is most to be permitted and allowed in a prince or soveraine governor of a realme"). For an infinitely more serious survey of the various ways the word was used in its more abstract and colloquial senses, including during the ratification debates, see Matt Steilin, How to Think Constitutionally About Prerogative, Working Paper at 8-60 (2018), available at SSRN (canvassing Revolutionary- and Founding-era uses of "prerogative" in its most generic sense to discuss entitlements to, *inter alia*, personal authority, political sovereignty, self-determination, property protection, and "order, peace, and the preservation of existing … hierarchies"; as well as the power not just to break but even to make the laws). Steilin rightly concludes, regarding the less technical uses: "it is enough to make one's head spin." *Id.* at 12. His findings match mine: the term most assuredly was used in many ways other than as a legal term of art. But its technical meaning was the same for transatlantic lawyers in that era as it is for U.K. lawyers now: "the residue of powers which remain vested in the crown." *R (Miller) v. Sec'y of State*, [2017] UKSC 5, paras. 44 (S.Ct.)

[204] Coke, 1 *Institutes*. See also, e.g., Cowell, *Institutes* (similar); Bagshaw, supra note 79 (similar); Bacon, *An Essay of a King* (similar); Staunford, *Expocicion of the King's Prerogative* (1567) (similar). *See generally Case of Convocations*, Reports, Part 12, I:485 (describing four sources of legally binding authority: "Prerogative of the King," "the Common Law," "Statute Law," and "Custome of the Realm").

[205] See, e.g., Edmund Burke, Thoughts on the Cause of the Present Discontents (canvassing "the discretionary powers which are necessarily vested in the monarch, whether for the execution of the laws, or for the nomination to magistracy and office, or for conducting the affairs of peace and war, or for ordering the revenue," after noting that "[t]he power of the crown, almost dead and

Before we transition to a closer focus on the executive power as a single element of the royal prerogative, it's worth stepping back to recall the big picture structure of Blackstone's analysis. First he discussed the entity that possessed the legislative power: Parliament. Then he discussed the structural law of that entity's formation and constitution. And then he turned to the substantive authorities and entitlements of that entity—*including but not limited to the legislative power*. Next, he walked through the exact same steps in analyzing the entity that possessed the executive power: the Crown. Once again, he began with a detailed discussion of the structural constitutional law of that entity. And once again he then turned to a detailed discussion of the substantive authorities and entitlements of that entity—*including but not limited to the executive power*.

B. "The Executive Power" Was the Power to Execute the Laws

So "the executive power" was a discrete subset of the crown prerogative, which was itself a long list of substantive authorities ranging from the consequential (the right to participate in lawmaking and the power of war and peace) to the mundane (the power to erect lighthouses and the right to claim whale carcasses). Within this suite of powers, though, what exactly did the executive power entail?

We already know Blackstone's answer: it was simply "the right … of enforcing the laws." In keeping with the nutshell quality of his constitutional discussion more generally, this was just the rote recitation of a terminological commonplace. Locke was but one in a long line of commentators who contrasted "the legislative power" as "a right to direct how the force of the common-wealth shall be employed" with "the executive power,"

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rotten as Prerogative, has grown up anew, with much more strength, and far less odium, under the name of Influence"); Hume, 5 History of England 229 (1778) ("Parliament … had … been gradually encroaching on the executive power of the crown, which forms its principal and most natural branch of authority."); Henry St. John, Viscount Bolingbroke ("He is interested with the executive power and several other powers and privileges, which we call prerogative, are next to this trust."); Aequus, *From the Craftsman*, Massachusetts Gazette (March 6, 1766) (cataloguing powers wielded by the Crown and Parliament over the colonies, including "the executive power of government" as one item in a long list of authorities including many of the typical prerogatives).

[206] E.g., Moyle, *Democracy Vindicated: An Essay on the Constitution and Government of the Roman State* 5 ("Thus I have run briefly through the civil orders, upon which [Romulus] founded his dominion, viz. … his standing body of guards; his great revenue in lands; the sole power of the executive, and part of the legislative; and last of all, the administration of justice, and the command of the armies, which were the great branches of the royal prerogative."); Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution* of 1791 (1792) (cataloguing French King's constitutional powers with a similar distinction between "the executive … power" and a number of other distinct authorities including "much of the legislative power," the ability to require various revenues, and the war powers).

which "see[s] to the execution of the laws that are made, and remain in force."[207] In Algernon Sidney's martial formulation, "the sword of justice comprehends the legislative and the executive power: the one is exercised in making laws, the other in judging controversies according to such as are made."[208] And using "executive power" as the word for law-implementation was no Anglo-American idiosyncrasy. As the seminal international law theorist Emmerich Vattel explained

> The Executive power naturally belongs to the sovereign—to every conductor of a people: he is supposed to be invested with it, in its fullest extent, when the fundamental laws do not restrict it. When the laws are established. it is the prince's province to have them put in execution. To support them with vigour, and to make a just application of them to all cases that present themselves, is what we call rendering justice."[209]

Nor was the terminology ideologically inflected or otherwise conceptually contested. To the contrary, even arch-royalists like the man known to Founding-era Americans as "the prostituted, rotten Sir Robert Filmer"[210] knew that the "executive power" was limited to

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[207] Locke, *Second Treatise*, Chapter XII ("Of the Legislative, Executive, and Federative Power of the Commonwealth"). Remember that this is precisely how Blackstone defined "executive power" as well—as the interlocked rule-implementing counterpart to legislative power's capacity to create rules in the first place. *See supra* __.

[208] Algernon Sidney, *Discourses Concerning Government* (1698). See also James Harrington, Oceana ("[T]he hand of the magistrate is the executive power of the law, so the hand of the magistrat is answerable to the people, that his execution be according to the law; by which Leviathan may see that the hand of sword that executes the law is in it, and not above it.").

[209] *Rights of Nations*, Sec. 162. Other Continental commentators were to the same effect. De Lolme began his chapter titled "Of the Executive Power" by defining it as "[t]he first prerogative of the King, in his capacity of Supreme Magistrate, [which] has for its object the administration of Justice." Jean de Lolme, *The Constitution of England*, Ch. 5 (G. Robinson, London 1784) ("When the Parliament is prorogued or dissolved, it ceases to exist; but its laws still continue to be in force: the King remains charged with the execution of them, and is supplied with the necessary power for that purpose") ("Du pouvoir exécutif": "Lorsque le parlement est prorogé ou dissous, il cease d'exister; mais les lois subsistent: le roi est chargé de l'exécution, est muni du pouvoir nécessaire pour la procurer."); *see also id.* ("It is true, the King himself cannot be arraigned before Judges; because, if there were any that could pass sentence upon him, it would be they, and not he, who must finally possess the executive power") ("Le roi lui-même est, il est vrai, hors de l'atteinte des tribunaux parce que, s'il en étoit, un qui put le juger, ce seroit ce tribunal & non pas lui, qui auroit finalement le pouvoir exécutif"); Rousseau, *Social Contract,* Book 2 Chapter 2 ("A declaration of [the general] will is an act of sovereignty and constitutes law. … Our political theorists, unable to divide the principle of sovereignty, divide it in its purpose; they divide it into power and will, divide it, that is, into executive and legislative").

[210] *A Farmer I*, Baltimore Maryland Gazette (15 February 1788), http://rotunda.upress.virginia.edu/founders/RNCN-02-11-02-0003-0074. See also, e.g., John

law-execution. That's why Filmer and other critics of parliament *resisted* a description of the King's power that was limited to those terms:

> By these words of legislative, nomothetical and architectonical power, in plain English, [is understood] a power of making laws. And by gubernative and executive, a power of putting those laws in execution by judging and punishing offenders.[211]

It's hard to overstate the uniformity of this point. As Jean-Jacques Rousseau explained almost a hundred years later, it just wasn't that complicated a concept: "the executive power … is only the instrument for applying the law."[212]

In the most significant sense, Rousseau's "only" was completely accurate: "the executive power" didn't encompass other authorities. In another way, though, it might mislead modern ears—because, let's be clear, this was a hugely important authority. As discussed at length above, the execution problem may have been the single greatest concern of political and legal thinkers over the course of English history. In recognizing this power as perhaps the king's defining authority, Blackstone was thus once again following an illustrious list of predecessors. From *Bracton*[213] to Hume[214]—with a chorus of

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Adams, Novanglus (excoriating an opposing pamphleteer as a "foul-mouth scold, deserv[ing only] silent contempt" for "mak[ing] no scruples to advance the principles of Hobbes and Filmer boldly"). Despite his role as designated boogeyman, Filmer was fourth on James Madison's shopping list of political writers for the library of the Continental Congress. *Journals of the Continental Congress 1774-1789*, 85 (Jan. 24, 1783).

[211] Filmer, *The Anarchy* 136 (1648). Not once does the single greatest theoretician of royal power describe the full suite of royal powers as "the executive power." Along with all well-socialized Englishmen, his word for the king's full suite of authorities was "the royal prerogative." *See also*, e.g., Philip Hunton, *Treatise of Monarchie* 5 (1689 ed.) ("In respect of its degrees [government is] Nomothetical or Architectonical, and Gubernative or Executive. And in respect of the subject of its residence, there is an ancient and usual distinction of it into Monarchical, Aristocratical, and Democratical.") (distinguishing between the conceptual executive power of government and the entity called a monarchy) (criticizing both parliamentarian resistance theory and divine-right absolutism). *Cf.* Hunton, *Vindication of the Treatise of Monarchie* 39 (1644) (noting that "[the King] is the sole Principle and fountain from whence the execution of all Law and Justice flows to his people by inferior Officers and Courts, all whose Authority is derivatively from him as its head," but asking rhetorically, "is not the *Legislative* Power the *supreame*?").

[212] Rousseau, *Social Contract* III:15. For other examples, see, *e.g.*, Rutherford, *Lex Rex* (1644) ("A Power executive of Laws more in the King, a Power legislative more in the Parliament"); William Mollyneux, *Case of Ireland* 43-44 (1770) ("the judiciary and executive parts of the Law, and the Ministers and Process thereof") (emphasis removed).

[213] *Bracton*, Book 1, Chapter 24, I:441-443.

thinkers as diverse as Bacon,[215] James I,[216] Milton,[217] and Filmer[218] in between—English law had for centuries recognized the King's "coercive power [to] punish and coerce delinquents"[219] as his "principal and most natural branch of authority."[220] This "power to compel the parties to come to judgment and to execute the judgment given"[221] was celebrated especially in judicial opinions, which saw "a King's Crown [as] an

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[214] Hume, 5 History of England 229 (1778) ("Parliament … had … been gradually encroaching on the executive power of the crown, which forms its principal and most natural branch of authority.").

[215] Bacon, *An Essay of a King* (prerogative to "animate[] the dead letter [of the law], making it active toward all his Subjects *praemio* & *poena* [i.e., by reward and by punishment]).

[216] James I publicly admonished his son, "that as yee are a good Christian, so yee may be a good King … in establishing and executing, (which is the life of the Law) good Lawes among your people…." *Basilikon Doron*, Book 2. Over the course of the brief pamphlet, James returned to his exhortations about "executing ... Lawes" sixteen times. The record does not reflect whether he also advised his son neither to borrow nor to lend.

[217] Milton, *A Defence of the People of England* 106 ("the king was created to put … laws in execution").

[218] Filmer (? or Holbourne - authorship disputed), *Freeholder's Grand Inquest* 114(1679) (there be a power in kings both to judge when the laws are duly executed, and when not; as also to compel the judges if they do not their duty).

[219] *Bracton*, Book 1, Chapter 24.

[220] Hume, 5 History of England 229 (1778). For a mere sample of this kind of celebration of the king's law enforcement power—in both its judicial and executive guises—see, *e.g*, Otis, *Rights of the Colonies Asserted and Proved* (1764) ("The supreme legislative, and the supreme executive, are a perpetual check and balance to each other.… Here, the King appears, as represented by his judges, in the highest luster and majesty, as supreme executor of the commonwealth; and he never shines brighter, but on his throne, at the head of the supreme legislative."); Plowden, *Commentaries* 237 (1761) (reporting William v Berkeley, 3 Eliz.) ("The king has in him three things, viz. power, justice, and mercy: Power to do, justice to enforce him to do, and mercy to restrain him from doing. The last of these is exercised in matters that touch himself, but justice to enforce him to do has respect to things which concern the public, so that every subject may claim from him justice, and the king is forced by justice to do that which he ought."); Nalson, *The King's Prerogative and the Subject's Priviledges* 108 (relying on a close analysis of Magna Carta to infer the Crown's power and obligation to deliver "execution of justice"); Cowell, *Institutes*; Ellesmere, *Rights of the King* 1 (discussing king's absolute but delegable prerogative to "punish the guiltie"); *Bracton*, Book 1, Chapter 24, I:441-443; Hobbes, *Leviathan* ("Eleventhly, to the Soveraign is committed the Power And of Rewarding, and Punishing … and of Punishing with corporall, or pecuniary punishment, or with ignominy every Subject according to the Law he hath formerly made").

