The Executive Power Clause

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Article II of the Constitution vests "the executive power" in the President. Advocates of presidential power have long claimed that this phrase was originally understood as a term of art for the full suite of powers held by a typical eighteenth-century monarch. In its strongest form, this view yields a powerful presumption of indefeasible presidential authority in the arenas of foreign affairs and national security.

This so-called Vesting Clause Thesis is conventional wisdom among constitutional originalists. But it is also demonstrably wrong. Based on a comprehensive review of Founding-era archives—including not just records of drafting, legislative, and ratification debates, but also committee files, private and official correspondence, diaries, newspapers, pamphlets, and other publications—this article not only refutes the Vesting Clause Thesis as a statement of the original understanding, but replaces it with a comprehensive affirmative account of the clause that is both historically and theoretically coherent.

The Founding generation understood "executive power" to mean something both simple and specific: the power to execute law. This authority was constitutionally crucial, but it extended only to the implementation of pre-existing legal norms and directives that had been created pursuant to some other authority. It wasn't just that the use of 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.

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Introduction

Article II of the Constitution vests "the executive power" in a President of the United States. The text of the provision is plain-spoken, even underwhelming at first glance. And yet what it meant to the Founders is "one of the most important questions of any kind, on any subject, under the Federal Constitution."[1] After more than two centuries of dispute, this article resolves the debate. For the Founders, "the executive power" meant the power to execute the law. Nothing more. And nothing less.

For the uninitiated, this conclusion may seem obvious on its face. And yet the meaning of the Executive Power Clause is not just immensely important; it is also "one of the most contested questions in constitutional law."[2] Broadly speaking, there are three interpretations. First, the cross-reference thesis. On this view, the clause has no standalone content; it simply refers to the more specific powers listed later in Article II, from the power to appoint officers to the power to receive ambassadors. Second, the law execution thesis. On this view, the clause grants the power to execute the laws and is otherwise an empty vessel until it has legislative instructions to carry out. Third, the royal residuum thesis. This last view reads the Executive Power Clause as granting all the powers typically possessed by an eighteenth-century "executive"—with the British Crown as the dominant referent—except as specifically reallocated or prohibited elsewhere in the document.

It's hard to overstate the consequences of this debate. The least aggressive version of the royal residuum reads the Executive Power Clause as a defeasible power authorizing the president to take any action he deems necessary in the realms of foreign affairs and national security, so long as neither the Constitution nor any specific statute forbids it. The most aggressive version reads it as indefeasible: that is to say, if it's the sort of thing the eighteenth-century British Crown could presumptively have done, then nothing short of the Constitution itself can stop our American President from doing it too. This has consequences of the highest order for real world disputes ranging from the seizure of steel mills[3] to the torture of suspected terrorists.[4] On the defeasible version, the President might be able to engage in dragnet surveillance to gather intelligence on organizations associated with al-Qaeda, so long as statutes that authorize wiretapping only in more limited forms

[1] Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. Rev. 375, 383 (2008).

[2] Michael McConnell, *The President Who Would not be King* 148 (manuscript).

[3] *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[4] *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).

don't expressly prohibit its use in war.[5] On the indefeasible version, the President might be able to bomb Syria for gassing its own civilians so long as he doesn't purport to formally declare "war."[6]

You don't have to be an originalist on questions like these to understand that it's immensely important to get the historical meaning right. For one thing, even those who think constitutional meaning evolves—clap your hands if you believe in precedent!—understand that you have to start somewhere. For another, a great many constitutional interpreters are indeed committed originalists,[7] ready to give sufficiently well-established original meaning not just significant but conclusive interpretive weight. And so what follows is valuable not only as a history previously untold, but as a source of guidance for some of the most important questions in a modern democracy.

This Article shows that the Founders understood the opening sentence of Article II to vest exactly what it said: the power to execute the law. This essential element of governance was understood as including both the authority to enforce private compliance with the law's negative prohibitions and also the authority to carry out the projects delegated by law's affirmative authorizations. Many Founders thought the executive power also either functionally implied or logically entailed the authority to appoint "assistances" to help implement each of the first two tasks. The Executive Power Clause thus represented an incredibly potent delegation to an incredibly important official. Indeed, the power it vested may have been the Constitution's single most controversial innovation—and not for lack of competition.

The executive power's signal characteristic, however, was that it was substantively an empty vessel. The only thing the clause authorized the President to do was to carry out legal instructions created pursuant to some other authority. This fundamentally derivative characteristic meant that executive power was incapable of serving as even a defeasible source of independent substantive authority, let alone one that would be immune to legislative revision. While the Founders disagreed vehemently about a great many questions

[5] *Cf.* Joint Inspectors General, Unclassified Report on the President's Surveillance Program 11, 13 (July 10, 2009).

[6] *Cf.* Office of Legal Counsel, Memorandum Opinion for the Counsel to the President, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities.

[7] This includes at least four and probably five current Supreme Court Justices. For the Supreme Court Justices, see Confirmation Hearing on Nomination of John G. Roberts, Jr., Senate Committee on the Judiciary, p. 182 (Sept. 12, 2005) (Roberts); Confirmation Hearings on Nomination of Samuel A. Alito, Jr., Senate Committee on the Judiciary, p. 465 (Jan. 9, 2006) (Alito); Cass R. Sunstein & Eric A. Posner, Institutional Flip-Flops, 94 Tex. L. Rev. 485, 536 (2016) (Thomas); Confirmation Hearing on Nomination of Hon. Neil M. Gorsuch, Senate Committee on the Judiciary, p. 262 (March 20, 2017) (Gorsuch). *Cf.* Alex Sawyer, *Brett Kavanaugh best described as 'originalist,' say legal scholars*, The Washington Times (Sept. 3, 2018).

relating to the separation of powers generally and the President specifically, this issue prompted no debate at all. The executive power meant the power to execute. Period.

The Article proceeds as follows. Part I summarizes the current state of the scholarship. Part II explores the Founders' competing visions of the presidency and the gradual emergence of a negotiated compromise between the imperatives of vigor and safety. Part III focuses on the most important element of this negotiated settlement: "the executive power." However much the Founders disagreed about how to allocate powers within the federal government, their conceptual and semantic framework for debating this question was well-established. Under that framework, "the executive power" vested the empty-vessel power to execute law. Part IV shows that the Founders repeatedly rejected the concept of a royal residuum. The Conclusion sketches some implications of this research.

I. Three Views of the Executive Power Clause

There are at least three ways to understand Article II's reference to the executive power.[8] 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 Executive Power Clause has been embraced by Supreme Court justices,[9] national legislators,[10] and a number of academics.[11] On this view, the term is a convenient lexical handle for a grab bag of powers. The full contents are set out in the remainder of Article II. And nothing else goes in the bag. While this approach reads the Executive Power 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.

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 been

[8] This Part's summary of scholarly positions both condenses and extends material from from Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1 (2019).

[9] *Youngstown Sheet & Steel*, 343 U.S. at 641 (Jackson, J., concurring); *id.*, at 632 (Douglas, J., concurring) (similar). The majority opinion in *INS v. Chadha* gestures at this view as well. 462 U.S. 919 (1983).

[10] 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").

[11] 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); Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 307-308 (2009). *See also* Edward S. Corwin, *The President 1787-1984*, at 177; Louis Henkin, *Foreign Affairs and the U.S. Constitution* 13-14.

supported by Presidents,[12] Supreme Court justices,[13] and scholars[14]—"the executive 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 connect 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."[15] And no other provision of the Constitution gives it to the President as an affirmative *enforcement* authority rather than as the *compliance* obligation that is imposed by Take Care clause.[16]

The third understanding is what I will call the "Royal Residuum" theory. Advocates of this theory claim that "[b]ecause supreme executives in [many] countries had a similar basket of powers, it became common to speak of an 'executive power' that encompassed an array of powers commonly wielded by monarchs."[17] 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.[18]

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[12] *Cf.* William Howard Taft, *Our Chief Magistrate and His Powers* 140 (1916).

[13] *E.g. Clinton v. Jones*, 520 U.S. 681, 712 (Breyer, J., concurring in the judgment).

[14] *E.g.*, Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev. 309 (2006); Wilmerding, *The President and the Law* 334 (1952). 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); Gwyn, *The Meaning of the Separation of Powers* 5 (1965). *Cf.* Curtis Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 551-552 (2004).

[15] *Bowsher v. Synar*, 478 U.S. 714, 732 (1986).

[16] For a terrific account of the historical meaning of the Take Care Clause—which imposed a compliance obligation that was entirely distinct from the empowering effects of the Executive Power Clause—see Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. __ (2019) (forthcoming) ("The history we present . . . supports readings of Article II that tend to subordinate presidential power to congressional direction.")

[17] Saikrishna Bangalore Prakash, *Imperial from the Beginning* 31 (2015).

[18] 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 (citing "political theory" and "Anglo-American constitutional history" to assert that "the executive power was understood at the time of the

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."[19]

The Royal Residuum thesis has been remarkably successful. Besides express support from Supreme Court justices,[20] prominent federal legislators,[21] leading executive branch officials,[22] and at least one president,[23] it is easily the dominant historical account among modern commentators.[24] The consequences of that success are stark, at least for originalists willing to stick with the full logical consequences. If the Executive Power Clause really is a royal residuum, then the President is endowed with those aspects of kingly authority that have not been reallocated to other actors. The Executive Power Clause was front and center, for example, in the now-retracted memo advising George W. Bush's Defense Department that it could torture suspected terrorists without legal consequences for committing war crimes.[25] So too with the Office of Legal Counsel's later advice 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

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Constitution's framing to include the war, treaty, and other general foreign affairs powers").

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

[20] *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).

[21] *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.").

[22] *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").

[23] Theodore Roosevelt, *An Autobiography* 357 (1903).

[24] The canonical modern summation is Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 253-54 (2001). For other typical examples, see, *e.g.,* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. Ill. L. Rev. 1 (2006); Phillip R. Trimble, *International Law: United States Foreign Relations Law* 21 (2002); Charles J. Cooper, *What the Constitution Means by Executive Power*, 43 U Miami L. Rev. 165, 177 (1988); Michael McConnell, *A President Who Would Not Be King* (manuscript); Eugene Rostow, *President, Prime Minister, or Monarch?* (1989); 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); Michael D. Ramsey, *The Textual Basis of the President's Foreign Affairs Power*, 30 Harv. J.L. & Pub. Pol'y 141 (2006).

[25] 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* 11, 18-19 (Mar 14, 2003).

approval.[26] And Justice Thomas argued that the Executive Power 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.[27]

Particularly among constitutional originalists, the residuum thesis is dominant. At most, criticism of the historical claim waves a caution flag of uncertainty, contingency, and historical contestation. As Aziz Huq's generally sympathetic account explains, even the strongest critics of the royal residuum "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.[28] It is here that this Article picks up the challenge.

What follows will not only refute the residuum thesis as a claim about original understanding, but also offer an affirmative replacement theory that is both historically and theoretically coherent. Previous work has laid the intellectual foundation for this claim by showing that the Law Execution understanding of "executive power" pervaded the eighteenth century bookshelf. The earlier article showed that, for late-eighteenth-century English speakers, "the 'executive power' was nothing more than 'a power of putting [the] laws in execution.'"[29] That conclusion, however, only teed up the real question. By far the most important task remains: to show that this dictionary definition was *in fact* reflected in both the drafting and ratification of the Constitution itself. On any normatively satisfactory theory of originalism, what matters is not a word game of dictionary bingo but rather the constitutive legitimacy of sovereignty, as defined by what the ratifying generation chose to enact when approving the Constitution. And so that's where this Article picks up—with the

[26] Office of Legal Counsel, *Authority to Use Military Force in Libya* 6 (April 1, 2011).

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

[28] Aziz Z. Huq, *Separation of Powers Metatheory*, 118 Colum. L. Rev. 1517, 1530-31 (2018). For examples of such basically equivocal historical criticism of residuum theory, see, *e.g.*, Curtis Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 551-552 (2004); 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); Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 307-308 (2009). For some typical responses for residuum advocates, *see*, *e.g.* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. Ill. L. Rev. 1 (2006) ("At 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…."); Prakash & Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 Minn. L. Rev. 1591, 1593 (2005) ("[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.").

[29] Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. _ (2019) (forthcoming). (reporting on a review of more than a thousand works of political, theological, and legal theory, as well as some forty dictionaries).

crucial payoff that settles the Executive Power Clause debate for once and for all.

It is the project of this Article to show that the ordinary Law Execution understanding of executive power pervaded the drafting and ratification of the Constitution itself. The sources relied on are varied, but at bottom the claim is grounded on an exhaustive review of every instance of the word root "exec-" in three major collections spanning millions of words: the 29-volume Documentary History of the Ratification of the Constitution,[30] the 34-volume Journals of the Continental Congress,[31] and the 26-volume Letters of Delegates to the Continental Congress.[32] From there, the leads followed were varied, inductive, and less categorizable, but those three collections form the core of evidence on which this Article establishes its claim. On the strength of that research, this Article concludes that Founders *did* "have in mind, and intend[] the Constitution to reflect, a conception of what is 'naturally' or 'essentially' within executive power.'"[33] That meaning, however, was unambiguously limited to Law Execution.

II. Mapping the Article II Settlement

A. America in Crisis

To properly frame the question of how the Founders arrived at the Executive Power Clause, we must start with a wide-angle lens. What prompted the Constitutional Convention? Why did a sense of crisis emerge so quickly after the revolutionary triumph of 1781? Why did the Founders so radically transform the national system of government? The following account barely qualifies as even a sketch of the consensus historiography.[34] But it's worth letting some especially relevant elements of the story emerge in the Founders' own words. There's no better way to experience the sheer urgency they felt about their governments' inability to execute the law. Grasping that intensity is essential to

[30] Documentary History of the Ratification of the Constitution (hereinafter "DHRC") (collecting "records of town meetings, legislative proceedings, convention journals and debates, and forms of ratification; personal papers, such as letters, memoirs, and diaries; diplomatic correspondence; and printed primary sources, such as newspaper articles, broadsides, and pamphlets").

[31] Journals of the Continental Congress (hereinafter "J. Cont. Cong.") (collecting "the records of the daily proceedings of the Congress as kept by the office of its secretary" as supplemented by materials from other sources).

[32] Letters of Delegates to the Continental Congress (hereinafter "Let. Del. Cong.") (collecting "documents written by delegates that bear directly upon their work during their years of actual service in the First and Second Continental Congresses," including "letters from delegates…, diaries, public papers, essays, and other documents").

[33] Bradley & Flaherty, 102 Mich. L. Rev. at 551-552 (disagreeing with this proposition).

[34] For more detail on any particular point see the scholarship referenced in the footnotes. And for the best law review survey of the political historiography, please do not miss Martin Flaherty's *The Most Dangerous Branch*, 105 Yale L. J. 1725 (1996), especially at 1758-1779.

understanding why vesting the executive power was such a central constitutional move.

1. The Critical Period

The 1780s were a time of experimentation and failure, hope and disappointment, uncertainty and—increasingly as the decade wound on—anger. By the time politicians began exploring serious constitutional reform, Americans shared a broad sense of crisis. Any number of alarm bells were ringing. The states were descending into a destructive economic competition that European powers were only too happy to exploit.[35] Both national and state budgets were in a parlous state.[36] One American wrote of state finances in 1787 that "their Ars will be through their breeches before they can buy new ones,"[37] and only George Washington's brilliantly maudlin intervention may have stopped a revolt by the infantry after Virginia and Rhode Island vetoed national taxes that would have covered the soldiers' unpaid wages.[38] The states' inability to coordinate left them militarily vulnerable to "little insurgents"[39] like the "ignoble contemptible Shays,"[40] to the

[35] For an highly readable overview of the foreign affairs dimensions of Critical Period politics, see *Foreign Affairs and the Founding Fathers: From Confederation to Constitution*, 1776-1787 (2011). *See also*, *e.g.*, Patrick O'Brien, "Inseperable Connections: Trade, Economy, Fiscal State, and the Expansion of Empire, 1688-1815," in 2 *Oxford History of the British Empire* 53 (1998) (focusing on commercial relationships and competition); Jack Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 243-274 (1979) (focusing on connection between domestic factions and international relations); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation, The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 952-1014 (2010) (focusing on international power politics).

[36] *See*, *e.g.*, Jack Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 275-329 (1979).

[37] Archibald Stuart to John Breckinridge, Richmond, 8 DHRC 89 (Oct 21, 1787).

[38] "Gentlemen," he said, "you will permit me to put on my spectacles, for I have not only grown gray but almost blind in the service of my country." Fleming, *The Perils of Peace* 271 (2007). Washington did more than just pull their heart strings; he also wrote a circular to the government of all 13 states putting his immense political capital behind major reform of the system. George Washington, "To the Executives of the States" *Providence United States Chronicle*, 13 DHRC 60 (March 15, 1783).

[39] Federal Farmer, Letters to the Republican, 19 DHRC 203 (Nov. 8, 1787) ("men in debt, who want no law").

[40] David Daggett, *An Oration, Pronounced in the Brick Meeting-House to the City of New Haven*, 13 DHRC 160 (July 4, 187)

"depredations of the savages"[41]—and to slave rebellions, the great terror of the south.[42]

All of this gave rise to an mood of intense crisis. Regardless of whether the Framers exceeded their remit by producing a brand new governing document rather than amendments to the existing one,[43] many understood that profound change was afoot when the drafting convention met in Philadelphia. As one Pennsylvanian argued in June 1787, "[t]he present Confederation may be compared to a hut or tent, accommodated to the emergencies of war—but it is now time to erect a castle of durable materials, with a tight roof and substantial bolts and bars to secure our persons and property from violence, and external injuries of all kinds."[44]

Contemporaries could identify any number of problems with their existing governments. But a common theme was clear: the ardent expectations for Rousseauvian republicanism had come acropper. In Gordon Wood's still-authoritative account,

> The belief that the 1780's, the years after the peace with Britain, had become the really critical period of the entire Revolution was prevalent everywhere during the decade…. The move for a stronger national government thus became something more than a response to the obvious weaknesses of the Articles of Confederation. It became as well an answer to the problems of the state governments…., [which James Madison called] "so frequent and so flagrant as to alarm the most stedfast friends of Republicanism…."[45]

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[41] Extract of a Letter from Augusta, *Charleston Columbian Herald*, 3 DHRC 223 (Oct. 22 1787) (warning it would require "martial law" to repel) (reprinted by twelve newspapers). For more on diplomacy, trade, and conflict with Native American tribes, *see e.g.*, Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (2008); Kathleen DuVal, *The Native Ground: Indians and Colonists in the Heart of the Continent* (2007). For a work focusing on the cultural salience of this fear, see Nicole Eustace, *Passion Is the Gale: Emotion, Power, and the Coming of the American Revolution* (2008).

[42] E.g., Herbert Aptheker, *American Negro Slave Revolts* (1983); David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (2009) (arguing that the fear of slave rebellions directly influenced the Constitution's militia and suspension clauses). The comments of Convention delegates, at least as recorded by Madison and other notetakers, were often indirect on this point. But see, for example, Oliver Ellsworth pointing out, perhaps archly, the salutary effects of this fear: "the danger of insurrections … will become a motive to kind treatment of the slaves" Ellsworth, 2 Farrand 371 (Aug. 22, 1787) (Madison's notes).

[43] Probably they did. *Cite congressional charge; Contemporary criticisms; biblio cites.* For two of the best narrative accounts of drafting and ratification in all their contextual complexity, see Clinton Rossiter, *1787: The Grand Convention* (1987) (drafting convention) and Pauline Maier, *Ratification: The People Debate the Constitution* (2010) (ratification debates). For a one-volume analysis synthesizing some key ideological and legal themes of debate, see Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*.

[44] Philadelphia Independent Gazetteer (June 27, 1787).

[45] Gordon S. Wood, *The Creation of the American Republic 1776-1787*, 393 (1998). *See also* Sidney, *Philadelphia Independent*, 13 DHRC 88 (June 6, 1787) ("the melancholy experience we have had of the

For many, the signal failure of their governments was the inability to cope with the willful persistence of factions in domestic politics. There had always reason to doubt, of course, whether political disagreement could really be resolved by pat reference to the general will.[46] But in the late 1780s, such skepticism was typically presented as a new insight "discovered"[47] during America's experimentations in governance after the revolution. As James Madison put it at the Convention, "what we once thought the Calumny of the Enemies of Republican Govts. is undoubtedly true—There is diversity of Interest in every Country the Rich & poor, the D[ebto]r. & Cr[editor]. the followers of different Demagogues, the diversity of religious Sects."[48]

In truth, few of these social divisions were new. But many revolutionaries appear genuinely to have pinned sincere hopes on political salvation through the self-restraint of a virtuous republic. Here too, however, hard experience dashed dreams of a New World birthing New Citizens. Americans, it turned out, were no more intrinsically virtuous than Turks:

> It is idle to expect more virtue in an American than in an individual of any other nation….—Human nature is the same in all parts of the world, bad is the best…. We see in America the same vices, as abroad, and we are not backward in the practice of both wit and ingenuity in cultivating them.[49]

folly, instability, and tyranny of single legislatures" should lead Americans "to banish those dangerous experiments in government out of our country); A Farmer VII (Part 1), *Baltimore Maryland Gazette*, 12 DHRC 473 (April 4, 1788) ("[T]o attempt to form a virtuous republic on the unqualified principles of representation is as vain as to expect a carriage to run with wheels only on one side.—Wheels will be added on the other, and the machine once set in motion down hill will never stop until it carries us to the bottom.").

[46] *See* generally Don Herzog, *Happy Slaves* (discussing New Model Army debates at Putney in 1647). I tend to agree with Merrill Jensen that "the leaders of the Revolution … took party politics for granted, … gloried in partisan warfare, and … used methods as invariably deplored but as invariably used by practitioners of the art of politics in every age." Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution*, 1774-1781 (1940).

[47] Americanus I, *New York Daily Advertiser*, 19 DHRC 171 (Nov. 2 1787) ("it has also been discovered that faction cannot be expelled even from a Representative body, while possessed singly of the whole of the Legislative power").

[48] 1 Farrand 108 (June 4, 1787). The scholarship on these various axes of American identity and interest is extensive, to say the least. For socio-economic dimensions, *see*, *e.g.*, James Henretta, *The Evolution of American Society, 1700-1815: An Interdisciplinary Analysis* (1973); Gary Nash, *The Urban Crucible: The Northern Seaports and the Origins of the American Revolution* (1986); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 143-166 (1985).

[49] John De Witt IV, American Herald, 4 DHRC 265 (Nov. 19, 1787).

This cheery assessment was shared by Federalists[50] and Anti-federalists[51] alike, and the implication was clear. There was no reason to expect that American virtue would ever live up to the dearest hopes of revolutionary theorists. "[I]t must be evident to all by this time that our Utopian Ideas were to[o] fine spun for Execution."[52]

2. The Execution Problem

That brings us to the whole reason for adopting the Executive Power Clause in the first place: a systemic failure of execution throughout American governance. "Our Laws are generally good," wrote one merchant; "[i]t is the administration that gives us pause."[53] Political and legal theorists, of course, had been grappling with this execution problem for centuries. But Revolutionary-era governments managed to distinguish themselves as award-winningly bad at executing the laws they so loved to enact. Hamilton's version of the point may have been tendentious: "It is said a republican government does not admit a vigorous execution. It is therefore bad; for the goodness of a government consists in a vigorous execution."[54] But even the arch-republican Richard Price knew there were problems, alerting his beloved Americans in a published letter from London that

> At present the power of Congress in Europe is an object of derision rather than respect, at the same time the tumults in New-England, the weakness of Congress, the difficulties and sufferings of many of the states, and the knavery of the Rhode-Island Legislature, form subjects of triumph in this country. The

[50] Federalist 10 is the most famous instance, but Madison made the point even more bluntly in private. See James Madison to Thomas Jefferson, New York, 8 DHRC 97 (Oct. 24 & Nov. 1, 1787) ("Experience … shews" that 'prudent regard' for the "general and permanent good of the whole …. has little effect on individuals, and perhaps still less on a collection of individuals; and least of all on a majority with the public authority in their hands."). *See also*, *e.g.*, Newport Herald, 25 DHRC 339 (July 1, 1788) ("The scene now before us is truly dark; but does not the darkness arise from the want of public virtue, public faith and credit; and from the neglect or abuse of public and private advantages; all which is in a measure owing to the dishonesty and villainy of some individuals, but principally to that blindness and infatuation which governs at large?").

[51] *E.g.* Cato V, New York Journal, 19 DHRC 276 (Nov. 22, 1787) ("[Y]ou do not believe that an American can be a tyrant? If this be the case you rest on a weak basis, Americans are like other men in similar situation."); A Federal Republican, A Review of the Constitution, 14 DHRC 255 (Nov. 28, 1787) (quoting Montesquieu's observation that "ministers of restless dispositions have [often] imagined that the wants of the state were those of their own little and ignoble souls" and noting "[t]hat this may happen here, we have a right, and indeed ought to suppose").

[52] J. Pintard to E. Boudinot, DHRC (Sept. 22, 1787) ("Were we all as upright as Yourself & a very few others Mankind might be ruled by opinion, but as that can never be the case in an extensive dominion the Laws ought to be sufficient the executive powerful enough to restrain the turbulent & support the peaceable members of Society").

[53] Logan & Story to Stephen Collins, Petersburg, 8 DHRC 141 (Nov. 2, 1787).

[54] Hamilton, 1 Farrand 304 (June 18, 1787).

> conclusion is that you are falling to pieces, and will soon repent of your independence.[55]

As Price was not-so-gently pointing out, the national government in particular was literally a joke. George Washington certainly agreed, calling congressional requisitions "little better than a jest and a bye word throughout the Land," [56] and a Federalist pamphleteer waxed metaphorical in making the same point:

> I scarcely need tell you that Congress is but a name, that her resolutions are cyphers. She is fallen into contempt. Our union is slender: exists rather in idea than in reality—in the shadow than in the substance. Her present state is the grief of the friends of the union, the source of the fears of strangers and the subject of the ridicule of enemies…. Without a government which can employ and improve the power of the whole to national purposes we are an headless trunk: a monster in creation. Thirteen bodies without one soul to inspire, pervade and move the complicate, unwieldy and nameless machine.[57]

Many mourned the loss of the Spirit of 1776, now sooner viewed as an unsustainable idiosyncrasy of war than as a sign of special American virtue.[58]

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[55] Richard Price: On the American Government Philadelphia Independent Gazetteer, DHRC (May 16, 1787). Price kept pushing the point over the course of the year. *E.g.*, Richard Price to William Bingham, Philadelphia Independent Gazetteer, 13 DHRC 133 (June 20, 1787) (reprinted by at least 24 different newspapers) ("[T]he Federal Government, in particular, is unsettled, and, I suppose, will continue so, 'till insignificance and discredit amongst foreign powers, and internal distresses of wars oblige them to give it due strength and energy.").

[56] George Washington to John Jay (Aug. 15, 1786) ("If you tell the Legislatures they have violated the treaty of peace and invaded the prerogatives of the confederacy they will laugh in your face.").

[57] Numa, Political and Moral Entertainment VII, Hampshire Gazette, 14 DHRC 7 (Sept. 5, 1789). *See also*, *e.g.*, Editor's Note,13 DHRC 159 ("Robert R. Livingston told the New York Society of the Cincinnati that 'I sicken at the sight' of the federal government. Congress, he continued, was 'a nerveless council, united by imaginary ties, brooding over ideal decrees, which caprice, or fancy, is at pleasure to annul, or execute").

[58] "During the war," one Federalist wrote, "the fear of a powerful enemy answered all the purposes of the most energetic government. But as soon as that fear was removed, the thirteen United States began to draw different ways." A Native of Virginia: Observations upon the Proposed Plan of Federal Government, 9 DHRC 655 (Apr. 2, 1788) ("As soon as peace took place, confusion in every department of Congress, ruin of public and private credit, decay of trade, and loss of importance abroad, were the immediate consequences of the radical defects in the Confederation."). For others making this point, *see e.g.*, Publicola: Address to the Freemen of North Carolina, State Gazette of North Carolina, (March 27, 1788), 16 DHRC 493 at ("Our zeal during the war supplied the want of good government."); An Old Soldier, Connecticut Gazette, 15 DHRC 256 (Jan. 4 1788) ("[D]uring the late war, … the recommendations of Congress, like a decree from above, were implicitly obeyed…. [But] its powers expired at the peace, became a dead letter, for the fear of common danger was gone"); Alexander Hamilton, N.Y. Ratific. Debates, 22 DHRC 1704 (June

Practically speaking, the Confederation's fatal flaw—and this is by now as standard an observation in the scholarship as it was during the Founding[59]—was that the national government relied heavily on the states to execute its measures. Instead of a reliably complete government staffed by committed national officials, the Continental Congress was "a diplomatic corps"[60] plagued by chronic absenteeism.[61] And the states were often disinclined to carry out Congress's instructions, recommendations, requisitions, and prohibitions.[62] As John Jay wrote on the eve of the Convention:

> The existing Congress may resolve, but cannot execute either with dispatch or with secrecy. In short, they may consult, and deliberate, and recommend, and make requisitions, and they who please may regard them. From this new and wonderful system of Government, it has come to pass, that almost every national object of every kind, is at this day unprovided for.[63]

20, 1788) ("[D]uring the War that Governt. only gave advice and the Patriotism of the People made them Execute the measures. And even then where there was less Danger the Citizens were more Inactive"); Simeon Baldwin Oration, New Haven, 18 DHRC 235 (July 4, 1788) ("[T]he glory of the United-States–where is it? It expired with that patriot warmth which once united our councils, opened our purses, and strengthened our arms without the force of law").

[59] *See*, *e.g.*, Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States*, 1-3, 153-211 (1986); Alison LaCroix, *The Ideological Origins of American Federalism* 126-135 (2010). For a representative example of the standard execution strategy, see 16 J. Cont. Cong. 144 (Feb. 9, 1780) (resolving to appoint a committee to ask the Pennsylvania executive branch to convene its legislature to "carry[] into execution the above resolves" seeking the procurement of 50,000 barrels of flour or wheat).