[221] Hale, Prerogatives of the King, 179; see also id. 191 (discussing power of "coercion" as "that whereby the judicative power is acted and … the king … may enforce the person complained of to come to judgment and to execute it.").

Hieroglyphick of the Lawes, where Justice, &c. is administered,"[222] and public law treatises, which "take it for granted, That the king, being the supreme magistrate of the kingdom, [is] entrusted with the whole executive power of the law."[223]

It was precisely because the Crown's defining authority was "the sole exercise of the executive power" that he was "therefore by our English lawyers called 'the universal judge of property'—'the fountain of justice'—'the supreme magistrate of the kingdom, intrusted with the whole executive power of the law'."[224] And it was for that same reason that the Crown's implementation of this particular prerogative was the principal measure of its performance: if a legislature is "denominated good, from the goodness of its laws," then "the goodness of executive government" for its part "consists in [the] due administration of the laws already made."[225]

C. This Power to Execute Was an Empty Vessel, both Subsequent and Subordinate to the Power to Legislate

The singular feature of this constitutionally indispensable authority was its derivative and subsequent character—and therefore its conceptual subordination *ab initio*. Certainly as a matter of the specific constitutional law of England, the executive power was subject to plenary control and instruction by parliamentary legislation.[226] But conceptually speaking, this wasn't just a contingent feature of Parliament's political and military supremacy. Rather, this subordinacy had always been understood as a constitutive feature of "the executive power" as such: without some pre-existing intention or instruction, that power is an empty vessel that has nothing *to* execute.[227] This conceptual point was in no

[222] The Post-Nati, 7 Co. Rep. 1a (1608).

[223] Hawkins (1712) Pleas of the Crown, Book II, Chap 1, Sec 1 (pivoting from Book I's discussion of the substantive "nature of criminal offenses" to Book II's procedural-structural discussion of "in what manner the offenders are brought to punishment").

[224] "Letter by J.", Boston Evening Post (May 23, 1763). See also, e.g., Noah Webster (1794) *The Revolution in France* ("[P]roperty must be placed under the protection of law; and the laws must receive an energy from a well-constituted executive power, that shall ensure a due execution.").

[225] Nathaniel Niles, Two Discourses on Liberty (June 5, 1774) ("The thoughts that have been suggested in this discourse, open to us the nature of good government in its several branches. A legislature is denominated good, from the goodness of its laws, or, from the tendency of the laws made by it to produce the highest good of the community…. The goodness of executive government, consists in its due administration of the laws already made. It is for the good of the community alone, that laws are either to be made or executed.").

[226] See supra, Part II.A (discussing the emergence of parliamentary sovereignty).

[227] Hunton, *Of Monarchy* I:26 ("The supream power being either the *Legislative* or the *Gubernative*. In a mixed Monarchy, sometimes the mixture is the seat of the Legislative power, which is the chief

wise a tendentious claim of Whigs, republicans, or commonwealthmen. It was simply intrinsic to the concept in eighteenth-century vocabulary—both in the governance context and in the world at large.

1. The "Empty Vessel" Nature of Executive Power in General

To begin with, the conceptual subservience of executive power to legislative power was just a special case of executive power in general. While law was certainly the default object of execution in political theory, "executive power" in its most generic sense referenced the ability and authority to take a plan, intention, or instruction, and bring that mentally-formulated state of affairs into actual being. As more than one dictionary explained, "To Execute" meant "to put a law, or any thing planned, in practice."[228] This distinction was central to eighteenth-century theories of human perception and cognition.[229] Rousseau's account, for all its naiveté by the standards of modern neuroscience, beautifully captures the standard eighteenth-century framework:

> Every free action has two causes which occur to produce it, one moral—the will which determines the act; the other physical—the strength which executes it.… When I walk towards an object, it is necessary first that I should resolve to go that way and secondly that my feet should carry me. When a paralytic resolves to run and when a fit man resolves not to move, both stay where they are.... The body politic has the same two motive powers—and we can make the same distinction between will and strength—the former is legislative power and the latter executive power.[230]

The notion of an "executive power" as the enacting force which transforms intentions into reality was as pervasive among theologians as it was among philosophers of the mind: "It is the distinguishing character of a rational Creature, to propose to himself an end, and then to pursue that End in proper methods; hence Logicians tell us, the End is first in

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of the two…. For if the Legislative be in one [body], then the Monarchy is not mixed, but simple, for that [i.e, the legislative power] is the superior, if that be in one, all else must needs be so too: By Legislative, I mean the power of making new laws ….").

[228] Allen, A Complete English Dictionary (1765) (second definition after "to discharge…a duty"). See Part IV, *infra*, for more dictionary definitions than you can shake a stick at.

[229] E.g., Locke, Essay on Human Understanding, Chapter 21 ("Of Power") ("For the mind [has] in most cases … power to suspend the execution and satisfaction of any of its desires."); Hume.

[230] Rousseau, Social Contract III:1. See also id. III:4 ("He who makes the law knows better than anyone how it should be executed and interpreted. So it might seem that there could be no better constitution than one which united the executive power with the legislative; in fact, this very union makes that form of government deficient in certain respects, for things which ought to be separate are not.").

the Intention, and then in the Execution."[231] And so it was, according to Aquinas, that "operation belongs to the executive power; and the act of the will does not follow the act of the executive power, on the contrary execution comes last."[232]

The act of execution thus often had a rote or even marionette quality, with the influential treatise writer William Hawkins describing "[c]onjurers, who by force of certain magick words endeavor to raise the Devil, and compel him to execute their commands"[233] and Francis Bacon describing officers who "execute the experiments so directed" by another officer.[234] Not for nothing did the phrases "executors and administrators"[235] and "execution and administration"[236] become formulaic. Indeed, Justinian's *Institutes* taught that if you went beyond your instructions, you were no longer engaged in execution: you could no longer intelligibly speak of your actions as manifestation of executive power.[237] Execution also had a significant association with

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[231] Tennent, "Sermon on Corinthians 10:31," in *Sermons on the Chief End of Man* 40 (1743). In a separate Sermon, Tennent made this comparison to the two great powers of government explicit: "The *Law* must be enacted by *competent Power* and Authority; because Legislation, as well as the Execution thereof, are Acts of Government." Tennent, "Sermon on Deuteronomy 32:4," in *Sermons on the Chief End of Man*, p.270 (1743). See also Samuel Davies, Religion and Patriotism the Constituents of a Good Soldier (1755) ("true Courage … will render Men vigilant and cautious against Surprizes, prudent and deliberate in concerting their Measures, and steady and resolute in executing them.").

[232] Aquinas, Summa Theologica. See also id., L.32, C.7, art. 6 ("The principles of sinning are the same in us as the principles of action, for a sin is an act. Now there are in us three principles of action; the first is the directing principle, namely, the cognitive power; the second is the commanding principle, namely, the appetitive power; the third is the executive principle, namely, the motive power."); id. L.16, C.5, art. 4 ("Now the thing willed is not only the end, but also the means. And the last act that belongs to the first relation of the will to the means, is choice; for there the will becomes fully proportionate, by willing the means fully. Use, on the other hand, belongs to the second relation of the will, in respect of which it tends to the realization of the thing willed. Wherefore it is evident that use follows choice; provided that by use we mean the will's use of the executive power in moving it").

[233] Hawkins, Pleas of the Crown (1716).

[234] Bacon, New Atlantis (1626).

[235] Kyd, Bills of Exchange (1798) ("executors, administrators, and assigns" of a principal); Bacon, *Elements of Common Law* (1630) ("executors or administrators" of a principal); *Slade's Case*, Reports, I:122 ("executors or administrators"); Cowell, *The Interpreter* 240, 261 (1607) ("executor or administrator"). Many statutes used the same formulation.

[236] Finch, supra note 77, at 32 (1759) ("constituting a new Sheriff, 'Viz. f[or?] the Execution and Administration of Justice").

[237] *See, e.g.*, Justinian, *Institutes*, book III, Tit 27 (1756 trans.) ("He, who executes a mandate ought not to exceed the bounds of it") ("*is, quis exequitur mandatum, non debet excedere fines mandati*"); Finch,

success: not merely an attempt to perform the plan, but the actual consummation thereof.[238] In this vein, three standard objects of "execution" were a judicial writ,[239] a legal judgment,[240] and a creative work.[241]

2. The "Empty Vessel" Nature of Executive Power in a Constitutional Context

Applying "executive power" to the special case of state action was thus pretty straightforward. It was the implementing power: the authority to deploy the massed force of the state to bring legislated intentions into effect, especially the laws and their intended consequences. Notably, this concept of bringing-into-being extended to all decisions about state action of any sort—which for their part could only be designated by an exercise of *legislative* power. That's why Locke begins with the broadest possible definition of legislation: "The legislative power is that, which has a right to direct how the force of the common-wealth shall be employed."[242] The implementation of authoritatively formulated intent was intrinsic to the very concept of the executive function, both grammatically and in principle.

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supra note 77, at[] ("officers negligent or corrupt, who do not execute their office as of right they ought").

[238] One especially nice example plays on an obvious double meaning: "If, upon judgment to be hanged by the neck till he be dead, the criminal be not thereby killed, the sheriff must hang him again: for the former hanging was no execution of the sentence….." Burn, *A New Law Dictionary*, "Execution of Criminals." See also East, Treatise of the Pleas of the Crown, Chap 15, Sec 21 (1806) ("The breaking and entry of the mansion in the night must be with intent to commit some felony therein … whether the felonious intent be executed or not."); Beccaria *Crimes and Punishments*, Chap 37, p. 69 (1764) ("The importance of preventing even attempts to commit a crime sufficiently authorises a punishment; but as there may be an interval of time between the attempt and the execution…"); Grand Remonstrance, para 81 ("such violent intentions were not brought into execution"); *id.*, at para 178 ("if by God's wonderful providence their main enterprise upon the city and castle of Dublin had not been detected and prevented upon the very eve before it should have been executed"); Bolingbroke, *Letters on the Study and Use of History* 82 ("The emperor … attempted little against France, and the little he did attempt was ill ordered, and worse executed.").

[239] Fitz-Herbert, *Nature Brevium* (1743) (passim).

[240] Examples are ubiquitous. For a specific dictionary definition, see Burn, A New Law Dictionary 1792 ("Execution (in civil cases), signifies the obtaining of actual possession of any thing acquired by judgment of law"). See also, e.g., Hale, History of the Common Law (1713) ("execution or coercion of a judgment").

[241] See, e.g., Hobbes, Leviathan, Chap 34, ("the execution of some supernaturall work"); Plowden, Commentaries xii ("that I might execute this work with the utmost sincerity and truth").

[242] Locke, Two Treatises of Government, Chapter 12, Sec 143 (emphasis added).

By the Founding, the implementatory essence of executive power was most often expressed in terms of Locke's vision of law as an interlocking tripartite phenomenon: first the law must be *legislated*, then in at least some cases it must be *adjudicated*, and then its requirements must be *executed.* While this trinitarian scheme still dominates our modern understanding of the law-related functions of government, it's worth noting that Blackstone was far from alone in describing the essential powers of government as *two* interlocked halves of a whole: the "legislative … authority" as "the right … of making … the laws," and the "executive authority" as "the right … of enforcing" them. This taxonomic uncertainty about whether to classify judicial power as a distinct authority or as a subset of executive power ran deep,[243] but for present purposes it doesn't matter in the slightest. That's because all formulations were identical on the crucial point: exercising "the executive power" meant bringing the legislated intentions of society into being. As Obadiah Hulme put it in his much-praised *Historical Essay on the English Constitution*,

> The king, who is in the constant exercise, of the executive power, in the state, always did the business of the state; and therefore, it immediately falls within his province, to see any plan, of national utility, put into execution….[244]

In its famous 1774 *Appeal to the Inhabitants of Quebec,* the Continental Congress described the standard framework in similar terms:

> You have a Governor, it may be urged, vested with the executive powers or the powers of administration. In him and in your Council is lodged the

[243] As a colonial pamphlet explained,

> Government is generally distinguished into three parts, Executive, Legislative and Judicial; … [But] however we may refine and define, there is no more than two powers in any government, viz. the power to make laws, and the power to execute them; for the judicial power is only a branch of the executive, the CHIEF of every country being the first magistrate.