[60] James Monroe, *Some Observations on the Constitution*, 9 DHRC 844 (c. May 25, 1788) (not generally circulated).

[61] *See*, *e.g.*, 29 J. Cont. Cong. 629-630 (Aug. 16, 1785) (motion of Charles Pinckney) ("it has not been in [Congress's] power to keep nine States upon the floor--a number without which any important resolution cannot be passed …. [T]his arises from some of the States not sending any, and others having but two members attending…."); 21 J. Cont. Cong. 1113-1116 (Nov. 14, 1781) ("Ordered, That the President write to the executives of the states, requesting the attendance of delegates from such states as are not represented, and urging the necessity of sending forward and keeping up a representation in Congress for conducting the affairs of the United States").

[62] For a sampling on this point, *see*, *e.g.*, Baltimore Maryland Gazette, DHRC 13 112 (May 22, 1787) (reprinted by 18 other newspapers) ("In short, [the Confederation Congress] may declare every thing, but can do nothing. If any thing can be added to this description of the impotence of our federal Government, it must be a total want of authority over its own members."); An Old Soldier, *Connecticut Gazette*, 15 DHRC 415 (Jan. 4 1788) ("Congress might advise, or recommend measures; might approve the conduct of some States, and condemn that of others; might preach up public faith, honour, and justice. But was this sufficient to preserve a union of thirteen States, or support a national government? It had no authority").

[63] A Citizen of New-York [John Jay]: An Address to the People of the State of New York, 20 DHRC 922 (Apr. 15, 1788). *See also*, *e.g.*, Americanus I, Virginia Independent Chronicle, 8 DHRC 200

In response, Congress became almost a parody of itself, creating first a committee to explore solutions to the "public embarrassments"[64] of their execution problem;[65] then a committee to explore the implementation of the solutions identified by the first committee;[66] and then still more committees to take over the implementation and execution of specific national portfolios.[67] What apparatus there was often fell prey to absurd infighting. In one charming example of their pettifoggery, the national Treasurer of Loans excoriated the "very reprehensible [and] extremely disgusting" behavior of the Board of Treasury, including its refusal to conduct business "between the hours of nine and twelve in the forenoon" and its insistence on transacting even "the most trivial affairs in writing only."[68] By the end they were grasping at straws. At least one delegate thought the path to respect might run through the garment district, urging his colleagues to require that "the President of Congress shall in future while in the Chair be seated in his robes."[69]

(Dec. 5, 1787) ("It was found, that a want of energy prevailed in our national Assembly, and that jealousies pervaded our local legislatures; that the pressing requisitions of Congress were treated with haughty contempt"). Compare also 25 J. Cont. Cong. 872 (Jan. 28, 1783) (Alexander Hamilton) (urging that the general revenue "be collected by officers under the appointment of Congress," who would "deriv[e] their emoluments from & consequently [be] interested in supporting the power of Congress").

[64] 17 J. Cont. Cong. 525 (June 17, 1780) ("*Resolved*, That the United States, from New Hampshire to South Carolina, inclusive, … be requested, at this critical conjuncture, to inform Congress … what measures they have taken in consequence of the several resolutions…"). Such simultaneously peevish and plaintive requests for updates from the states on their execution of national law were a common occurrence. *Cf.* 10 J. Cont. Cong. 260-261 (March 16, 1778).

[65] 19 J. Cont'l Cong. 236 (March 6, 1781) (appointing James M. Varnum, James Madison, and James Duane "to prepare a plan to invest the United States in Congress assembled with full and explicit powers for effectually carrying into execution in the several states all acts or resolutions passed agreeably to the Articles of Confederation"). Varnum's appointment at least may have signaled the mood of the committee; he had written to a friend the month before that "in the United States[, the] Manners are generally corrupt, & the Laws but feebly executed." James M. Varnum to Horatio Gates, 16 Letters Del. Cong. __ (Feb 15, 1781). For the Committee's report, see 21 J. Cont. Cong. 893-896 (Aug. 21, 1781) (listing several dozen recommendations reforming the national government).

[66] 21 J. Cont. Cong. 893-896 (Aug. 21, 1781) ("*Resolved*, That a Comee be appointed to prepare a representation to the several States of the necessity of these supplemental powers and of pursuing in the modification thereof, one uniform plan.").

[67] *See infra* __.

[68] 17 J. Cont. Cong. 779-780 (Aug. 25, 1780) (emphasizing that "even … officers in the department" were subjected to this rigamarole, and bemoaning Treasury's "unintelligible and impracticable" orders). It does not appear that Treasury exercised its right of reply.

[69] 29 J. Cont. Cong. 649 (Aug. 19, 1785) (motion of Charles Pinckney). And yes, the delegates promptly appointed a committee to explore the question. *Id.*

In truth, writes Gordon Wood, "by the middle eighties Congress had virtually collapsed."[70] And so the sense of urgency around getting the laws executed pervaded the Philadelphia discussions, both in- and out-of-doors. "Let us be under one vigorous government, established on liberal principles," exhorted one Philadelphia newspaper, "possessed of coercion and energy sufficient to pervade and invigorate the whole—we will then rise immediately into the highest consideration.[71] Inside the convention hall, Governor Edmund Randolph opened the proceedings with a speech that focused almost completely on the Confederation's execution problem.[72] This singlemindedness turned out to be common ground among the delegates, who generally agreed that "[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands."[73] Even comparatively anti-consolidationist members of the Convention acknowledged the political reality that "[t]he Language of the people has been that Congs. ought to have the power of collecting an impost and of coercing the States when it may be necessary."[74]

This theme carried over full force into the ratification debates, where the Confederation's inability to take meaningful practical action was the butt of relentless criticism. The basic challenge was simple—"What is advice, recommendation, or requisition? It is not Government"[75]—and Federalists from Connecticut,[76] Maryland,[77]

[70] Gordon S. Wood, *The Creation of the American Republic 1776-1787*, 464 (1998).

[71] Virginia Gentleman, Philadelphia Independent Gazetteer, DHRC (June 26, 1787) (citing "contempt [Americans] have so universally incurred on account of the weakness of government")

[72] Randolph, _ Farrand _ (Apr. _, 1787).

[73] Madison, II Farrands 8-9 (July 14, 1787). Roger Sherman offered a typical republican concession of the point: "The complaints at present are not that the views of Congs. are unwise or unfaithful, but that that their powers are insufficient for the execution of their views point at the Convention." 1 Farrand 341 (June 20, 1787). For a sample of other instances at the Convention, see, e.g., Morris, 1 Farrands 43 (May 30, 1787) ("The federal gov. has no such compelling capacities"); Wilson, 1 Farrands 70 (June 1, 1787) (similar); Hamilton, 1 Farrand 284-285 (June 8, 1787) (similar).

[74] Bedford, 1 Farrand 491 (June 30, 1787) ("We must like Solon make such a Govemt. as the people will approve.").

[75] Nathaniel Peaslee Sargeant to Joseph Badger, 5DHRC 563 (1788) ("What security is it possible to have under such a Government? A Government without energy, without power.").

[76] *E.g.* Oliver Walcott, Sr., Connecticut Convention, 15 DHRC 312 (Jan 9, 1788) ("generally agreed, that the present confederation is inadequate to the exigencies of our national affairs").

[77] *E.g.* Aristides: Remarks on the Proposed Plan, Annapolis, 11 DHRC 229 (Jan. 31, 1788) ("At this moment, congress is little more than a name, without power to effect a single thing….").

Massachusetts,[78] New York,[79] North Carolina,[80] Pennsylvania,[81] South Carolina,[82] and Virginia[83] competed to make the point most forcefully. As one bit of doggerel put it:

> Nor can you boast this present hour,
> The shadow of the form of power;
> For what's your congress or its end?
> A power to advise and recommend;
> To call for troops, adjust your quotas,
> And yet no soul is bound to notice;
> To pawn your faith to the utmost limit,
> But cannot bind you to redeem it….
> Can utter oracles of dread

[78] *E.g.* Bowdoin, Mass. Ratific. Debates, 6 DHRC 1313 (Jan 23, 1788) (morning session) (the national government lacking "any power of coercion," "the requisitions of Congress, have in most of the States, been little regarded"); Remarker, *Independent Chronicle*, 5 DHRC 734 (Jan. 17, 1788) ("We have long seen the futility of a nominal power in Congress, unsupported by reality…. Bare recommendations have been too long slighted and the delinquency of some States hath engendered evils in them all").

[79] *E.g.* Robert R. Livingston, N.Y. Ratific. Debates, 22 DHRC 1681 (Childs) (June 19, 1788) ("[W]ith the addition of a few powers, those [the national government] possessed were competent to the purposes of the Union. But …. the defect of the system rested in the impossibility of carrying into effect the rights invested in them by the States"); *id.* (Livingston) ("many powers were given, yet they were withheld, by withholding the means of executing them"); John Brown Cutting to William Short, London, 14 DHRC 492 (c. Jan. 9, 1788) ("the confederation of 1781"—a "Code thus feebly formed thus carelessly executed"—"was from the first formation of it unsustainable … and in short built upon the unstable breath of State Legislatures who might and did puff its contexture and edicts into empty air at pleasure").

[80] *E.g.* Davie, North Carolina Ratification Convention (July 24, 1788), 4 Elliot's 21 ("Another radical vice in the old system … was, that it legislated on states, instead of individuals; and that its powers could not be executed but by fire or by the sword…..").

[81] *E.g.* An American, Pennsylvania Gazette, 9 DHRC 833 (May 21, 1788) ("we have not constitutional powers to execute our own desires, even within our own jurisdiction").

[82] *E.g.* A Back Wood's Man, Charleston Columbian Herald, 27 DHRC 277 (May 8, 1788) ("the inefficacy of our laws, which though they answered the purpose pretty well, during our late troubles, are notwithstanding in their present state, inadequate to the execution of domestic or foreign regulations").

[83] *E.g.* Nov. Anglus, *Norfolk and Portsmouth Journal*, 8 DHRC 235 (Dec. 12, 1787) ("A want of energy in the laws of some States, and a want of their execution in others"). For a satisfyingly sarcastic version of the point, see Randolph, Virginia Ratifying Convention, 9 DHRC 970 (June 6, 1788) (Randolph) ("We humbly supplicate, that it may please you to comply with your federal duties! We implore, we beg your obedience! Is not this, Sir, a fair representation of the powers of Congress? Their operations are of no validity, when counteracted by the States. Their authority to recommend is a mere mockery of Government.").

> Like Friar Bacon's brazen head;
> But should a faction e'er dispute 'em
> Has ne'er an arm to execute 'em.[84]

A central theme for many Federalist authors was thus precisely how *well* the laws would be executed under the draft Constitution. However much some modern thinkers have minimized the "errand boy" nature of Law Execution,[85] the Founders never made that mistake. Time and again, it was the lead point raised or first issue discussed: at the Philadelphia drafting convention;[86] at the Pennsylvania[87] and Connecticut[88] ratifying

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[84] A Federalist, Charleston City Gazette, 27 DHRC 284 (May 16, 1788). The verse is from John Trumbull's "M'Fingal: A Modern Epic Poem in Four Cantos." It doesn't get any better.

[85] Mansfield, *Taming the Prince* ("[I]f 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"); *Youngstown Sheet & Steel v. Sawyer*, 343 U.S. 579, 708-709 (1952) (Vinson, C.J., dissenting) ("Under this messenger-boy concept" of the Presidency, "the President must confine himself to sending a message to Congress recommending action").

[86] Randolph, 1 Farrand 18-20 (opening speech of the Convention) ("the prospect of anarchy from the laxity of government every where").

[87] James Wilson opened the Pennsylvania Convention with a speech hammering on the point. And then his final stemwinder—which stretched over two sessions and according to Yeates's notes lasted more than two and a half hours—focused almost entirely on the new government's capacity to execute its law and other legislative projects. On his opening speech, see James Wilson's Opening Speech to the Pennsylvania Ratifying Convention, Pennsylvania Packet, 2 DHRC 333 (Nov. 24 1787) ("He forcibly contrasted the imbecility of our present Confederation with the energy which must result from the proffered Constitution"); *cf.* James Wilson, Version of Wilson's Speech by Alexander J. Dallas, 2 DHRC 340 ("In short, sir, the tedious tale disgusts me."). For a pithy summary of Wilson's endless closing pitch, see James Wilson, Pennsylvania Convention Debate, 2 DHRC 550 (Dec. 11, 1787) (morning session) ("It is of great consequence to us and our posterity whether we shall continue under a Confederation without efficient powers to carry its purposes into execution, despised abroad and without credit at home; or whether we shall adopt a system of Union; with energetic powers, which can effectually carry into execution such measures as may be calculated and devised for the common safety"). Compare also Lloyd's perhaps unreliably florid recapitulation of the latter. James Wilson, Pennsylvania Convention Debate, 2 DHRC 550 (Lloyd) (Dec 11, 1787) (morning session) ("[A]fter making a law, they cannot take a single step towards carrying it into execution"); James Wilson, Pennsylvania Convention Debate, 2 DHRC 571 (Lloyd) (Dec 11, 1787) (PM session) ("Congress may recommend, they can do more, they may require, but they must not proceed one step further.").

[88] Oliver Ellsworth opened the ratifying convention with a speech focusing entirely on this argument:

> A more energetic system is necessary. The present is merely advisory. It has no coercive power….. have we not seen and felt the necessity of such a coercive power? …. The Constitution before us is a complete system of legislative, judicial, and executive power. It was designed to supply the defects of the former system.

conventions; in public propaganda;[89] and in private correspondence.[90]

Certainly it was Publius's hard sale that the Draft Constitution would fix "the great and radical error"[91] of leaving the Confederation "destitute even of the shadow of constitutional power to enforce the execution of its own laws."[92] (To be honest, Publius was a little obsessed with the need for enforcement authority.[93] As the generally sympathetic Charles Johnson wrote to James Iredell, "I am surprised that he should have thought it necessary to take so much pains to establish, what appears at the first glance, at least to me, an incontrovertible truth."[94]) Nor was the Madison-Hamilton-Jay troika unusual in this

Speech in the Connecticut Convention, *Connecticut Courant*, 15 DHRC 243 (Jan. 7, 1788) (reprinted in 20 other newspapers) (surveying the "coercive power" of various European executives to "execute decrees" and "set their unwieldy machine of government in motion"). William Samuel Johnson came next, and doubled down: "Our commerce is annihilated; our national honour, once in so high esteem, is no more…. The gentleman's arguments have demonstrated that a principle of coercion is absolutely necessary." William Samuel Johnson, Speech in the Connecticut Convention, *id.* (reprinted in sixteen other newspapers).

[89] James McHenry, Speech to Maryland House of Delegates, 14 DHRC 279 (Nov. 29, 1787) ("the Journals of Congress are nothing more than a History of expedients, without any regular or fixed system, and without power to give them efficacy or carry them into Execution…. [T]here is no power, no force to carry their Laws into execution, or to punish the Offenders who oppose them"); Oliver Ellsworth, Speech in the Connecticut Convention, *Connecticut Courant*, 15 DHRC 273 (Jan. 7, 1788) (reprinted in 15 other newspapers) ("[H]ow humiliating is our present situation…. [H]ow necessary for the union is a coercive principle. No man pretends the contrary. We all see and feel this necessity. The only question is, shall it be a coercion of Law, or a coercion of arms…. [W]e must establish a national government, to be enforced by the equal decisions of Law, and the peaceable arm of the magistrate.").

[90] The Reverend James Madison to James Madison, Williamsburg, 8 DHRC 31 (c. Oct. 1, 1789) (noting as first concern the need for "ready Compliance amongst ye Bulk of ye People of America, with federal Measures").

[91] Federalist 38, New York Independent Journal, 15 DHRC 353 (Jan. 12, 1788).

[92] Federalist 21, New York Independent Journal, 14 DHRC 414 (Dec. 12, 1787).

[93] For just a few of the longer passages, see, *e.g.*, Federalist 3 ("under the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner"); Federalist 16 ("It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions…."); Federalist 27 ("there is good ground [under the draft Constitution] to calculate upon a regular and peaceable execution of the laws of the Union"). Even Publius's discussion of the legislative powers of the draft federal government emphasized the point. Federalist 44 ("the new Constitution … does not enlarge [the Confederation's] powers; it only substitutes a more effectual mode of administering them.").

[94] Charles Johnson to James Iredell, Strawberry Hill, 15 DHRC 363 (Jan. 14, 1788) ("that the States, united under one efficient government, properly balanced, will be much more powerful … than the States disunited into distinct, independent governments, or separate confederacies").

respect. Many Federalist propagandists defended the draft constitution first and foremost as a solution for the Confederation's "very certain" lack of "vigor enough to carry [its] actually delegated power into execution."[95] The very existence of "union can never be supported," said another Federalist, "without definite and effectual laws which are co-extensive with their occasions, and which are supported by authorities and laws which can give them execution with energy."[96] What the constitution principally offered was thus "an energetic government capable of putting in execution prohibitory laws uniformly throughout the states."[97] And on and on and on.[98]

What about the loose and diverse group of skeptics and outright opponents known to history as the Antifederalists? Certainly some contested the premise. Agrippa huffed that "our government is respected from principles of affection, and obeyed with alacrity,"[99] and Patrick Henry puffed that "the people of Virginia" have "manifested the most cordial

[95] A Freeman I, Pennsylvania Gazette, 15 DHRC 453 (Jan. 23 1788).

[96] A Citizen of Philadelphia, Remarks on the Address of Sixteen Members, 13 DHRC 297 (Oct. 18, 1787), ("the superlative authority and energetic force vested in congress and our federal executive powers" are "extensive as they are, are not greater than is necessary for our benefit.").

[97] Letter from New York, 3 DHRC 380 (Oct. 24, 1787); *see also id.* (Oct 31, 1787) (Philadelphia convention resulted from "the opinion of a majority of the citizens of America that a national government, of energy and efficiency, ought to be established over the United States for the better security and promotion of the interests of the individual, as well as the confederated states").

[98] For but a small further sampling, see, *e.g.*, Common Sense, Massachusetts Gazette, 5 DHRC 693 (Jan 11, 1788) ("Men of penetration have grown weary of such a weak and inefficient system, and wish to lay it aside; and have substituted in its room, a government that shall be as efficacious throughout the union as this state government is throughout the Massachusetts."); A Freeholder, Virginia Independent Chronicle, 9 DHRC 719 (Apr. 9, 1788) (extraordinary) ("this constitution … gives an energy and dignity to the supreme legislative and executive powers, of which energy and dignity the present Congress have not even the shadow"); Edmund Pendleton to Richard Henry Lee, Richmond, DHRC (June 14, 1788) ("Union is only to be preserved by a Fœdral Energetic Government, and … the Articles of Confederation Possess not an Atom of such a Government, …. a strong & firm Govt. of wholsome laws, well executed, to protect the honest Peaceable Citizen From Oppression, Licentiousness, Rapine & violence, appear to me indispensibly necessy"); One of the People, *Pennsylvania Gazette*, 2 DHRC 186 (Oct. 17, 1787) (while "no one state can carry into effect their impost laws," the new government "will have energy and power to regulate your trade and commerce, to enforce the execution of your imposts, duties and customs.").

[99] Agrippa XII, Massachusetts Gazette, 5 DHRC 720 (Jan. 15, 1787). Agrippa was notably insistent on the point. *See also* Agrippa I, Massachusetts Gazette, 4 DHRC 303 (Nov. 23, 1787) ("It is now conceded on all sides that the laws relating to civil causes were never better executed than at present"); Agrippa II, Massachusetts Gazette, 4 DHRC 322 (Nov. 27, 1787) ("the sheriffs, have in no case been interrupted in the execution of their office …. [T]he law has been punctually executed"). *Cf.* Frank Drebin, *Naked Gun* ("Nothing to see here. Please disperse.") (1985).

acquiescence in the execution of the laws."[100] But the urgency of such denials just betrayed the power of the argument.[101] Indeed, for the most part Antifederalists *agreed* with the diagnosis, both privately[102] and publicly.[103] Brutus was typical in "acknowledg[ing] … that the powers of Congress, under the present confederation, amount to little more than that of recommending,"[104] and Centinel called it "universally allowed" that "extraordinary

[100] Henry, Virginia Ratific. Debates, 9 DHRC 943 (June 5, 1788) ("What could be more awful than their unanimous acquiescence under general distresses? Is there any revolution in Virginia? Whither is the spirit of America gone? Whither is the genius of America fled?"). The Virginia delegates chased their tails on this question for some time. See Virginia Ratific. Debates, 9 DHRC 1006 (June 7, 1788) (back-and-forth among Madison, Randolph, and Henry).

[101] *See also*, *e.g.* A Plebeian: An Address to the People of the State of New York, 20 DHRC 942 (April 17, 1788) ("[A]ll the powers of rhetoric … are employed to paint the condition of this country, in the most hideous and frightful colours…. [But the] laws are as well executed as they ever were, in this or any other country."); Benjamin Gale, Notes for a Speech, 3 DHRC 420 (Nov. 12 1787) ("All these combining have raised a mighty outcry of the weakness of the federal government…. But, gentlemen, have not we the same power we ever have had…. If any opposition is made to government, has not our sheriffs power to call to their assistance the militia to support him in the execution of his office, and is it not so in every state in the Union."); John Lansing, New York Convention Debates and Proceedings, 22 DHRC 1976 (June 28, 1788) ("Sir, have the states ever shewn a disposition not to comply with the requisitions? We shall find that, in almost every instance, they have, so far forth as the passing the law of compliance, been carried into execution.").

[102] Richard Henry Lee to John Adams, 8 DHRC 9 (Sept. 3, 1787) ("The present federal system, however well calculated it might have been for its designed ends if the States had done their duty, under the almost total neglect of that duty, has been found quite ineffecient and ineffectual—The government must be both Legislative and Executive, with the former power paramount to the State Legislatures in certain respects essential to federal purposes.").

[103] Dissent of the Minority of the Pennsylvania Convention ("[T]he annual requisitions were set at naught by some of the states, while others complied with them by legislative acts, but were tardy in their payments…. The Congress could make treaties of commerce, but could not enforce the observance of them"); Grayness, Va. Ratific. Debates, 9 DHRC 1142 (June 11, 1788) ("I admit that coercion is necessary in every Government in some degree, that it is manifestly wanting in our present Government, and that the want of it has ruined many nations"); Samuel Jones, New York Ratifying Convention, 22 DHRC 1877 (June 25, 1788) (Childs notes) ("a fact universally known, that the present confederation had not proved adequate to the purposes of good government"); Instructions to Delegates, Town of Preston, 3 DHRC 438 (Nov 12, 1787) (calling for a series of amendments while expressing "our ardent wish that an efficient government may be established over these states" with "sufficient provision made for carrying into execution all the powers vested in government"). The "Federal Farmer" was notably preoccupied with this issue in his first three letters. *E.g.*, A Federal Farmer, Letters to the Republican I, 14 DHRC 14 (Nov. 8, 1787) ("the interest I have in the protection of property, and a steady execution of the laws, will convince you, that, if I am under any biass at it, it is in favor of any general system which shall promise those advantages").

[104] Brutus IX, *New York Journal*, 20 DHRC 617 (Jan. 17, 1788).

difficulties [have] hitherto impeded the execution of the confederation."[105]

Rather than denying the problem, Antifederalists typically responded by warning that the draft Constitution went too far in fixing it. The new government's dramatically improved enforcement power, they urged, would overshoot the mark and result in tyranny.[106] "The publick mind, I fear," worried Cornelius, "is at this critical juncture, prepared to do the same that almost every people, who have enjoyed an excessive degree of liberty have done before;—to plunge headlong into the dreadful abyss of Despotick Government."[107] Dire warnings abounded about execution running amok, from "swarms"

[105] Centinel IV, Philadelphia Independent Gazetteer, 14 DHRC 317 (Nov. 30, 1787) (conceding that "the present confederation is inadequate to the objects of the union," while cautioning that these difficulties were "temporary" and should not be attributed to irreparable "defects in the [Confederation] system itself").

[106] E.g., A Countryman, American Herald, 5 DHRC 757 (Jan. 21, 1788) ("Are we to give up every thing dear to us, because it is demanded by a set of men, who, while they make the demand, exhibit a spirit of despotism—equalled only by that of the Batons of the Germanic Empire … over their vassals[?]"); The Impartial Examiner I, Virginia Independent Chronicle, 8 DHRC 459 (March 5, 1788) ("can any one think that there is no medium between want of power, and the possession of it in an unlimited degree? Between the imbecility of mere recommendatory propositions, and the sweeping jurisdiction of exercising every branch of government over the United States to the greatest extent?").

[107] Cornelius, Hampshire Chronicle, 4 DHRC 410 (Dec 11 & 18 1787) (suggesting that "great embarrassments under which we have laboured" under the Confederation could be remedied by narrower amendments facilitating tax collection and the regulation of commerce). At the Virginia ratifying convention, one Antifederalist had some fun on this score:

> We are now told … that every calamity is to attend us … unless we adopt this Constitution … [T]he Carolinians from the South, mounted on alligators, I presume, are to come and destroy our corn fields and eat up our little children!

Grayness, Va. Ratific. Debates, 9 DHRC 1142 (June 11, 1788).

of enforcement agents[108] to the "military execution"[109] of the national laws.[110] Cato's litany of probable consequences was typical:

> the necessity to enforce the execution of revenue laws (a fruitful source of oppression) on the extremes and in the other districts of the government, will incidentally, and necessarily require a permanent force, to be kept on foot—will not political security, and even the opinion of it, be extinguished? can mildness and moderation exist in a government, where the primary incident in its

[108] Melancton Smith, N.Y. Ratific. Debates, 22 DHRC 1921 (June 27, 1788) ("Will it not give occasion for an innumerable swarm of officers, to infest our country and consume our substance?"); Dissent of Minority of Pennsylvania Convention, Philadelphia Packet, 2 DHRC 617 (Dec. 18, 1787) ("judges, collectors, tax gatherers, excisemen, and the whole host of revenue officers will swarm over the land, devouring the hard earnings of the industrious, like the locusts of old"); The Republican Federalist VII, Massachusetts Centinel, 5 DHRC 869 (Feb. 6, 1788) ("the executive and judicial departments of the union, will necessarily produce through the Continent, swarms of officers"); John De Witt V, American Herald, 4 DHRC 351 (Dec. 3, 1787) ("that swarm of revenue, excise, impost and stamp officers, Continental assessors and collectors, that your new Constitution will introduce among you … will, of themselves, be a STANDING ARMY to you … without the blessed assistance of any military corps."). John DeWitt was so distraught on this point that he wrote two straight essays on it. *See also* John De Witt IV, *American Herald*, 4 DHRC 265 (Nov. 19, 1787) ("A new set of Continental pensioned Assessors will be introduced into your towns, whose interest will be distinct from yours.—They will be joined by another set of Continental Collectors, still less principled and less adequate than the former").

[109] Twenty-seven Subscribers, New York Journal, 20 DHRC 558 (Jan. 1, 1788) ("do not be so irresolute as to be frightened out of your duty by any pert adventurer [—*oh hi, Alex!*—], whose principles may be despotic, from habit in the wars and whose ideas of government cannot be satisfied with less than military execution"); A Federal Farmer, Letter II to the Republican, 14 DHRC 14 ("the general government, far removed from the people, and none of its members elected oftener than once in two years, will be forgot or neglected, and its laws in many cases disregarded, unless a multitude of officers and military force be … employed to enforce the execution of the laws").

[110] The Virginia ratifying convention saw especially long colloquies on the subject. Va. Ratific. Debates, 10 DHRC 1258 (June 14, 1788) (Clay, Madison, Mason, Henry, Nicholas, Randolph, and Lee); Virginia Ratification Debate, 10 DHRC 1299 (June 16, 1788) (Henry, Madison, Pendleton). For other examples, see, *e.g.*, Philadelphiensis IV, Philadelphia Freeman's Journal, 14 DHRC 418 (Dec. 12, 1787) ("to carry the arbitrary decrees of the federal judges into execution, and to protect the tax gatherers in collecting the revenue, will be ample employment for the military"); John De Witt V, American Herald, 4 DHRC 351 (Dec. 3, 1787) (warning that federal military power was an "infernal engine of oppression to execute their civil laws" and asking "where is the standing army in the world, that [has not] finally, tak[en] a chief part in executing [the] laws…."); Interrogator, To Publius or the Pseudo-Federalist, 19 DHRC 342 (after Dec. 1, 1787) (unpublished manuscript) ("And does not the [Calling Forth?] Clause … involve a State of War and military Execution to the Persons who are the objects of it?").

exercise must be force?[111]

Given longstanding Country anxieties about a standing army, these reactions made some sense, at least for the most paranoid.[112] The key thing for our purpose is that both supporters and opponents understood that the sales pitch for ratification focused on the new Constitution's radically improved *execution* of national projects and prohibitions.

B. The Presidency's Role in the Constitutional Solution

That brings us to the President. Expanded legislative power was of course an essential element of the proposed constitutional solution, and there was angst aplenty about the federal courts' ability to enforce legal rights and obligations. But when it came to the execution problem, the Article II presidency was central. Certainly James Madison thought so. In a letter summarizing the proceedings for Thomas Jefferson, Madison listed executive power first among "the great objects which presented themselves" to the Convention.[113] The reason was simple. The whole point of the Article II presidency was to cure the existing government's crippling inability to bring its laws, policies, and projects into anything like effective execution.[114]

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[111] Cato III, New York Journal, 19 DHRC 125 (Oct. 25, 1787). *See also* Brutus IV, New York Journal, 19 DHRC 313 (Nov. 29, 1787) ("If then this government should not derive support from the good will of the people, it must be executed by force, or not executed at all….—The convention seemed aware of this, and have therefore provided for calling out the militia to execute the laws of the union."). Brutus's first number was in much the same vein. Brutus I, New York Journal, 19 DHRC 103 (Oct. 18, 1787) ("the government will be nerveless and inefficient, and no way will be left to render it otherwise, but by establishing an armed force to execute the laws at the point of the bayonet").