Anonymous [*possibly Tom Paine*], Four Letters on Interesting Subjects, Letter IV (1776). *See also*, *e.g.*, A Farmer of New-Jersey, *Observations on Government*, New York (Nov 3, 1787) (proposing "[t]hat the [draft Constitution's] executive be divided into THREE GRAND DEPARTMENTS," headed by "The President, … The Chief Justice, …. [and] The Superintendent of Finance"), at http://rotunda.upress.virginia.edu/founders/RNCN-02-19-02-0002-0066; Nathaniel Fiennes, "Speech of February 9, 1640," in Rushworth, 4 *Historical Collections* 174 (1701) ("And here, Mr. Speaker, give me leave to lament the Condition of this our Church of England …. As to the Executive part, which consisteth in the exercise of ecclesiastical Jurisdiction, therein I note also two Disorders, Confusion and Corruption.").

[244] Hulme, An Historical Essay on the English Constitution 182.

> power of making laws. You have Judges who are to decide every cause affecting your lives, liberty or property. Here is, indeed, an appearance of the several powers being separated and distributed into different hands for checks one upon another….[245]

To put it mildly, such constitutional formulations about the "execution" of "law" were pervasive, including both those that used the specific phrase "executive power" and those that did not.[246]

This definition of executive power necessarily entailed both its subsequence and its subordination to the legislative power. As Gad Hitchcock explained in his famous 1774 Election Day sermon—in front of an audience that included the British military governor for Massachusetts—"the executive power is strictly no other than the legislative carried forward, and of course, controllable by it."[247] David Hume summarized the point as an uncontroversial and fully generalizable point of political theory: "The executive power *in every government* is altogether subordinate to the legislative."[248] A long and diverse list of

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[245] Continental Congress, Appeal to the Citizens of Quebec (October 26, 1774) (The Americans helpfully continued by explaining to their neighbors to the north that this was just an illusion, a "tinsel'd …. 'sepulchre' for burying your lives, liberty, and property").

[246] For a tiny inlet from the vast sea of such usages, see *e.g.*, Grand Remonstrance ("due execution of those good laws which have been made for securing the liberty of your subjects"); Beccaria, *Of Crimes and Punishments* ("… a magistrate, the executor of the laws"); id. ("Clemency is a virtue which belongs to the legislator, and not to the executor of the laws…. Let, then, the executors of the laws be inexorable, but let the legislator be tender, indulgent, and humane"); Voltaire, *Commentary* ("this law, like many others, remained unexecuted"); Hobbes, *Leviathan*, Ch 30 ("[T]he procuration of the safety of the people …. should be done … by a generall Providence, contained in publique Instruction, both of Doctrine, and Example; and in the making, and executing of good Lawes"); Cowell, *Institutes* Bk 1, Tit 1, para 3 (1605) ("it is requisite likewise, that there be Magistrates ordained [so that] the Laws may be put in execution."); Grotius, *Rights of War and Peace*, Vol 2, Book 2, XLIV:6 ("[I]n a Civil State [the useful function of religion] is partly supplied by the Laws, and the easy Execution of the Laws; whereas, on the contrary, in the universal Society of Mankind, the Execution of Right is very difficult … and the Laws are very few, which themselves, moreover, derive their Force chiefly from the Fear of a Deity….").

[247] Gad Hitchcock, Election Sermon (1774) ("Legislators … should know how to give force, and operation to their laws…. This, indeed, is to be done by means of the executive part…"). For more on the context of this annual sermon series, see Lindsay Swift, The Massachusetts Election Sermons: An Essay in Descriptive Bibliography (1897).

[248] Hume, Essay VI, in Essays Moral, Political, and Literary (emphasis added) (clarifying that this was a global point, distinct from the English Crown's practical need for money). See also Hume, Idea of a Perfect Commonwealth ("the legislative power being always superior to the executive").

commentators was in accord.[249] That's why the great eighteenth-century historian Catherine Macaulay could call it "absurd"—strictly as a matter of deductive logic—for Charles to claim sovereignty over the estates, "since no power can be superior to the legislative; and if the King is not part of the legislative, he can be only the executive, which is a power subordinate to the legislative."[250] And that's likewise why writers seeking to limit magistrates to the executive power could describe the "executive branch of government" as being charged "only to perform, (without a will of their own), what the constitution and representation enacts."[251]

Far from disagreeing, even the most royalist writers emphasized—often with some disdain—that "the executive power" by definition "derived from" the legislative power.

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[249] See, e.g., Hunton, Of Monarchy ("Supreme power is either legislative, or gubernative[, and] the legislative power is the chief of the two."), Burlamaqui, The Principles of Politic Law, Ch. 1, paras 2 & 30 ("Among the essential parts of sovereignty, we have given the first rank to the legislative power"); Prynne, Soveraigne Power of Parliaments and Kingdomes (1643) ("Military Affaires of the kingdome heretofore, have usually, even of right, (for their originall determining, counselling, and disposing part) beene Ordered by the Parliament; *the executive, or ministeriall part onely*, by the King.… To instance in particulars. First, the denouncing of warre against forraine enemies, hath been usually concluded and resolved on by the Parliament, before it was proclaimed by the King…. Secondly, All preparations belonging to warre by Land and or Sea, have in the grosse and generall, beene usually ordered, limited and setled by the Parliaments….") (emphasis added); Locke, *Second Treatise on Politics*, Chapter 13 Section 149 ("[T]here can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate… In all cases, whilst the government subsists, the legislative is the supreme power: for what can give laws to another, must needs be superior to him."); Chauncy, Civil Magistrates Must Be Just Ruling in the Fear of God ("the laws are the rule for the executive powers in the government") (1747); Samuel Sherwood, A Sermon Containing Scriptural Instructions to Civil Rulers ("[R]ulers considered either in their legislative or executive capacity … must be just…. Particularly 1. There is justice to be observed in making laws. The legislative authority is usually stiled supreme. The power of making laws is undoubtedly the highest in every society. The executive officers are obliged to observe the rule prescribed them by the legislators … 2. Rulers considered in their executive capacity as putting laws in executive, must be just. Executive officers are obliged to proceed according to the received and established laws of their country."). See also, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) ("If, then, a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.").

[250] Catherine Macaulay, 3 History of England 6 (1763)

[251] Anonymous, "Of the Distribution of Authority," in Rudiments of Law and Government Deduced from the Law of Nature 34 (1783) ("Which executive branch of government is best formed of a small body with one superior. The executive only to perform, (without a will of their own), what the constitution and representation enacts.").

The divine right theorist Filmer was especially contemptuous: "When the law must rule and govern the monarch, and not the monarch the law, he hath at the most but a gubernative or executive power."[252] It was precisely because of the subsequent and subordinate nature of this power that Filmer *rejected* it as the basis for the English king's powers: "[A] limited monarch must govern according to law only. Thus is he brought from the legislative to executive power only."[253] Other writers sympathetic to the monarchy were similarly disdainful in framing "executive power" as a factotum's charge. Pufendorf observed that it "is characteristic of a minister or a bare executor" to "have the strength by which you may compel others, but only if another decides that it should be brought to bear."[254] Edmund Burke scolded "many on the continent" who "altogether mistake the condition of a King of Great Britain" as "an executive officer." To the contrary, Burke explained, "[he] is a real King," certainly "if he will not trouble himself with contemptible details, nor wish to degrade himself by becoming a party from little squabbles."[255] The less-categorizable Adam Smith captured a similarly dismissive flavor: "The leading men of America … feel, or imagine that if their assemblies … should be so far degraded as to become the humble ministers and executive officers of [the British] parliament, the greater part of their own importance would be at an end."[256]

At times, Edmund Burke was even more explicit about narrow scope of executive power, not only recognizing its "mere" implementatory nature, but going out of his way to emphasize that it did *not* include the authority to make decisions about foreign and military affairs. Listen to his mockery of the revolutionary French government. "[I]n their hurry to do every thing at once," he jibed, "they have forgot one thing that seems essential, and which, I believe, never has been before, in the theory or the practice,

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[252] Filmer, The Anarchy 136 ("When the law must rule and govern the monarch, and not the monarch the law, he hath at the most but a gubernative or executive power …. [A] limited monarch must govern according to law only. Thus is he brought from the legislative to executive power only."). For the same point in a more neutral register, see Bolingbroke's observation that "the executive power [is] trusted to the Prince, to be exercised according to such rules and by the ministry of such officers as are prescrib'd by the laws and Customs of this Kingdom." Dissertation on Parties 156 (1735).

[253] Filmer, The Anarchy (1648) ("When the law must rule and govern the monarch, and not the monarch the law, he hath at the most but a gubernative or executive power.").

[254] Pufendorf, Law of Nature and Nations (1729 ed.).

[255] Burke, A Letter to a Member of the [French] National Assembly.

[256] Smith, *Wealth of Nations*, vol. 2, part 3. For a similar rhetorical flavor from American Revolutionaries, see the letter from James Mitchell Varnum to Nathanael Greene ("Our Time is consumed in trifling executive Business, while Objects of the greatest Magnitude are postponed, or rejected as subversive in their Nature, of democratical Liberty.").

omitted by any projector of a republic." What was it? "A Senate, or something of that nature and character." And why did the omission matter? Because he thought a government with only legislative and executive officers might forget to designate anyone to conduct foreign affairs:

> Never, before this time, was heard of a body politic composed of one legislative and active assembly, and its executive officers, without such a council; without something to which foreign states might connect themselves; something to which, in the ordinary detail of government, the people could look up; something which might give a bias and steadiness and preserve something like consistency in the proceedings of state. Such a body kings generally have as a council. A monarchy may exist without it; but it seems to be in the very essence of a republican government. It holds a sort of middle place between the supreme power exercised by the people, or immediately delegated from them, and the mere executive.[257]

Note that Burke had no problem believing in precisely the "constitutional gap" that modern residuum theorists find unthinkable. He knew what practicing lawyers and statesmen have never forgotten: drafting is hard.

All of this is to say that Blackstone was neither confused nor idiosyncratic when he described the executive power as the power to enforce the law. Here as in most other respects, the eighteenth century's greatest law treatise was just reciting a relatively bland restatement of conventional wisdom.[258] Even at the most royalist stage of the political

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[257] Burke, Reflections on the Revolution in France 308 (summarizing "my few remarks on the constitution of the supreme [i.e., legislative] power, the executive, the judicature, the military, and on the reciprocal relation of all these establishments"). See also, e.g., Guthrie, 1 *A New* Geographical, Historical, and Commercial Grammar 205 ("The king of Scotland had no negative- voice in parliament; nor could he declare war, make peace, or conclude any other public business of importance, without the advice and approbation of parliament. The prerogative of the king was so bounded, that he was not *even* entrusted with the executive part of the government.") (emphasis added); 2 *id.*, at 140 (noting that the Spanish privy-council has "the direction of all the executive part of government," while the Spanish council of war "takes cognizance of military affairs only.").

[258] E.g. deMably, Remarks on the Government and Laws of the United States ("Let us now come to the executive power, without which it were a useless task to frame a law"); Daniel Shute (1768) *An Election Sermon* ("the welfare of the province … demands the attention of the guardians of our natural and civil rights; to this purpose the legislative and executive powers are to be exercised. But laws are useless in a state, unless they are obeyed; nor will putting the executive power into the best hands avail to the designed purpose, if there is not proper application made to it … for in proportion to this want of application the most excellent code of laws will be a dead letter. …. It is necessary in the nature of the thing, and indispensably obligatory …. to give life and energy to the laws in producing the designed happy effects. We [thus] have good laws; and magistrates anointed

story traced in Part II.A, and even according to the most royalist writers, this conceptual understanding of "the executive power" was common currency—simply a special case of the same phrase when applied to human affairs in general. It was the power to execute a law or project that had been separately authorized by some other source of government authority: perhaps a statute; perhaps the common law; perhaps a royal decree issued pursuant to a different branch of prerogative. The key conceptual point was that "executive power" referred to the downstream implementing authority, not to its upstream authorization. Without a source, you can't have a fountain;[259] without a planet, the idea of a satellite makes no sense.[260]

IV. Why Have Residuum Proponents Misunderstood this Evidence?

We are left with a puzzle. In the face of such overwhelming evidence, how did the Royal Residuum thesis come to conflate the overarching category of royal prerogative with a single sub-item on the incredibly long list of authorities that it included? How could a Supreme Court Justice wind up writing the following, catastrophically incorrect summary of the evidence:

> Founding-era evidence reveals that the "executive Power" included the foreign affairs powers of a sovereign State.… This view of executive power was widespread at the time of the framing of the Constitution.… William Blackstone, for example, described the executive power in England as including foreign affairs powers.… Given this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the "executive Power" vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution…."[261]

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to put those laws into execution."); Goldsmith, History of England IV:338-339 (the Commons is "armed with no legal executive powers to compel obedience");

[259] Davies, Reports of Cases in Ireland (1615) ("what is the King himself, but the clear fountain of Justice? And what are the professors of the law but the conduit pipes deriving and conveying the streams of his Justice to all the subjects of his several kingdoms?").

[260] Perez Fobes, An Election Sermon (1795) (developing a metaphor of government as a solar system to note that "a number of secondaries perform their judicial circuits in periodical times" and "are attended with satellites of executive power.") (emphasis removed).

[261] Zivotofsky, 576 U.S. at __ (Thomas, concurring in part and dissenting in part). I did try to warn him. See Mortenson, The Supreme Court Should Stay Far Away from the Vesting Clause in Zivotofsky v Kerry, Lawfare (2014) ("My only point here is to urge any Justice who considers the Vesting Clause argument to take a couple of hours and read Blackstone---or at least assign the first nine chapters of Book I of the Commentaries to a clerk.").

Not one sentence in that excerpt is right. For the moment, though, focus only on Justice Thomas's claim about the Founding Generation's "pervasive view of executive power." How could he have gotten it so wrong?

In this Part, I want to focus on three reasons, starting with mistakes in the scholarship on which Justice Thomas relies.[262] First and most important, while looking for evidence in the historical materials, residuum theorists have systematically confused two different things: [i] the use of the phrase "executive power" to reference a *conceptual power* capable of being "vested," and [ii] the use of the phrase "the executive" as a metonym for *the political entity* in which that conceptual power was vested. Second, residuum theorists have misread an idiosyncratic taxonomy adopted by two authors—to be clear, not a taxonomy that contradicts anything about the conceptual structure described above; just an odd way of talking about it. The third reason is a little different. It has to do, not with errors made by the residuum's champions, but with the ready audience they find in many lawyers and academics. Some listeners' receptivity may of course result from what they *want* presidential power to be—a bias to which none of us is immune. The more significant reason, however, seems to be a common misunderstanding of what the Founders meant by a "separation" of powers in the first place.

A. The First Scholarly Error: Attributing the Whole to the Part

By far most the important mistake of residuum theory is a systematic confusion of two different things: [i] the Constitution's use of "executive" to describe a particular power of government with [ii] the historical sources' use of "executive" as metonymy for the political entity which possesses both that particular power *and also many others*. It's hard to overstate the pervasiveness[263] of this error. So far as I can tell, every single piece of

[262] These writers are surely influenced, it must be said, by an ambiguous passage from Alexander Hamilton's multi-essay defense of the Washington Administration's right to state aloud its interpretation of various treaty obligations. I don't think Hamilton erred so much as he sought to wring a meaning from Article II that he was famously unable to win at the Convention itself. Not for nothing was he known as "the best lawyer in New York City." Flaherty, The Judicial Role in Foreign Affairs (forthcoming).

[263] It's worth nothing that, while unmistakable, the error is perhaps understandable. It is at least a cousin of the linguistic phenomenon that can produce semantic drift over time—consider the semantic path of words like "terrible" and "awful," where widespread error by prescriptive lights eventually changed the meaning of both terms. Certainly authors on both sides of the Vesting Clause debate have been tempted by the error. In addition to the examples below, see, e.g., Flaherty, Most Dangerous Branch, supra note 31, at 1729 ("[T]he [Northwest] Ordinance accord[ed] the governor an absolute veto over legislation as well as the 'power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.' This was arguably 'executive' authority; British monarchs and royal colonial governors possessed these powers into the eighteenth century."). Without wading into the debates over corpus linguistics—

evidence from pre-Framing commentary cited in support of the residuum theory—other than the misunderstanding of Rutherforth and Montesquieu discussed below—is a trivially demonstrable conflation of these two meanings.

At bottom, the point is simple. The eighteenth-century practice of referring to Presidents, Governors, Prime Ministers, Stadtholders, and Emperors as "the executive" was an everyday metonymy:[264] the use of something associated with the referent as a name for the referent itself, like talking about "head" of cattle or "boots" on the ground. This was neither semantically confused nor substantively controversial: today, we likewise use "the executive" as shorthand for our governors, presidents, and prime ministers, because they all count the executive power as *one* of their authorities. But not even the most aggressive residuum theorist would claim that *all* authorities held by "an executive" in this metonymic sense are part of "the executive power" in the relevant conceptual sense. Partly that's because the claim is obviously wrong: everyone agrees, for example, that the president's veto is a quintessentially legislative act. More profoundly, however, the problem is that this would turn the linguistic logic of metonymy upside down. Rather than using the part as shorthand for the whole, this move crams all the features of the whole into the part. And that's exactly backwards.

Think, for example, of referring to a 17-year-old boy as "a youth." We do that because one attribute of the boy is his youth—his young age. So far, so uncontroversial. But besides his youth, the boy surely has other characteristics too. Probably he can read and run. Probably he has ears and elbows. But even if in these respects this particular boy is pretty representative of boys in general, it would be incorrect to reason as follows:

1. This boy is called a youth.
2. This boy has ears.
3. Therefore, it is an intrinsic feature of youth to have ears.[265]

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which doubtless has its uses—the metonymy error's persistence even among those who have looked closely at the texts leaves me skeptical that database corpus techniques would shed much light on the Vesting Clause.

[264] I sometimes think that this use of "executive" is better characterized as synecdoche than metonymy; the former being a more specific example of the latter. If we think of "the executive power" as being a constituent element of the political entity, then calling the President the executive is synecdoche in the same way that calling for "all hands on deck" is synecdoche. If we think of "the executive power" as something related but not physically integral to the political entity, then it is a metonymy in the same way that claiming the pen is mightier than the sword is metonymy. Nothing substantive rides on this difference. Replace every reference to "metonymy" in this paper with "synecdoche" and the analysis works precisely as written.

[265] I have used the metonymic noun as the principal example. But the point applies with equal force to the use of metonymy in its adjective form. That is to say, it would be equally incorrect to reason as follows:

For an example closer to the political context, consider the practice of referring to an army as "a force." The semantic logic of this metonymy is that the army has the capacity to be forceful—to compel, especially in a violent or kinetic fashion. And yet it would be nonsensical to include attribute other characteristics of this army (even if shared by many other armies) in the dictionary definition of the word "force." Probably this army is wearing uniforms. Probably its members carry rifles rather than halberds. Surely some of its members are qualified to deliver skilled medical care. But that would hardly lead us to conclude that it is a constituent element of "force" to be wearing a uniform, carrying any particular weapon, or wielding an EMT certification.

And yet that is exactly what virtually all of the evidence for the residuum theory involves. There are far too many examples to list. But the error comes in two different versions. The first involves [i] accurately flagging an author's metonymic reference to the king as "the executive" or "the executive authority," and then [ii] mistakenly concluding that *all* of the royal powers later described by the author are therefore conceptually "executive." The leading scholarly argument for the residuum, for example, states:

> According to Blackstone, the executive power "is the delegate or representative of his people" who transacts with 'another community' because it is impossible for individuals of one community to transact directly "the affairs of that state" with another.[266]

What Blackstone actually says in the cited text, however, is: "*the king* is the delegate or representative of the people," and "*the king*, therefore as a center" must "transact the affairs of that state.'" It's only (much) earlier that Blackstone uses the shorthand "executive power"—in its metonymic sense—to refer to the King.[267]

A second version of the error involves [i] accurately flagging an author's observation that the king has the "executive power" of government, but then [ii] mistakenly suggesting that the all the *other* prerogatives later described by the author are therefore

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1. This boy is the young person in our group.

2. This boy has ears.

3. Therefore, it is an intrinsic feature of being "young" to have ears.

I am grateful to Henry Monaghan for pointing out that this is a version of the fallacy of the undistributed middle.

[266] Prakash & Ramsey, 111 Yale L. J. at 269.

[267] Blackstone, *Commentaries* Book 1, p.253 (1780). Of course the king did have these powers. But that doesn't mean that they are part of the *executive* power. Indeed, in the very next paragraph, Blackstone turns to the king's absolute negative as "a constituent part of the supreme legislative power." And no one, least of all Blackstone, sees the veto as "executive" in the conceptual sense.

part of that "executive power" as well. So, for example, the leading modern residuum theorists assert: "Emmerich de Vattel, a leading European writer on the law of nations, said that the 'conductor' or 'sovereign' of a nation had the 'executive power,' and *consequently* could enter into treaties, send emissaries, engage in war, and control the nation's ambassadors."[268] But what Vattel actually wrote in the quoted passages was that

> [t]he executive power naturally belongs to the sovereign—to every conductor of a people: he is supposed to be invested with it, in its fullest extent, when the fundamental laws do not restrict it. When the laws are established, it is the prince's province to have them put in execution. To support them with vigour, and to make a just application of them to all cases that present themselves, is what we call rendering justice. And this is the duty of the sovereign, who is naturally the judge of his people.[269]

This is, of course, the textbook definition of executive power explained at length above; indeed, Vattel turned immediately from this point to an extended discussion of the judicial function, which had historically been associated with the executive power in its law enforcement sense. It was only much later in Vattel's discussion that he turned to the chief magistrate's authority to enter treaties and send ambassadors. And in those contexts, Vattel doesn't use any variant of "executive" to describe the magistrate; rather, he refers to "the sovereign." Far from suggesting that the latter powers are "consequent[]" to the "executive power," Vattel makes clear that they have nothing to do with it—they are simply different branches of what the English called prerogative.[270]

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[268] Prakash & Ramsey, 111 Yale L. J. at 270 (emphasis added).

[269] Emmerich de Vattel, *The Law of Nations* 107. Vattel used the word "Executive power" only one other time in the work. That use, too, was in the proper, conceptual sense. And that use, too, was obviously in reference to the execution of law: "[W]ise and free people have too often seen, by the experience of other nations, that the laws are no longer a firm barrier and secure defence, when once the executive power is allowed to interpret them at pleasure."

[270] For a similar example, the leading modern residuum advocates state that "Jean DeLolme ... described the King's executive power as including the ability to serve as 'the representative and depository of all the power and collective majesty of the nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war and making peace.' 111 Yale L. J. at 270. But de Lolme doesn't say that at all. His chapter "Of the Executive Power" ("Du pouvoir exécutif") follows his chapter "Of the Legislative Power" ("Puissance legislative"). In the first paragraph, it notes that "[w]hen the Parliament is prorogued or dissolved, … its laws still continue to be in force: the King remains charged with the execution of them, *and is supplied with the necessary power for that purpose*." Jean de Lolme, *The Constitution of England*, Ch. 5 (G. Robinson, London 1784) (emphasis added). de Lolme then goes on to catalogue the king's *other* prerogatives, starting with the unequivocally legislative right to veto proposed enactments: "the share allotted to him in the legislative authority" by way of "giv[ing] or refus[ing] his assent to the bills

Make no mistake: Blackstone (and many others) did say that—in *addition* to the executive power—the King claimed a range of foreign affairs powers as part of his prerogative. And Blackstone (and many others) did variously refer to the Crown as "the executive," "the executive magistrate," "the executive part of government," and sometimes even "the executive power."[271] But neither of those facts, nor both in combination, remotely supports the erroneous claim that "William Blackstone … described the executive power [in its conceptual sense] … as including foreign affairs powers."[272] Instead, William Blackstone described *the Crown* as having various foreign affairs powers, in addition to the distinct power to execute the laws. And he used "the executive" as a shorthand for the political entity, rather than as an umbrella category for the activity or function. So long as you bear this simple grammatical distinction in mind, the bookshelf evidence offered for the royal residuum simply evaporates as you read it.

B. The Second Scholarly Error: Misunderstanding "Internal Executive" and "External Executive"

The second source of confusion is rooted in the idiosyncratic taxonomy of two eighteenth century writers—the minor Thomas Rutherforth and the major Baron de Montesquieu. As noted in Part I, modern advocates of the Royal Residuum thesis have relied on snippets from these writers' glancing discussions of that taxonomy in a way that is both inaccurate and also totally out of proportion to the taxonomy's contemporary

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presented to him." *Id.* de Lolme's reference to foreign affairs powers is about the eighth prerogative that is listed as an additional authority *after* the king's executive power. *Id.*

[271] Blackstone, Commentaries I:8, 334 (""We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty" and "the power of the executive magistrate, or prerogative of the crown"); Blackstone, Commentaries I:8, 336-337 (The post-Restoration reforms "put together give the executive power so persuasive an energy with respect to the persons themselves … as will amply make amends for the loss of external prerogative…. The stern commands of prerogative have yielded to the milder voice of influence"). *See also, e.g.* de Lolme ("But all these general precautions to secure the rights of the Parliament, that is, those of the Nation itself, against the efforts of the executive Power, would be vain, if the Members themselves remained personally exposed to them. Being unable openly to attack, with any safety to itself, the two legislative bodies, and by a forcible exertion of its prerogatives, to make, as it were, a general assault, the executive power might, by subdividing the same prerogatives, gain an entrance, and sometimes by interest, and at others by fear, guide the general will, by influencing that of individuals."). For an American example, consider Article I, Section 10 of the Constitution, prohibiting states from "enter[ing] into any Agreement or Compact … with a foreign Power" without the permission of Congress.