[112] E.g. Luther Martin Addresses the House of Delegates, 11 DHRC 87 (Nov. 29, 1787) ("Should the power of these Judiciaries be incompetent to carry this extensive plan into execution, other, and more certain Engines of power are supplied by the standing Army unlimited as to number or its duration, in addition to this Government has the entire Command of the Militia"); A Baptist, New York Journal, 19 DHRC 331 (Nov. 30, 1787) (similar); Dissent of Minority of PA Convention, Philadelphia Packet, 2 DHRC 617 (Dec. 18, 1787) (similar).

[113] James Madison to Thomas Jefferson, New York, 8 DHRC 97 (Oct. 24, Nov. 1, 1787) ("1. To unite a proper energy in the executive and a proper stability in the legislative departments, with the essential characters of republican government.") ("Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them"). One of the most strangely persistent misunderstandings of Madison is the idea that he was uninterested in the executive branch or resistant to strong centralized authority. Clinton Rossiter had it right back in 1964: "I am far more impressed by the large area of agreement between Hamilton and Madison than by the differences in emphasis that have been read into rather than [written] in their papers." Clinton Rossiter, *Alexander Hamilton and the Constitution* 58 (1964)

[114] Governeur Morris, 2 Farrand 52 (July 19, 1787) ("It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the

Many Federalists traced this execution problem to a revolutionary overreaction by their fellow citizens in the wake of independence. "[T]he immediate crush of arbitrary [British] power," they lamented, had prompted Americans to "lean too much … to the extreme, of weakening than of strengthening the Executive power in our own government."[115] In the throes of the Critical Period, however, even the staunchest republicans began to concede the need for *some* kind of office to "preside over civil concerns, and see that our laws are duly Executed,"[116] and even the smallest states eventually signed onto New Jersey's call for a new "federal Executive" vested with authority "to enforce and compel" and "carry[] into execution" "all acts of the U. States in Congs. made."[117] The resulting presidency thus served as the Convention's answer to the following choice: "We must either … renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it."[118] As one North Carolina Federalist said: "If [the President] takes care to see the laws faithfully executed, it will be more than is done in any government on the continent; for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects mere ciphers."[119]

Unfortunately, creating an executive magistrate wasn't just one of the most pressing questions. It was also one of the hardest. Madison later explained to the Virginia convention that—while debates about "the organization of the General Government" were certainly "in all [their] parts, very difficult"—there was "a peculiar difficulty in that of the Executive."[120] At times the difficulty seemed almost paralyzing. The Convention's discussion of the subject began with a motion "that the Executive consist of a single person." Then:

> A considerable pause ensuing, and the Chairman asking if he should put the

efficacy & utility of the Union among the present and future States.").

[115] Marcus III, Norfolk and Portsmouth Journal, 16 DHRC 322 (March 5, 1788).

[116] Benjamin Franklin, 1 Farrand 85 (June 2, 1787).

[117] New Jersey Amendments to Articles of Confederation (June 15, 1787) ("enforce and compel an obedience to such Acts, or an Observance of such Treaties"). OK, not Rhode Island. But they weren't even there.

[118] Governeur Morris, 2 Farrand 52 (July 19, 1787) ("It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy & utility of the Union among the present and future States.").

[119] Maclaine, North Carolina Ratifying Convention, 4 Elliot's 135 (July 28, 1788).

[120] Madison, Virginia Ratific. Debates, 10 DHRC 1412 (June 20, 1788) (emphasis added) ("Every thing incident to it, must have participated of that difficulty"). Madison made the same point privately. James Madison to Thomas Jefferson, New York, 8 DHRC 97 (Oct. 24, Nov. 1, 1787) ("The first of these objects as it respects the Executive, was peculiarly embarrassing"). See also George Mason, 2 Farrand 118 (July 26, 1787) ("In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared").

> question, Docr. Franklin observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put.
>
> Mr. Rutlidge animadverted on the shyness of gentlemen on this and other subjects.[121]

Whence this weird silence among delegates who—Rutledge's reference to "other subjects" notwithstanding—had so far showed no detectable reticence on any other topic? Surely it was due in part to the identity of their presiding officer, "whose election [as President] will doubtless be unanimous, unless he declines the trust."[122] But that can't be the whole story: indeed, the topic of presidential power prompted an identically awkward "silence" when introduced at the North Carolina ratification debates, where General Washington was nowhere to be found.[123]

The Founders' persistent "embarrassment" on the topic had a thoroughly substantive reason. Indeed, generations of political theorists had taught that structuring the chief magistracy was probably the hardest problem in governance. As Governor Edmund Randolph said to the Virginia ratifying convention, "[e]very Gentleman who has … considered of the most eligible mode of Republican Government, agrees that the greatest difficulty arises from the Executive, as to the time of his election, mode of his election, quantum of power, &c.[124] Echoing the handwringing of parliamentarians a century earlier and an ocean away, Governeur Morris explained why:

> It is <the> most difficult of all rightly to balance the Executive. Make him too weak: The Legislature will usurp his powers. Make him too strong. He will usurp

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[121] 1 Farrand 65.

[122] A Citizen of New-York, New York Daily Advertiser, 19 DHRC 54 (Sept. 27, 1787) (listing other politicians "equal to the office of President" should Washington decline). *Cf.* Letter from Philadelphia, *Fairfield Gazette*, 13 DHRC 172 (July 25, 1787) (suggesting that there was a plot to install a monarch, and speculating that "Gen. Washington, though unexceptionable in every respect of his virtues, would probably decline the crown were it offered him").

[123] On the relevant day, the secretary's notes observe that "Article 2d, section 1st" was read for comment. The next recorded comment comes from an irritated Federalist challenging the opponents of the Constitution to object. Davie, North Carolina Ratifying Convention, 4 Elliot's 102-103 (July 26, 1788) ("Is it not highly improper to pass over in silence any part of this Constitution which has been loudly objected to[?]"). Silences continued throughout the North Carolina convention's discussion of Article II. See, e.g., 4 Elliot's 106 (July 28, 1788); "The rest of the 1st section read without any observations"; Iredell, *id.* ("Mr. Chairman, I was in hopes that some other gentleman would have spoken to this clause.").

[124] Edmund Randolph, Virginia Debates, 10 DHRC 1338 (June 17, 1788). See generally Mortenson, *supra* note _.

on the Legislature.[125]

This dynamic forced the Framers to "act[] a very strange part" in structuring the presidency: "We first form a strong man to protect us, and at the same time wish to tie his hands behind him."[126] The Antifederalist Melancton Smith used *Bracton*'s bridle metaphor for the same point: "Power is a Head strong Horse—requires a Curb and will even then sometimes [break free.[127]] Will the Rider then Hamstring To Contrive a Govt. to check it from operating"?[128]

These were hard questions, to put it mildly. And so the Convention bogged down in what Madison called "tedious and reiterated discussions."[129] (Smash cut to generations of scholars nodding vigorously.) A series of fundamentally interconnected issues was hotly contested, including the number of people at the head of the executive branch, the process of selecting them, the provisions for removing them, the length of their terms, their eligibility for re-election, and the provision for an executive veto. However mechanical each

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[125] Morris, 2 Farrand 103-105 (July 24, 1787). *Cf.* Reply to George Mason's Objections to the Constitution, New Jersey Journal, 3 DHRC 154 (Dec. 19, 26, 1787) ("May not every person you appoint, probably, also become venal, wicked, and oppressive? I answer: …. If we must have no government till we can get one that cannot be abused, there is an end of the business at once"). Compare Parker, *Observations on His Majesties Late Answers* (1642).

[126] Morris, 2 Farrand 317 (Aug. 17, 1787).

[127] McKesson did not get down the end of this thought. It seems safe to assume the reference was to the "Curb" sometimes failing.

[128] Melancton Smith, N.Y. Ratific. Debates, 22 DHRC 1877 (June 25, 1788) (McKesson's notes) [accessed 31 Oct 2015] ("With respect to the Powers of Govt. they must [be] adequate to the objects or it becomes useless—There must be checks or the Govt. will [be] dangerous—"). For a version of the same point from a Federalist, see James Wilson, 1 Farrand 482 (June 30, 1787) ("Bad Governts. are of two sorts. 1. that which does too little. 2. that which does too much: that which fails thro' weakness; and that which destroys thro' oppression."). There really was something of a sensible middle driving the discussions: Federalists like Wilson and Morris generally acknowledged that fixing the execution problem risked making the government too strong; Antifederalists and skeptics like Smith and Randolph generally acknowledged that every government required some force and authority and capacity to execute. The calibration was the hard part—and the contested one.

[129] James Madison to Thomas Jefferson, New York, 8 DHRC 97 (Oct. 24, Nov. 1, 1787) ("On the question whether it should consist of a single person, or a plurality of co-ordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place").

For present purposes, tracking the chronological evolution of the Philadelphia proposals isn't terribly useful. For summaries of the evolution of the Presidency over the course of the drafting process, see Clinton Rossiter, *1787: The Grand Convention* (1966); M.J.C. Vile, *Constitutionalism and the Separation of Powers* 135-143 (discussing, e.g., the veto power, the appointment power, the treaty power, and the power over war and peace); Jack Rakove, *Original Meanings: Politics and Law in the Making of the Constitution* 244-287 (1996). See also Bradley & Flaherty, *supra* note __ 593-595.

question may seem individually, the disagreement they provoked was entirely in line with Morris's sketch of the basic problem: how to promote presidential independence and vigor (and how much) while restraining presidential abuse (and how strictly)? The vehemence of these debates over presidential independence, however, shouldn't obscure a broad band of warm agreement on at least two equally central questions of presidential design.

First, everyone knew that vehement antiroyalism was a singularly potent force in American politics. The king's protection had of course for a time been lifted up by the colonists during their confrontations with parliament,[130] and there appear even to have been some pockets of genuinely revanchist sentiment.[131] But what we now think of as Whig history was easily the dominant rhetorical trope, with all sides of the mainstream debate celebrating "that patriotic spirit which prompted the illustrious English barons to extort Magna Charta from their tyrannical king, John."[132] This bedrock fact of political life sharply constrained the Founders' options in designing an American executive.

Both Framers and Federalists thus had to account at every stage for "that jealousy of executive power which has shown itself so strongly in all the American governments."[133] We might discount the Antifederalist tendency to bang on about the draft constitution's betrayal of liberty[134]—always a surefire way to irritate the Federalists, who saw in such warnings "the same design that nurses tell children many strange stories about raw-head and bloody-bones.[135] But even strong proponents of a vigorous executive like James Iredell

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[130] *See generally* John Philip Reid, *Constitutional History of the American Revolution*; Jack P. Greene, *Constitutional Origins of the American Revolution*; Eric Nelson, *The Royalist Revolution*..

[131] *See*, *e.g.*, DHRC editorial note; George Washington to John Jay (Aug. 15, 1786) ("I am told that even respectable characters speak of a monarchical form of government without horror…. Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend.")..

[132] Tar & Feathers #2, Independent Gazetteer, 2 DHRC 152 (Oct. 2, 1787). For particularly detailed surveys of the relevant English constitutional history, *see*, *e.g.*, A Farmer I, Baltimore Maryland Gazette, 11 DHRC 306 (Feb. 15, 1788); Federalist 26 (Hamilton) (Dec. 22, 1787), _ DHRC _, at rotunda.upress.virginia.edu/founders/RNCN-03-15-02-0016.

[133] Davie, North Carolina Ratifying Convention (July 28, 1788), 4 Elliot's 115. James Monroe made the same point from across the aisle. James Monroe, Some Observations on the Constitution, 9 DHRC 844 (c. May 25, 1788) (private memorandum) ("Against the encroachments of the Executive the fears and apprehensions of the whole continent would be awake, with a watchful jealousy they would observe its movements").

[134] Cornelius, Hampshire Chronicle, 4 DHRC 410 (Dec. 11 & 18, 1787) ("the dignified station in which that officer is placed … cannot be considered as far below that of an European Monarch …. with the most dreadful consequences"); Philadelphiensis IX, Philadelphia Freeman's Journal, 16 DHRC 57 (Feb. 6, 1788) ("Who can deny but the president general will be a king to all intents and purposes").

[135] Letter from New York, 3 DHRC 380 (Oct. 24 & 31, 1787) ("What snake in the grass is there here? … Such a whim could never have entered the noddle of any man of sense, unless it were for

readily admitted that "in every [American] country … there is a strong prejudice against the executive authority."[136] To be sure, that didn't necessarily translate into categorical opposition to any non-hereditary magistracy. While James Wilson conceded that "the manners of the United States … are agt. a King and are purely republican,"[137] for example, he also reminded the Philadelphia delegates not to get carried away: "[a]ll know that a single magistrate is not a King."[138] But the resistance was to more than just a title. From Randolph observing that "the permanent temper of the people was adverse to the very *semblance* of Monarchy"[139] to Hamilton conceding "the aversion of the people to monarchy,

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the purpose of frightening those who have been taught to start at the sound of 'king.'"). Hamilton was a little over the top in his fury, accusing Antifederalists of inventing a President with a "diadem sparkling on his brow" and "murdering janizaries" and the "unveiled mysteries of a future seraglio" at his command. The Federalist 67, New York Packet, 16 DHRC 369 (March 11, 1788) ("calculating upon the aversion of the people to monarchy, [the antifederalists] have endeavoured to [mischaracterize] the intended President of the United States; not merely as the embryo but as the full grown progeny of that detested parent."). *See also*, *e.g.*, Aristides, Remarks on the Proposed Plan, Annapolis, 11 DHRC 229 (Jan. 31, 1788) (similar objections); Publicola, Address to the Freemen of North Carolina, State Gazette of North Carolina, 16 DHRC 493 (March 27, 1788) (similar); Americanus I, Virginia Independent Chronicle, 8 DHRC 200 (Dec. 5, 1787) (similar); A Freeholder, Virginia Independent Chronicle, 9 DHRC 719 (April 9, 1788) (extraordinary) (similar).

[136] *See also*, *e.g.*, Dickenson, 1 Farrand 86 (June 2, 1787) (noting that he considered "limited Monarchy… as one of the best Governments in the world," but conceding that "limited monarchy was out of the question. The spirit of the times -- the state of our affairs, forbade the experiment"); Opening Speech of Charles Pinckney, S.C. Ratific. Debates, 27 DHRC 324 (May 14, 1788) ("The citizens of the United States would reprobate, with indignation, the idea of a monarchy.").Alexander Hamilton's "despair that a Republican Govt. Could be established" in the United States didn't prevent his "sensib[ility] at the same time that it would be unwise to propose one of any other form." Hamilton, 1 Farrand 288-289 (June 18, 1787) (emphasizing his "private" admiration of the "British Govt").

[137] Wilson, 1 Farrand 71 (June 1, 1787).

[138] Wilson, 1 Farrand 96 (June 4, 1787) (emphasis added) ("Mr. Wilson … observed that [Randolph's] objections [to a one-person presidency] were levelled not so much agst. the measure itself, as agst. its unpopularity.").

[139] Randolph, 1 Farrand 72 (June 2, 1787) (Madison's notes) (emphasis added) (unsuccessfully urging an executive by committee); *see also* Randolph, 1 Farrand 72 (June 1, 1787) (Hamilton's notes) ("I Situation of this Country peculiar II --Taught the people an aversion to Monarchy III All their constitutions opposed to it IV -- Fixed character of the people opposed to it"). For others in this vein, see, *e.g.*, Mason, 1 Farrand 101-102 (June 4, 1787) ("He hoped that nothing like a monarchy would ever be attempted in this Country. A hatred to its oppressions had carried the people through the late Revolution"); Gerry, 1 Farrand 432 (June 26, 1787) ("the American people have the greatest aversion to monarchy, and the nearer our government approaches to it, the less Chance have we for their approbation"); *Baltimore Maryland Gazette* (July 3, 1787) (criticizing John Adams for supporting "monarchy, or what is the same, 'a first Magistrate possessed exclusively of

…. that detested parent,"[140] this descriptive point was understood across the ideological spectrum.

That brings us to a second point of broad agreement. At least in part because of the political fact of American tyrannophobia, everyone understood that any politically acceptable design would have to subject the executive branch to the laws of the land. As Blackstone's enormously influential treatise taught, "one of the principal bulwarks of civil liberty" in Britain was "the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them."[141] Americans liked to imagine that this principle was embedded deep in English history, as in the sketched offered here by "A Farmer":

> Henry Bracton, a contemporary 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.[142]

While this point had been forcefully contested by the Stuarts and their intellectual minions,[143] the aftermath of the Glorious Revolution had conclusively resolved the debate in favor of Parliament. And so it was a political necessity for Federalists to reiterate that the Constitution they were selling would put "every department and officer of the federal government … subject to the regulation and controul of the laws."[144]

But wasn't subjecting the chief magistrate to "ordinary acts of legislation" incompatible with Federalists' avowed and enthusiastic embrace of presidential vigor and independence? They didn't think so. Just as the Founders understood the difference between conceptual

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the Executive power.'").

[140] Federalist 67 (Hamilton).

[141] Blackstone, Commentaries I:7, 237. A recent Note has shed important light on the substantial influence on legal education that was exerted by legal writers other than Blackstone. But its title was probably not well chosen, and is best read as an overstatement of the author's actual, impressively demonstrated thesis. See Martin Jordan Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the* Commentaries, 104 Va. L. Rev.1359 (2019) (arguing that Coke, Hale, and Rolle may have been more significant than Blackstone in the instruction of eighteenth-century law students).

[142] A Farmer I, Baltimore Maryland Gazette, 11 DHRC 306 (Feb. 15, 1788) (criticizing the draft constitution's failure to include a bill of rights).

[143] *E.g.* James I ("the King is above the law, as both the author and the giver of strength thereto"); Cowell, ("the King … is above the Law by his absolute power.").

[144] A Citizen of New Haven, Observations on the New Federal Constitution, Connecticut Courant, 15 DHRC 280 (Jan. 7, 1788) (concluding, perhaps optimistically, that "therefore the people will have all possible security against oppression").

powers and political entities, they also understood the difference between the statutory framework and the various branches of government which created and interpreted it. The separation of powers was implicated when you forced the President to obey *Congress*, not when you forced him to obey the *laws*. The former was a political entity that existed and acted at a specific point in time. The latter was an abstract framework of rules that had been successfully enacted through a complex process that included presidential approval as a necessary step. Alexander Hamilton could not have been clearer on the point:

> It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government; and whatever may be the forms of the Constitution, unites all power in the same hands.[145]

Pause for a moment, if you don't mind, and read that quote again. As the era's most committed advocate for a strong executive magistracy saw it, the considerations bearing on the President's *political independence* from Congress had nothing to do with the considerations bearing on what *substantive authorities* he should possess.[146] The two questions were wholly separate:

> [H]owever inclined we might be to insist upon an unbounded complaisance in the executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the Legislature. The latter may sometimes stand in opposition to the former; and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the executive should be in a situation to dare to act his own opinion with vigor and decision.

It would be a perfectly natural response here to respond with limit-testing hypotheticals. But don't let that reaction obscure the political centrality of Hamilton's distinction. Even

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[145] Publius [Hamilton], The Federalist 71, New York Packet, 16 DHRC 411 (March 18, 1788) (emphasizing the "tendency of the legislative *authority* to absorb every other") (emphasis added). This was no aside. The excerpt above is perhaps the most important two sentences in perhaps Publius's most important defense of the constitutional president's vigor and independence. Federalist 71 was the first of a pair defending two core elements of the Convention's package deal on presidential independence: the duration of the office and the president's eligibility for re-election. It was thus a key task to explain why these bulwarks of independence were not at odds with the universally accepted principle that the chief magistrate should be subject to law.

[146] Prudence might have counseled more care with the assumption that this was a sharply binary distinction; it's not hard to imagine how the form of law could be used to effectuate direct control by a political entity. But I have seen no sign in the Founding debates of a suggestion that the proposition so formulated would have been adjusted in response to more careful thought about the ambiguity of that line. To the contrary—and perhaps this is not so surprising on the background of Parliament's history of micromanaging the Crown—what the Founders specifically said about such hypotheticals suggests that they would have been untroubled by them.

as they forcefully defended the wisdom of an independent and vigorous executive magistrate, Federalists not only didn't but couldn't question Bractonian piety. The president was subject to the laws.

There was no question, however, of the President being weak. To the contrary: Federalists leaned hard into their pitch of an Article II president who would be *independent* in the exercise of his constitutional and statutory authorities.[147] The Philadelphia deliberations had certainly created a series of safeguards to precisely that end. By combining selection by the Electoral College with an extended duration in office, the Constitution reduced the likelihood that the President would be a catspaw for legislative factions. By giving him the first move in the appointments process and a presumptively decisive veto power, the Constitution gave the President tools to defend that independence once in office. By permitting impeachment, the Constitution created a limited route for real-time supervision; by requiring a supermajority for conviction, the Constitution reduced the likelihood that impeachment would become a tool of ordinary politics.

For the Federalists, this hydraulic calibration was a triumphant solution to the age-old dilemma of executive authority. And so throughout ratification they trumpeted the Constitution's success in giving the President both "that degree of vigour which will enable the president to execute the laws with energy and dispatch," and also "that firm or independent situation which can alone secure the safety of the people, or the just administration of the laws."[148] Did this raise its own risks to liberty? You betcha. In the

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[147] This point has been made at least since Charles Thach's seminal *Creation of the Presidency*. The latest entry in this literature is Eric Nelson's *Royalist Revolution*, which urges the non-parliamentary nature of the government scheme that emerged. Recall that in the Westminster system, literally anything Parliament enacted was law, including fundamental changes to the constitution. Nelson's immensely learned book reasonably argues that *some* of the king's prerogatives were reintroduced by the American constitution. And certainly the revolutionaries' deployment of the "evil counsellors" trope—so familiar to political debate in any monarchical system—conveyed a perhaps-even-sometimes-sincere regard for the British monarchy. *E.g.* J. Cont. Cong. 391 (Nov. 29, 1775) ("The manner in which the last dutiful petition to his Majesty was received … are considered by Congress as further proofs of those malignant councils, that surround the sovereign…."). But Nelson's imprecision about legal terminology—and in particular about the constitutional significance of prerogative as a well-defined set of authorities—is central to a misunderstanding that leads him to see a meaningfully "royalist" camp by modern lights among the Revolutionaries and the Founders.

[148] Opening Convention Speech of Charles Pinckney, S.C. Ratific. Debates, 27 DHRC 324 (May 14, 1788). For a pair of more canonical examples, see Madison, _ Farrand _ ("If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be separately exercised; it is equally so that they be independently exercised…. It is essential then … [to] give [the President] a free agency with regard to the Legislature"); John Adams, *A Defense of State Constitutions* (1787) ("the people's rights and liberties, and the democratical mixture in a constitution,

ever-so-delicate words of one French emissary's report home: "It will perhaps be interesting to examine, if … it is prudent ... to elect an Officer as powerful as the President of the united States will be?"[149] This was no milquetoast president, and everyone knew it. As Federalists enjoyed reminding their opponents, though, "[i]t is a well established principle in rhetorick, that it is not fair to argue against a thing, from the abuse of it."[150]

As the Founding era has receded further into memory, the more difficult problem for historians has been to identify what powers the Constitution actually conveyed. At least where the President's constitutional authorities are concerned, the enumeration principle simplifies that question quite a bit. If "[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined,"[151] then it's hard to get around the fact that Article II doesn't include many grants of presidential authority. And that focuses things in a big way. Because as a textual matter, the Executive Power Clause is the only phrase plausibly capable of serving as a wild card. Does that mousehole hide an elephant?[152] Did someone slip "the unallocated parts of Royal Prerogative"[153] into the first sentence of Article II? Or does the clause convey only the functional authority to execute law? On either reading, the Executive Power Clause was the raison d'être of Article II. Let's try to figure out which one is right.

III. "The Executive Power" Meant The Power to Execute the Laws

For the answer, we need to turn to the Founders' use of political theory and legal doctrine. In discussing the Articles of Confederation and the Constitution alike, the Founders repeatedly invoked a standard lesson of political theory: it's not enough for government to have a power to make rules; it also needs the authority to enforce them. As this Part will show, the Founders called that simple but crucial authority "the executive power." Many thought it implied at least a presumptive authority to make appointments. And everyone agreed that it was an empty vessel with a simple executory function: to

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can never be preserved without a strong executive, or, in other words, without separating the executive power from the legislative").

[149] Louis Guillaume Otto to Comte de Montmorin, New York, 13 DHRC 422 (Oct 20, 1787) (editors' translation).

[150] A Native of Virginia: Observations upon the Proposed Plan of Federal Government, 9 DHRC 655 (Apr. 2, 1788) ("Would you say there should be no Physicians because there are unskilful administers of medicine: No Lawyers because some are dishonest: No Courts because Judges are sometimes ignorant; nor government because power may be abused? In short, it is impossible to guard entirely against the abuse of power.") (discussing the Senate).

[151] Federalist 45.

[152] *Cf.* Edward Coke, Cobbett's, 4 Carl. I 357 (1628) ("This is magnum in parvo…. It is a matter of great weight, and to speak plainly, it will overthrow all our Petition.")

[153] Phillip R. Trimble, *International Law: United States Foreign Relations Law* 21 (2002)

implement the law as generated by relevant sources of legislative authority.

A. The Power to Execute the Laws Was Essential to a Complete Government

1. Law Is Meaningless without Execution

For the Founders, the Confederation's ineffectiveness was just the latest example of a recurring difficulty in governance design. For Edmund Randolph, the point was practical: "No government can be stable, which hangs on human inclination alone, unbiassed by the fear of coercion"[154] For Publius, it was a conceptual feature of law as such: "It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience."[155] The implications were straightforward either way. "[P]ositive regulations ought to be carried into execution" and "negative restrictions ought not to [be] disregarded or violated."[156]

This was no abstract piety. To the contrary, the execution problem was a matter of deep and abiding concern for their entire generation. "It is an established truth that no nation can exist without a coercive power, a power to enforce the execution of its political

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[154] Edmund Randolph, Letter of his Excellency Edmund Randolph on the Federal Constitution, 15 DHRC 117 (Oct. 10, 1787) (deriding the Confederation's "wretched impotency …. sentenced to witness in unavailing anguish"). *See also*, *e.g.*, Spaight, N.C. Ratific. Debates, 4 Elliot's 139 (July 28, 1788) ("When any government is established, it ought to have power to enforce its laws, or else it might as well have no power. What but that is the use of a judiciary ? … [N]o government can exist without a judiciary to enforce its laws, by distinguishing the disobedient from the rest of the people, and imposing sanctions for securing the execution of the laws"); Maclaine, N.C. Ratific. Debates, (July 29, 1788) 4 Elliott's 182 ("[T]he powers given by this Constitution must be executed. What, shall we ratify a government and then say it shall not operate? This would be the same as not to ratify…."); Spencer, North Carolina Ratification Convention 4 Elliot's 153 (July 29, 1788) ("I am ready to acknowledge that the Congress ought to have the power of executing its laws").

[155] The Federalist 15, New York Independent Journal, 14 DHRC 324 (Dec. 1, 1787) ("Government implies the power of making laws….")

[156] Davie, North Carolina Convention, 4 Elliot's 156-160 (July 29, 1788). Note that, in the literature on which this discussion drew, the Founders distinguished between two theoretically distinct powers of execution. First, the enforcement of negative prohibitions like a ban on piracy. *E.g.* Marcus IV [Iredell], Norfolk and Portsmouth Journal, 16 DHRC 379 (March 12, 1788) ("if they could not enforce such acts by the enacting of penalties, those powers would be altogether useless, since a legislative regulation without some sanction would be an absurd thing indeed"). Second, the implementation of affirmative projects like the construction of postal roads. The Reverend James Madison to James Madison, Williamsburg, 8 DHRC 31 (c. Oct. 1, 1789) ("a Govt. so wisely conceived in it's general Plan … must possess Vigour & Energy sufft. to execute the Measures adopted under it"). See generally Mortenson, *A Theory of Republican Prerogative*, 88 S. Cal. L. Rev. 45 (2015).

regulations."[157] Without the power to enforce, the power to legislate was "nonsensical";[158] "idle and nugatory";[159] "useless";[160] "ridiculous";[161] an "inconceivable absurdity";[162] a "political farce" or "solecism";[163] "strange indeed;"[164] even "a felo de se."[165] Some Founders argued that "[l]aws of any kind which fail of execution, are *worse* than none, because they weaken the government, expose it to contempt, destroy the confidence of all men."[166] Following the literature on which they relied, the point was often made with

[157] Samuel Huntington, Connecticut Convention, 15 DHRC 312 (Jan. 9, 1788).

[158] Nathaniel Peaslee Sargeant to Joseph Badger, 5 DHRC 563 (1788) ("Can there be such a thing as Government without Power? What is advice, recommendation, or requisition? It is not Government…. When Laws are made they are nonsensical unless they can be carried into execution; therefore it is necessary somebody shou'd have a Power of determining when they are broken, and to decree ye forfieture in consequence of such breach.").

[159] Cato, Poughkeepsie Country Journal, 19 DHRC 438 (Dec. 19 1787) (supplement) ("If a union is necessary, a government is also necessary for that union; for to make general laws without having power of executing them, would be idle and nugatory…. the powers necessary to be given to a confederated government, for the purposes of executing the general laws of the union").

[160] Iredell, N.C. Ratific. Debates, 4 Elliot's 144 (July 28, 1788) ("[L]aws are useless unless they are executed. At present, Congress have powers which they cannot execute. After making laws which affect the dearest interest of the people, in the constitutional mode, they have no way of enforcing them").

[161] A Jerseyman: To the Citizens of New Jersey, Trenton Mercury, 3 DHRC 146 (Nov. 6, 1787) ("The wisdom and prudence is to be shown in the framing laws; the complete execution of them ought to follow of course. It will be readily agreed, that it would be highly ridiculous to send representatives … to make laws for us, if we did not give power to some person or persons to see them duly executed.").

[162] Letter from New York, 3 DHRC 380 (Oct. 24 & 31, 1787) (discussing Calling Forth clause) ("if Congress is invested with power to make laws, the power of executing laws in the most ample and effectual manner ought to be lodged there also. Without this, there would have been an inconceivable absurdity in the Constitution").