[272] *Zivotofsky*, 576 U.S. at __ (Thomas, J. concurring in part and dissenting in part).

significance.[273] In this subsection I will show that the residuum thesis's heavy reliance on these two writers is substantively mistaken.[274] Not only was the taxonomy of Montesquieu and Rutherforth idiosyncratic; even taken on its own terms, their framework doesn't actually support a royal residuum at all. To the contrary, their discussion necessarily rejects it, for exactly the same reasons that the rest of the literature does too.

But first, what did Montesquieu and Rutherforth say? For them, it was taxonomically important to distinguish between the application of "the executive power" to *internal* objects and its application to *external* objects. In his *Institutes*, Rutherforth wrote:

> The executive power is either internal or external. We may call it internal when it is exercised upon objects within the society; when it is employed in securing the rights, or enforcing the duties of the several members, in respect either of one another or of the society itself. And we may call it

[273] See, e.g., the full passage from Justice Thomas's separate opinion in *Zivotofsky v. Kerry* cited supra.

Modern authors have also relied on a set of resolutions passed by a county assembly in Essex County Massachusetts. As a substantive matter, the Essex Result simply adopts the taxonomic distinction introduced by Rutherforth and Montesquieu, with the same focus on *actions* taken—a reading underscored by its author's comments at the Massachusetts ratifying convention a decade later. See Mortenson, VEPNRP #2 (forthcoming) (describing Theophilus Parsons' discussion of "executive power" in the Massachusetts convention). That said, I leave it in a footnote here because, so far as I can tell, the Essex Result seems to have had no impact outside of Massachusetts. I have yet to see a single contemporaneous source supporting the proposition that it was any more influential on the national debate than the hundreds of other pamphlets that appeared in the second half of the eighteenth century. (The 1859 remembrance of the author's son—almost eighty years later—is neither contemporaneous nor exactly neutral.) So far as I can tell, it is cited zero times—by author, by town of origin, or by paraphrase—in the documents collected during almost five decades of work by the team responsible for *The Documentary History of the Ratification of the United States*. Besides the 1859 memoir of Parsons *fils*, the earliest citation I have seen to it comes from Charles Thach's 1922 description of the Resolves as a "document, from the pen of a future State chief justice, [which] may be fairly considered as representative of conservative Massachusetts opinion." Thach, supra note 23, at 29 (1922) (providing no citation other than the memoir of Theophilus Parsons's son).

To be clear, the Essex Result is a terrific piece of work, and well worth study. (Substantively, it is even less relevant to the Royal Residuum than Montesquieu or Rutherforth, because it expressly declares the external executive beyond its scope of discussion. But I agree that it is "a most remarkable document," M.C. Vile Separation of Powers 165; see also Willi Paul Adams, The First American Constitutions 21.) I can't find the slightest indication, however, that Parsons' work registered in, let alone influenced, the national discussion. I would be grateful to be alerted to any evidence I have missed.

[274] Compare Bradley & Flaherty, supra note 31, at 563-564 (2004) (suggesting that Montesquieu's discussion is unclear and self-contradictory); *see also* Vile (making similar points).

> external executive power, when it is exercised upon objects out of the society; when it is employed in protecting either the body or the several members of it against external injuries, &c.[275]

Montesquieu said something similar: "In every government there are three sorts of power: the legislative; the executive [*la puissance exécutrice*], in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law."[276] Note that his definition was even narrower than Rutherforth's, identifying both forms of executive power as involving the authority to implement strictly *legalized* entitlements and authorizations.

1. Montesquieu's Taxonomy of "Executive Power" Was Just an Expositional Tool to Organize His Otherwise Standard Use of the Concept

First and most important, the substance of Rutherforth and Montesquieu's discussion reflected an entirely standard understanding of "the executive power" as a general concept. Their taxonomic wrinkle was no conceptual revolution. It served simply to highlight the rather mundane point that government force can be directed in one of two directions: inward or outward. In *both* realms, "the executive power" is the power to execute; the power to follow through on a plan, desire, or instruction. It's just that it's "internal" when performed internally; "external" when performed externally.

If you read Rutherforth's entire discussion of government powers, the point isn't subtle:

> The legislative is the joint understanding of the society, directing what is proper to be done, and is therefore naturally superior to the executive, which is the joint strength of the society exerting itself in taking care that what is so directed shall be done.[277]

A leading review of his *Institutes* zeroed in on precisely this point: the internal and external versions were conceptually indistinguishable aspects of the same power to carry out an *a priori* instruction or plan. "It may be called internal," the reviewer wrote, "when exercised

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[275] Rutherforth, Institutes, Book II, Chapter 3.

[276] Montesquieu, The Spirit of Laws, Book XI, Ch. 6, Book XI, p.181 (S. Crowder, London 1773) ("Il y a, dans chaque état, trois sortes de pouvoirs; la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, & la puissance exécutrice de celles qui dépendent du droit civil.").

[277] Rutherforth, Institutes Book II, Ch 4 ("[L]egislative power is thus found to be superior to executive, when they are considered in the abstract"—i.e., as powers of government, than with respect to the political entities to which they are contingently allocated).

upon members of the society; external, when exercised upon persons neither belonging to the society, nor residing in it…."[278]

Montesquieu likewise left no doubt that "the legislative power" was the content-giving font of instructions to be carried out by the external "executive [power]." He could scarcely have been more specific: the legislative power and the external executive power may each

> be given … to magistrates or permanent bodies, because they are not exercised on any private subject; *one being no more than the general will of the state, and the other the execution of that general will*.[279]

It's for that reason that his account so tightly associated the separation of powers with the protection of liberty: "There would be an end of every thing, were the same man, or the same body, … to exercise those three powers, that of enacting laws, *that of executing the public resolutions*, and that of trying the causes of individuals."[280] Every single example in Montesquieu's weirdly celebrated sentence about the "law of nations" executive[281] thus relates to the implementation of a plan—a plan that he has just finished telling us is

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[278] Review of Institutes 219 (emphasis omitted). For other political theory references to executive power as the motive force or the power of action, see, e.g., N. Bacon (1682) Historical and Political Discourses of the Laws and Government of England II:18 (privy councilors' obligation to "do right in Judgment" concerns "immediately the King in his politick capacity, but trenches upon all Laws of the Kingdom, in the executive power; and all the motions of the whole Kingdom, either of Peace or War").

[279] Montesquieu, The Spirit of Laws, Book XI, Ch. 6, Book XI, p.183 (S. Crowder, London 1773) (emphasis added) ("Les deux autres pouvoirs pourraient plutôt être donnés à des magistrats ou à des corps permanents, parce qu'ils ne s'exercent sur aucun particulier; n'étant, l'un, que la volonté générale de l'État, et l'autre, que l'exécution de cette volonté générale").

[280] Id. at 181-182 ("Tout serait perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers"). See also id. at 182 ("In the republics of Italy, where these three powers are united …. [t]he same body of magistrates are possessed, *as executors of the laws*, of the whole power they have given themselves in quality of legislators….; and as they have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions") ("Dans les républiques d'Italie, où ces trois pouvoirs sont réunis, …. [l]e même corps de magistrature a, comme exécuteur des lois, toute la puissance qu'il s'est donnée comme législateur. Il peut ravager l'État par ses volontés générales, et, comme il a encore la puissance de juger, il peut détruire chaque citoyen par ses volontés particulières").

[281] See infra, Part IV.B.2 ("'By the [executive power,] [the magistrate] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.'") ("Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions.").

defined in toto by an exercise of the relevant *legislative* power, wherever that happens to be vested.[282]

Understanding the conceptual subordinacy of execution to legislative intention, however, doesn't even require this close a reading of their respective accounts. Because both authors go out of their way to insist that the executive power is conceptually every bit as subordinate to the legislative power when acting on foreign objects as it is when acting domestically. Again, Rutherforth couldn't be more explicit:

> [T]he external executive power, in its own nature, is no more an independent power of acting, without being controlled by the legislative than the internal executive power is. Even in those civil societies, where the particular constitution has left this power discretionary in some instances, it does not suffer it to be so in all.[283]

Again, this is exactly how Rutherforth's eighteenth-century contemporaries understood him: "The Doctor is of opinion, that the executive power is derived from, and ought always to be held as, in a very great measure, dependent upon, and originally subordinate to, the legislative."[284] And again Montesquieu is to the same effect: not only was the external executive power just "the execution of [the] general will" as defined by the legislative power, but the terms of that execution could be dictated totally by the entity possessing the legislative power.[285]

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[282] Rousseau is almost identical in this respect:

> The mistake comes from having no precise notion of what sovereign authority is, and from taking mere manifestations of authority for parts of the authority itself. For instance, the acts of declaring war and making peace have been regarded as acts of sovereignty, which they are not, for neither of these acts constitutes a law, but only an application of law, a particular act which determines how the law shall be interpreted—and all this will be obvious as soon as I have defined the idea which attaches to the word 'law.'

Social Contract, II:2, p.71. As he later explains, "The public force thus needs its own agent to call it together and put it into action in accordance with the instructions of the general will, … , and in a sense to do for the public person what is done for the individual by the union of soul and body. *Id.* at III:1, p.102.

[283] Rutherforth, Institutes, II:3.

[284] Review of Institutes, at 219. Note that final formulation: "originally" here means, not "at first" but "as a matter of its origin." The subsequence and subordinacy executive power were as true when applied to external objects as it was to internal objects.

[285] Montesquieu twice emphasized that, unless the head magistrate had the right to participation in lawmaking, his conduct of foreign affairs could be stripped entirely away by legislative prescription. Montesquieu, The Spirit of Laws, Book XI, Ch. 6, Book XI, p.190 (S. Crowder, London 1773) ("The executive power, pursuant to what has been already said, ought to have a

Here Montesquieu and Rutherforth were on common ground with every other commentator I have encountered. Everyone agreed that an exercise of the *conceptual* function of legislative power would define the scope of every other function of government, including the federative:

> We act as a nation, when, through the organ of the legislative power, which speaks the will of the nation, and by means of the executive power → which does the will of the nation, we enact laws, form alliances, make war or peace, dispose of the public money, or do any of those things which belong to us in our collective capacity.[286]

Certainly that had been the constitutional law of England since at least the 1701 Act of Settlement,[287] and as expressed more saliently for the Revolutionaries in cases like *Campbell v. Hall*, which barely paused on the point in discussing the crown's foreign affairs prerogative as the basis for a peace treaty with France in the Caribbean.[288] Likewise in

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share in the legislature by the power of rejecting, otherwise it would soon be stripped of its prerogative."); id. at 188 ("Were the executive power not to have a right of putting a stop to the incroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers.").

Note the doctrinal consequence. Even if "the executive power" in Article II is understood to adopt the broadest definition of the term, including the execution of the nation's intentions in the external realm, on a plug-and-play application of Montesquieu's broadest formulation (i.e., the ones advocated by Residuum theorists) it would be fully controllable and defeasible. This alone is an insuperable barrier to claims about an indefeasible foreign affairs residuum.

[286] Anna Letitia Barbauld, Sins of Government, Sins of the Nation (1793).

[287] Act of Settlement (1701) (prohibiting monarchs not born in England from "engag[ing] in any war for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of Parliament").

[288] Campbell v. Hall (1775) ("[I]f the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion … from the power of Parliament … ; and so in many other instances which might be put"). Note that *Campbell* —like all eighteenth-century questions of prerogative authority—is a Zone 2 case ("It is left by the constitution to the King's authority to grant or refuse a capitulation…. No man ever said the crown could not do it.").

The colonists might also have been struck by reports of the parliamentary debate about the King's 1776 introduction of Hessian mercenaries into Gibraltar and Minorca without parliamentary approval. See 13 Cobbett's Parliamentary History of England 798-824 (1814). The opposition claimed that this violated the Bill of Rights' prohibition on keeping a standing army within the kingdom, the Mutiny Bill's limitation on the size of British army, and the Act of Settlement's prohibition placing foreigners in any military "office, or place of trust." Supporters of

the realm of theoretical commentary, where writers observed without fear of contradiction that the various foreign affairs powers were fully subject to direction by legislative power.[289]

2. Montesquieu's Taxonomy for Executive Power Was Odd and Unrepresentative

Notably, Montesquieu and Rutherforth's presentational choice to divide the universe of executive power into these taxonomic categories was highly unrepresentative. Certainly as a specific matter of English law, "the executive power" was a completely distinct branch of royal authority from the military and foreign affairs powers—a point by itself decisive in a Constitution so thoroughly steeped in Anglo-American legal concepts. But so far as I can tell, Rutherforth and Montesquieu stood alone among political theorists in this taxonomy more generally. Indeed, both thinkers acknowledged that "[t]hese two branches of the executive power, may, if we like these names better, be called civil and military…"[290] So they may. And so they typically were: the standard way to incorporate foreign affairs into governance theory was as a *subject matter*—a competence, to borrow a term from modern European Union law—no different in principle from building lighthouses, or coining money, or conferring honors.[291]

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the government responded by arguing that the statutes did not apply under the circumstances, and by suggesting that an Act of Indemnity be passed to immunize any illegal behavior. But none of them argued that the Crown was legally entitled to ignore the statute.

[289] Locke, *Two Treatises* ("[T]here can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate," such that "the federative power [is] both ministerial and subordinate to the legislative"); Harrington, *Oceana* ("executive power … in the *management* … of a war or treaty with foreign states"). Compare in this respect the Antifederalist "Federal Farmer's" logical extension of Rutherforth's geographical subdivision of executive power to the other two powers of government. *Letter III* ("In the second place it is necessary, therefore, to examine the extent, and the probable operations of some of those extensive powers proposed to be vested in this [national] government. These powers, legislative, executive, and judicial, respect internal as well as external objects. Those respecting external objects, as all foreign concerns, commerce, imposts, all causes arising on the seas, peace and war, and Indian affairs, can be lodged no where else, with any propriety, but in this [national] government.").

[290] Rutherforth, Institutes. See also Montesquieu, The Spirit of Laws, Book 11, Chap. 19, p.216 (S. Crowder, London 1773) ("I]n a commonwealth the same magistrate ought to be possessed of the executive power, as well civil as military," with "some [officers that have] the civil executive, and others the military executive power, which does not necessarily imply a despotic authority."). Besides the Essex Resolves, I have come across only one other contemporary author who comes close to using their taxonomy. See John Brand, Vindication of Royalists (1792) ("The remaining heads of this comparison will relate to the executive power of the Crown, judicial and military.").

[291] Althusius, Politica Ch 7, Sec 12 (1614) (listing as distinct portfolios, *e.g.*, "the executive functions and occupations necessary and useful to the provincial association [i.e., legislature]"; "the distribution of punishment and awards by which discipline is preserved in the province";

To be sure, many thought that the various foreign affairs competences ought *usually* to be vested in the same hands that held the executive power.[292] But that was all contingent

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"the provision for provincial security"; "the mutual defense…against force and violence"; and many others). Althusius goes on to distinguish at great length between what he repeatedly refers to as the administrator's *executive* function as to general right see, e.g., id. ("General right, in turn, involves (1) the enactment and execution of useful laws, and the administration of justice"), and what he describes as the separate and distinct function of "arms and war" among many other "special right[s]"), *id.* at Ch 33. In a similar vein, see Burlamaqui, "Of Fundamental Laws," *Politic Law*, XLIX ("the body of the nation reserves to itself the legislative power … [and] it gives the king the military and executive powers, &c"). Burlamaqui's chapter "Of the Parts of Sovereignty" left no doubt that he was distinguishing here between a Lockean executive power in the "true" sense and a Lockean federative power. He there describes "the legislative power," "the coercive power," "the judiciary power," and an unnamed assortment of foreign affairs powers to "guard the people against strangers, and to procure to them, by leagues with foreign states, all the necessary aids and advantages."

For other examples, see, *e.g.*, Beccaria, Crimes & Punishments (1764) (distinguishing between "the interior power, which defends the laws, and the exterior, which defends the throne and kingdom"); Locke, Two Treatises of Government (describing the "distinct" and "natural" power called "federative," which "contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth, and may be called federative, if any one pleases); de Lolme, Chapter V (distinguishing between executive, federative, and legislative powers in noting that "[t]he [English] King not only unites in himself all the branches of the Executive power,—he not only disposes, without controul, of the whole military power in the State,—but he is moreover, it seems, Master of the Law itself, since he calls up, and dismisses, at his will, the Legislative Bodies."); Bynkershoek, On Questions of Public Law Ch 13, p. 282 (1737) ("[T]he counsellors of the States-General who have charge of the state treasury and the exaction of the contributions … do not possess executive power in the several provinces, nor any jurisdiction, nor any military authority without permission of the Estates."); Hobbes, *Leviathan*, Chap 23 (discussing "publique ministers" whose portfolios involve "speciall Administration; that is to say, charges of some speciall businesse, either at home, or abroad", and describing departments for the economy, the armed forces, the judiciary, the execution of judgments, and the wielding of diplomatic power."); Burke, Reflections on the Revolution in France 308 (describing "the supreme [i.e., legislative] power, the executive, the judicature, [and] the military" as separate branches of government authority").

[292] Locke, Two Treatises of Government ("Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated, and placed at the same time, in the hands of distinct persons: for both of them requiring the force of the society for their exercise, it is almost impracticable); Pufendorf, Two Books of the Elements of Universal Jursiprudence, Observation V ("it follows that in a state there ought necessarily to be in the hands of some one person the authority to unite and arm as many citizens in any peril or occasion, as shall seem to be needed for the common defence, in view of the enemy's force, and again, to make peace with the enemy, as often as it shall be profitable to do so. This power will rest with the same one also who has the authority to exact punishments, since no one can of right

political dickering—such debates had nothing to do with essentialist claims about the "executive" nature of such competences. To the contrary: the same people often asserted that similar practical considerations meant that the chief magistrate should also hold powers that were on *nobody's* account "executive": the veto or negative,[293] the power to raise money,[294] and in some cases the power to enact law itself.[295]

The Founders rightly declined to confuse this distinction between subject matter (competence) and conceptual function (power).[296] There is much more to say on this score, but for the moment, let some statistics refute the claim that we should treat the Rutherforth-Montesquieu presentational taxonomy as anything other than idiosyncratic. The most comfort their writings offer to the royal residuum is a single sentence by Montesquieu that—shorn completely of context and squeezed for every conceivable

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force citizens to arms and to the expense of war, except the one who can also punish the recalcitrant"); Pufendorf, Law of Nature and Nations (similar).

[293] Montesquieu, The Spirit of Laws, Book XI, Book Ch. 6, p.181 (S. Crowder, London 1773).

[294] Pufendorf, Law of Nature and Nations ("Now it is obvious that the right of war and peace, and the right to impose taxes cannot be separated from this right [of the punitive power]. For no one can rightfully compel citizens to take up arms, or to assume the expenses of war and peace, unless he can rightfully punish those who do not comply").

[295] Pufendorf, Law of Nature and Nations ("For if the legislative authority belongs in the end to one part and the punitive power to another, fundamentally and independently to each, either the former will necessarily be without substance or the latter will minister to it"); See also Pufendorf, Two Books of Elements of Universal Jurisprudence, Obsv. V; Hobbes, Leviathan.

[296] We don't treat executive power as having subject matter subcategories: an environmental executive power, and a criminal executive power, and a postal executive power, and an international armed conflict executive power, and so on. Certainly in each case, the conceptual power (that of bringing a desire into being) is applied to a topic area, or competence. But it's all executive power, and the subdivisions are thoroughly unilluminating. Montesquieu got a lot right. But his conceptual structure wandered—as some of the Founders pointed out. See, e.g., Americanus V, *New York Daily Advertiser* (Dec. 12 1787) http://rotunda.upress.virginia.edu/founders/RNCN-02-19-02-0002-0146 ("Tho' the Spirit of Laws contains a fund of useful and just observations on Government, yet, the systematic part of it is evidently defective. His general divisions of Government into different species—his definition of their several natures, and the principles he deduces from them, do not convey to the mind clear and distinct ideas of different qualities really existing in the nature of things…."); A Farmer V (Part 1), *Baltimore Maryland Gazette* (March 25, 1788) http://rotunda.upress.virginia.edu/founders/RNCN-02-12-02-0001-0001 ("[I]t is much to be questioned whether the full and free political opinion of any one great luminary of science, has been fairly disclosed to the world—Even when the great and amiable Montesquieu had hazarded a panegyric on the English constitution, he shrinks back with terror"); *cf.* Federalist 47 (glossing Montesquieu's views on the basis of his separation of powers examples, so that "we may be sure then not to [ahem] mistake his meaning in this case")

semantic ambiguity—reads as follows: "by the [executive power,] [the magistrate] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."[297] This quote from Montesquieu is littered throughout the modern commentary, invoked as a shibboleth by those who claim a presidential power to ignore the law in the realm of national security and foreign affairs.[298] But if the quote were as central to the founding generation's conception of the executive power as these commentators believe, surely the founding generation would have mentioned it. Yet they did not—not once, not even in passing, and surely not to assert that an executive could ignore duly-enacted law.

The gargantuan-though-still-unfinished Documentary History of the Ratification of the Constitution of the United States has compiled all archival records relating to the Constitution's drafting and ratification from every state except North Carolina. None of these documents (zero) contain the phrase "internal executive," "external executive," or their cognates. For his part, Montesquieu is cited 166 times. But *not one* of these citations quotes, paraphrases, or even mentions the quote on which more or less the entire intellectual pedigree for the Royal Residuum hangs. To the contrary: *every single citation* to Montesquieu's discussion of the separation of powers invokes the portion of his discussion where "the executive power" unambiguously means the execution of domestic law.[299] (I

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[297] Montesquieu, The Spirit of Laws, Book XI, Book Ch. 6, p.181 (S. Crowder, London 1773) ("Il y a, dans chaque État, trois sortes de pouvoirs; la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, & la puissance exécutrice de celles qui dépendent du droit civil.… *Par la seconde, [le prince ou le magistrat] fait la paix ou la guerre, envoie ou reçoit des ambassades, établit, la sûreté, prévient les invasions*.").

[298] E.g., Prakash & Ramsey, 111 Yale L. J. at 269 ("Montesquieu immediately provided a more precise definition of the executive power over foreign affairs: making war and peace, sending or receiving embassies, establishing public security, and protecting against invasions."); Yoo, Continuation of Politics by other Means: The Original Understanding of War Powers, 84 Calif. L. Rev. 167, 201 (Montesquieu's understanding of "the executive in respect to things dependent on the law of nations" is "wholly rooted in war and foreign affairs: 'By the executive power, the prince or magistrate makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.'"); Turner, War and the Forgotten Executive Power Clause of the Constitution, 34 Va. J. Int'l L. 903, 931 n.106 ("Montesquieu [described] 'the executive [power] in respect to things dependent on the law of nations,' by which he argued 'the prince or magistrate ... makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.'"); *Zivotofsky*, 576 U.S. at __ (Thomas, concurring in part and dissenting in part) ("Baron de Montesquieu … described executive power as including the power to 'mak[e] peace or war, sen[d] or receiv[e] embassies, establis[h] the public security, and provid[e] against invasions.'").

[299] Cf. Prakash, Essential Meaning, supra note 34, at 747 ("[O]ne can only make sense of Montesquieu's famous separation maxim if one regards him as subscribing [in that passage] to a modern conception of executive power—as all powers to execute the law except for the judicial

suspect this is because that passage is the one paraphrased by Blackstone, who a great many Founders actually read in some depth.[300]) As for Rutherforth, he's cited one single

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power."). Blackstone's reference is likewise to one of Montesquieu's unambiguous uses of the phrase "executive power" in the standard sense of executing the legislative will as to internal law. Even uncredited, this Blackstonian paraphrase surfaced regularly. See, e.g., Continental Congress, Appeal to the Inhabitants of Quebec (1774) (citing "the authority of a name which all Europe reveres" for the proposition that "'*There is no liberty*, if the power of *judging* be not separated from the *legislative* and *executive* powers.'").

Montesquieu himself rarely deployed the taxonomy created in his chapter on the government of England. I have found very few occasions in his work where he does so to refer to the conceptual power rather than as metonymy for the entity which possesses that power. Most are simply indeterminate. See, e.g., Montesquieu, Spirit of Laws (noting that the decemvirate controlled all powers of government, including "the whole legislative, the whole executive, and the whole judicial"; id. at 11:18 (noting that both the people and the Senate had a "part of the executive"); id. at 11:3 (rulers in aristocracy "are invested both with the legislative and executive authority"); id. at 9:1 (captured town is "deprived not only of the executive and legislative power, but moreover of all human property").

Those references that don't just gesture at a general anti-centralization principle are, frankly, confused even on Montesquieu's own taxonomy. One such reference relates to the scope of the Roman Senate's powers. Montesquieu notes that "So great was the share the senate took in the executive power that … foreign nations imagined that Rome was an aristocracy." The next sentence then lists a series of what could be read as examples that begin with acts that not even Montesquieu would understand as executive: "dispos[ing] of the public money" and "farm[ing] out the revenue." *id* at 11:17. Further confusing things, Montesquieu seems later to define even the *implementation* of foreign affairs intentions as "legislative"—which certainly cannot be the case either under his taxonomy or anyone else's. id. at 11:17 ("in the earliest times, when the people had some share in the affairs relating to war and peace, they exercised rather their legislative than their executive power"). In the same vein, Montesquieu seems to define the "granting … of permission [to] borrow[]" as relating to conceptually executive power. It is ambiguous as to whether this connection described the *motivation* for the Senate's permission (it had a government to run!) or the *essence* of the Senate's permission, though if the latter it is confused on Montesquieu's own account, since he explains that the Senate did so by "enact[ing] decrees," which is unequivocally legislative on his earlier taxonomy. Id. at 22:22.