[163] Randolph, Va. Ratific. Debates, 9 DHRC 915 (June 4, 1788) (The Confederation was "a system, that provided no means of enforcing the powers which were nominally given it. Was it not a political farce, to pretend to vest powers, without accompanying them with the means of putting them in execution?")

[164] Charles Carroll of Carrollton, Draft Speech for Maryland Convention, DHRC (early 1788) (undelivered speech on N&P Clause) ("To have given to Congress an authority & power to make laws, & withheld the means of enforcing them would have been a proceeding strange indeed in men so well acquainted with the defects of the existing system…. and leave us nothing but the shadow, the mockery of an unreal government").

[165] Davie, North Carolina Convention, 4 Elliot's 156-160 (July 29, 1788).

[166] A Citizen of Philadelphia, Remarks on the Address of Sixteen Members, 8 DHRC 297 (Oct. 18, 1787) (emphasis partly omitted) ("[I]n fine, our union can never be supported without definite and effectual laws which are co-extensive with their occasions, and which are supported by authorities and laws which can give them execution with energy").

extended metaphors involving bodies or machines. Enforcement authority provided the "ligaments of government,"[167] the "limbs, or parts" of the institutions they served,"[168] and "the nerves of the whole body politic."[169] Government is therefore "a nerveless mass, a dead carcase, without the executive power."[170] Its "powers … are mere sound";[171] its "machine[ry]" can "no more move, than a ship without wind, or a clock without weights."[172] "[I]mpowering one body of men to enact statutes; and another to forbid their being carried into execution," Republicus wrote, "resembles a man putting forth his right hand to do some important business and then stretching forth his left hand to prevent it."[173]

Their obsessive worry manifested in almost ritualistic reference to "good laws faithfully executed."[174] Indeed, that phrase became literal ritual when it came time to toast

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[167] Pendleton, Va. Ratific. Debates, 10 DHRC 1184 (June 12, 1788) (citing Montesquieu, Locke, Sidney, Harrington on the balance between excessive severity and excessive lenience in execution).

[168] Federal Farmer: An Additional Number of Letters to the Republican, Letter XV, New York, 20 DHRC 976 (May 2, 1788) ("The business of the judicial department is, properly speaking, judicial in part, in part executive, done by judges and juries, by certain recording and executive officers, as clerks, sheriffs, &c. they are all properly limbs, or parts, of the judicial courts, and have it in charge, faithfully to decide upon, and execute the laws, in judicial cases.").

[169] Simeon Baldwin Oration, New Haven, 4 July (excerpt) 1788, http://rotunda.upress.virginia.edu/founders/RNCN-03-18-02-0065-0005 ("The nerves of the whole body politic should concenter in the supreme executive; and the great council of the nation, under due restrictions, ought to command the purse and the sword; or in vain will they weild the sceptre of government. To what purpose should a legislative enact laws if nobody is obliged to obey them? …. The resolves of that illustrious body of men, who form the nerveless council of our union, are disregarded at home and despised abroad").

[170] Davie, North Carolina Ratifying Convention, 4 Elliot's 58-59 (July 25, 1788) ("Let your representatives be the most vicious demons that ever existed; let them plot against the liberties of America; let them conspire against its happiness, — all their machinations will not avail if not put in execution. By whom are their laws and projects to be executed? By the President."). Compare Federalist 38's declaration that government is "a lifeless mass" without "the means of carrying [its powers] into practice." Federalist 38 ("the Confederation is chargeable with the still greater folly of declaring certain powers in the fœderal government to be absolutely necessary, and at the time rendering them absolutely nugatory").

[171] James Wilson, PA Convention Proceedings, 2 DHRC 571 (Dec 11, 1787) (afternoon session) (the "power to execute" and "perform a single national act").

[172] Oliver Ellsworth, Speech in the Connecticut Convention, 15 DHRC 243 ("Mr. President, have we not seen and felt the necessity of such a coercive power?"). *Cf.* William Pierce Oration, Savannah, 18 DHRC 249 (July 4, 1788) ("the old Constitution … being placed, as it were, out of the perpendicular, it is like the hanging tower of Pisa; it is kept up and supported only by props, that must one day or other fall.").

[173] Republicus, Kentucky Gazette, 8 DHRC 375 (Feb. 16, 1788) (criticizing bicameral structure of legislative process rather than the executive power per se).

[174] Philadelphia Independent Gazetteer, 13 DHRC 126 (June 5, 1787). American antecedents

ratification. Whether accompanied by muskets or cannon, by folded hands or a raised tumbler, the formulation was strikingly consistent: "wise Federal Laws, and may they be well executed" in Maryland[175] and Pennsylvania;[176] "wisdom to frame laws and spirit to execute them" in South Carolina;[177] and "grace, wisdom and understanding to make and execute such laws … to secure … the blessings of liberty" in Virginia.[178] Meaningful execution was the central promise of ratification, and they knew it.

2. Executing Laws Was the Defining Function of the Article II President

Having identified the job that needed doing, their next step was to give it to someone.[179] "Suppose that the three powers, were to be vested in three persons by compact among themselves," Governeur Morris mused, such that "one was to have the power of making -- another of executing, and a third of judging, the laws."[180] His analogy wasn't meant to

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stretched back at least to the Rhode Island Compact of 1636. Rhode Island Compact (1636), *in* 6 *The Federal and State Constitutions* 3207 (1909) ("It is in the Powre of the Body of Freemen orderly assembled, or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man"). *See also*, *e.g.*, Randolph, Virginia Ratifying Ratific. Debates, 9 DHRC 970 (June 6, 1788) ("No extent on earth seems to me too great, provided the laws be wisely made and executed") ("laws … made with integrity, and executed with wisdom."); William Vassall to John Lowell, Clapham Common, 7 DHRC 1709 (Feb. 26, 1788) ("without an Efficient Government no State or Society of Men will be just or happy. By an Efficient government I mean, a judicious firm & honest Legislature, that will make wise & Equitable Laws, And as Horace expresses it, Justos et tenaces propositi Vires be Armed with full compulsive power to Execute said Laws"); Pendleton, Virginia Ratific. Debates, 10 DHRC 1412 (June 20, 1788) ("To give execution to proper laws, in a proper manner, is the[] peculiar province" of the judiciary).

[175] Baltimore Maryland Journal, 12 DHRC 751 (July 11, 1788); Maryland Journal, 10 DHRC 1718 (July 1, 1788) (toast to "Wise Federal Laws, and well executed").

[176] Extract of a letter from Head of Elk, Pennsylvania Mercury, 12 DHRC 752 (July 15, 1788).

[177] Charleston City Gazette, 27 DHRC 276 (May 7, 1788).

[178] *E.g.*, The New Litany, Virginia Herald, 8 DHRC 399 (Feb. 21, 1788) ("make and execute such laws as will best tend to secure to thy people the blessings of liberty").

[179] Separation of powers theory advised at least two design principles for any distribution of the powers of government. First, the various entities needed to be meaningfully independent. *E.g.* Pendleton, Virginia Debates, 9 DHRC 943 (June 5, 1788) ("Would any Gentleman in this Committee agree," one Federalist asked in Virginia, "to vest these three powers in one body, Congress? No.—Hence the necessity of a new organization and distribution of those powers."). Second, each individual entity needed to be structured so that it could most effectively implement its defining power. *E.g.* Simeon Baldwin Oration, New Haven, 18 DHRC 235 (July 4, 1788) ("[I]t is necessary in a good government, that the legislature should be so formed as not to enact laws without due deliberation–that the judicial be competent to the administration of justice, and that the executive have energy to carry their decisions into execution.").

[180] Morris, 2 Farrand 78 (July 21, 1787) (responding to criticism of including judiciary in proposed

be subtle. The defining role of the legislature was promulgating law. The defining role of the judiciary was adjudicating law. And the defining role of the President was executing law.

So in this framework, it was fundamentally "the president, …. so much concerned in the execution of the laws,"[181] who transformed the Confederation into a more perfect union. To be sure, a number of other provisions also spoke to the execution problem. But it was ultimately the Article II presidency that made the new government "complete." This point was common ground among the competing proposals in Philadelphia: both the New Jersey plan and its Virginia competitor listed "authority to execute" or "power to carry into execution" as the chief magistrate's first substantive authority.[182] Indeed, the first draft of each plan gave these provisions an almost-goes-without-saying flavor, listing presidential powers "*besides* a general authority to execute the National laws"[183] and "*besides* [a] general authority to execute the federal acts,"[184] respectively.

What emerged from the ensuing negotiations was the President as "the superior officer, who is to see the laws put in execution":[185]

> a properly constituted and independent executive,—a vindex injuriarum—an avenger of public wrongs; who with the assistance of a third estate, may enforce the rigor of equal law on those who are otherwise above the fear of punishment.[186]

This charge was indispensable. The Article II "office of superintending the execution of the laws of the Union," declared James Iredell, was "an office of the utmost importance. It is of the greatest consequence to the happiness of the people of America, that the person to whom this great trust is delegated should be worthy of it."[187]

B. The Constitutional Term for this Power to Execute Laws Was "The Executive Power"

So everyone understood that the defining function of the President was the power to

council of revision). Cato's use of Vesting Clause terms was similarly unmistakable. Cato V, New York Journal, 19 DHRC 276 (Nov. 22, 1787) (without "certainty in political compacts, … you might as well deposit the important powers of legislation and execution in one or a few and permit them to govern according to their disposition and will").

[181] Fabius [John Dickinson], Letters (surveying the defining features of each branch).

[182] Virginia Plan, Farrand (May 29, 1787) (first listing "a general authority to execute the National laws"); New Jersey Plan, June 15, 1787 (first listing "authority to execute the federal acts"); First Amended Virginia Plan (first listing "power to carry into execution the National Laws"); Second Amended Virginia Plan (first listing "power to carry into execution the national Laws").

[183] Virginia Plan, Farrand (May 29, 1787) (emphasis added).

[184] New Jersey Plan, Farrand (June 15, 1787) (emphasis added).

[185] Maclaine, North Carolina Convention (4 Elliot's 47 (July 25, 1788).

[186] A Farmer II, Baltimore Maryland Gazette, 11 DHRC 325 (Feb. 29, 1788).

[187] Iredell, North Carolina Ratifying Convention, 4 Elliot's 106 (July 28, 1788).

execute laws. In a limited constitution of enumerated powers, though, which clause conveyed that specific mandate as an affirmatively authorized governance authority? Stepping back from decades of highly politicized controversy, the question is so textually obvious that for newcomers it might seem rhetorical. Because the answer is staring you in the face:

> The executive power shall be vested in a President of the United States of America.

It really is that simple. The Founders variously shorthanded the power therein granted as "the authority [or responsibility] to execute laws";[188] as "the whole executive government";[189] or as "the whole [or sole] executive authority."[190] But most often they just called it "executive power."[191] Sometimes it seemed like the only thing on which that squabbling generation could agree.

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[188] A Countryman, Baltimore Maryland Gazette, 11 DHRC 115 (Dec. 18, 1787) ("Are not the Governors of the different States equally absolute all along? Each of them have had the command of the fleet, the army and militia, and authority to execute laws?"); A Native of Boston: Thoughts Upon the Political Situation of the United States, Worcester, 7 DHRC 1763 (Aug. 14, 1787) (advocating a single magistrate with a veto, the appointment power, and "responsib[ility] in the dernier resort for the execution" of law).

[189] A Countryman V, New Haven Gazette, 15 DHRC 54 (Dec. 20, 1787) (listing "the whole executive government" as a separate prerogative from the king's military, veto, prorogation, and financial powers).

[190] James Iredell, N.C. Ratification Debates 4 Elliot's 109 (July 28, 1788) ("[T]he reasons which prevail in Great Britain for a council do not apply equally to us. In that country, the executive authority is vested in a magistrate who holds it by birthright. He has great powers and prerogatives."); A Countryman V, New Haven Gazette, 15 DHRC 54 (Dec. 20, 1787) ("the whole executive authority" as alternative formulation); The Impartial Examiner IV, Virginia Independent Chronicle, 10 DHRC 1609 (June 11, 1788) (Extraordinary) (contrasting "the sole executive authority" with the separate prerogative of veto).

[191] *E.g.*, The Impartial Examiner IV, Virginia Independent Chronicle, 10 DHRC 1609 (June 11, 1788) (Extraordinary) (contrasting "the supreme executive power" as alternative formulation); Pierce Butler to Weeden Butler, Mary-Ville Plantation, 27 DHRC 269 (May 5, 1788) (paralleling Caroliniensis; implications unclear for question of authorship vs. influence); Americanus IV, New York Daily Advertiser, DHRC (Dec. 5-6, 1787) (contrasting the constitution's placement of "the Executive power in the hands of a single person" with the King's suite of "dangerous prerogatives"). *Cf.* Federalist 47 (explaining that the English constitution mixes powers because the King—who possesses "the whole executive power"—is thus "the executive magistrate" *and yet also possesses* "the prerogative of making treaties," the veto, and the power of judicial appointments); Marcus II [James Iredell], Norfolk and Portsmouth Journal, 16 DHRC 242 (Feb. 27, 1788) (describing the Crown "who has the whole Executive authority" and need not "consult []either house as to any exercise of its Executive power," in a discussion of "the actual present practice of Great-Britain"—where, of course, *other* elements of the royal prerogative *were* regularly subject to legislative review and control).

1. The Root and Cognates of the Term

Let's start with the root of the word. The word "execute" meant to perform; to complete; to carry out; to implement; to bring into being; or simply to do. When you executed something, you took some intention that as yet existed only as a plan, and you brought it into reality. Execution thus meant success in creating something new, often with a flavor of subordination in implementing instructions that had originated somewhere else.[192] It was also a pretty ordinary word, appearing regularly in circumstances where we would likely use a lower-register formulation today.[193]

The sheer range of objects taken by "execute" in eighteenth-century discourse is striking. But easily its most common[194] grammatical object was the enforcement, implementation, and carrying out of "law." If, as Publius declaimed, "Law is defined to be a rule of action,"[195] then enforcing that rule was obviously its "execution." (Just to make double sure, the busybodies of the Political Club of Danville agreed that it would be best to amend the Constitution by "strik[ing] out the word 'execute'" each time it appeared and replacing it with "enforce obedience to."[196]) This formulation was in constant use, whether the Founders were chattering in informal contexts or declaiming in formal ones. They "executed" the law of the national government, the law of the individual states, the law of particular localities, the law of nations, and the law of political society in the abstract. Their state constitutions are dotted with references to the "execution" of law—a constant collocation that both reflected and reinforced the standard tripartite structure for the elements of complete government.[197]

From here the key point for the Executive Power Clause followed naturally. Scores of eighteen-century dictionaries offer the following uncontradicted definition of the adjective "executive":

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[192] E.g., Zephaniah Swift to Paul Fearing, Windham, 3 DHRC 599 (April 10, 1788) ("Their story was that a combination was forming in the western part of the state to dismiss Dyer from the Superior Court and that this depended on me as an instrument to execute the plan."); Rough Carver, NY Daily Advertiser (Sept. 4, 1787) ("if a great villain orders one, or more, smaller ones, to cut our throats, they are all guilty, as well those who execute, as he who directs").

[193] For a comprehensive appendix of such uses, see Mortenson, SSRN.

[194] At least as reflected in the Documentary History, the Journals of the Continental and Confederation Congress, and the Correspondence of Delegates to the Continental and Confederation Congress.

[195] Publius, The Federalist 62, New York Independent Journal, 16 DHRC 232 (Feb. 27, 1788) (criticizing mutability in government policy).

[196] The Political Club of Danville, Kentucky, Debates over the Constitution, 8 DHRC 408 (Feb. 23 - May 17, 1788). We can apparently thank Mr. Innes for the initial motion, and Mr. McDowell for its second.

[197] See *infra* (discussing concept of a "complete" and "perfect" government)

having the quality of executing or performing[198]

The sheer unanimity is overwhelming. Consider how easy it would have to specify a metonymic definition of "executive"—even if only as a secondary meaning—that would support a substantive residuum. All it would have taken was some variation on "relating to an executive," "relating to the executive branch of government," or "relating to an executive magistrate." But while that "relating to" formulation was used regularly in definitions of *other* words,[199] it wasn't used once in dictionary definitions of "executive."

And so an "executive officer" was the one responsible for "execution of the laws,"[200] for "carry[ing] … decrees into execution,"[201] or simply for "compulsion"[202] The "executive part" of government was that which is "requisite for carrying those decrees into execution."[203] "Executive business" was implemented by "executive officers" who "have it in charge, faithfully … to execute the laws"[204] and whose reason for being was simply by

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[198] Samuel Johnson, A Dictionary of the English Language (1785). See generally Mortenson, *supra* note __ (surveying all available Founding era dictionaries).

[199] For just a few examples of this standard "relating to [noun]" formula, see *e.g.* Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "Abdominal" as "relating to the abdomen," "Airy" as "Relating to the air," and "Epístolary" as "Relating to letters"); Noah Webster, *American Dictionary of the English Language* (1828) (defining "subjective" as "Relating to the subject" and "nominative" as "pertaining to the name which precedes a verb").

[200] Noah Webster, *Notes on the Federal Constitution* (Oct. 1787) ("One half the evils in a state arise from a lax execution of the laws; and it is impossible that an executive officer can act with vigor and impartiality, when his office depends on the popular voice.")

[201] 32 J. Cont'l Cong. 259 ("Resolved that the said Commissioner with the advice and Consent of the major part of the said Magistrates of the district shall appoint executive officers therein respectively to carry their decrees into execution…") (proposal for organization of Illinois territory); 28 J. Cont'l Cong. 156 (March. 14, 1785) ("That the Commissioner, with the advice and consent of the above magistrates, appoint executive Officers in the respective districts to carry their decrees into execution.") (proposal for organization of Kaskaskie territory).

[202] Robert Livingston, Convention Debates and Proceedings, 22 DHRC 1908 (June 26, 1788) (a proposal for indirect taxation requires "compulsion" in the case the states refuse, which in turn "supposes that a compleat establishment of executive officers must be constantly maintained").

[203] Nathaniel Peaslee Sargeant to Joseph Badger, 5 DHRC 563 (1788) ("When Laws are made they are nonsensical unless they can be carried into execution; therefore it is necessary somebody shou'd have a Power of determining when they are broken, and to decree ye forfieture in consequence of such breach. This shows ye necessity of ye Judicial Power—and an executive with ye necessary officers are requisite for carrying those decrees into execution—and without all this ye whole parade of making laws wou'd be idle. That these parts, ye Judicial and executive, shou'd be appointed by congress is necessary in order that ye proceedings may be uniform and to prevent one state from conniving at or disregarding ye laws made for ye benefit of ye whole. If they are to raise money they must have officers to collect it.").

[204] Federal Farmer: An Additional Number of Letters to the Republican, Letter XV, New York, 20

definition "to carry into the effect the laws of the nation."[205] And referring to a government entity as the "Execut[ive] … power[]" meant that it was "the Executor … of laws."[206]

Enter metonymy. Because when the Founders used the *noun* form of "executive," they meant an entity that had the power of execution.[207] No one put it better than Publius:

> A feeble executive implies a feeble execution of the government. A feeble executive is but another phrase for a bad execution: And a government ill executed, whatever it may be in theory, must be in practice a bad government.[208]

And so the definition of an "executive" in its nominal form simply meant an "executor of the laws,"[209] a "person[] for the execution of the laws,"[210] an "executor … of laws,"[211] and an officer with "authority to enforce your laws."[212] An executive was thus necessarily

DHRC 976 (May 2, 1788) ("The business of the judicial department is, properly speaking, judicial in part, in part executive, done by judges and juries, by certain recording and executive officers, as clerks, sheriffs, &c. they are all properly limbs, or parts, of the judicial courts, and have it in charge, faithfully to decide upon, and execute the laws, in judicial cases.").

[205] A Landholder V, 3 DHRC 480 (Dec. 3, 1787) ("It is as necessary there should be courts of law and executive officers, to carry into effect the laws of the nation, as that there be courts and officers to execute the laws made by your state assemblies").

[206] Madison, 2 Farrands 34 (July 17, 1787) ("If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other… In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws").

[207] E.g., Articles of Confederation, Art. IV (1777) ("upon demand of the Governor or executive power, of the state"); U.S. Constitution, Art. IV, Sec. 2 ("on Demand of the executive Authority of the State")

[208] Publius: The Federalist 70, New York Independent Journal, 16 DHRC 396 (March 15, 1788).

[209] Dickinson, 1 Farrand 110 (June 4, 1787) ("Mr. Dickinson could not agree with Gentlemen in blending the national Judicial with the Executive, because the one is the expounder, and the other the Executor of the Laws.").

[210] Alexander Contee Hanson, DHRC. Hanson begins by discussing the basic units of government: First, the legislative function: "That the people should either make laws to bind themselves, or elect persons, without whose consent, no laws shall be made, is essential to their freedom." Next, the executive function: "But universal experience forbids, that they should immediately choose persons for the execution of the laws"—people who are then described as "an executive." *Id.* ("Against choosing an executive for life the reasons are weighty indeed.").

[211] Madison, 2 Farrands 34 (July 17, 1787) ("If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other… In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws").

[212] John Kean, Comments on the Constitution, 27 DHRC 248 (c. Apr. 8, 1788) ("an energetic executive is as necessary to government & the happiness of the governed as liberty—for without authority to enforce your laws, liberty degenerates into savage licentiousness, an extreme as much to be dreaded as tyranny").

"invested with power to enforce the laws of the union and give energy to the federal government,"[213] and indeed defined by its ability to "execute the laws without restraint."[214]

2. "The Executive Power" Meant "The Power to Execute"

On this background, the meaning of "the executive power" was exactly what you'd expect. If Publius could ask, "[w]hat is a legislative power but a power of making laws?",[215] then what indeed was the executive power but the power of executing them? As previous work has shown, the sources most prized by modern originalists reflect a literally uncontested understanding of this point. Eighteenth-century dictionaries, legal treatises, political theory tracts, caselaw, politicians, clergymen, and pamphleteers all agreed that executive power simply meant this:

> the power of putting in execution[216]

Rousseau offers a concise example of the bodily metaphor so often used to explain the point:

> 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…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.[217]

This understanding held true in dictionary definitions for generic authority without any specific context.[218] It held true in definitions that specified a legal hook or governance role.[219] It held true in definitions that referenced the entire phrase as a singular term of art.[220] And it held true in the express definitions offered by canonical writers like

[213] Webster, Notes on the Federal Constitution (October 1787) ("The president of the united States is elective, and . . . [a]s the supreme executive, he is invested with power to enforce the laws of the union and give energy to the federal government")

[214] Hamilton, New York Convention Debates and Proceedings, 22 DHRC 1908 (June 26, 1788) ("What is your state government? Does not your legislature command what money it pleases? Does not your executive execute the laws without restraint? These distinctions between the purse and the sword have no application to the system, but only to its separate branches.")

[215] Publius: The Federalist 32, New York Independent Journal, DHRC (Jan. 2, 1788).

[216] Anonymous, A Pocket Dictionary Or Complete English Expositor (1765).

[217] Rousseau, Social Contract III:1.

[218] Mortenson, *supra* note _ (28 definitions for the adjective "executive" in non-governance contexts).

[219] Mortenson, *supra* note _ (18 definitions for the adjective "executive" in governance contexts).

[220] Mortenson, *supra* note _ (5 definitions for the full phrases "executive power" or "the executive power").

Blackstone,[221] De Lolme,[222] Filmer[223] Locke,[224] Montesquieu,[225] Rousseau,[226] and Vattel,[227] among many, many others.[228] The evidence for this background understanding is uncontested, and it is overwhelming.

The Founders took this definition entirely for granted. Indeed, it was a presumption without which half of what they said about the presidency didn't make sense. And it was everywhere, with late-eighteenth-century Americans variously defining the executive power as

- "the power of … enforcing laws,"[229]
- "the power of executing the laws,"[230]
- the "peculiar duty to see [legislative] act[s] carried into execution."[231]
- "that of executing the public resolutions,"[232]
- "direct[ing] the execution of our laws,'[233]

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[221] Blackstone (defining executive power as "the right … of enforcing the laws.").

[222] DeLolme ("the administration of Justice").

[223] Filmer ("a power of putting those laws in execution").

[224] Locke ("see[ing] to the execution of the laws that are made").

[225] Montesquieu ("the execution of [the] general will" as defined by "the legislative power").

[226] Rousseau ("the strength which executes" the legislative "will").

[227] Vattel (possessing "the province to have [the laws] put in execution").

[228] Mortenson, *supra* note _.

[229] Cassius I: To Richard Henry Lee, Esquire, Virginia Independent Chronicle, 9 DHRC 641 (April 2, 1788) (quoting Blackstone) ("Are the legislative and executive powers in that government 'separate,' in which the King, who has the whole of the executive, occupies one entire branch of the legislative? … Let us, now, see what your favorite author Blackstone, says on this subject—'*In all tyrannical governments the supreme magistracy, or the right of making and enforcing the laws, is vested in one and the same man … and whenever these two power are united together, there can be no public liberty*.' From this it appears, that liberty is only endangered, when the whole of the power of both making and enforcing laws is vested in one man…").

[230] Edmund Randolph, Va. Ratific. Debates, 9 DHRC 1092 (June 10, 1788) ("It cannot be objected to the Federal Executive, that the power is executed by one man. All the enlightened part of mankind agree that the superior dispatch, secrecy, and energy with which one man can act, renders it more politic to vest the power of executing the laws in one man, than in any number of men.").

[231] *Godwin v. Lunan*, Jeff. 96 (Gen. Ct. Va. 1771) (defining "the executive power of the laws").

[232] Brutus, Virginia Independent Chronicle, 9 DHRC 798 (May 14, 1788) ("[T]here is no liberty if the power of judging be not separated from the legislative and executive powers… Miserable indeed would be the case, were the same man or the same body of men, whether of the nobles or the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes and differences of individuals").

[233] [Response to the Farmer], Baltimore Maryland Gazette, 11 DHRC 363 (March 4, 1788) (denying that the Senate would share "the executive power," since it cannot "interfere with or direct the execution of our laws").

- "The execution of ye. Laws,"[234]
- an "efficient power, to carry … article[s] into effect,"[235] and
- the "power to use … the powers nominally vested" in a government.[236]

That's why the Federal Farmer could breeze so quickly past a desultory approval of the Executive Power Clause: "reason, and the experience of enlightened nations, seem justly to assign the [Article I] business of making laws to numerous assemblies; and the [Article II] execution of them, principally, to the direction and care of one man."[237] That's why a Connecticut ratification delegate could refer so unselfconsciously to the Executive Power Clause as conveying a simple, unobjectionable authority: "the power, which is to enforce the[] laws."[238] And that's why a Georgia Federalist could describe the requisite authority so simply as "an efficient power to execute [the] laws."[239]

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[234] William Symmes, Jr. to Peter Osgood, Jr., Andover, 14 DHRC 107 (Nov. 15, 1787) ("That there must be an executive power independent of ye. Legislative branch, appears to have been generally agreed by ye. fabricators of modern Constitutions. But I believe it has not till now been supposed essential that this power should be vested in a single person. The execution of ye. Laws requires as much prudence as any other department, & ye. pardoning or refusing to pardon offences is a very delicate matter.").

[235] William Cushing: Undelivered Speech, 6 DHRC 1438 (c. Feb. 4, 1788) (along with the judicial power) ("the Confederation, in appearance imparted many, if not most of the great powers, now inserted in the proposed Constitution; … but not one efficient power, to carry a single article into effect…. These govermental powers, in order to have full & proper effect, must, in the nature of things, consist of the Executive, the Legislative, & judicial. Without these govmt cannot be carried an End.").

[236] Madison, Va. Ratific. Debates, 10 DHRC 1299 (June 16, 1788) ("He asked, if powers were given to the General Government, if we must not give it executive power to use it? The vice of the old system was, that Congress could not execute the powers nominally vested in them.").

[237] Federal Farmer, Letter XIV: An Additional Number of Letters to the Republican, 20 DHRC 976 (May 2, 1788) (noting that "by art. 2. sect. 1. the executive power shall be vested in a president"). He elsewhere explained the "business of the judicial department" is "properly speaking, judicial in part, in part executive" because courts are charged both "faithfully to decide upon, and [to] execute the laws, in judicial cases." Federal Farmer, Letter XV: An Additional Number of Letters to the Republican, New York, 20 DHRC 976 (May 2, 1788) ("The business of the judicial department is, properly speaking, judicial in part, in part executive, done by judges and juries, by certain recording and executive officers, as clerks, sheriffs, &c. they are all properly limbs, or parts, of the judicial courts, and have it in charge, faithfully to decide upon, and execute the laws, in judicial cases").

[238] William Samuel Johnson, Speech in the Connecticut Convention, *Connecticut Courant*, 15 DHRC 243 (Jan. 4, 1788).

[239] William Pierce Oration, Savannah, 18 DHRC 249 (July 4, 1788) ("*In all the state governments the three great branches* that maintain each other give each separate part of the Union an efficient power to execute its own laws. *But, in the Federal Constitution, there is nothing but legislative* and recommendatory powers, without even the shadow of authority to support or enforce its decrees.") (emphasis added).

This understanding was unmistakable regardless of the precise terminology used, as when Brutus called "executive authority" the power "to carry all [a government's] laws into effect," and observed that the "authority to execute" was simply "the means, to attain the ends, to which [governments] are designed."[240] This resulted, among other usages, in a frequent equation of "executive duties" and "administration,"[241] as with the Continental Congress defining "the executive powers" as "the powers of administration,"[242] or with Centinel's observation that "the executive" element of "the great distinctions of power" was simply "the ordinary administrative."[243] (In fact, this understanding of "executive" power as the *implementing* authority is one reason the drafters decided to give Congress the power to "Declare" rather than to "Make" war. One delegate worried that "'make' war might be understood to 'conduct' it which was an Executive function."[244]) And so Publius was just stating a commonplace when explaining that "the administration of government … in its most usual and perhaps in its most precise signification" is "limited to executive details, and falls peculiarly within the province of the executive department.[245]

3. "The Executive Power" Was the Hallmark of a "Complete" or "Perfect" Government

That brings us to one of the era's most important political tropes: the idea of a

[240] Brutus VI, New York Journal, 19 DHRC 466 (Dec. 27, 1787) (with judicial power) ("the government will have complete judicial and executive authority to carry all their laws into effect," since "each [government] should be furnished with the means, to attain the ends, to which they are designed").

[241] *E.g.*, Philly Indep. Gazetteer, DHRC (June 26, 1787) ("the administration or executive duties of government"); A Citizen of Philadelphia, *The Weaknesses of Brutus Exposed*, 14 DHRC 63 (Nov. 8, 1787) ("the execution and administration of [these government authorities] will require the greatest wisdom…. The best constitution possible, even a divine one, badly administered, will make a bad government."); *Cf.* Theophilus Parsons, Notes of MA Ratific. Debates, DHRC 1206 (Jan. 15, 1788) (afternoon session) ("executors or administrators" of an estate).

[242] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774) ("Apply these decisive maxims [of Montesquieu], sanctified by the authority of a name which all Europe reveres, to your own state. You have a Governor, it may be urged, vested with the executive powers, or the powers of administration…"). *See infra*, text accompanying footnote [__] for more on this letter.

[243] Centinel II, Philadelphia Freeman's Journal, 13 DHRC 457 (Oct. 24, 1787) ("The chief improvement in government, in modern times, has been the compleat separation of the great distinctions of power; placing the legislative in different hands from those which hold the executive; and again severing the judicial part from the ordinary administrative. When the legislative and executive powers (says Montesquieu) are united in the same person, or in the same body of magistrates, there can be no liberty.").

[244] Rufus King, 2 Farrand 318-319 (Aug. 1787).

[245] Publius [Hamilton]: The Federalist 72, New York Independent Journal, 16 DHRC 421 (March 19, 1788) (noting also that administration" in its largest sense, comprehends all the operations of the body politic, whether legislative, executive or judiciary").

"complete" or "perfect" government. This had nothing to do morality or beauty. Rather, it built on an almost naively simple concept of government action as a tripartite sequence of "legislative, judicial, and executive power."[246]

These "three grand immutable principles in good government"[247] were logically intertwined, each indispensable to a coherent whole. Legislative action was the formulation of political intent in the form of operational instructions. Judicial action was the impartial assessment of how legislated instructions should apply to particular circumstances. Executive action was the active implementation of legislated instructions in the real world. Drawing on a rich foundation of political and legal theory,[248] the sequence was so familiar that it verged on trite.[249] Soap, scrub, rinse. Powder, ball, cartridge. Legislate, adjudicate, execute. Once in a great while someone pointed out that the boxes had fuzzy edges,[250] and—true to long tradition[251]—there were varying views on the taxonomic relationship between executive power and judicial power.[252] But for the most part the tripartite sequence

[246] Cato II, New York Journal, 19 DHRC 79 (Oct. 11, 1787).

[247] A Bostonian, *A View of the Federal Government of America, Its Defects, and a Proposed Remedy*, Boston Independent Chronicle, DHRC (Aug 10, 1786).

[248] Mortenson, *supra* note __. For perhaps the quintessential real-world example when the Framers sat down in Philadelphia, consider the 1783 Massachusetts Constitution: "The body politic" requires "an equitable mode of making laws, … an impartial interpretation, and a faithful execution of them." Preamble. "[T]he people" therefore "vested" these three powers as "authority, whether legislative, executive, or judicial" in "the several magistrates and officers of goverenment" as "their substitutes and agents." *Id.*, Declaration of Rights V.

[249] An exasperated British reviewer's snark about John Adams's work on mixed government can serve just as well to in describing the Founder's discussions of the separation of powers: "We are indeed repeatedly told that no government can exist, but where a balance, consisting of three parts, is preserved. Upon this point, like Lord Chesterfield with the Graces, Dr. Adams dwells for ever." *London Monthly Review* 395 (May 1787). Note of course that, as Martin Flaherty has emphasized, the Founding debate engaged two quite different concerns: the separation of powers proper and the Aristotelian-via-Westminster theory of mixed government. As I have shown in previous work, the distinction between those two concerns was well established in the Anglo-American legal and political discourse that undergirded the Founding era. This article shows that the Founding debates reflected that fully.

[250] True to form, Madison offered the clearest thinking about the hard cases: "Even the boundaries between the Executive, Legislative & Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference." James Madison to Thomas Jefferson, New York, 8 DHRC 97 (Oct. 24, Nov. 1, 1787) (paging Dr. Schechter). *See also* Federalist 37, New York Daily Advertiser, 15 DHRC 343 (Jan. 11, 1788) (generically discussing line-drawing problems, including in the separation of powers context).

[251] For more on the uneven development of distinctions between executive and judicial power, see Mortenson, *supra* note __.

[252] For examples that focused on a *two*-step process of moving from the formulation of intentions to

was catechism.[253] It's like what one Virginian said about the relationship between George Mason and Patrick Henry: "the former plans, & the latter executes."[254]

In this context, no government could be "complete"[255] or "perfect"[256] if it did not

their execution in the real world, see, *e.g.*, Reply to George Mason's Objections to the Constitution, New Jersey Journal, 3 DHRC 154 (Dec. 19 & 26, 1787) ("Was it ever said that the people do not make their own laws or that the government of a republic is not in the people because they make the one, and execute the other, through persons delegated by them"); Luther Martin, Genuine Information III, Baltimore Maryland Gazette, 11 DHRC 144 (Jan. 4, 1788) (discussing a citizen's "share in the forming of his own government, and in the making and executing its laws"); A Watchman, Worcester Magazine, 5 DHRC 879 (Feb. 7, 1788) ("the governments of Connecticut and Rhode island … have chose their own officers, and made and executed their own laws"); Philanthrop: To the People, American Mercury, 3 DHRC 467 (Nov. 19, 1787) ("Are not the Congress and Senate servants of the people, chosen and instructed by them, because the whole body of the people cannot assemble at one place to make and execute laws"); Republicus, Kentucky Gazette, DHRC 8 446 (March 1, 1788) (criticizing "president [who] may exercise the combined authority of legislation and exception," and noting that "the people…., and only they, have a right to determine whether they will make laws, or execute them").

[253] For just a few examples, see, *e.g.*, Newport Herald, 24 DHRC 40 (Oct. 25, 1787) ("It is presumed that those States who have heretofore granted powers to Congress for regulating trade cannot disapprove of the New Constitution; for the grant to Congress implied that they were vested with full powers to enact all laws relative thereto, to be adjudged and executed by officers of their appointment."); Curtius II, New York Daily Advertiser, 19 DHRC 97 (Oct. 18, 1787) ("What! resign all the three powers, legislative, judicial and executive, in the hands of one body of men?"). James Wilson's post-Ratification lectures were magisterial on the point:

> The powers of government are usually, and with propriety, arranged under three great divisions; the legislative authority, the executive authority, and the judicial authority…. Wise and good laws are indeed essential; but though they are essential, they are so only as means. If we stop here, all that we have done is nugatory and abortive. The end is still unattained; and that can be attained only when the laws are vigorously and steadily executed; and when the administration of justice under them is unbiassed and enlightened.

James Wilson, *Lectures on Law delivered in the College of Philadelphia*, ch. V (1791).

[254] James Duncanson to James Maury, Fredericksburg, 10 DHRC 1582 (June 7 & 13, 1788) (describing the relationship between George Mason and Patrick Henry in organizing Antifederalists in Virginia).

[255] George Clinton's Remarks Against Ratifying the Constitution, DHRC (July 11, 1788) (The proposed system "commences in a complete system of government—divided into Legislative, Executive, and Judicial Branches"); Hamilton, 1 Farrand 284-286 (June 8, 1787) ("The great & essential principles necessary for the support of Government [include] Force by which may be understood a coertion of laws or coertion of arms. Congs. have not the former except in few cases…. How then are all these evils to be avoided? only by such a compleat sovereignty in the general Govermt").

[256] Brutus alternated between the two formulations. *See supra. See also*, *e.g.*, [possibly James Kent],

include "the powers of Legislation, Judgment and Execution."[257] If a government didn't have the power to implement its intentions, then it was "incomplete"[258] in the sense that it lacked the final link in a sequential chain of governing.[259] Certainly Federalists thought so, with one opening the Connecticut ratification convention by arguing that "[t]he Constitution before us is a complete system of legislative, judicial, and executive power,"[260] and another telling the Virginia convention:

> Government must then have its complete powers, or be ineffectual: Legislative to fix rules, impose sanctions, and point out the punishment of the transgressors of these rules,—an Executive to watch over officers and bring them to punishment,—a Judiciary to guard the innocent, and fix the guilty, by a fair trial. Without an Executive, offenders would not be brought to punishment: Without a Judiciary, any man might be taken up, convicted and punished, without a trial. Hence the necessity of having these three branches.[261]

Poughkeepsie Country Journal, 19 DHRC 71 (Oct. 3, 1787) ("if the only effective and durable bond of union among states, as well as among individuals be a coercive government; … and if the perfection of that form consists in the accurate distribution of the legislature, executive and judiciary powers, and in their harmonious union in one coercive point;—if these positions be true … the expediency of adopting the new constitution comes as strongly enforced as any thing which can be offered to the human mind"); A.B., Hampshire Gazette, 5 DHRC 596 (Jan. 2, 1788) ("I am ready to concede, that 'the government proposed …. has as absolute and perfect powers to make and execute all laws,['] &c. with respect to every object to which it extends as any other in the world) (quoting Brutus while disagreeing with his conclusions).

[257] John De Witt II, American Herald, 4 DHRC 156 (Oct. 29, 1787) ("the future Congress of the United States shall be armed with the powers of Legislation, Judgment and Execution").

[258] James Wilson, Pennsylvania Debates, 2 DHRC 465 (Dec. 4, 1787) ("I think it no objection, that it is alleged the government will possess legislative, executive, and judicial powers. Should it have only legislative authority! … For what purpose give the power to make laws, unless they are to be executed? … Ought the government then to remain any longer incomplete?");

[259] *E.g.*, Richard Henry Lee to John Adams, New York, 8 DHRC 9 (Sept. 3, 1787) ("The present federal system … has been found quite ineffecient and ineffectual—The government must be both Legislative and Executive"); An Old Planter, Virginia Independent Chronicle, 8 DHRC 394 (Feb. 20, 1788) ("It is clear that wherever we give or delegate a trust to do any one act, we must lodge authority sufficient to insure the execution of that act. When we choose an assembly to make laws and regulate the government of this state, what would an assembly avail, if they had not power to inforce every act necessary for our government?").

[260] Oliver Ellsworth, Speech in the Connecticut Convention, 15 DHRC 243 (Jan. 4, 1788) ("the proposed Constitution … evidently presupposes two things; one is the necessity of a federal government, the other is the inefficiency of the old articles of confederation…. A more energetic system is necessary. The present is merely advisory. It has no coercive power…. The Constitution before us … was designed to supply the defects of the former system").

[261] Pendleton, Virginia Debates, 9 DHRC 943 (June 5, 1788) (contrasting "complete" government in this sense with "consolidated" government in the totally centralized sense feared by

And Antifederalists likewise shared this frame for the "compleat and compulsive operation"[262] of government as a matter of common vocabulary. Indeed, it was the Antifederalist Brutus who offered perhaps the most thoroughly worked-out model of governmental "perfection,"[263] and certainly its most repetitive expression. To "give the general [government] compleat legislative, executive and judicial powers to every purpose,"[264] he thought, yielded something very frightening: "one complete government, possessed of perfect legislative, judicial, and executive powers."[265] Brutus framed his first letter around precisely this point, drawing a sharp distinction between the functional "*powers*" of government and the particular subject matter "*objects*" to which those powers would be applied. "It is true this government is limited to certain objects," he conceded. But *as to those objects*, it was "as much one complete government as that of New-York or Massachusetts." Indeed,

> It … has as absolute and perfect powers to make and execute all laws, to appoint officers, institute courts, declare offences, and annex penalties, with respect to every object to which it extends, as any other in the world.[266]

Antifederalists).

[262] Morris, 1 Farrand 34-35 (May 30, 1787) (urging the Philadelphia drafting convention to understand their very project as aimed at a new national government with "a compleat and compulsive operation") (responding to a question from one of the Pinckneys whether the Convention was even "authorize[d] [to] discuss[] a System founded on different principles from the federal Constitution.").

[263] For others, see, *e.g.*, John Smilie, Pa. Ratific. Debates, 2 DHRC 382 (Nov. 28, 1787) ("It contains all the necessary parts of a complete system of government, the executive, legislative, and judicial establishments"); 2 DHRC 465 (Dec. 4, 1787) (repeating the point and warning that the imperium in imperio problem would necessarily lead from this to consolidation); Republicus, Kentucky Gazette, 8 DHRC 375 (Feb. 16, 1788) ("equal natural right to legislative and executive power in all their different branches, which takes in all the powers that can exist in a state").

[264] Brutus XII, New York Journal, 20 DHRC 756 (Feb. 7, 1788).

[265] Brutus I, New York Journal, 19 DHRC 103 (Oct. 18, 1787) ("The [proposed] government then, so far as it extends, is a complete one, and not a confederation. It is as much one complete government as that of New-York or Massachusetts, has as absolute and perfect powers to make and execute all laws, to appoint officers, institute courts, declare offences, and annex penalties, with respect to every object to which it extends, as any other in the world."). Brutus couldn't get enough of this point. *See also*, *e.g.*, Brutus VI, New York Journal, 19 DHRC 466 (Dec. 27, 1787) ("What will render this power in Congress effectual and sure in its operation is, that the government will have complete judicial and executive authority to carry all their laws into effect"); Brutus XI, New York Journal, 15 DHRC 512 (Jan. 31, 1788) ("This [proposed] government is a complete system, not only for making, but for executing laws.").

[266] Brutus returned to the formulation in his later letters, albeit in a less central role. Brutus XII, New York Journal, 20 DHRC 756 (Feb. 7, 1788) (warning against giving "the general [government] compleat legislative, executive and judicial powers to every purpose," and then returning repeatedly

The division thus sketched by Brutus was pervasive. The Founders repetitiously distinguished between [1] various subject matter objects of government action, "whether civil or military" and [2] the tripartite mechanical sequence by which government took functional action on those objects, "whether…legislative, executive, or judicial."[267] The conceptual point was simply common currency; the only thing to debate was its implications. And so on one side, Samuel Chase objected to the fact that "[t]he National Government has unlimited power, legislative, executive and judicial, as to every object to which it extends by the Constitution."[268] And on the other side, the Federalist "A.B." agreed that "[t]his government is to possess absolute and uncoutroulable powers, legislative, executive, and judicial with respect to every object to which it extends.'"[269]

A casual reader might get the impression that completeness was just another way or talking about the police power. So let's be clear: the question of completeness in government had *nothing* to do with the substantive scope of a government's regulatory portfolio. To measure a government's perfection required no knowledge about its power to regulate commerce, make treaties, establish a religion, or invade Canada. *Any* unit of government at *any* level of regional or administrative hierarchy with *any* sorts of subject matter competences could easily possess all three powers *as to those things where its jurisdiction extended.*[270] The point of perfection was that "[t]he means of securing the welfare of the

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to warn of the consequences of allowing that government to "passing laws on these subjects, as well as of appointing magistrates with authority to execute them" in various contexts.).

[267] Bostonians, Boston Gazette, 4 DHRC 274 (Nov. 19, 1787) ("…a charter of delegation, being a clear and full description of the quantity and degree of power and authority, with which the society, vests the persons intrusted with the powers of the society, whether civil or military, legislative, executive or judicial").

[268] Samuel Chase, *Objections to the Constitution*, 12 DHRC 631 (Apr. 24-25, 1788). Chase's next three sentences rehearse the same point in more detail. First: there was no serious subject matter limitation on the business of the federal government: "The powers of the National legislature extend to every case of the least consequence." Second, the national government had the legislative power to extend to the formulation of binding policies in each such area: "[I]t may make laws to affect the lives, liberty and property of every citizen in America." Third, the national government had the executive power to bring those into being: "[N]or can the Constitution of any State prevent the Execution of any power given to the National legislature."

[269] "A.B.," Hampshire Gazette, 5 DHRC 596 (Jan. 2, 1788) (somewhat misquoting Brutus to dispute the implications of this description).

[270] *See also*, *e.g.*, Pendleton, Virginia Debates, 9 DHRC 943 (June 5, 1788) (embracing the Constitution as creating "complete" government, and sharply distinguishing that from charges of it also creating a "consolidated" government, defined as "that which should have the sole and exclusive power, Legislative, Executive, and Judicial, without any limitation"). For an example of the kind of criticism prompting Pendleton's point, see, *e.g.*, Federal Farmer, Letter XVII, New York, 20 DHRC 976 (May 2, 1788) ("To form a consolidated, or one entire government, …. all things, persons and property, must be subject to the laws of one legislature alone; to one executive, and

community must be coextensive with the objects to which the legislature extends its views."[271]

That's why Oliver Ellsworth said of Hartford, "This very spot where we now are, is a city. It has complete legislative, judicial and executive powers. It is a complete state in miniature."[272] And that's why Brutus was careful to emphasize that even entities with only limited subject-matter competences—like the proposed federal government—were perfectly capable of being "complete" in the relevant sense:

> This government is to possess absolute and uncontroulable power, legislative, executive and judicial, with respect to every object to which it extends for…. The government then, so far as it extends, is a complete one, and not a confederation.[273]

Rather than omnicompetent subject matter authorization,[274] then, these references to completeness referenced the functionally sequential process of (first) bringing an idea or project into being and (then) being able to implement it in the real world. The functional relationships thus emphasized now bring us to an authority often viewed as either logically entailed in or functionally necessitated by the executive power as such: the right to appoint "assistances" for its implementation.

C. The Executive Power Was Often Viewed as Either Logically Entailing or Functionally Implying the Appointment of "Assistances"

Modern Supreme Court doctrine holds that "the power to appoint inferior officers …

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one judiciary.").

[271] Samuel Holden Parsons to William Cushing, Middletown, 3 DHRC 569 (Jan. 11, 1788). The Connecticut convention delegate was writing here to his Federalist colleague—and future Supreme Court Justice—in Massachusetts. *See also*, *e.g.*, Federalist 80, 18 DHRC 96 (May 28, 1788) (implicitly endorsing the proposition that "every government ought to possess the means of executing its own provisions by its own authority"). *Cf.* Federalist 21 (focusing on the Confederation's gap in this respect as the "extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws").

[272] Oliver Ellsworth, Speech in the Connecticut Convention, 15 DHRC 273 (Jan. 7 , 1788) ("Yet it breeds no confusion, it makes no scism. The city has not eat up the state, nor the state the city.") *See also id.* ("Wherever the army was, in whatever state, there congress had complete legislative, judicial and executive power").

[273] Brutus I, New York Journal, 19 DHRC 103 (Oct. 18, 1787). For other examples of the distinction, see, *e.g.*, Providence United States Chronicle, 25 DHRC 383 (Aug 7, 1788) ("'Power to make Laws and form Regulations for the Good of all, and to compel their execution and observance'").

[274] Contrast, for example, the use of completeness to describe federal competences in A Freeman III, Pennsylvania Gazette, DHRC (Feb 6, 1788) ("such would be the consequence of a single national constitution, in which all the objects of society and government were so compleatly provided for, as to place the several states in the union on the footing of counties of the empire").

is not in itself an 'executive' function in the constitutional sense."[275] A good number of Founders would have disagreed. George Mason was in good company in considering "the appointment of publick officers"[276] closely linked to the executive power—sometimes as a strict conceptual element of the thing itself, other times more loosely as an indispensable buttress for its meaningful exercise.

This view of appointments as "executive" drew on a well-established strand of Anglo-American legal thought. Certainly the inseparability of execution and appointment was central among Charles I's objections to conceding a parliamentary role in appointments:[277]

> He conceives, He cannot perform the Oath of protecting His people if He abandon this power, and assume others into it. He conceives it such a Flowre of the Crown, as is worth all the rest of the Garland."

Charles's argument may have had special force under English law, which was often said to prohibit the King from personally executing the law.[278] But its deeper logic was quite generalizable. As Matthew Hale's pathbreaking treatise observed, "the weight, multiplicity and variety of the occasions and emergencies of a kingdom doth necessarily require assistances."[279] Laying claim to the executive power in any large jurisdiction was thus arguably an exercise in fiction unless you had the authority to appoint "assistances"—

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[275] *Morrison v. Olson*, 487 U.S. 654 (1988).

[276] (concluding that this power was "improper" in the Senate).

[277] Parker, Observations (1642) ("He conceives, That if He should passe this, He should retain nothing but the Ceremonious Ensignes of Royalty, or the meer sight of a Crown and Scepter; (nay the Stock being dead, the Twigs would not long flourish;) but as to true, and reall power, He should remain, but the outside, the picture, the signe of a King"). There's some irony in how much more evocative the parliamentarian's paraphrase is than the King's original.

[278] Bagshaw, *Rights of the Crown* (1660) ("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"); Hale, *Prerogatives of the King* ("he neither speaks nor doth anything in the public administration of this realm but what he doth by these or some of these, especially the chancellor"). *see generally* Holdsworth.

[279] Hale, *Prerogatives of the King* 105 (describing the king's "legal council" as "the distributors of the king's judgment and will according to rule, for he neither speaks nor doth anything in the public administration of this realm but what he doth by these or some of these, especially the chancellor"). As Hale later explained, the king's appointments power was at least at times *compulsory*—that is to say, he could conscript private individuals into compulsory state service. ("refusing to take" an "office[] that [is] grantable by the king and concern[s] the administration of justice" is "punishable for a contempt"). *Cf.* Hulme, *An Historical Essay on the English Constitution* 182 ("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, and to authorize the acting parties by a writing, vesting them with certain powers, for the accomplishment of the business which is to be done").

implementing agents—to act on your behalf.

This view of the relationship between appointments and execution influenced thinking in the Americas well before the Founding. In a 1771 Virginia dispute about appointments authority, for example, the winning counsel argued that "whereever an act of Parliament or of Assembly erects a new office, without prescribing the particular mode of appointing the officer, it belongs to the King to make the appointment." Counsel's explanation is key: the proposed canon of construction followed necessarily from the King's executive power. "[P]ossessing the executive power of the laws," it is the King's "peculiar duty to see such act carried into execution, which cannot be unless an officer is appointed." That in turned implied that "[i]f then our acts of Assembly, erecting [an office] have not said by whom the nomination shall be, it will follow that the King, who is to see the law executed, must nominate persons for that purpose."[280]

This commonsense view persisted into the Founding era. Some discussions were agnostic on the formal classification,[281] focusing instead on prudential considerations.[282] But at least as many, and probably more, relied on separation of powers logic that King Charles would have found quite congenial: "Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute."[283] The limited and parasitic nature of the claim was evident, however, in the fact that that this view didn't typically extend to *all* acts of appointment. Rather it focused only on the appointment of *executive* officers. In this sense, the idea was just the specific application of a general principle: "each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others."[284] And so there was much less angst about the Senate's role in appointing judges—and much more angst about

[280] *Godwin v. Lunan*, Jeff. 96 (Gen. Ct. Va. 1771) (recording winning counsel's argument).

[281] E.g. Randolph, 2 Farrand 405-407 (Aug. 24, 1787) ("the power of appointments was a formidable one both in the Executive & Legislative hands").

[282] E.g. Mason, 2 Farrand 537 (Sept. 7, 1787) (legislative bodies "too unwieldy and expensive for appointing officers."); Randolph, 22 Farrand 81 (July 21, 1787) ("inconveniencies" with vesting judicial appointments in a multi-member body").

[283] Wilson, 2 Farrand 537-538 (Sept 7, 1787) ("object[ing] to the mode of appointing, as blending a branch of the Legislature with the Executive"). *Cf.*, *e.g.*, Morris, 2 Farrand 53 (July 19, 1787) ("There must be certain great officers of State…. These he presumes will exercise their functions in subordination to the Executive…. Without these ministers the Executive can do nothing of consequence.").

[284] Publius, The Federalist 51, New York Independent Journal, 16 DHRC 43 (Feb. 6, 1788) ("Were this principle rigorously adhered to, … [s]ome difficulties … would attend the execution of it. Some deviations therefore from the principle must be admitted."). *See also*, *e.g.*, Madison, 1 Annals of Cong. 463 (1789) ("if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.".

the President's.[285]

The point wasn't uncontested. Indeed, some of the fussier formalists forcefully rejected the claim that the Senate's role in appointments gave it any portion of the executive power. For them, the standard meaning of executive power decisively rebutted that claim: since the Senate "cannot execute" the laws, it was definitionally impossible for it to be "a part also of the executive."[286] One Maryland Federalist made the point at some length:

> Much learned and hackneyed declamation has been used against the executive power of the senate, and the making one body of men both an executive and a legislative. Happily the reasoning does not apply. —The objection would be valid, if the senate could alone make laws, and alone execute. This they cannot do, and we may rest assured, that the representatives, having no share in the execution, will never consent to tyrannical laws, to be executed in a tyrannical manner by the president and the senate. What are the executive powers of the senate? None at all. It has nothing at all to do with the execution of the laws it assents to.[287]

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[285] George Mason, for example, supported presidential appointment of executive branch officers, but opposed any presidential role in the appointment of judges. *Compare* Mason, infra note __ *with* Mason, 2 Farrand 83 (July 21, 1787) ("He considered the appointment [of judges] by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself."). For others expressing similar views, *see*, *e.g.*, Madison, 1 Farrand 120 (June 5, 1787) ("on the other hand, he was not satisfied with referring the appointment [of judges] to the Executive. He rather inclined to give it to the Senatorial branch…."). And so compared to the Framers' desultory discussion of judicial appointments, their endless tail chasing about non-judicial appointments was not just tedious but far more charged. *Compare*, *e.g.* 2 Farrand 41-44 (July 18, 1787) (discussing appointment of judicial officers) *with*, *e.g.*, 1 Farrands 232 et seq. (discussing appointment of non-judicial officers); 2 Farrands 42 et seq. (same); 2 Farrands 80 et seq. (same); 2 Farrand 405 et seq. (August 24, 1787) (same); 2 Farrand 522 et seq. (Sept. 6, 1787) (same); 2 Farrand 537 et seq. (Sept 7, 1787) (same); 2 Farrands 627 et seq. (same).

[286] Charles Carroll of Carrollton: Notes on the Constitution, 12 DHRC 862 (post Feb. 1, 1788). See also, e.g., A Landholder V, 3 DHRC 480 (Dec. 3, 1787) ("On examination you will find this objection [to the Senate] unfounded. The supreme executive is vested in a President of the United States…. In the President, all the executive departments meet, and he will be a channel of communication between those who make and those who execute the laws."). Other than the President's legislative veto and the Vice-President's presiding role in the Senate, the Landholder continued, "[i]n no other instance is there even the shadow of blending or influence between the two departments." When discussing the judiciary in the very next section, The Landholder went on to discuss the need for "executive officers, to carry into effect the laws of the nation," so it's not like the functional point was lost on him.

[287] Maryland Journal, 12 DHRC 867 (July 25, 1788). While the author was contemptuous of the formal claim, he was typical among Federalists in taking the functional concerns more seriously. *See id.* (disputing the notion that the Senate's constitutional designation as a source of "advice" rendered

For his part, Tench Coxe called it an "evident" error to speak of "the executive powers of the senate."[288] There's no mistaking the prescriptivist condescension of his explanation:

> The Senate as a body & the Senators as individuals can hold or execute no office whatever. They cannot be Ambassadors Generals, Admirals, Judges. Secretaries of War. or Finance, nor perform any other National duty, but that of Senators, nor can they even nominate a person for any post or employment. In short they can execute no offices themselves, nor can they declare who shall—Their power is merely to declare who shall not. You will pardon me, Sir. for applying the term to so elegant a Scholar as you are. but really to say as you do that the power of declaring who shall not hold an office is to hold it oneself appears to me an absolute Solecism.[289]

This was just vanilla formalism pulled straight from the dictionary. The Senate had no power to execute the law. Therefore, the Senate did not possess executive power. Case closed.

These objections aside, most Americans who spoke to the point seemed to conclude that the right to appoint "assistances" in execution was necessary on any functional understanding of the power to execute. Certainly this view was prominent among antifederalists. "Hampden" was typical in singling out "the most important and most influential portion of the executive power, viz., the appointment of all officers."[290] The list of constitutional skeptics who thought of appointments as an executive power—among

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it a "council to the president," which was in itself a "formidable executive power[]").

[288] An American [Tench Coxe], *To Richard Henry Lee*, 15 DHRC 173 (draft).

[289] An American [Tench Coxe], *To Richard Henry Lee*, 15 DHRC 173 (draft). Coxe was typical of Federalists in both dismissing Antifederalists' formalist argument and evaluating more seriously the their functionalist criticism of the senate's mix of authorities.

[290] Hampden, Pittsburgh Gazette, 2 DHRC 663 (Feb. 16, 1788) (criticizing "the highly dangerous combination of the legislative and executive departments," and noting that "the President only acts as a nominating member" for executive appointments). William Findley, who is thought to be the author of "Hampden," urged the same point in opposing ratification at the Pennsylvania convention:

> Only a part of the executive power is vested in the President. The most influential part is in the Senate, and he only acts as primus inter pares of the Senate; only he has the sole right of nomination. The officers of government are the creatures of the Senate…. The great objection is the blending of executive and legislative power.