[300] The better educated Founders can be found commenting condescendingly on their peers' lack of genuine familiarity with Montesquieu. There are more literate examples, but one of my favorites is "The News-Mongers' Song for the Winter of 1788," which ran in part: "Write something at randum, you need not be nice / Public spirit, Montesquieu, and great Dr. Price." Albany Gazette (Nov. 15, 1787). Blackstone, by contrast, was a kind of bible in the Protestant sense of a totemic authority whose interpretation was totally democratized. [*Cite wonderful dispute in Pennsylvania convention where Findley totes in his battered copy of Blackstone and reads a giant chunk of it aloud to gleefully correct the great James Wilson's condescending comment on the previous day. "I'd whip my son for getting this wrong if he were studying the law" etc etc.*] See also Bailyn (1967) (most writers' citations to nonlegal sources were poorly understood "window dressing").

time in the ratification discussions—for the proposition that adopting the Constitution would not absolve debtors of their obligations to the United States. Publius didn't even spell the guy's name right.[301]

C. Fertile Ground among Nonspecialists: Conflating the "Separation" and the "Distribution" of Powers

Besides the misreadings described above, residuum theory offers no other support for its claims about Madison's bookshelf or the intellectual foundation on which the Revolutionary and Founding debates took place.[302] But there's something else worth saying about the success of residuum theory—a more speculative observation that has less to do with the errors of residuum champions, and more to do with the mistaken premises of some in their audience. Specifically, many nonspecialists—that is to say, lawyer-generalists who have no expertise in either constitutional history or eighteenth-century political theory—have confused intuitions about what the constitutional "separation" of powers actually entails.

Justice Scalia's *Morrison* dissent is a classic example. It begins:

> It is the proud boast of our democracy that we have "a government of laws, and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:
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> > "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, and not of men."

[301] See Federalist No. 84, n.4 (Hamilton) ("Vide Rutherford's Institutes, Vol.2, Book II, Chapter X, Sections XIV and XV."). It's unlikely that Publius's spelling can be explained as a matter of variable eighteenth-century orthography. Rather, it seems to be a slip of the pen for a completely different person: Samuel Rutherford, a seventeenth century parliamentarian who wrote a well-known defense of limited monarchy called *Lex Rex*. For an unrelated citation to that work, see *supra*, note __.

[302] Residuum theorists do have other arguments to do with political practice during the Revolution, the Founding, and the Early Republic. Those will be taken up in subsequent work. For the moment, it suffices to state that residuum theorists make no arguments about background political and legal theory that are not addressed in this paper.

> The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government….

Justice Scalia thus equates the federal constitution's allocation of powers with the Massachusetts Constitution's statement that only the chief magistrate may exercise any portion of the executive power. He then bolsters the case—without noticing that he has shifted from conceptual powers to institutional organization—by noting that "the Founders conspicuously and very consciously declined to sap the Executive's strength … by dividing the executive power. Proposals to have multiple executives … were rejected.…" According to Scalia, this shows that Article II's vesting of "the executive power" in the President "does not mean *some of* the executive power, but *all of* the executive power."[303]

As a historical statement about the Founding, this is a howler. Opponents of the Constitution savaged the document—at length and with great relish—precisely because of its *failure* to impose the kind of clean separation between legislative, judicial, and executive powers that is sketched in Scalia's excerpt of the Massachusetts Constitution. Far from being embarrassed by this feature of the Constitution, Federalists embraced it:

> Is there any one branch, in which the whole legislative and executive powers are lodged? No. The legislative authority is lodged in three distinct branches properly balanced: *The executive authority is divided between two branches*; and the judicial is still reserved for an independent body, who hold their office during good behaviour.[304]

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[303] *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting) (emphasis in original); *see also id.* ("It is not for us to determine … how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are."). Cf. Flaherty, Most Dangerous Branch, supra note 31, at 1734 ("The Court's formalist cases teach what 'every schoolchild learns,' at least those schoolchildren who are headed to the Office of Legal Counsel. Formalist catechism posits three discrete branches, each exercising one of three distinct powers.").

[304] Alexander Hamilton, New York Convention Debates and Proceedings (26 June 1788) (Childs), at http://rotunda.upress.virginia.edu/founders/RNCN-02-22-02-0002-0011-0001 (emphasis added). Madison's discussion of the point in Federalist 47 is so well-known as almost not to need mention. But at the risk of pedantry, I include it here:

> The constitution of Massachusetts … declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu…. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified

As Hamilton explained, this distribution of powers "is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the great scrutiny with success." Madison agreed: while "[i]t is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments," it is likewise true that "the degree of separation which the maxim requires … can never in practice be duly maintained" "unless these departments be so far connected and blended as to give to each a constitutional control over the others."[305]

For present purposes, however, Justice Scalia makes an even more significant mistake. And that's the *methodology* he announced for deciding what kinds of power count as "executive." He asks:

> In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive?

Scalia thus suggests an inductive analysis based on empirical observations about institutional practice of actual political entities: if the thing called "the executive branch" does X, then that means that X is an exercise of "executive power." As an evidentiary matter, this is a version of the grammatical error described above, conflating the metonym with its referent. And at least by the lights of Madison's bookshelf, it's simply incorrect.

To Scalia's credit, he was later persuaded to reject the residuum as yielding "a presidency more reminiscent of George III than George Washington."[306] But his confusion in *Morrison* exemplifies the mistaken mental shorthand that makes some

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> negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the [Massachusetts] Constitution have, in this last point at least, violated the rule established by themselves.

[305] Federalist 48. As Federalists never tired of pointing out, this was perfectly consistent with Montesquieu. See Willi Paul Adams, First American Constitutions 274-277. Cf. Richard Neustadt, Presidential Power (1960) (describing "separated institutions 'sharing' power").

[306] *Zivotofsky*, 576 U.S. at __ (Scalia, J. dissenting) (definitely not relying on purposive reasoning or legislative history).

audiences such fertile ground for claims about a royal residuum. If you move from the (correct) observation that each branch is associated primarily with one power to the (incorrect) conclusion that all acts by that branch represent an exercise of that power, then the royal residuum might seem quite intuitive. But that doesn't make it any less wrong, at least as a matter of history.

V. Dictionaries

In light of the sources canvassed above, it should come as no surprise that the literally uncontradicted dictionary definition of executive power in the Founding era was "the power to execute." For someone immersed in the historical materials, this makes perfect sense. The words "execute" and "execution" were commonly used in the eighteenth century for the act of bringing an intention into being, often in places where it would now be more typical to say "do" or "finish" or "perform."[307] And yet seeing the definitions below may startle people who have read only the residuum scholarship. That's because it is central to residuum claims that eighteenth century readers shared some special, counterintuitive-by-modern-lights understanding of "executive" that involved *more* than just the power to execute law. There was obviously more to the word; it would disrespect the President to confine him to his enumerated powers, supplemented only by the role of executing legislative commands! Or so the instinct goes—and it's quite misguided.

In 1808, Webster's first edition made a typical distinction between "executive" as an adjective and "executive" as a noun.[308] As a noun, "executive" meant "the person or council administering a government."[309] Other dictionaries agreed: when used as a

[307] Google ngram for "execute"; Google ngram for "execution."

[308] For other dictionaries that take the same care with this distinction, see, e.g. Alexander, The Columbian dictionary of the English Language (1800) ("Executive, eks-'ek'u-tiv, n. the chief magistrate; Executive, eks-e'u-tiv, a. having power to act, or to carry laws into execution"); James Stormonth, A Dictionary of the English Language (1800) ("*n.* egz-ek-u-tiv, the person or body in the administration of a country who puts the laws in force--thus distinguished from the legislative and judicial bodies; the governing person or body; *adj.* pert. to the governing body: having the power to put the laws in force; not legislative or judicial; active").

[309] Or the "executive power" for short. Webster also listed another synonym for this entity: "Executioner - n., a man who puts the law in force."

A number of other dictionaries and encyclopedias defined *the entity* referred to as the executive power. They generally observed that the executive power-qua-entity possessed its homonym power-qua-authority, without elaboration on what the latter actually was. See, e.g., Encyclopedia Brittanica (1779) ("The supreme executive power of these kingdoms is vested by our laws in a single person, the King or Queen, for the time being. *Black.* … The executive power, in this state, hath a right to a *negative*, in parliament, i.e., to refuse assent to any acts offered, or otherwise the two branches of the legislative power would, or might, become *despotic*. *See Montesquieu[]…*"); Jacob

noun, "executive" meant "the person or body in the administration of a country who puts the laws in force—thus distinguished from the legislative and judicial bodies"[310] The Vesting Clause obviously uses executive in the adjectival sense, and it is that sense on which the remainder of this Part focuses.[311]

Here are the Founding-era dictionary definitions I have found for the adjective "executive" as an attribute or characteristic in the most general sense. Each bullet represents a definition from a different dictionary.

- "having the quality of executing or performing"[312]
- "having power to act"[313]
- "having power to act"[314]
- "(adj from execute) having the quality of executing, having the power of execution"[315]
- "that which may be done, or is able to do; … [*exécutoire*, F.] serving to execute"[316]
- "[*executoire*, F.] that which may be done or is able to do, or pertaining to executing"[317]
- "being invested with a Power to act"[318]
- "that which may be done, or which is able to do"[319]
- "that has the power of doing a thing, by virtue of a proper authority"[320]

Giles, A New Law Dictionary (1782) (almost verbatim). For shorter versions obviously cribbed from these longer entries, see, e.g., Chambers, Cyclopaedia, or a Universal Dictionary of Arts and Sciences (1786) ("EXECUTIVE power, supreme, is by the constitution of these kingdom's lodged in a single person, the king or queen, for the time being. See CROWN"); Hall, The New Royal Encyclopaedia (1788) (almost verbatim); Howard, The New Royal Cyclopaedia and Encyclopedia (1788) (almost verbatim); Perth, Encylopaedia Perthensis (1796) (almost verbatim, though including a mention of the French Directorate).

[310] Stormonth, A Dictionary of the English Language (1800) ("the governing person or body").

[311] It is grammatically impossible to parse the Vesting Clause in any other way: Article II uses the word "executive" as an adjective, and in any event the President obviously wasn't being vested with a political entity.

[312] Francis Allen, A Complete English Dictionary (1st. ed. 1765).

[313] Anonymous, A Dictionary of the English Language (1794).

[314] Anonymous, A General and Complete Dictionary of the English Language (1785).

[315] John Ash, The New And Complete Dictionary Of The English Language (1775).

[316] Bailey, A Universal Etymological English Dictionary (1789).

[317] Bailey, Dictionarium Britannicum (1736).

[318] Baskerville, A vocabulary, or pocket dictionary (1765).

[319] Defoe, A Compleat English Dictionary (1735).

[320] Thomas Dyche & William Pardon, A New General English Dictionary (1768).

- "having power to act"[321]
- "having a power, or tending, to act"[322]
- "active, able to act"[323]
- "having power to execute"[324]
- "having power to act"[325]
- "having power to act"[326]
- "having power to act[327]
- "having the quality of executing or performing. They are the nimblest, agil, strongest instruments, fittest to be executive of the commands of the souls. *Hale*."[328]
- "having power to act"[329]
- "that serves to execute."[330]
- "that which may be done, or which is able to do"[331]
- "having power to act."[332]
- "that which may be done, or is able to do"[333]
- "having power to act"[334]
- "having power to act, active"[335]

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[321] Enfield, A General Pronouncing Dictionary (1816).

[322] John Entick, The New Spelling Dictionary (1787).

[323] Daniel Fenning, The New and Complete Spelling Dictionary (1773).

[324] Anne Fisher, An Accurate New Spelling Dictionary (6th. ed. 1788).

[325] George Fulton & George Knight, A Dictionary of the English Language (1814).

[326] Jarvis, A Dictionary of the English Language (1793).

[327] B. Johnson, The Philadelphia School Dictionary of the English Language (1806).

[328] Samuel Johnson, A Dictionary Of The English Language (1785). Johnson's dictionaries were regularly abridged by other editors. See, e.g., Hamilton, Johnson's Dictionary of the English Language in Miniature (1797) ("Exec'utive, a. having power to act"). I have not included such abridgments in this list.