William Findley, Pa. Ratific. Debates, 2 DHRC 512 (Dec 7, 1787) (Wilson's notes); *see also id.* (Yeates's notes) ("President in appointing officers will generally nominate such persons as will be agreeable to the Senate. The legislative and executive departments are mixed in this Constitution").

them Brutus,[291] Centinel,[292] the Federal Farmer,[293] Richard Henry Lee,[294] and George Mason[295]—goes on.[296] Many Federalists readily conceded the point as well. Writing as

[291] Brutus IV, New York Journal, 19 DHRC 313 (Nov. 29, 1787) ("[the President's] power when elected is check'd by the Consent of the Senate to the appointment of Officers, and without endangering Liberty by the junction of the Executive and Legislative in this instance."). *See also*, *e.g.* Brutus XVI ("It may possibly also, in some special cases, be adviseable to associate the legislature, or a branch of it, with the executive, in the exercise of acts of great national importance…. But I think it equally evident, that a branch of the legislature should not be invested with the power of appointing officers"). Melancton Smith, often thought the likeliest author of the Brutus letters, seems to have made the same point at the New York Ratification debates. Melancton Smith, New York Convention Debates and Proceedings, 22 DHRC 2094 (July 4, 1788) (notes of Richard Harrison) ("[T]he legislative & executive should be kept apart…. [I]t is improper that the Senate … should appoint Officers."); *see also id.* (notes of Robert Livingston) ("Objs. to appt of officers by consent senate—executive power to be distinct").

[292] Centinel I, Independent Gazetteer, 2 DHRC 158 (Oct. 5, 1787) ("The Senate, besides its legislative functions, has a very considerable share in the executive; none of the principal appointments to office can be made without its advice and consent."). *See also*, *e.g.*, Centinel II ("The king of England is … in possession of the whole executive power, including the unrestrained appointment to offices"); Centinel II, Philadelphia Freeman's Journal, 13 DHRC 457 (Oct. 24, 1787).

[293] Federal Farmer, An Additional Number of Letters to the Republican, New York, 20 DHRC 976 (May 2, 1788) ("It has been thought adviseable by the wisest nations, that the legislature should so far exercise executive and judicial powers as to appoint some officers"). The Federal Farmer's discussion of the separation of powers spans many letters, and richly rewards close study. Given the nature of space limitations here, I note only that the author classifies appointments as "executive" in nature. See infra __ for his discussion of the Senate's role in treaty approval.

[294] Richard Henry Lee, Proposed Amendments, 14 DHRC 364 (Dec. 20, 1787) ("In order to prevent the dangerous blending of the legislative and executive powers, and to secure responsibility, the privy, and not the senate shall be joined with the president in the appointment of all officers, civil and military, under the new constitution…."). It appears that Lee's widely-republished proposal may first have been written as a pitch to Edmund Randolph. *See* Richard Henry Lee to Edmund Randolph, 24 Let. Del. Cong. 452-453 (Sept. 29, 1787) (enclosure proposing amendments).

[295] Mason, 1 Farrand 101 (June 4, 1787) ("Col. Mason observed that a vote had already passed he found (he was out at the time) for vesting the executive powers in a single person. Among these powers was that of appointing to offices in certain cases").

[296] *See*, *e.g.*, John De Witt III American Herald, 4 DHRC 194 (Nov. 5, 1787) ("With respect to the Executive, the Senate excepting in [*i.e., taking exception to*] nomination, have a negative upon the President….) (later referencing "their share above mentioned in the Executive department"); A Federal Republican, A Review of the Constitution, 14 DHRC 255 (Nov. 28, 1787) (proposing "a sovereign executive council … [which would] have the appointment of all officers" since "the senate … should have no executive or other powers whatever in that department").

Less unequivocal, but hard to explain on any other theory, were more abstractly expressed

Publius, Madison conceded that "the appointment to offices, particularly executive offices, is in its nature an executive function."[297] A number of other supporters of the Constitution—including John Adams,[298] John Brown Cutting,[299] A Democratic

antifederalist claims that the Senate would "'execute [the laws] tyrannically'"—a concern with no obvious legal hook besides the Appointments Clause. *E.g.*, Cincinnatus IV, To James Wilson, Esquire, New York Journal, 19 DHRC 281 (Nov. 22, 1787) ("[B]y making [the Senate] participant in the executive," the Framers ignored Montesquieu's adage: "'When the legislative and executive powers are united in the same person … the same monarch or senate will make tyrannical laws, that they may execute them tyrannically'"). *Cf.* Winchester Virginia Gazette, 8 DHRC 469 (Mar. 7, 1788) ("The powers granted to Congress are boundless in some instances of the utmost consequence to the people, particularly … their power of legislation blended with that of the execution of their own laws, without controul.").

[297] Publius: The Federalist 47, New York Independent Journal, 15 DHRC 498 (Jan. 30, 1788). *See also* Publius: The Federalist 38, New York Independent Journal, 15 DHRC 353 (Jan. 12, 1788) ("With another class of adversaries to the constitution … the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting this executive power in the executive, alone, is the vicious part of the organisation").

In fact, at the Convention, Madison had gone so far as to suggest that there might be no need to explicitly grant appointments authority, since it was logically entailed within the vesting of "executive power" simpliciter. Madison proposed amending the Virginia Plan to read:

> that a national Executive ought to be instituted with power to carry into effect, the national laws. to appoint to offices in cases not otherwise provided for, and to execute such other powers <'not Legislative nor Judiciary in their nature.'> as may from time to time be delegated by the national Legislature.

He then observed that "he did not know" that specifying the appointment power was "absolutely necessary," since it was "perhaps included in the first member of the proposition," which vested the executive power. Madison, 1 Farrand 67 (June 1, 1787) ("Mr. Madison did not know that the words [of the third clause] were absolutely necessary, or even the preceding words. "to appoint to offices &c. the whole being perhaps included in the first member of the proposition. He did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions.").

[298] John Adams to Thomas Jefferson, London, 4 DHRC 212 (Nov. 10, 1787) ("They have adopted the Idea of the Congress at Albany in 1754 of a President to nominate officers and a Council to Consent: but thank heaven they have adopted a third Branch, which that Congress did not. I think that Senates and assemblies should have nothing to do with executive Power. But still I hope the Constitution will be adopted.").

[299] John Brown Cutting to William Short, London, 14 DHRC 475 (Dec. 13, 1787) (supporting the Constitution, but noting that his "principal apprehension" [was] "the mingled legislative and executive powers of the senate… — especially in appointments to office").

Federalist,[300] John Kean,[301] and James Wilson[302]—plainly held the same view.[303] Indeed, Aristedes forthrightly "confess[ed]" that the objections to the Senate had "at first appeared formidable." The separation of powers risk was obvious: permitting a legislature to appoint "persons for the execution of the laws" would arguably "be the same thing, in many respects, as if the legislature should execute its own laws."[304] That's why George Mason explained that his 1788 amendments[305]——like those proposed by both James Wilson[306]

[300] A Democratic Federalist, Independent Gazetteer, 2 DHRC 294 (Nov. 26, 1787) ("The executive powers of the Union are separated in a higher degree from the legislative than in any government now existing in the world. As a check upon the President, the Senate may disapprove of the officers he appoints, but no person holding any office under the United States can be a member of the federal legislature. How differently are things circumstanced in the two houses in Britain where an officer of any kind, naval, military, civil or ecclesiastical, may hold a seat in either house.").

[301] John Kean, Notes on the New Constitution, DHRC (c. May 1788) (sketchy outline written by a South Carolina convention delegate) (advocating without elaboration "[a] legislature … who has no executive or judicial powers," and later urging in reference to "Defense" that "appointment of officers—ought not be exercised by the Legislature").

[302] Wilson, 2 Farrands 530 (McHenry's notes) (Sept. 6, 1787) ("The different branches should be independent of each other. They are combined and blended in the Senate. The Senate may exercise, the powers of legislation, and Executive and judicial powers. To make treaties legislative, to appoint officers Executive for the Executive has only the nomination"); *see also* James Wilson, 1 Farrand 66 (Jun. 1, 1787) ("The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.").

[303] *See also*, *e.g.*, Thomas McKean, Pennsylvania Ratifying Convention, 2 DHRC 512 (Dec. 10, 1787) ("[T]he whole of the executive power is not lodged in the President alone," but "as to the Senators having a share in the executive power, so far as to the appointment of certain officers, I do not know where this restraint on the President could be more safely lodged"); *see also id.* (Yeates's notes) (similar); *id.* (Wilson's notes) ("There is scarce a king in Europe that has not some check upon him in the appointment of officers"). Davie, North Carolina Ratification Convention, 4 Elliot's 121-123 ("In this state, and most of the others, the executive and judicial powers are dependent on the legislature. Has not the legislature of this state the power of appointing the judges? Is it not in their power also to fix their compensation?").

[304] Aristides: Remarks on the Proposed Plan, Annapolis, 11 DHRC 229 (Jan. 31, 1788). Aristides went on to defend the Senate's role in appointments as a necessary concession to pragmatics over theory: "Let us reflect … whether it be proper for any one man (suppose even the saviour of his country to be immortal) to have the appointment of all those important officers…. I confess, that the number of the senators for this purpose only is excessive. But I can confidently rely on the extraordinary selection to compensate for the excess." *Id.*

[305] George Mason to John Lamb, Richmond, 9 DHRC 818 (June 9, 1788) (Encl.) ("the Legislative, Executive and Judicial powers of Government should be separate and distinct").

[306] Wilson, 2 Farrand 537 (Sept. 7, 1787) ("Mr. Wilson moved to add, after the word 'Senate' [in the Treaty Clause] the words, 'and House of Representatives'. As treaties he said are to have the operation of laws, they ought to have the sanction of laws also"). Wilson's motion was rejected in the face of typical functionalist concerns about secrecy in a large body.

and the Society of Western Gentlemen.[307]—would restore each branch to its proper place: by getting the Senate *out* of the executive function of appointments[308] and by bringing the House *into* the legislative function of treatymaking.[309]

So while the most strait-laced formalists disagreed, a great many Founders did take a more functional view of Law Execution. On the view of these commentators, a more loosely disaggregated view of executive power reflects the reality that executing the law includes not just (i) the power to impose prohibitions on private parties and (ii) the power to carry out the legislature's affirmative projects, but also (iii) the appointment of different kinds of subordinates to do each kind of execution. This disaggregated understanding can also be found in their occasional references to "executive power*s*" plural.[310] The Continental Congress's famous 1774 "Letter to the Inhabitants of Quebec," for example, argued that the future of liberty in the North depended on its inhabitants' proper understanding of Montesquieu—including his standard gloss on "executive power" as "'the power of executing.'"[311]

> You have a Governor, it may be urged, vested with *the executive powers, or the powers*

[307] The Society of Western Gentlemen Revise the Constitution, Virginia Independent Chronicle, 9 DHRC 769 (Apr. 30 & May 7, 1788) (proposing to strip President's veto power and require House approval of all treaties).

[308] George Mason to John Lamb, Richmond, 9 DHRC 818 (June 9, 1788) (Encl.) ("that the Power of …appointing Ambassadors, other public Ministers or Consuls, Judges of the Supreme Courts, and all other Officers of the United States, whose appointments are not otherwise provided for by the Constitution, and which shall be established by Law be vested in the president of the United States with the Assistance of the [newly formed Executive] Council").

[309] George Mason to John Lamb, Richmond, 9 DHRC 818 (June 9, 1788) (Encl.) ("But all Treaties so made or entered into [by the President], shall be subject to the Revision of the Senate and House of Representatives for their Ratification").

[310] Early drafts of the Articles of Confederation themselves thus generically referenced interactions by the national entity with "the Officers in the several States who are entrusted with the executive powers of government." E.g. 5 J. Cont. Cong. 687 (Aug. 20, 1776); 9 J. Cont. Cong. __. For other examples of this usage as the generic reference to state-level executive actors in their mailbox function, see, *e.g.*, 3 J. Cont. Cong. 414 (Dec. 7, 1775) ("those Officers, in whom the executive powers of government in those colonies may be vested"); 3 J. Cont. Cong. 431 (Dec. 15, 1775) ("such officers in the several colonies as are entrusted with the executive powers of government").

[311] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774) ("'When the power of making laws, and the power of executing them, 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 Monarch or Senate, should enact tyrannical laws, to execute them in a tyrannical manner…. [Likewise,] [t]here is no liberty, if the power of judging be not separated from the legislative and executive powers.'"). Congress evidenced not a particular of shame in resorting to outright flattery, using our northern neighbors to "exert[] the natural sagacity of Frenchmen" and consider the authority of that "truly great man," "your countryman" Montesquieu.

> *of administration*: In him, and in your Council, is lodged the power of making laws. You have Judges, who are to decide every cause affecting your lives, liberty or property.[312]

"Your countryman," the letter anglosplained, would have told the Quebecois that any appearance here of a separation of powers was but a "tinsel'd outside."[313] Congress was quite specific about why: the British Governor controlled each of the three functional governance authorities in the sequential process of creating, adjudicating, *and executing* legislative instructions. And the Governor's control of that complete sequence of government action meant that the government of Quebec was but "'a whited sepulchre,' for burying your lives, liberty and property."[314]

That brings us to the final characteristic of executive power, about which their views were again unanimous: it was an empty vessel authorizing only the implementation of instructions issued from a legislative authority.

D. "The Executive Power" Was Unanimously Understood as an Empty Vessel, Both Subsequent and Subordinate in Character

Beyond its definition as "the power to execute," the signal characteristic of executive power was that it was derivative and subsequent. The Founders' embrace of this point fully reflected the legal and political theory on their bookshelves. This section will explore their understanding of that derivative quality by explaining two related features. First, the intrinsic subordination of executive authority to its legislative principal. Second, the immense latent power of executive authority—especially where its holder could influence the exercise of legislative power to convey broad delegations of discretion and authority.

1. As a Form of Agency Authority, the Exercise of Executive Power was Fully Subordinate to Instructions by its Legislative Principal.

Generations of writers had explained that the power to execute was fully subordinate to the power to legislate. This claim had nothing to do with power struggles among political *institutions* in any particular regime. It was rather a logically entailed feature of the relationship between two intrinsically successive *functions* of government in the abstract.[315] The failure to appreciate this distinction has frequently caused confusion for modern

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[312] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774) (emphasis added).

[313] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774). ("Your Judges, and your Legislative Council, as it is called, are dependant on your Governor, and he is dependant on the servant of the Crown, in Great-Britain. The legislative, executive and judging powers are all moved by the nods of a Minister.")

[314] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774) (emphasis added).

[315] Mortenson, *supra* note _ (discussing the dominance of this frame on the eighteenth-century bookshelf).

audiences. One often-misunderstood line of Federalist 49, for example, describes the *branches* of federal government as "co-ordinate" with one another.[316] A shallow reading of that sentence might seem in tension with the mass of evidence that the Founders understood executive power as subordinate to legislative power.[317] But it isn't. Publius's statement about the coordinacy of *branches* had nothing to with the subordination of *powers*; invoking the former to refute the latter conflates the political entity called "the executive" with the conceptual function of government called "the executive power."[318]

The Founders definitely talked about the new constitutional entities as organizationally parallel. The Founders definitely created a structure that would protect the President qua entity from becoming categorically subordinate to the institution of Congress. And the Founders definitely meant for the institution of the presidency (which possessed a variety of powers, including but not limited to the executive) to be in some respects coordinate to the institution of Congress (which possessed a variety of powers, including but not limited to the legislative). But when it came to the question of government functions, the Founders agreed (without contradiction of which I am aware) that "the executive power" vested by Article II was fully subordinate to the "legislative powers" that the President shared with Congress.

The Founding records are replete with versions of this observation, itself practically a

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[316] This description is important more because it has become a standard judicial reference in modern caselaw than because it was particularly common at the Founding. (It wasn't). *E.g.*, *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922).

[317] Federalist 49 ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers…."). Less well remembered is Madison's use of the same phrase during the Virginia debates in service of an argument that sits uncomfortably with a strong departmentalist reading of Publius.

> It may be no misfortune that in organizing any Government, the explication of its authority should be left to any of its co-ordinate branches. There is no example in any country where it is otherwise.

Madison, Va. Ratific. Debates, 10 DHRC 1412 (June 20, 1788) (going on to discuss examples of judicial review of action by the states).

[318] This is a version of what I have elsewhere called the metonymy error. Mortenson, *supra* note _. The Federalist Papers were themselves elsewhere quite clear that obeying the law is different from obeying the legislative branch. Consider also that the entities most often described as "co-ordinate" were the states and the federal government, rather than the departments of the federal government themselves. That characteristic was apparently quite consistent with their shared understanding that the federal government would be supreme (for better or worse) within its field of activity.

paraphrase of John Locke,[319] David Hume,[320] and many other writers on whom the Founders relied.[321] Start with the famously pro-executive John Adams, who defended the gubernatorial veto as necessary because "the legislative power is naturally and necessarily sovereign and supreme over the executive."[322] Continue from there to an array of others across the ideological spectrum. "A Farmer" pressed the same conceptual subordination in service of his more republican agenda:

> The power of making rules or laws to govern or protect the society is the essence of sovereignty, for by this the executive and judicial powers are directed and controuled, to this every ministerial agent is subservient.[323]

Centinel was to the same effect: "It will not be controverted that the legislative is the highest delegated power in government, and that all others are subordinate to it."[324] The Old Whig emphasized the observation's distinguished pedigree: "In the opinion of Montesquieu, and of most other writers, ancient as well as modern, the legislature is the sovereign power."[325] And "A Landholder" suggested the negative implication: "a legislative power without a judicial and executive under their own control is in the nature of things a nullity."[326]

This all just followed from the definition of the thing. Executive power was intrinsically an empty vessel, awaiting instructions from an exercise of the legislative power that would give it something to execute. This understanding pervaded the discourse. It grounded Gad Hitchcock's observation, in a famous Election Day sermon from 1774, that "the executive power is strictly no other than the legislative carried forward, and of course, controllable

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[319] 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").

[320] Hume made the point repeatedly. Hume, Essay VI, in *Essays Moral, Political, and Literary* ("The executive power in every government is altogether subordinate to the legislative"); Hume, *Idea of a Perfect Commonwealth* ("the legislative power being always superior to the executive").

[321] Mortenson, *supra* note _.

[322] Adams, 1 Defense of Constitutions ch. X ("…and therefore, . . . The latter must be made an essential branch of the former, even with a negative, or it will not be able to defend itself").

[323] A Farmer, Philadelphia Freeman's Journal, 17 DHRC 133 (April 16 & 23, 1788) ("[T]o this all corporate or privileged bodies are subordinate: this [legislative] power not only regulates the conduct, but disposes of the wealth and commands the force of the nation.").

[324] Centinel I, Independent Gazetteer, 2 DHRC 158 (Oct. 5, 1787).

[325] An Old Whig II, Philadelphia Independent Gazetteer, 13 DHRC 399 (Oct. 17, 1787).

[326] A Landholder V, 3 DHRC 480 (Dec. 3, 1787). Comments like these have too often been mistaken for being the end of an argument (i.e., contestable assertions of republican ideology) rather than the beginning of one (i.e., an attempt to build from common ground). But that reading is demonstrably wrong—not least because so many Federalists not only recognized but affirmatively relied on the point as a key descriptive element of their arguments.

by it."[327] It was necessary to Elbridge Gerry's claim that reading the Articles of Confederation to permit troop requisitions by Congress "must preclude the states from a right of deliberating, and leave them only an executive authority on the subject."[328] It surfaced in Theodorick Bland's argument that there was a profound distinction between "'levy[ing]' an impost" and "'collect[ing]' an impost," because "the first word imported a legislative idea, & the latter an executive only."[329] The same point was reflected in references to debt payment as "a simple executive operation"[330] and contrasts between "trifling executive Business" and "objects of the greatest Magnitude."[331] And it was emphasized by the Board of Treasury when denying appeals for funds grounded in equity rather than the statutory framework: "[a]s the Executive Officers of Congress, [i]t is not for this Board to enter into the Merits of [a] Claim" that contradicts an "Explicit[]" statute.[332] As the Board repeatedly explained, its merely executive nature left it with no independent policy prerogative; its only authority—even in the face of demands from the likes of Pennsylvania[333] and Virginia [334]—was to implement the letter of legislative instruction as

[327] 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).

[328] 27 J. Const. Cong. 518 (June 2, 1784) (motion of Elbridge Gerry); *see also* 27 J. Const. Cong. 433 (May 26, 1784) (earlier version of same motion).

[329] 25 J. Const. Cong. 946-947 (March 27, 1783) ("…and consequently the latter might be less obnoxious to the states"). The other congressional delegates were unpersuaded by the claim that levying and collecting should be read as distinct phases of a process as opposed to synonyms in a more pragmatic sense. But no one challenged the principle behind Bland's proposed sales pitch; just the way Bland was applying it to the semantics of their particular case.

[330] Report of Superintendent of Finance, 22 J. Const. Cong. 435 (Aug. 5, 1782) ("Already Congress have adopted a plan for liquidating all past accounts, and if the States shall make the necessary grants of Revenue, what remains will be a simple executive operation which will presently be explained.").

[331] James Mitchell Varnum to Nathanael Greene, Philadelphia (April 2, 1781), 17 Let. Del. Cong. 115 ("Our Time is consumed in trifling executive Business, while Objects of the greatest Magnitude are postponed….").

[332] Report of Board of Treasury, 30 J. Cont. Cong. 386 (July 3, 1786). Recall also Adam Smith's observation that if "the leading men of America … should be so far degraded as to become … executive officers of parliament, the greater part of their own importance would be at an end." Smith, Wealth of Nations, vol. 2, part 3.

[333] Report of Board of Treasury, 30 J. Cont. Cong. 386 (July 3, 1786) ("As the Executive Officers of Congress, [i]t is not for this Board to enter into the Merits of [a] Claim.").

[334] ("It is with regret that the Board observe that a strict adherence on their part, to their duty as Executive Officers, should expose the United States to the risque of not receiving from the State of Virginia that support towards the Expences of the Current Year")

written.

For eighteenth-century Americans, this subordinated principal-agent relationship was "naturally and necessarily" true of the executive power[335]—indeed inherent in the very "nature of things."[336] Indeed, the empty vessel nature of executive power made it a useful metaphor for enumerated constitutionalism itself:

> [A]s the constitution comes immediately from the people; so ought the laws to flow immediately from the constitution; it should like a circle circumscribe all legislative power as the legislat[i]ve ought to circumscribe the executive."[337]

Celebrating South Carolina's ratification, another Federalist amplified the point:

> The legislative powers are resolveable into this principle, that the sober second thoughts and dispassionate voice of the people, shall be the law of the land. The executive department amounts to no more than that the man of the people shall carry into effect the will of the people."[338]

This "no more than" was common ground across ideological lines. For each committed republican telling the drafting convention that "the Executive magistracy [w]as nothing more than an institution for carrying the will of the Legislature into effect,"[339] you can find a strong advocate for the constitutional Presidency telling a ratifying convention that "[e]xecutive officers … have no manner of authority, any of them, beyond what is, by positive grant and commission, delegated to them."[340] The Remarker put the point sharply: "[t]he executive … hath its own [inherent] limits," since "[t]o make laws is an unlimited authority; but to execute them when made, is limited to their existence."[341] A Federal

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[335] Adams, quoted *supra*, text accompanying note [ ].

[336] A Landholder, quoted *supra*, text accompanying note [ ].

[337] Republicus, Kentucky Gazette, 8 DHRC 375 (Feb. 16, 1788) ("…and both take their form from the people as the great centre of all.").

[338] David Ramsay Oration, Charleston Columbian Herald (June 5, 1788), _ DHRC _, at http://rotunda.upress.virginia.edu/founders/RNCN-02-27-02-0006-0002-0002-0006 ("I congratulate you my fellow-citizens on the ratification of the new constitution. This event, replete with advantages, promises to repay us for the toils, dangers and waste of the late revolution").

[339] Sherman, 1 Farrand 64 (June 1, 1787). Note that Sherman started in the same place as his ideological opponent John Adams, but came to very different conclusions about the *institutional* implications that should follow. Sherman, 1 Farrand 68 (date) ("for the appointment by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed"); *id.* at 64 (similar). There aren't many better examples of how the debaters used identical descriptive terminology and an identical conceptual toolkit even when making otherwise contradictory normative arguments.

[340] Thomas McKean, Pa. Ratific. Debates, 2 DHRC 512 (Dec. 10, 1787).

[341] Remarker, Independent Chronicle, 5 DHRC 527 (Dec. 27, 1787) ("The executive should always have a negative upon the legislative, for this simple reason, that the former hath its own limits, but the latter, independent of it, would have none at all. To make laws is an unlimited authority; but to

Republican used notably identical language in defending the President's veto:

> It hath been made an objection to this constitution, that the legislative and executive are not kept perfectly distinct and seperate. This, I think, is not valid. The executive should have a check on the legislative for this simple reason–that the executive hath its own limits–but the legislative independent of it, would have none at all. To make laws is unconfined and indefinite, but to execute them when made, is limited by their existence.[342]

Even Federalists could thus conclude in private that "[a]s to the executive powers … there is nothing of any great importance in [the President's] power *solely*"[343] or in public that "the cases, in which he can exercise an *exclusive* power, are too insignificant to be productive of dangerous consequences."[344]

When Charles Francis Adams commented decades later that "the legislative power is the precise measure of the executive power,"[345] he was thus channeling the legacy of the Founding in full. Standing alone, the executive power was a thin authority that did no more than authorize the implementation of instructions from some other source. This sequence of steps by which official intention was formulated and then implemented, however, was entirely orthogonal to the real world subject matters on which it acted. Indeed, this sequence of functional authorities was defined without any reference to the particular subject matters to which they were applied; as the Federal Farmer explained, "these powers, legislative, executive, and judicial, respect internal as well as external objects."[346] And so

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execute them when made, is limited to their existence.").

[342] A Federal Republican, A Review of the Constitution, 14 DHRC 255 (Nov. 28, 1787). Note that this description of the *conceptual* nature of executive power came from an Antifederalist who nonetheless viewed that the constitutional President as a threatening figure. *Id.* ("The executive, as vested in the president is too pointedly supreme. The fears of the people will and ought easily to be agitated by such an extent of power in a single man").

[343] Samuel Holden Parsons to William Cushing, Middletown, 3 DHRC 569 (Jan. 11 1788) ("As to the executive powers, some appear to apprehend danger; but … I think no man of considerable discernment can have fears from this quarter unless he has also very weak nerves") (emphasis added). Note that this description was of the President's various powers standing alone. As the next section will discuss, the Founders understood very well that when executive authority was used to implement legislative instructions that were sufficiently broad and discretionary, it could be very powerful indeed.

[344] Americanus II, Virginia Independent Chronicle, 8 DHRC 244 (Dec. 19, 1787) (offering the President's executive power as an example of just such an "exclusive power," emphasizing "the unity of the executive authority" and that "the executive power was [not] lodged in the hands of many persons") (emphasis added).

[345] Charles Francis Adams, *An Appeal from the New to the Old Whigs by a Whig of the Old School* (Boston, 1835).

[346] Federal Farmer, Letter III. Note how the author's distinction between "internal" and "external"

the sequence of government action could be applied to the formulation and execution of policy on literally any topic: domestic or foreign; economic or social; local or national; enslavement or emancipation. Thence came the intense antifederalist anxiety about granting the national government "legislative, executive, and judiciary powers on every citizen of the empire."[347] If available in succession and concert, those three powers amounted to the capacity to formulate, assess, and apply any policy or project to any individual in the country—at least on subjects where the national government had prescriptive jurisdiction.

That's why they returned so often to the idea of a "correspondent," "consequent," or "commensurate" relationship between legislative and executive power. Certainly George Washington began his transmission of the draft Constitution to the Confederation Congress by emphasizing the necessarily interrelated "corresponden[ce]" between legislated intention and the executive power of implementation:

> The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union."[348]

Consider not just Washington's logic, but his vocabulary. He first identifies some of the new government's most important subject matter competences—themselves spread, it is worth noting, across Article I and Article II. He then emphasizes that the government is *also* vested with the "executive and judicial authorities" that "correspond[]" to the implementation of these competences.

This idea of a definitionally linked "correspondence" between specific legislative authority and the ensuing executive power of implementation recurred throughout the debates.[349] For James Wilson, the word was "commensurate": "the executive powers of

executive power tracks onto every power of government; it is not a special feature of "executive" authority. *See* Mortenson, *supra* note _. (discussing Rutherforth, Montesquieu, & Essex Result). *See also* Federal Farmer, Letter 1, 14 DHRC 14 (Nov. 8, 1787) ("Let the general government consist of an executive, a judiciary and ballanced legislature, and its powers extend exclusively to all foreign concerns … and to a few internal concerns of the community…. In this case there would be a compleat consolidation, quoad certain objects only.").

[347] A Farmer VII (Part 6), Baltimore Maryland Gazette, 12 DHRC 535 (Apr. 25, 1788).

[348] George Washington to President of Congress, 19 DHRC 526 (Sept 17, 1787).

[349] *E.g.*, A Freeholder, Newport Herald, 26 DHRC 731 (Feb. 25, 1790). ("The Constitution is calculated for a confederacy of States. It vests in Congress the power, of making war, peace, and treaties; over concerns of a foreign and general nature, of regulating commerce, providing for the support of government, and establishing correspondent judicial and executive authorities."); Solon, junior, Providence United States Chronicle, 26 DHRC 737 (Feb. 25, 1790) (quoting Washington's letter transmitting the draft Constitution to the states).

government," he told the Pennsylvania ratifying convention, "ought to be commensurate with the government itself, and that a government which cannot act in every part is so far defective."[350] For Valerius Agricola, the relationship was better described as "consequent," with the first "right[] of sovereignty" defined as precisely this basic trio: "Legislation, and the consequent executive and Judicial rights."[351] But everyone agreed on the underlying structure. Executive power was subsequent, subordinate, and dependent on instructions from a prior exercise of its legislative counterpart.

2. Executive Authority Was Immensely Potent, Especially When Its Holder Could Influence the Exercise of Legislative Power to Convey Broad Delegations of Authority and Discretion

A final point. The empty-vessel nature of executive power could be misunderstood as reducing its bearer to a factotum. But that would radically underappreciate both the essence and the potential of executive authority. The significance of any particular grant of executive power isn't self-explanatory. Rather, its significance depends entirely on a series of decisions subsequently made by the bearer(s) of *legislative* power. Just as an empty vessel can be filled with water, small beer, fortified wine, or distilled spirits, the executive power's potency depends entirely on the instructions its bearer is later given to execute. And that, of course, can change over time.

Consider by analogy the diverse range of instructions imposed by the Continental Congress by General George Washington in his role as commander-in-chief.[352] On one hand, he was subject to unbelievably particularized instructions from his national principal, sometimes half-drowning in a flood of orders ranging from the distribution of flour barrels,[353] to the transportation of refugees from Charleston to ports of their choice,[354] to

[350] James Wilson, Pennsylvania Convention Debate, 2 DHRC 550 (Dec. 11, 1787) (morning session) ("Let us examine these objections; if this government does not possess internal as well as external power, and that power for internal as well as external purposes, I apprehend, that all that has hitherto been done must go for nothing. … I presume, sir, that the executive powers of government ought to be commensurate with the government itself, and that a government which cannot act in every part is so far defective.").

[351] Valerius Agricola, Part 1 Albany Gazette, 19 DHRC 186 (Nov. 8, 1787). Agricola went on to set out various subject matter competences to which these three great powers of formulating intentions, assessing applications, and implementing results could be applied.

[352] As the pathbreaking work of David Barron and Marty Lederman have shown, Americans adopted the British understanding of commander-in-chief as "a purely military post under the command of political superiors" rather than a font of independent substantive authority. David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb, Part 1*, 121 Harv. L. Rev. 689, 772 (2008). See generally David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb, Part 1*, 121 Harv. L. Rev. 689, 772-786 (2008) (surveying eighteenth-century practice in England, under the Continental Congress, and in the separate states).

[353] 12 J. Cont. Cong. 902-903 (Sept. 11, 1778).

[354] 22 J. Cont. Cong. 330-331 (June 14, 1782) ("Resolved, That the delegates of South Carolina be

the suspension of court-martial sentences until Congress could review the trial records.[355] On the other hand, Congress regularly delegated massive substantive authority of startling dimensions and with few limiting specifications. Consider the order "direct[ing]" General Washington "to carry … into the most effectual execution" Congress's policy of interdicting "dangerous and criminal … correspondence" from England "containing ideas insidiously calculated to divide and delude the good people of these states."[356] The statute contained nothing more than a goal—to suppress English propaganda—and an open-ended full-powers authorization to pursue the goal by any means necessary.

The increasing prevalence of such open-ended instructions was surely due in part to Washington's increasing prestige. And that point is generalizable: the more influence an executive has over the legislative process, the more empowering and less constraining his instructions are likely to be. So as a practical matter, the congressional "instructions" issued to General Washington often consisted of an ex post approval of some proposal for which Washington himself had earlier requested authority,[357] or a forward-looking authorization

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authorized to furnish the Secretary at War with the names of such of the aforesaid person, who chuse to be reconveyed by water with their servants and baggage to any of the Southern ports in or near the State of South Carolina, and that the Secretary at War do transmit the list of such persons to the Commander-in Chief who is hereby instructed to take order that the said measure may be carried into execution").

[355] 24 J. Cont. Cong. 510-511 (Aug. 15, 1783) ("Resolved, that the execution of the sentences against the several offenders who have been tried for convicted of mutiny by the general court-martial now sitting at Philadelphia, be suspended, until the further order of Congress ten days after a full report of all the proceedings of the said court-martial respecting the mutiny, shall have been laid before Congress").

[356] J. Const. Cong. 616 ("Resolved, That it be, and it is hereby earnestly recommended to the legislative and executive authorities of the several states, to … take the most effectual measures to put a stop to so dangerous and criminal a correspondence. Resolved, That the Commander in Chief … hereby directed to carry the measures recommended in the above resolution into the most effectual execution.")

[357] *E.g.*, 14 J. Cont. Cong. 1004 (Aug. 27, 1779) ("Resolved, That the plan prepared by General Washington for conducting the western expedition, is in the opinion of Congress wise and judicious; that the measures he has taken for the execution of it are proper and prudent; and that Congress are perfectly satisfied with the General's conduct relative to the same"). *Cf.* 8 J. Cont. Cong. 630 (Aug. 11, 1777) ("Congress took into consideration the letter from General Washington, respecting the river defence necessary to be adopted for the protection of Philadelphia. Ordered, That … the Board of War … be directed to carry the General's plan of defence into execution with all possible despatch.").

An executive's political ability to influence legislative instructions presumably varies based on a range of factors, including his political coalition and his popular support. In this respect, the President's authority to participate in the Article I *legislative* process is a crucial lever of influence on the content of the instructions that he is then entitled to implement under Article II.

for the great man to investigate some problem and take action if he saw fit.[358] As Madison explained, this exact dynamic might yield tyrannical power for the President precisely as an executive—unless Congress's *legislative* authority were 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 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.[359]

That's at least in part why the Continental Congress would sometimes pair such open-ended delegations with short-cycle sunset provisions.[360]

The latent possibility of such immense delegated authority thus posed a recurring question for legislators: how much discretion to embed in any particular instruction. Some contemporaries certainly argued that "laws *should* be so formed as to leave little or nothing to the discretion of those by whom they are executed."[361] Where a statute was written that way, any executive authority parasitic on its instructions was indeed close to the caricature of an automaton or messenger boy. But lots of statutes rejected this advice, instead delegating broad authority for discretionary execution by its recipient. The founding generation well understood the consequence of that choice. Thus the Board of Treasury urged the Continental Congress *not* to extend the same discretionary authority to its state

[358] *E.g.*, 15 J. Const. Cong. 1108 (Sept. 26, 1779) ("that General Washington be authorized and directed to concert and execute such plans of co-operation with the Minister of France, or the Count, as he may think proper"); 12 J. Const. Cong. 906, (Sept. 12, 1778) ("whether a reduction of the stationary teams cannot be made consistently with the good of the service, or whether ox-teams cannot, in the present seat of war, be substituted in a great measure for horse-teams; and if General Washington shall be of opinion that both or either of these measures are advisable, that the quarter master general take measures for carrying the same into execution"); 25 J. Const. Cong. 604 (Sept. 23, 1783) ("that he be directed to give orders relative to Genl. Howe and the troops under his command as he shall deem expedient").

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

[360] 20 J. Cont. Cong. 556 (May 28, 1781).

[361] Report of Superintendent of Finance, 22 J. Const. Cong. 435 (Aug. 5, 1782) (emphasis added) (treating revenue laws as a special case of this general principle).

commissioners for settling accounts with states that those commissioners had for settling accounts with individuals:

> That altho' the powers vested by Congress in the said Commissioners for settling Accounts with Individuals are as extensive as a regard to the Public Security can possibly admit of…. it would be inconsistent with those principles of equality which ought to Govern in the settlement of the Accounts of the Individual States with the United States to vest the Commissioners with those extensive powers, in settling the accounts of the State, which they have a right to Exercise in the case of Individuals.[362]

Discretion in questions of such magnitude, the Board explained, should be reserved for truly high level executive entities—such as, for example, itself.

An analogous problem arose when interpreting existing statutes: how much discretion to infer when implementing ambiguous legislative instructions? The Continental Congress often used the formulation "take order," for example, when issuing instructions to executive agents—as with the resolution disbanding the Continental Army, which instructed that "the Superintendent of Finance take order for furnishing [the discharged troops] two months pay."[363] But was the formulation a discretionary authorization or a mandatory command? When the point was pressed, the delegates had a hard time agreeing. John Rutledge moved to resolve that "when a matter was referred to any of the [national executive] departments *to take order*, it was the sense & meaning of Congress that the same should be carried into execution."[364] After some discussion, the secretary's notes observe, it "seemed to be the general sense of the house that a reference to take order implied a discretionary power."[365] James Madison's account is more detailed:

> On this motion some argued that such reference amounted to an absolute injunction, others insisted that it gave authority, but did not absolutely exclude discretion in the Executive Departments. The explanation which was finally acquiesced in as most rational & conformable to practice was that it not only gave authority, but expressed the sense of Congress that the measure ought to be executed: leaving it so far however in the discretion of the Executive Department, as that in case it differed in opinion from Congress it might suspend execution & state the objections to Congress that their final direction

[362] 29 J. Cont. Cong. 536-527 (July 14, 1785)

[363] 27 J. Cont. Cong. 510 (June 2, 1784).

[364] 23 J. Cont. Cong. 848-849 (Nov. 12, 1782) (Charles Thomson's notes). *See also* 23 J. Cont. Cong. 722-723 (Nov. 12, 1782) (James Madison's notes).

[365] 23 J. Cont. Cong. 722 (Nov. 12, 1782) ("But it was argued by Mr Madison that if the thing was not done the officer should report the reasons that prevented."). Madison not citing his own intervention here is consistent with my sense that the view of him as over-representing his role at the Constitutional Convention is improbable.

might be given.[366]

The gist of their discussion was thus not about what Congress could authorize or require, but rather about the interpretive question of how Congress's instructions should be understood if the wording wasn't clear.

That's entirely consistent with the fact that executive power was understood to have an immense latent potency. The scope of executive departments' authority and discretion was a function of legislative intent. The legislature might decide to impose rote obligations in minute detail, or it might decide to simple state a goal and authorize appropriate action. Either way, executive power was neither intrinsically weak nor intrinsically strong. Rather, its sweep turned on the *revisable legislative decision* of what instructions to convey and how broadly to formulate their parameters.

* * *

That brings us back to perhaps the most important impetus for the constitution in the first place. We saw above how people on all sides of the ratification debates recognized that the Confederation Congress wasn't cutting it. And we saw how all sides agreed that its worst problem was the lack of an effective mechanism to effectuate its intentions. That's why national governance was so fundamentally transformed by the vesting "executive power" in a single President.[367] That's why so many suggested that the new constitution didn't change the "ends" or "objects" of the national government so much as it changed the mechanisms available to execute them.[368] And that's why Publius said that "the executive power" was not only "restrained within a narrower compass" than its legislative counterpart, but also "more simple in its nature."[369] When the essence of a function is to

[366] In the end, the motion was withdrawn, "the mover alledging that as he only aimed at rendering an uncertain point clear, & this had been brought about by a satisfactory explanation, he did not wish for any Resolution on the subject."

[367] This wasn't the only way that execution was transformed; also important were the new Congress's legislative competences, from Commerce to Necessary & Proper authorities. The idea of legislative execution was especially important to Governeur Morris, who emphasized that each of the three powers could be framed with relatively more or less compulsive aspect to its implementation: "The foederal gov. has no such compelling capacities, whether considered in their legislative, judicial or Executive qualities." Governeur Morris, 1 Farrand 42 (May 30, 1787) ("1. We are not now under a foederal government. 2. There is no such thing. A foederal government is that which has a right to compel every part to do its duty….").

[368] *E.g.*, William Cushing: Undelivered Speech, 6 DHRC 1438 (c. Feb. 4, 1788) ("the Confederation, in appearance imparted many, if not most of the great powers, now inserted in the proposed Constitution …. but not one efficient power, to carry a single article into effect… —These govermental powers, in order to have full & proper effect, must, in the nature of things, consist of the Executive, the Legislative, & judicial. Without these govmt cannot be carried an End.").

[369] Publius: The Federalist 48, DHRC (Feb. 1, 1788).

implement instructions, it's just not that hard to explain.

IV. "The Executive Power" Was Not Another Word for Royal Prerogative

At this point the affirmative case for the meaning of "executive power" is complete. What remains is to explore its implications for the larger structure of Article II, and to more squarely address the principal competing theory in its own right. In broad strokes, this Part will proceed as follows. Part IV.A will sketch the radical implausibility of the residuum claim as a matter of Founding-era politics, political theory, and legal terminology. Part IV.B will show that, when engaging the question directly, the Founders rejected even the possibility of residual executive authority as absurd. Part IV.C will explore residuum theory's "dog that didn't bark" problem, emphasizing the sheer number of instances where at least *someone* would have referred to the possibility of a Vesting Clause residuum if such a thing was even plausibly in play.

A. The Royal Residuum is Facially Implausible

The first thing to say about the royal residuum is that it is wildly implausible on any serious account of the era's politics. To be sure, the incompetence and excesses of state legislatures during the Critical Period created a vocal constituency for a structurally independent executive branch with a legislative veto. Not everyone agreed, but there's no denying the appeal of state constitutions with strong executives like those of New York and Massachusetts.[370] Here are two more things that can't be denied: the virulently anti-monarchical cast of American politics, and the radical semantic unsuitability of "executive" as an umbrella term for royal power.

1. It's Politically Implausible

As discussed above, Founders of all ideological stripes recognized that anti-monarchism was perhaps the defining feature of American politics. Other than anxiety about national consolidation, the biggest problem in selling the constitution was probably American revulsion for even the slightest pong of monarchy. On this point, there may be no prose more purple than Hamilton's:

> [T]he writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation, calculating upon the aversion of the people to monarchy, they have endeavoured to inlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo but as the full grown progeny of that detested parent.

[370] *See, e.g.*, Willi Paul Adams, *The First American Constitutions* 254-273 (1973); Gordon S. Wood, The Creation of the American Republic 1776-1787, 430-438 (1998). *But see* Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (1997) (suggesting that other historians attribute too much significance to "the Massachusetts Moment").

> To establish the pretended affinity they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate … have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a King of Great-Britain. He has been shown to us with the diadem sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses; giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been almost taught to tremble at the terrific visages of murdering janizaries; and to blush at the unveiled mysteries of a future seraglio.[371]

Hamilton therefore set out to rout such comparisons with a relentless demonstration of the "gross pretence of a similitude between a King of Great-Britain and a magistrate of the character marked out for that of the President of the United States."[372] Such Federalist mockery, of course, only evinced their political concern about this line of attack: "The enemies of the new form of government endeavour to persuade others, what I can scarcely think they believe themselves; that the President of the United States is only another name for King, and that we shall be subject to all the evils of a monarchical government." [373]

For now, suffice it to say that the Federalists' urgent need to disprove such comparisons marks the *political* implausibility of the Executive Power Clause as the site of some royal residuum:

> We have seen that the late honorable Convention, in designating the nature of the *chief executive office* of the United States, have deprived it of all the dangerous appendages of royalty, and provided for the frequent expiration of its limited powers—As our President bears no resemblance to a King, so we shall see the Senate have no similitude to nobles.[374]

On this background, it would be deeply weird to imagine that the Framers snuck in—much less that the Ratifiers approved—a corpus of royal power that no English monarch had claimed since James II. The much-rehearsed Whig history of English constitutionalism depended on the elimination of exactly such open-ended "sovereignty" in the king. Sure, many American patriots were increasingly dissatisfied with unchecked unicameral republicanism. But it's implausible in the extreme that the revolutionary generation would have responded by re-introducing the substance of Crown prerogative under a different

[371] Publius (Hamilton): The Federalist 67, New York Packet, 16 DHRC 369 (March 11, 1788).
[372] Publius (Hamilton): The Federalist 67, New York Packet, 16 DHRC 369 (March 11, 1788).
[373] Publicola: Address to the Freemen of North Carolina, State Gazette of North Carolina, 16 DHRC 493 (March 27, 1788).
[374] An American Citizen II [Tench Coxe?]: On the Federal Government, Philadelphia Independent Gazetteer, 13 DHRC 264 (Sept. 28, 1787).

name.

2. It's Doctrinally Implausible

The sheer political implausibility of a royal residuum is compounded by its impossibility as a matter of doctrine and terminology. For one thing, the idea that "the executive power" was an umbrella term for all of the king's powers runs into a brick wall when you consider that the royal prerogative also included a veto[375]—which was unanimously classified as legislative.[376] More fundamentally, the Founders followed Blackstone (and the rest of English law) in expressly *distinguishing* executive power from the other branches of royal authority, whether in foreign affairs, national security, finance, commerce, or church government. Residuum theory requires us to believe that that this standard term of art for one discrete function suddenly became the catchall for naming the full motley array. Far from suggesting a sudden abandonment of black letter terminology, however, the evidence all points to a rather dull carrying forward of the standard framework in a robustly transatlantic legal culture.[377]

There's just no getting past the array of writers who expressly distinguished between "legislation and the consequent executive and judicial rights" on one hand and foreign affairs powers like "[t]he rights of making war and peace, consequently of raising troops,

[375] That the crown's negative had basically fallen into disuse domestically left it no less a black letter component of royal prerogative. Certainly the Founding generation had recent experience with crown representatives vetoing the legislative projects of the colonial legislatures. "The king of England has an unconditional negative," wrote one Federalist, "and has often exercised it in his former colonies." Reply to An Officer of the Late Continental Army, Independent Gazetteer, 2 DHRC 216 (Nov. 10, 1787).

[376] For just a few examples, see, *e.g.*, Madison, 1 Farrand 139 (June 6, 1787); [Townshend] Instructions to Daniel Adams, Delegate to State Convention, 5 DHRC 1055 (Dec. 31, 1787); John Leland's Objections to the Constitution, 8 DHRC 424 (Feb. 28, 1788). Some discussions of the veto expressly contrasted "the supreme executive power" or "the sole executive authority" and the royal negative—which was "a branch of legislative jurisdiction," The Impartial Examiner IV, Virginia Independent Chronicle, 10 DHRC 1609 (June 11, 1788) (Extraordinary); see also James Wilson, 1 Farrand 140 (June 6, 1787) (describing the President's "[r]evisionary duty" as categorically "extraneous" from his "executive duties")

The choice to create a presidential veto—the veto as such occasioned remarkably little resistance at the convention, though it was more controversial during ratification—was just another example of why it is far more accurate to speak of the Constitution's distribution of powers rather its separation of them. See 1 Farrand 94 (June 4, 1787) (adopting qualified negative). See also Story, Commentaries on the Constitution ("In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws.

[377] *See generally*, *e.g.*, Mary Sarah Bilder, *Colonial Legal Culture and the Empire* (2008); Daniel Hulsebosch, *Constituting Empire* (2005).

establishing navies, arsinals, &c" on the other.[378] Caroliensis was typical in reminding South Carolinians that "[n]ot only all executive power is lodged in" the King, but *also* twelve *more* specifically enumerated "powers and prerogatives….together with many others, with which any person may make himself more particularly acquainted by reading the learned and accurate judge Blackstone on the subject."[379] The point is equally unmistakable in Publius's implication that the Executive Power Clause didn't even bear mention:

> [While] the executive authority, with few exceptions, is to be vested in a single magistrate[,] … this will scarcely … be considered as a point upon which any comparison can be grounded; for if in this particular there be a resemblance to the King of Great-Britain, there is not less a resemblance to the Grand Signior, to the Khan of Tartary, to the man of the seven mountains, or to the Governor of New-York.

For the executive power was nothing more than the basic enforcement authority that any magistrate had to possess. The only way to assess comparisons to the English king was by comparing the *other* presidential powers to the *other* elements of crown prerogative. And so Hamilton pivoted to a drumbeat of contrasts between the *other elements* of Crown prerogative and the *other authorities* enumerated in Article II.[380] Residuum theory, which

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[378] P. Valerius Agricola, Albany Gazette, 19 DHRC 186 (Nov. 8, 1787). For a mere sampling of other examples, see, *e.g.*, Cincinnatus V: To James Wilson, Esquire, New York Journal, 19 DHRC 319 (Nov. 29) ("sovereignty consists in three things—the legislative, executive, and negociating powers."); Federalist 75 (Hamilton), Publius: The Federalist 75, New York Independent Journal, 16 DHRC 481 (March. 26, 1788) (distinguishing between "the power of making treaties" and "the class of executive authorities"); Livingston, Draft Essay in Defense of the Constitution, 23 DHRC 2536 ("The United Netherlands were also of distinct republicks possessing however a common council a common treasury & a common military establishment & a common executive…."); Caroliniensis, Charleston City Gazette, 27 DHRC 235 (April 1 & 2, 1788) (distinguishing between the English King's possession of "all executive power" and his separate possession of foreign affairs authorities); Luther Martin: Address No. III, Maryland Journal, 27 DHRC 235 (March 28, 1788) ("the general government [possesses] extensive and unlimited powers … in the executive legislature and judicial departments, together with the powers over the militia, and the liberty of establishing a standing army"); Fabius IX, Pennsylvania Mercury (May 1, 1788), 17 DHRC 261 ("Is there more danger to our liberty, from such a president as we are to have, than to that of Britons, from an hereditary monarch, with a vast revenue; absolute in the erection and disposal of offices, and in the exercise of the whole executive power; in the command of the militia, fleets, and armies, and the direction of their operations; in the establishment of fairs and markets, the regulation of weights and measures, and coining of money; who can call parliaments with a breath, and dissolve them with a nod; who can at his will, make war, peace, and treaties irrevocably binding the nation; and who can grant pardons or titles of nobility, as it pleases him?")

[379] Caroliniensis, Charleston City Gazette, 27 DHRC 235 (April 1, 2, 1788).

[380] Federalist 69 (Hamilton), New York Packet, 16 DHRC 387 (March 14, 1788). See *infra*, note __ for the full list of contrasts: it's striking stuff.

constantly cites such federative competences as being contained within "executive power," simply can't make sense of these constant distinctions.[381]

B. The Royal Residuum Was Expressly Rejected

Standing alone, this semantic and political implausibility is fatal to the cause of residuum theory. But we needn't limit ourselves to linguistic or historical inference, because residuum theory is even worse off than its failure to cite affirmative evidence from the Founding might suggest. That's true in two respects: first, the Founders' repeated and unmistakable denial of any such residual authority; and second, the number of instances where their failure to mention such authority is basically impossible to explain unless it didn't exist.

1. They Knew Exactly What a Residuum Structure Looked Like.

The Founders were thoroughly familiar with residuum structure as a doctrinal tool. The common law was understood as residual in precisely this sense,[382] and the concept was well-established as a structuring device for other kinds of legal authority as well. The 1774 case of *Campbell Hall*, well known to the colonists, expressly deployed the notion of a defeasible residuum to explain royal power in foreign affairs.[383] *Marbury v. Madison* later explored a hypothetical government structure where "the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power,"[384] and *Gibbons v. Ogden* engaged the appellants' claim that "full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it."[385] While the question of defeasibility might vary from system to system, the underlying conceptual structure was an off-the-shelf move: residual authority was that component of an original grant that remained after adjustment by some superior source of legal authority.

The structural concept of a residuum was thus regularly invoked by all sides of the

[381] *Cf.* Marine Committee to William Aylett. 12 Let. Del. Cong. _ (DATE) (quoting a separate letter written to James Maxwell and Paul Loyall) (contrasting "the executive part of [military] business" and the non-executive part").

[382] Mortenson, *supra* note _.

[383] *Campbell v. Hall*, 1 Cowp. 204, 98 E.R. 1045 (1774) ("If the King (and when I say the King, I always mean the King without the concurren[ce] 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"). On the contemporary salience of *Campbell*, see John Philip Reid, *Constitutional History of the American Revolution; The Authority of Rights* 158 (noting "the discussion [*Campbell*] generated during the months leading up to the American Revolution.").

[384] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[385] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Founding debates. They used a variety of words for the idea, from "residuum"[386] and "residue"[387] in the most general sense to "prerogative" when talking specifically about executive magistrates.[388] They deployed the concept to describe the fundamental allocation of authority in state and federal government when discussing the need for a bill of rights.[389] And they deployed it again when discussing the British system's distinctive approach to the residual authorities of an executive magistrate.

At the Virginia ratifying convention, for example, George Nicholas leaned hard on the residuum structure of English crown power as a reason *not* to adopt a bill of rights in America:

> In England, in all disputes between the King and people, recurrence is had to the enumerated rights of the people to determine. Are the rights in dispute secured—Are they included in Magna Charta, Bill of Rights, &c. If not, they are, generally speaking, within the King's prerogative. In disputes between Congress and the people, the reverse of the proposition holds. Is the disputed

[386] Spencer, NC Ratific. Debates, 4 Elliot's 136 (July 28, 1788) ("those unalienable rights, which are called by some respectable writers the residuum of human rights"); Federal Farmer, Letter XIII, New York (May 2, 1788), _ DHRC _, at http://rotunda.upress.virginia.edu/founders/RNCN-02-20-02-0004-0139 (After specifying certain appointments provisions, "we shall then want to lodge some where a residuum of power, a power to appoint all other necessary officers…. The fittest receptacle for this residuary power is … the first executive magistrate, advised and directed by an executive council…").

[387] An Annapolitan, Annapolis Maryland Gazette, 11 DHRC 218 (Jan. 31, 1788) ("One of these branches possesses a great share of the executive authority, the residue of which is committed to a single man") (describing sharing of executive power between Senate and President). For more on the sense in which the Senate had executive power, see *infra*, Part V.B.

[388] Publius, Federalist 26, New York Independent Journal, 15 DHRC 65 (Dec. 22, 1787) ("In England for a long time after the Norman conquest the authority of the monarch was almost unlimited. Inroads were gradually made upon the prerogative, in favour of liberty, first by the Barons and afterwards by the people, 'till the greatest part of its most formidable pretensions became extinct.").

[389] Spencer, NC Ratific. Debates, 4 Elliot's 136 (July 28, 1788) ("There has been a comparison made of our situation with Great Britain. We have no crown, or prerogative of a king, like the British constitution."); A Citizen of New-York [John Jay], An Address to the People of the State of New York, 20 DHRC 922 (April 15, 1788) ("In days and countries where Monarchs and their subjects were frequently disputing about prerogative and privileges, the latter often found it necessary [to] oblige the former to admit by solemn acts, called bills of rights, that certain enumerated rights belonged to the people, and were not comprehended in the royal prerogative"); Thomas Hartley, Pennsylvania Ratification Convention, DHRC (Nov. 30, 1787) ("[W]hatever portion of those natural rights we did not transfer to the government was still reserved and retained by the people; for, if no power was delegated to the government, no right was resigned by the people").

> right enumerated? If not, Congress cannot meddle with it. Which is the most safe? The people of America know what they have relinquished, for certain purposes. They also know that they retain every thing else, and have a right to resume what they have given up, if it be perverted from its intended object. The King's prerogative is general, with certain exceptions. The people are therefore less secure than we are.[390]

When Patrick Henry rose the following week to dispute Nicholas's conclusion, he began by agreeing that crown power was residual: "every possible right which is not reserved to the people by some express provision or compact, is within the King's prerogative." According to Henry, however, the American context rendered this consideration irrelevant.[391] Nicholas returned to the point shortly thereafter, again invoking the residual structure of English royal authority as a contrast to American governance structure: "It is easier to enumerate the exceptions to [the King's] prerogative, than to mention all the cases to which it extends."[392]

This exchange of agreement between opposite ends of the ideological spectrum. exemplifies what earlier work has already shown. Eighteenth-century Americans indeed had a specific word for any catchall residual authority held by a magistrate. And that word was "prerogative,"[393] used perhaps most frequently in reference to the English king's residual authorities in the realms of foreign and military affairs.[394]

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[390] George Nicholas, Va. Ratific. Debates, 9 DHRC 1092 (June 10, 1788).

[391] Patrick Henry, Va. Ratific. Debates, 10 DHRC 1229 (June 16, 1788) ([I]f implication be allowed, you are ousted of those rights. If the people do not think it necessary to reserve them, they will be supposed to be given up.").

[392] George Nicholas, Virginia Debates, 10 DHRC 1299 (June 16, 1788).

[393] *See*, *e.g.*, Congress's Proclamation to Colonies (Feb. 13, 1776) J. Cont. Cong. 135-136 ("The Share of Power, which the King derives from the People, or, in other Words, the Prerogative of the Crown, is well known and precisely ascertained"); Americanus VII, New York Daily Advertiser, 20 DHRC 629 (Jan. 21, 1788) ("the ideas we have imbibed from our English ancestors" include an understanding of "[t]he extensive prerogatives and regal state, which the Supreme Executive in England have always possessed"); Governeur Morris, 5 Elliot's 287 (July 7, 1787) ("the great prerogatives of the [German] emperor, as head of the empire"). *See generally*, Mortenson, *supra* note __.

[394] For a few examples from document not cited elsewhere in this article, see James Madison letter to W.C. Rives, 3 Farrand 521 (Oct. 21, 178[7]) ("the Royal prerogatives of war & peace, treaties coinage &c."); George Nicholas, Virginia Debates, DHRC (June 18, 1788) ("king's prerogative to make treaties, leagues, and alliances"); Congress's Response to the King's Proclamation, J. Cont. Cong. 510 (Aug. 20. 1782) ("the prerogative of the crown to manage the affairs of peace"); Westchester Farmer, To Citizens of America, DHRC (June 8, 1787) ("The powers of the supreme executive council should be well defined, and be perfectly enabled to maintain its independence and vigor. It should possess the prerogative of making peace and war, of sending and receiving all ambassadors, of making treaties, leagues and alliances with foreign states and princes").

2. They Repeatedly Denied that Any Such Residuum Existed in Article II

On this background, the Founders' repeated denial of any royal residuum is unmistakable. The residuum concept was standard operating procedure. The terms "executive prerogative"[395] and "prerogatives of the president"[396] were readily available—as was the move of building new structures from existing governance templates.[397] But the Founders roundly rejected the whole apparatus when it came to the definition of presidential power, precisely because of American "jealousy of this danger" from "a monarch … [with] prerogatives very considerable."[398] Indeed, this rejection was a pillar of Federalist responses to the likes of Patrick Henry roaring that "there is to be a great and mighty President, with very extensive powers; the powers of a King"[399] and Luther Martin prophesying that the President will "when he pleases … become a king in name, as well as in substance."[400] Over and over again, Federalists responded to such loose emotive comparisons by dragging their opponents back to the plain text of the Constitution, the well-known doctrinal structure of English constitutionalism, and the patent difference between the two.

It would be hard to make the point more clearly than "A Native of Virginia" did in criticizing the Glorious Revolution for undershooting its mark. True enough, William of

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395 Madison, Comments on Virginia and Kentucky Resolves, 4 Elliot's 551-553 ("It is in this latitude, as a supplement to the deficiency of the laws, that the degree of executive prerogative materially consists.").

396 This phrase was used more casually, but it was available as well. *See*, *e.g.*, Cato IV, New York Journal, 19 DHRC 195 (Nov. 8, 1787) ("the direct prerogatives of the president"); Americanus II, Virginia Independent Chronicle, 8 DHRC 244 (Dec. 19, 1787) ("the province of the president, and … the exercise of his prerogatives").