[329] Stephen Jones, A General Pronouncing And Explanatory Dictionary (1797).

[330] John Kersey, A New English Dictionary (1772).

[331] James Manlove, New Dictionary Of All Such English Words (1741).

[332] Myers, A Pronouncing Dictionary of the English Language (1796).

[333] William Paterson, A New Complete English Dictionary (1740).

[334] Peacock, A General and Complete Dictionary of the English Language (1785).

[335] William Perry, The Royal Standard English Dictionary (1788).

- "having the quality of executing or performing.--They are the nimblest, agil, strongest instruments, fittest to be *executive* of the commands of the souls. *Hale*."[336]
- "[from execute or executoire, Fr.] … Having the quality of executing or performing. *Executive* of the commands of the soul. *Hale*."[337]
- "having power to act"[338]
- "Having power to act"[339]

I have found no evidence for a specialized meaning that varied from this core transitive concept. If an unusual or specialized term of art existed, you would expect it to emerge in definitions of "executive" as applied to legal or governmental functions. But the notion of simple transitive implementation persists in full and without modification in such definitions as well:

- "having the quality of executing or performing. Active, or putting into execution, opposed to deliberative or legislative"[340]
- "having the quality of executing. Active, or putting into execution, opposed to deliberative or legislative"[341]
- "having the quality of executing or performing. Active, or putting into execution, opposed to *deliberative* or *legislative*"[342]
- "having the quality of executing or performing. Active, or putting into execution, opposed to deliberative, or legislative"[343]
- "having the quality of executing or performing; active, not deliberate, not legislative"[344]
- "having the quality of executing or performing. Active, or putting into execution, opposed to deliberative or legislative"[345]

Definitions that offer more detail about the *object* of execution in a government context are clearer still: it is the execution *of law*, precisely as you would expect from the

[336] Perth, Encylopaedia Perthensis (1796).

[337] Joseph Scott, A New Etymological Dictionary (1772).

[338] William Scott, Spelling, Pronouncing, Explanatory Dictionary (1799).

[339] John Walker, A Critical Pronouncing Dictionary (1779).

[340] James Barclay, A Complete And Universal English Dictionary On A New Plan (1782).

[341] Frederick Barlow, The Complete English Dictionary (1772).

[342] Daniel Fenning, The Royal English Dictionary: Or, A Treasury Of The English Language (1771).

[343] Charles Marriott, The New Royal English Dictionary (1780).

[344] Perry, The synonymous, etymological, and pronouncing English dictionary (1805).

[345] William Rider, A New English Dictionary (1st ed. 1759).

commentators and theorists on whom these definitions drew. Here are the Founding-era dictionary definitions of "executive" that offer a more particularized specification of what the "executive" power of governance meant:

- "having power to act, or to carry laws into execution"[346]
- "the being invested with a power to act, do, or execute, having authority to put the laws in force"[347]
- "having the quality of executing. *Hale*.--Not legislative, having the power to put in act the law. *Swift*"[348]
- "having the quality of executing or performing. Active; having the power to put in act the laws"[349]
- "having the quality of executing or performing. Active; having the power to put in act the laws"[350]
- "Active, not deliberative; not legislative; having the power to put into effect the laws. The Roman emperors were possessed of the whole legislative as well as *executive* power. *Addison's Freeholder*. Hobbes confounds the *executive* with the legislative power, though all well-instituted states have ever placed them in different hands. *Swift.*"[351]
- "[from *execute*.] Having the quality of executing or performing -- Active; not deliberative; not legislative; having the power to put in act the laws."[352]
- "the being invested with a power to act, do, or execute, having authority to put the laws in force"[353]
- "Active; not deliberative; not legislative; having the power to put in act the laws.--The Roman emperors were possessed of the whole legislative as well as *executive* power. *Addison's Freeholder*.--Hobbes confounds the *executive* with the legislative power, though all well instituted states have ever placed them in different hands. *Swift*"[354]
- "Having the power of putting in act the laws, active, not legislative or deliberative. The legislative as well as executive power. *Addison*."[355]

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[346] Caleb Alexander, The Columbian Dictionary of the English Language (1800).

[347] Daniel Bellamy, English Dictionary (1760).

[348] Thomas Browne, Union Dictionary (1800).

[349] Alexander Donaldson, An Universal Dictionary Of The English Language (1763).

[350] Johnson, J., The New Royal and Universal Dictionary (1763).

[351] Samuel Johnson, A Dictionary Of The English Language (1785).

[352] William Kenrick, A New Dictionary Of The English Language (1772).

[353] Marchant, A New Complete English Dictionary (1760).

[354] Perth, Encylopaedia Perthensis (1796).

[355] Joseph Scott, A New Etymological Dictionary (1772).

- "Having the quality of executing or performing; active, not deliberative, not legislative, having the power to put in act the laws"[356]
- "pert. to the governing body: having the power to put the laws in force; not legislative or judicial; active"[357]

Now the kicker. A handful of dictionaries do reference the full phrase "executive power" precisely as used in the Article II Vesting Clause: a term of art for a conceptual authority that is capable of being vested in a government entity. I have found five such definitions. Each of them defines "executive power" to mean exactly what an informed reader of Madison's bookshelf would have expected: the power to execute laws.

- "EXE'CUTIVE Power, (S.) The power of putting in execution"[358]
- "EXECUTORY or EXECUTIVE, that serves to execute; as The executive Power"[359]
- "Exécutive Power, *pouvoir d'executer*, potestas executorialis, Die Vollmacht etwas zu vollstrecken"[360]
- "Exécutive, a. Ex. Executive power, *pouvoir* ou *authorité d'exécuter*"[361]
- *"The executive power. Administratio; potestas aliquid administrandi*"[362]

Hidden meanings and counterintuitive findings are great when you find them. But sometimes simplest is best.

Conclusion

When a moderately educated eighteenth-century reader—or really any literate American with access to a dictionary—saw the phrase "executive power," they would have understood it as the power to execute plans, instructions, and above all else the laws. They would have understood the power as an empty vessel whose authority in any

[356] Thomas Sheridan, A Complete Dictionary Of The English Language (1789).

[357] Stormonth, A Dictionary of the English Language (1800). In the entry immediately previous, Stormoth makes clear he is using "governing" in the then-usual way, to refer to the "person or body" who "puts the laws in force." See supra note __.

[358] Anonymous, A Pocket Dictionary Or Complete English Expositor (1765). A number of encyclopedia-style publications (including the Encyclopedia Britannica) include an encyclopedia style discussion of the *political entity* "Executive Power." See supra note [__].

[359] Phillips, The New World of Words, of Universal English Dictionary (1706).

[360] Bailey, *A compleat English dictionary; oder, Vollständinges englisch-deutsches* (1783).

[361] Abel Boyer, The royal dictionary abridged French and English (1794). The accent on the leading word indicates spoken stress. That is to say, this is from a list of definition of English terms in French.

[362] Thomas Morell, An Abridgment of Ainsworth's Dictionary (1808).

particular case depended entirely on the substantive decisions of the entity (sometimes the same one that held the power to execute) which possessed the *legislative* power to direct executive action.

That's certainly not to say we've arrived at a comprehensive historical account of Article II as drafted. What settlement on presidential power did the drafting Framers think they had reached? What arrangement did the ratifying Founders think they were voting on? Doesn't the "Law Execution" theory of the Vesting Clause leave a foreign affairs gap in the constitutional text?[363] A detailed answer requires deep engagement with completely different set of historical materials—and perhaps a sturdier sense of civic confidence than competing theories seem to possess. But it is surely worth saying *something* about the power besides its bare semantic meaning. And that is a word on its contemptuous reception by theorists who yearn for a king.

Because, if mere execution is all there is to it, then wasn't this a rather milquetoast role? When Chief Justice Vinson called the merely executive president an "impotent" "automaton" or "messenger-boy," and when the arch-royalist Filmer dripped with disdain about a mere executive power, weren't they right? Didn't at least some Founders think so too? Take Charles Pinckney who, at the Convention, "objected to the contemptible weakness & dependence of the Executive" that was created by Article II.[364] That's certainly Harvey Mansfield's view: "if any real president confined himself to this definition, he would be contemptuously called an 'errand boy,' considered nothing in himself, a mere agent whose duty is to command actions according to the law."[365]

I don't think so. Certainly it's wrong today. The modern statutory framework conveys a staggering amount of discretionary policy power to the executive branch. Very few of

[363] A full response to the "foreign affairs gap" anxiety requires engaging constitutional text and ratification debates that range far beyond Madison's bookshelf. But because the "gap" argument features so centrally in residuum arguments, a few thoughts. As a matter of principle, such arguments-from-imperfection are misguided. They rely on assumptions about the Founding that contradict everything we know about human beings trying to draft complex text. As a matter of practice, the gaps suggested by residuum theorists are, in the main, minor and administrative. And the Article I Necessary & Proper Clause provided a trivially constitutional basis for Congress to fill them in as they went along. As with so many other areas of national governance, this sort of gap-filling is exactly what happened in the early Republic.

[364] Madison's Notes on the Philadelphia Convention (Sept. 15, 1787), in 2 Farrand's Debates 632. Pinckney had changed his mind, or at least his tune, by the time he was opening the South Carolina ratifying convention with a stirring speech on behalf of the Constitution. South Carolina Convention Debates (May 14, 1788) ("We have … endeavoured to infuse into this department, that degree of vigour which will enable the president to execute the laws with energy and dispatch.").

[365] Harvey C. Mansfield, Taming the Prince (1989).

the legal constraints imposed on these delegated authorities are so precise as to rule out a politically plausible policy option in the realm of national security and foreign affairs.[366] But it was obtuse in the eighteenth century as well: the executive power has never been anything less than the nation's force mustered in service of the nation's will. That was why many authors saw England not only as being the freest and happiest of countries, but also as the country whose ruler was in fact the most powerful—perhaps ironically, the Crown could direct the power of a peerlessly vigorous nation that flourished precisely because of the various formal limitations on royal authority. By this measure, the American President would soon be stronger still. At a minimum, James Wilson observed, the President's powers were clearly "of such a nature as to place him above expressions of contempt."[367] Some Antifederalists made far less sanguine versions of the same point: "though not dignified with the magic name of King, he will possess more supreme power, than Great Britain allows her hereditary monarchs."[368]

Even Madison (who, it turns out, had read the books on his bookshelf) saw what was coming. He warned that the President would likely wind up with tyrannical power in his *executive* capacity if Congress's *legislative* authority were not limited:

> One consequence must be, to enlarge the sphere of discretion allotted to the executive magistrate. Even within the legislative limits properly defined by the Constitution, the difficulty of accommodating legal regulations to a country so great in extent, and so various in its circumstances, had been much felt, and has led to occasional investments of power in the executive, which involve perhaps as large a portion of discretion as can be deemed consistent with the nature of the executive trust. In proportion as the

[366] See Kent & Mortenson, "The Search for Authorization: Three Eras of the President's National Security Power," in The Cambridge Companion to the United States Constitution (2017). See also, e.g., Edward Corwin, Total War and the Constitution, 39-40 (1947) ("delegation of vast discretionary powers to the President to deal with a broadly defined subject-matter in furtherance of objectives equally broad"); Clinton Rossiter, Constitutional Dictatorship (1946) (describing World War I and World War II authorizing statutes that conferred "extreme discretionary authority upon a president or his administration").

[367] James Wilson, Pennsylvania Ratification Debates (Dec 11, 1787; morning session), at http://rotunda.upress.virginia.edu/founders/RNCN-02-02-02-0003-0002-0019-0002.

[368] Tamony, Virginia Independent Chronicle, 9 January 1788, http://rotunda.upress.virginia.edu/founders/RNCN-02-08-02-0001-0183. "Tamony" expressly connected this Presidential power to foreign affairs authorities *that were conveyed by Congress pursuant to the legislative power*. Id. ("[T]hough not dignified with the magic name of King, he will possess more supreme power, than Great Britain allows her hereditary monarchs, who derive ability to support an army from annual supplies, and owe the command of one to an annual mutiny law. The American President may be granted supplies for two years, and his command of a standing army is unrestrained by law or limitation.").

> objects of legislative care might be multiplied, would the time allowed for each be diminished, and the difficulty of providing uniform and particular regulations for all be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature, so as to suit them to the diversity of particular situations.[369]

Yes, the immediate post-Revolutionary period saw the executive power either mismanaged by committee or left under the thumb of a multi-member legislature riven by squabbles. But once the federal executive was conferred on a single President, and once that President was given a veto to influence the content of what legislative instructions he was authorized to effectuate—watch out. Because the result was a massively powerful institution. Just not one with an indefeasible foreign affairs power, or indeed any other power not specifically listed in the Constitution. Exploring the particulars of that settlement, however, must wait for another day.

[369] Madison, Report on the Virginia Resolves (1799).