397 *See*, *e.g.*, Andrew Cecchinato, *William Blackstone as Interpreter of the European Legal Tradition* 68 (2019). ("[E]ven within those doctrines that accompanied and sustained the rise of nation-states, the paradigm of sovereign power could not be understood if not by attributing to kings those same prerogatives that had been traditionally attributed to the emperor himself."

398 Marcus IV [James Iredell], Norfolk and Portsmouth Journal, 16 DHRC 379 (March 12, 1788) ("a constant jealousy" toward executive authority "is both natural and proper"); Americanus VII, New York Daily Advertiser, 20 DHRC 629 (Jan. 21, 1788) ("The [King's] extensive prerogatives and regal state … have ever been, and with reason too, the object of terror to the friends of liberty. All their efforts have been directed to … circumscribe and limit these dangerous powers within proper bounds.").

399 Patrick Henry, Va. Ratific. Debates, 9 DHRC 943 (June 5, 1788). *See also*, *e.g.*, Randolph, Va. Ratific. Debates, 9 DHRC 1006 (June 7, 1788) (describing antifederalist claim that "the President can … establish himself a monarch"); Patrick Henry, Va. Ratific. Debates, 10 DHRC 1371 (June 18, 1788) ("Gentlemen say, that the King of Great-Britain has the same right of making treaties that our President has here. I will have no objection to this, if you make your President a King.").

400 Luther Martin, Genuine Information IX, Baltimore Maryland Gazette, 15 DHRC 494 (Jan. 29, 1788).

Orange dropped any pretense "to a divine right of governing," "acknowledged his [authority] to flow from the people," and even "entered into a compact with them, which recognized that just and salutary principle." But that didn't get the job done: the legal substance of Crown prerogative had been left in place:

> Had the English at this time limited the regal power in definite terms, instead of satisfying themselves with a Bill of Rights, there would have been an end of prerogative; but they from habit were contented with a Bill of Rights, leaving the prerogative still inaccurately defined, to claim by implification, the exercise of all the powers not denied it by that declaration.

Could there be a better definition of residuum theory than "[a] prerogative … to claim by implification, the exercise of all the powers not denied" elsewhere in a constitutional document? And "A Native of Virginia" didn't stop there. The draft Constitution, he said, had confronted and resolved this problem, precisely by *rejecting* that structure and so finally finishing the project of their ideological forebears. Under the Constitution,

> [t]he powers of the President are not kingly, any more than the ensigns of his office. He has no guards, no regalia, none of those royal trappings which would set him apart from the rest of his fellow citizens

No more than the President had purple robes and a sparkling diadem, in other words, could he "claim by implification" the right to any powers not expressly enumerated.[401] That was because the Constitution did what the English had failed to do: "limit[] the [magistrate's] power in definite terms" and make "an end of prerogative."

Federalist polemicists were relentless on this point in refuting claims that a unitary executive magistracy would be an elective monarchy in all but name.[402] The President would possess the executive power, they emphasized—and properly so. But he would have nothing like the default suite of magisterial authorities known to British law as prerogative: "the doctrine of prerogative and other peculiar properties of the royal character" were simply "incompatible with the view of these states when they are settling the form of a republican government."[403] Instead, "[t]he Constitution plainly, openly, and without disguise tells us the titles, offices, powers, and privileges of [the President, Senators, and Representatives] and the purposes of their appointment. What snake in the grass is there

[401] A Native of Virginia: Observations upon the Proposed Plan of Federal Government, 9 DHRC 655 (Apr. 2, 1788) (discussing structural reasons to omit a bill of rights and presidential term limits).
[402] For a typical example, see Baltimore Gazette, DHRC (July 3, 1787) ("Mr. Adams … seems to bring us back again to the English government; as he … is particularly fond of a strong Executive. Surely the air of Europe has not infected our Plenipotentiary? This language is by no means consistent with republicanism, and there are other passages in this writer which point direct to monarchy, or what is the same, 'a first Magistrate possessed exclusively of the Executive power.'").
[403] The Impartial Examiner IV, Virginia Independent Chronicle, 10 DHRC 1609 (June 11, 1788) (Extraordinary).

here?"[404]

Time and again their pamphlets, essays, and speeches made this point by contrasting a recitation of Crown prerogatives—in both their detailed administrative aspects and their open-ended residual nature—with the President's far shorter and expressly defined suite of authority.

> It must excite ridicule and contempt in every man when he considers on one side, the dreadful catalogue of unnecessary, but dangerous, prerogatives, which, in the British Government, is vested in the Crown; and, on the other side, takes a view of the powers with which this Constitution has cloathed the President.[405]

From here, Federalist authors would actually catalogue the Crown prerogatives, in language practically cut and pasted from the canonical Blackstone litany. Americanus's version was on the short side, comparatively speaking:

> Imperial dignity, and hereditary succession—constituting an independent branch of the Legislature—the creation of Peers and distribution of titles and dignities—the supremacy of a national church—the appointment of Archbishops and Bishops—the power of convening, proroguing, and dissolving the Parliament—the fundamental maxim that the King can do no wrong—to be above the reach of all Courts of law—to be accountable to no power whatever in the nation—his person to be sacred and inviolable—all these unnecessary, but dangerous prerogatives, independent of many others, such as the sole power of making war and peace—making treaties, leagues and alliances—the collection, management and expenditure of an immense revenue, deposited annually in the Royal Exchequer—with the appointment of an almost innumerable tribe of officers, dependent thereon—all these prerogatives, besides a great many more, which it is unnecessary to detail here, (none of all which are vested in the President) put together, form an accumulation of power of immense magnitude; but which, it seems, are only "immaterial incidents." ....
>
> You institute a comparison between a King of England, and a President, and because you find that some of the powers necessarily vested in this President, and some of the prerogatives of that King are alike, you place them on a footing, and talk "of a President possessing the powers of a Monarch."[406]

This pivot from mockery to a rote itemization of black letter prerogative doctrine was

[404] Letter from New York, 3 DHRC 380 (Oct. 24 & 31, 1787). ("What reason have we therefore to be jealous that the Constitution, under the disguise of such humble appellations, aims at the dignity and powers of the King, Lords, and Commons of the British Parliament?").

[405] Americanus II, New York Daily Advertiser, 19 DHRC 287 (Nov. 23, 1787).

[406] Americanus II, New York Daily Advertiser, 19 DHRC 287 (Nov. 23, 1787) (quoting Cato No. __).

standard.[407] And the incredulous conclusion was inevitable: "Let me pause and seriously ask you sir," one Federalist wrote to his friend, "to compare this tremendous catalogue of powers, privileges and prerogatives, with those of our fœderal President."[408] The bare comparison—between England's "hereditary Monarch, with all the appendages of royalty, and immense powers" and "the feeble power of the President," armed only "with a small revenue and with limitted powers, sufficient only for his own support"—spoke for itself.[409] Indeed, once charges of kingship were dissected to their component parts, the modal

[407] The Blackstonian detail from Publius was typical of the genre:

> There is no pretence for the parallel which has been attempted between him and the King of Great-Britain…But to render the contrast, in this respect, still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer groupe.
>
> The President of the United States would be an officer elected by the people for four years. The King of Great-Britain is a perpetual and hereditary prince.
>
> The one would be amenable to personal punishment and disgrace: The person of the other is sacred and inviolable.
>
> The one would have a qualified negative upon the acts of the legislative body: The other has an absolute negative.
>
> The one would have a right to command the military and naval forces of the nation: The other in addition to this right, possesses that of declaring war, and of raising and regulating fleets and armies by his own authority.
>
> The one would have a concurrent power with a branch of the Legislature in the formation of treaties: The other is the sole possessor of the power of making treaties.
>
> The one would have a like concurrent authority in appointing to offices: The other is the sole author of all appointments.
>
> The one can infer no privileges whatever: The other can make denizens of aliens, noblemen of commoners, can erect corporations with all the rights incident to corporate bodies.
>
> The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorise or prohibit the circulation of foreign coin.
>
> The one has no particle of spiritual jurisdiction: The other is the supreme head and Governor of the national church!
>
> What answer shall we give to those who would persuade us that things so unlike resemble each other?–The same that ought to be given to those who tell us, that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

[408] John Brown Cutting to William Short, London, 14 DHRC 475 (Dec. 13, 1787) (detailed itemization of prerogative contrasted to presidential power). *See also*, *e.g.*, Fabius IX, Pennsylvania Mercury, 17 DHRC 261 (May 1, 1788) (same)

[409] Nicholas, Virginia Ratific. Debates, 9 DHRC 915 (June 4, 1788) (detailed itemization of prerogative contrasted to presidential power).

response was bafflement. Prerogative structure just wasn't how a government of limited and defined powers *worked*. It was precisely because the President's powers were "so clearly defined," wrote Caroliniensis, that they could "never can be dangerous."[410] Article II left no room for implification: What you see is what you get.

The 1793 case of *Chisholm v. Georgia* serves well as a summary of the conventional framework. In the course of discussing the legal dispute in that case, the Supreme Court expressly contrasted the empty vessel of "executive" power with the open-ended inherent authority implied by "prerogative." "A Governor of a State," the majority observed,

> is a mere Executive officer; his general authority very narrowly limited by the Constitution of the State; with *no undefined or disputable prerogatives*; without power to effect one shilling of the public money, but as he is authorised under the Constitution, or by a particular law; having no colour to represent the sovereignty of the State, so as to bind it in any manner to its prejudice, unless specially authorised thereto.[411]

With the eighteenth century doctrinal framework firmly in mind, you can't miss the Court's point here. "Executive" authority is by its nature grounded in "*special* authoris[ations]" rather than general implifications of "undefined … prerogatives." *Chisholm* may have been talking about a state executive, but the vocabulary it used was as general as could be. Certainly there is no way to reconcile it with a view of "executive" authority as a hidey hole for residual prerogative.

C. A Play Park of Silent Dogs

Others have observed the failure of royal residuum theorists to identify even one positive assertion of the claim during drafting or ratification.[412] I've managed no better on their behalf. Despite reviewing tens of thousands of pages of commentary from hundreds of writers and speakers—and going to an abundance of caution to flag all instances that even vaguely tickled my antennae for a second and third review with as generous a mindset as could be mustered—I have been unable to find a single statement that the Executive Power Clause contained a substantive residuum.[413]

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[410] Caroliniensis, Charleston City Gazette, 27 DHRC 235 (April 1, 2, 1788) (contrasting the "supreme executive authority" that was "vested" in the President with *other* Crown prerogatives like the veto and the treaty power).

[411] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (emphasis added). See also *Calder v. Bull*, 3 U.S. 386, 398 (1798) ("If … a government[] … 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.").

[412] Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545 (2004).

[413] The closest thing worth flagging should speak to what I've meant to serve as the interpretive

But the research for this article reveals something much more important still: *this silence reigned even among participants who had a strong situational motivation to speak*. If there had been any possibility of reading the Executive Power Clause to contain even a sliver's residuum of substantive authority, it is simply impossible to explain why *no one* in two groups of commentators thought to propose, engage with, or at least mention the idea. First, authors who were conducting a treatise-style march through the powers of the President. Second, polemicists who attacked the constitutional President as a tyrant. If the royal residuum had been even a colorable interpretive possibility, each group would have had strong intrinsic motivation to engage it. And yet none of them—not one—did so.

In the first category of treatise-style surveys of presidential power fall the antifederalist Cato[414] and the federalists Americanus,[415] Cassius,[416] James Iredell,[417] and Publius.[418] Cassius's comment was pithiest:

> Section one, of article second, provides, that the executive power shall be vested in a president of the United States. The necessity of such a provision must appear reasonable to any one; any further remarks, therefore, on this head, will be needless.

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generosity of review. In the course of Alexander White's general defense of the proposed constitution, he launched into a meandering digression into Roman constitutional structure. First noting that "[t]he legislative power was vested in the assemblies of the people then noted," he then observed that "[w]here the executive power was vested, and how distributed, I will give you in language better than mine," and proceeded to quote verbatim Polybius's description of the Roman consuls and senators. That description made clear that each had powers that were part of the Law Execution understanding of executive power: "the administration of all public affairs" as well as the appointments power. It also made clear that each officer had other powers as well, including some that were part of crown prerogative (declaring war) and some that were not (power of the purse). *See* Alexander White, *Winchester Virginia Gazette*, 8 DHRC 401, 406 (Feb. 22, 1788). White's discussion is no different in substance from Blackstone's survey of similar authorities in England. And it's hard to see how his introductory line about "the executive power" could be an umbrella category for everything described in the Polybius excerpt, since the list includes several uncontestedly *non*-executive authorities like spending power. But it's the closest thing I've found to something that could be read as even ambiguous on the point at issue, so I cite it here.

[414] Cato IV, New York Journal, 19 DHRC 195 (Nov. 8, 1787).

[415] Americanus II, Virginia Independent Chronicle, 8 DHRC 244 (Dec. 19, 1787).

[416] Cassius VI, Massachusetts Gazette, 5 DHRC 479 (Dec. 18, 1787).

[417] James Iredell, North Carolina Ratifying Convention (July 28, 1788) Elliot's IV:106-108.

[418] Publius: The Federalist 70, New York Independent Journal, DHRC (March 15, 1788); Publius: The Federalist 73, New York Packet, 16 DHRC 447 (March 21, 1788); Publius: The Federalist 74, New York Packet, 16 DHRC 478 (March. 25, 1788); Publius: The Federalist 75, New York Independent Journal, 16 DHRC 481 (March. 26, 1788); Publius: The Federalist 76, New York Packet, 17 DHRC 4 (Apr. 1, 1788); Publius: The Federalist 77, New York Independent Journal, 17 DHRC 9 (Apr. 2, 1788).

Only the standard understanding that the executive power is the power to execute, of course, could render "needless" any commentary beyond the mere quotation of the Executive Power Clause. But the loudest silence came from Publius, whose eighty-five essays left no argument unrebutted, no criticism unrebuked, and no rejoinder unsaid. Yet nowhere in the Federalist's relentlessly over-explanatory hard sale will you find a whiff of a suggestion that the Executive Power Clause might reference anything beyond the standard eighteenth century definition. Certainly none of the Federalist's long essays on the presidency, the Senate, or foreign affairs even hint at the possibility of a complicated interaction—one that would have cried out for explanation next to the endless trivia its authors *did* elaborate—between a prerogative-style grant to the President and a partial reallocation of that authority elsewhere in the document.

From such careful itemizers of constitutional authority, this obliviousness to "the executive power" as a possible font of substantive authority is telling. But it is almost more striking among opponents of the proposed presidency—some practically hysterical about monarchy in disguise. Not two sentences after passing over the President's "supreme executive power" without blinking, the "Impartial Examiner" burst into a fury about the Constitution's importation of crown prerogative—because it included a *veto*:

> the British monarch being founded on maxims extremely different from those, which prevail in the American States, the writer hereof is inclined to hope that he will not be thought singular, if he conceives an impropriety in assimilating the component parts of the American government to those of the British: and as the reasons, which to the founders of the British constitution were motives superior to all others to induce them thus to give the executive a controul over the legislative, are so far from existing in this country, that every principle of that kind is generally, if not universally, exploded; so it should appear that the same public spirit, which pervades the nation, would proclaim the doctrine of prerogative and other peculiar properties of the royal character, as incompatible with the view of these states when they are settling the form of a republican government.[419]

It's basically impossible to take residuum theory seriously when reading the torrent of words devoted to charges like this without encountering a single reference to the Executive Power Clause as granting any kind of substantive authority, let alone a residual royal prerogative.[420]

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[419] The Impartial Examiner IV, Virginia Independent Chronicle, 10 DHRC 1609 (June 11, 1788) (Extraordinary).

[420] For others not previously cited who criticized President as a king without saying a word about the Vesting Clause, see, *e.g.*, Luther Martin, Genuine Information I, VI, & IX, Baltimore Maryland Gazette, 15 DHRC cite, cite, 494 (Jan. 29, 1788); Tamony, Virginia Independent Chronicle, 8 DHRC 286 (Jan. 9, 1788); Gazette of the State of Georgia, 16 DHRC 442 (March 20, 1788).

Consider what opponents of the constitution had to say in the North Carolina ratifying convention after the Executive Power Clause was read aloud for discussion: nothing. *Nothing.* This silence was notable even at the time; indeed, it affirmatively infuriated the federalist William Davie. After what was apparently an extended pause following the reading of the clause, he finally burst out:

> What is the cause of this silence and gloomy jealousy in gentlemen of the opposition? This department has been universally objected to by them. The most virulent invectives, the most opprobrious epithets, and the most indecent scurrility, have been used and applied against this part of the Constitution. It has been represented as incompatible with any degree of freedom. Why, therefore, do not gentlemen offer their objections now, that we may examine their force, if they have any?
>
> The clause meets my entire approbation. I only rise to show the principle on which it was formed. The principle is, the separation of the executive from the legislative — a principle which pervades all free governments.[421]

While Davie's rhetorical flourish usefully makes the awkward pause leap off the transcribed page, it wasn't exactly fair in context. Because the opposition had plenty to say about the *rest* of the President's powers—indeed, the convention spent days on the rest of Article II. But the Executive Power Clause? Nothing but "silence" greeted it in among North Carolina antifederalists who had otherwise come loaded for bear.

The lack of reference to residuum theory at the Virginia convention may be even more striking, because the antifederalists in Virginia were simultaneously among the most talented lawyers and the most paranoid republicans of their generation. Their florid fantasies of despotism were enough to drive the earnest James Madison to distraction.[422] And yet, even though the crown prerogative was the subject of extended discussion in the Virginia convention,[423] the antifederalists' frantic efforts to puff up the Constitution into the foetus of monarchy failed to gesture *even once* at the Executive Power Clause as a source of authority even worth comment, let alone concern. Over two full days spent discussing

[421] William Davie, 4 Elliot's 102-103 (July 26, 1788) ("Is it not highly improper to pass over in silence any part of this Constitution which has been loudly objected to?").

[422] These ranged from the idea that the future District of Columbia was designed as a refuge for traitors to the claim that Congress's power to "govern[]" the militia was meant to smuggle in permanent martial rule for the entire male citizenry. "We must," Madison finally said, "keep within the compass of human probability." Madison, Va. Ratific. Debates, 9 DHRC 915 (June 4, 1788).

[423] Patrick Henry, Va. Ratific. Debates, 10 DHRC 1299 (June 16, 1788) ("in Great-Britain …. every possible right which is not reserved to the people by some express provision or compact, is within the King's prerogative"); George Nicholas, Virginia Debates, 10 DHRC 1299 (June 16, 1788) ("easier to enumerate the exceptions to his prerogative, than to mention all the cases to which it extends").

Section 1 of Article II, the only thing they discussed was its mechanism for electing the President.[424] The Executive Power Clause itself was never even mentioned. It wasn't until they got to the article's *second* section—the part with clauses complicated or controversial enough to be worth actual discussion—that they started talking about the powers of the office. And then they leapt immediately into the fray, with Mason expressing "alarm[]" at "the magnitude of the powers of the President" from his authority as Commander-in-Chief to his power to pardon,[425] and the other delegates off to the races from there.

The point of all this isn't that the evidentiary record is spotty. To the contrary, it's voluminous. And yet residuum theory doesn't appear once in their discussions—across an enormous array of instances where only a ninny would have failed to raise it if the idea were vaguely plausible, let alone the obvious implication of a well-known phrase.

* * *

Consider too the following coda. It's a mistake to fetishize the sequence of recorded discussion at the drafting Convention, a project that too often devolves into the dictionary equivalent of numerology. But note how one of the most puzzled-over exchanges in the Philadelphia records reveals itself as perfectly sensible when read in light of the standard eighteenth-century framework.

On June 1, the Convention opened the topic of presidential power. The starting point was the Virginia Plan, which proposed

> that a national Executive be <instituted, to be chosen> by the national Legislature for the term of years <&c> to be ineligible thereafter, to possess the executive powers of Congress.

This standard reference to the disaggregated components of law execution tracked longstanding references by the Continental Congress to "the executive powers, or the powers of administration."[426] Channeling the standard anti-monarchical anxieties of his era, however, Charles Pinckney wanted to be as specific as possible. So he rose to warn that unless they were careful to define their terms, the new chief magistrate might try to claim a broad suite of powers analogous to the actual royal prerogative and thus "render the executive a Monarchy."[427]

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[424] *See* Va. Ratific. Debates, 10 DHRC 1371 (June 18, 1788); Va. Ratific. Debates, DHRC (June 17, 1788).

[425] George Mason, Va. Ratific. Debates, 10 DHRC 1371 (June 18, 1788) (first speech after "[t]he 1st clause, of the 2d section, [was] read").

[426] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774). For more on the disaggregated view of the coercive power, the implementation power, and the appointment power as component parts of law execution, see supra Part III.C.

[427] Pinckney, 1 Farrand 64-65 ("Mr. Pinkney was for a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render

Each of the next three speakers hastened to assure Pinckney that there was no plausible scenario under which the Convention would or even could adopt the residual prerogative that was the essence of such monarchy. Indeed, such a proposal would render any draft dead on arrival. John Rutledge began, declaring that while "he was for vesting the Executive power in a single person," he "was *not* for giving him the power of war and peace," and urging his fellow delegates to chime in on the point.[428] Roger Sherman followed up with doctrinaire republicanism: "the Executive magistracy" in its *entirety* should be "nothing more than an institution for carrying the will of the Legislature into effect." And then James Wilson—famously a forceful advocate for a strong executive—signed on to Rutledge's point in full, expressing it in the traditional Blackstone framework:

> He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.[429]

There were, Wilson said, only two "strictly Executive" powers among those contained in royal prerogative: "executing the laws" and "appointing officers." The other elements of royal prerogative were all "*legislative*"—explicitly including "that of war & peace &c." Certainly any particular political system might decide to allocate this legislative control over foreign and military affairs to the same political institution that held executive power. But like the other elements of royal prerogative, neither foreign affairs nor military authority was among the "executive powers, or the powers of administration"[430]—much less of *the* executive power that was eventually vested by the actual text of the Constitution.

After a brief squabble about whether the executive should be a single person, James Madison—ever the Convention's great sheepdog—herded them back to Pinckney's concern. Echoing Wilson's observation that "executive powers ex vi termini, do not include the Rights of war & peace &c,"[431] Madison proposed "to prevent doubts" about "General Pinckney['s fear that] improper powers might otherwise be delegated" with an amendment "fix[ing] the extent of the Executive authority" to "certain powers [that] were in their nature Executive." As then quickly adopted without dissent, the resulting amendment listed exactly two powers that were, per Madison's introduction, "in their nature Executive." And

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the Executive a Monarchy, of the worst kind, to wit an elective one.").

[428] (emphasis added)

[429] King's notes are to the same effect: "Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed." 1 Farrand 70 (King). And Pierce suggests that Wilson explicitly included the power of "[m]aking peace and war" in the "*legislative* powers" of the king. 1 Farrand 73 (Pierce)

[430] Continental Congress, *Letter to the Inhabitants of Quebec*, J. Cont. Cong. 104, 110 (Oct. 26, 1774).

[431] 1 Farrand 70 (King). Madison's notes of his own speech do not reflect this explicit claim.

they were (of course) the same ones Wilson had just finished saying were the "only" ones "strictly Executive" in nature: the power to execute the laws, and the power to make at least some appointments.[432]

Did the Convention later come to believe that the President should have *other* powers as well? For sure. But those subsequent additions were *in addition to* rather than *part of* the executive power. That's why Madison's amendment was proposed, that's how he explained it when introduced, and that's what they voted on without dissent. The notes are so brief, at least in part, because the basic point was so obvious to those discussing it.

Conclusion

As a historical matter, the competition between the royal residuum and the law execution interpretations of the Executive Power Clause isn't close. On one hand, you have an interpretation that is unanimously commanded by eighteenth-century legal treatises, political theory tracts, and dictionaries; that fits with everything we know about the political valence of monarchy in late eighteenth century America; that was expressly embraced by scores of Founders; and that makes sense of literally every reference to "executive" in the framing and ratification debates. On the other hand you have an interpretation whose proponents cannot identify a single phrase of direct affirmative support among the millions of words contained in the records of framing and ratification.

It might well be asked how anyone has concluded otherwise. At least where academic residuum theorists are concerned, the answer comes down to a few pervasive errors. First and easily the most important is what earlier work has described as the Metonymy Error: misunderstanding the metonymic logic of using the noun "executive" to name a political entity that possesses *both* "the executive power" and *also* many others.[433] A second and related error involves taking prescriptive claims that the executive *branch* should have various powers, and using them as evidence for the descriptive proposition that the executive *power* already includes them.[434] The third error is a failure to realize that the Founders' occasional

[432] 1 Farrand 64-66 (July 21, 1787) (as approved: "with power to carry into effect. the national laws [and] to appoint to offices in cases not otherwise provided for").

The full colloquy is even better. Madison's first draft of the amendment included a third category of presidential authority: "and to execute such other powers <'not Legislative nor Judiciary in their nature'> as may from time to time be delegated by the national Legislature." Pinckney spoke up immediately to "amend the amendment by striking out the last [category]." His earlier concerns apparently fully allayed by Wilson's reminder of the doctrinal point, he viewed it as "unnecessary, the object [already] being included in the 'power to carry into effect the national laws.'" He wasn't interested, in other words, in distinguishing between the negatively prohibitory and affirmatively implementatory aspects of law execution; for him they were features of the same authority.

[433] Mortenson, *supra* note [ ] (explaining this problem in detail).

[434] *See*, *e.g.*, Prakash & Ramsey, *supra* note [ ] at 267 ("Where did the [foreign affairs] power rest?

references to "executive power*s*" plural were grounded in the disaggregated understanding of Law Execution described in Part III.B.[435] The fourth error looks to Founding-era claims that both the Continental Congress[436] and the constitutional Senate[437] had executive power, which residuum theorists suggest can only be explained as a description of these bodies' foreign affairs competences.

In light of the arguments and evidence presented above, the gist of the first three errors should be obvious. The fourth category, which takes more time to address, will be taken up at some length in forthcoming work that maps the conceptual implications of the Law Execution thesis for contemporary doctrine. But a brief summary seems advisable, if only for those who are aware of the objections and would like to hear something about them here.

In short, every single description of the Continental Congress and the constitutional Senate as "executive" relied—without exception of which I am aware—on a straightforward Law Execution understanding of executive authority. The Continental Congress was said to have executive power because it had the power to execute laws, both by coercing compliance with prohibitions[438] and by implementing affirmative legislative projects.[439] Comparable claims about the Senate relied on varying combinations of three theories, each plainly grounded in the same Law Execution understanding. First, some Founders thought that the Senate's role in appointments was conceptually executive.[440]

With whoever wielded the executive power. Although the two powers were distinct in Locke's treatment…[,] the two powers, he said, 'are always almost united.'").

435 *E.g.*, Prakash & Ramsey, *supra* note [ ] at 281 ("The Virginia Plan … would have granted the executive the 'Executive rights' of the Continental Congress. This aspect, although seemingly innocuous, came in for heavy criticism. Some delegates did not want an executive with all the imperial trappings of foreign affairs.").

436 *E.g.*, McConnell, *supra* note [ ] at 192 ("The 'Executive rights' of the Confederation Congress went far beyond law execution— indeed, the Congress did not have the power of law execution. (Law execution was performed by the states).").

437 *E.g.*, Saikrishna Bangalore Prakash, *Imperial from the Beginning* 118-119 (2015) ("The Senate would serve as an executive council on treaties and diplomatic appointments…. [But] the Senate's executive powers over foreign affairs raised hackles [among] Anti-Federalist[s, and] Federalists generally agreed that treaty-making was an executive power.").

438 *E.g.*, Madison, 1 Farrand 447 (June 28, 1787) (Madison's notes) (the power to "operate immediately on … persons & properties" already "is the case in some degree as the articles of confederation stand; the same will be the case in (a far greater degree) under the plan proposed to be substituted.").

439 E.g. 9 J. Cont. Cong. 785 (Oct. 8, 1777) ("the committee appointed to carry into execution the resolution of Congress, ordering a medal to be struck and presented to General Washington").

440 *See supra*, Part III.C (discussing the view that the executive power entailed the right to appoint "assistances")

Second, some thought the Vice President's voting role forced a conceptually executive actor into the constituent membership of the body.[441] Third, some shared a forthrightly functional concern that regular interactions between the two bodies—including but not limited to what they described as the executive activity of appointments and the legislative activity of treatymaking—would produce a dangerous entanglement likely to yield functionally unified control over the full sequence of complete government.[442] Not one of these theories lends the slightest support to residuum theory.

And so we end where we started. For once, the original understanding of constitutional text is both clear and simple. When Article II vested "the executive power," it conveyed the authority to execute the laws. This power was an empty vessel that authorized only those actions previously specified by the laws of the land. Sometimes statutory terms delegated far-reaching policy discretion; other times statutes would specify in minute detail the precise and limited action that was authorized. Either way, the conceptual gist of the action was *implementation* of instructions and authority that *came from elsewhere*. Make no mistake: the presidency thus created was a massively powerful institution. Just not one with a free-floating foreign affairs power, a residual national security authority, or indeed any other power not specifically listed in the Constitution. To the contrary, the President thus created was "guided by law, "fetter'd by system," and "manacled both by man and measures."[443] Is he still?

[441] *E.g.*, Cincinnatus IV: To James Wilson, Esquire, New York Journal, 19 DHRC 281 (Nov. 22, 1787) (noting "the union of the executive with the legislative functions" and emphasizing "[t]he union established between them and the vice president, who is made one of the corps."). Cincinnatus also argued that the separation of powers was separately violated by the Senate's roles in appointments and impeachment. *Id.*

[442] *E.g.*, Cato VI, New York Journal, 19 DHRC 416 (Dec. 13, 1787) ("They are so intimately connected, that their interests will be one and the same"); George Mason, Va. Ratific. Debates, 10 DHRC 1371 (June 18, 1788) (the Constitution has married the President and Senate—has made them man and wife. I believe the consequence that generally results from marriage, will happen here. They will be continually supporting and aiding each other: They will always consider their interests as united…. The Executive and Legislative powers thus connected, will destroy all balances.").

[443] John Brown Cutting to William Short, London, 14 DHRC 475 (Dec. 13, 1787).