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# Article II Vests Executive Power, Not the Royal Prerogative

Julian Davis Mortenson

*University of Michigan Law School*, [jdmorten@umich.edu](mailto:jdmorten@umich.edu)

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## ARTICLE

### ARTICLE II VESTS THE EXECUTIVE POWER, NOT THE ROYAL PREROGATIVE

*Julian Davis Mortenson\**

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

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

*There was indeed a term of art for the Crown’s nonstatutory powers, including its various national security and foreign affairs authorities. But as a matter of well-established legal semantics, that term was “prerogative.” The other elements of the prerogative—including those*

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\* Professor of Law, Michigan Law School. Thanks to Kate Andrias, Nick Bagley, Mary Sarah Bilder, Curt Bradley, Josh Chafetz, Andrew Cecchinato, Bobby Chesney, Kristina Daugirdas, David Feldman, Martin Flaherty, Jean Galbraith, Jeff Goldsworthy, Tom Green, Monica Hakimi, Don Herzog, John Hudson, Aziz Huq, Rebecca Ingber, Andrew Kent, Adam Kleven, Gary Lawson, Marty Lederman, Thomas Lee, Michael McConnell, Conrad McRae, Gabe Mendlow, Henry Monaghan, Jefferson Powell, David Pozen, Richard Primus, Rebecca Scott, Matt Steilen, Jeremy Tellman, Matt Waxman, Ingrid Wuerth, and Ilan Wurman for helpful comments on this draft. Thanks also to participants in the ASIL International Law in Domestic Courts Workshop, Boston University Law Workshop, University of Cambridge Public Law Workshop, Michigan Legal Theory Workshop, and Yale–Duke Foreign Affairs Workshop for helpful discussions of various pieces of this project. Special appreciation goes to Seth Quidachay-Swain, Virginia Neisler, and the unsurpassed University of Michigan research librarians for their extraordinary support in making this project possible.

*relating to national security and foreign affairs—were possessed in addition to “the executive power” rather than as part of it.*

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## INTRODUCTION

What would happen if the President had no qualms about violating the law?<sup>2</sup> Suppose he is fighting terrorism and wants to deploy wiretaps prohibited by the statutory surveillance framework<sup>1</sup> and an interrogation program that violates federal criminal law.<sup>2</sup> Or imagine he wants to

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1. Cf. Offices of Inspectors Gen., Unclassified Report on the President’s Surveillance Program 11, 13 (2009), <https://fas.org/irp/eprint/psp.pdf> [<https://perma.cc/Q7H5-SV29>] (quoting an unreleased Office of Legal Counsel memo’s assertion that the Foreign Intelligence Surveillance Act “cannot restrict the President’s ability to engage in warrantless searches that protect the national security” (internal quotation marks omitted)).

2. Cf. Memorandum from Deputy Assistant Att’y Gen., Office of Legal Counsel, to Gen. Counsel, Dep’t of Def. 18–19 (Mar. 14, 2003) [hereinafter Office of Legal Counsel Torture Memorandum], <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutsideunitedstates.pdf> [<https://perma.cc/XQ4A-VHSV>] (contending that “if an interrogation method arguably were to violate” federal statutes criminalizing

conduct an unauthorized humanitarian intervention but runs into a statutory time limit requiring him to cease hostilities.<sup>3</sup> What if a statute requires U.S. passports to include a diplomatically provocative term, but the President wants the State Department to leave it out?<sup>4</sup> Different though the stakes and specifics of these questions may be, their underlying structure is identical. In each hypothetical, a presidential policy—to wiretap, torture, bomb, or scavenge—is prohibited by existing legislation. In each hypothetical, the prohibition is too clear to be finessed by clever statutory interpretation. And in each hypothetical, lawyers have to decide what will give way. Does the statute constrain the President? Or does executive power trump the statute?

A leading scholarly view—shared by at least one current member of the Supreme Court<sup>5</sup> and asserted with increasing persistence by the executive branch itself<sup>6</sup>—is that cases like these often turn on the President’s

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assault, maiming, and war crimes, then those statutes “would be unconstitutional as applied in this context”).

3. Cf. Dep’t of State & Dep’t of Def., *United States Activities in Libya* 25 (2011), <https://fas.org/man/eprint/wh-libya.pdf> [<https://perma.cc/M53X-JW2N>] (“The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution . . .”).

4. Cf. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082–83, 2096 (2015) (permitting the Administration to ignore a statute that entitled a Jerusalem-born U.S. citizen to have his passport list his place of birth as “Israel”).

5. See *id.* at 2097–99 (Thomas, J., concurring in the judgment in part and dissenting in part) (“Founding-era evidence reveals that the ‘executive Power’ included the foreign affairs powers of a sovereign State. . . . This view of executive power was widespread at the time of the framing of the Constitution.”).

6. See, e.g., Memorandum from Caroline D. Krass, Principal Assistant Att’y Gen., Office of Legal Counsel to Att’y Gen., *Authority to Use Military Force in Libya*, 2011 WL (OLC) 1459998, at \*5–6 (Apr. 1, 2011) [hereinafter *Office of Legal Counsel Libya Memorandum*] (arguing that the President has “independent authority” deriving from the President’s “unique responsibility, as Commander in Chief *and Chief Executive*, for ‘foreign and military affairs,’ as well as national security” (emphasis added) (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993))). The Obama Administration further argued that under the “historical gloss” on the executive power vested in Article II, the “President bears the ‘vast share of responsibility for the conduct of our foreign relations’” and accordingly holds “independent authority in the areas of foreign policy and national security.” *Id.* at \*7 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414, 429 (2003)). In *Zivotofsky*, the Administration grounded the President’s recognition power in the “assignment of the bulk of foreign-affairs powers to the President” and asserted that “Article II provides that ‘[t]he executive Power shall be vested in a President of the United States of America.’” Brief for the Respondent at 16, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628), 2014 WL 4726506 (alteration in original) (emphasis added) (quoting U.S. Const. art. II, § 1, cl. 1); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (“The Solicitor General seeks the power of seizure in [the Article II Executive Power Clause]. Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: ‘In our view, this clause constitutes a grant of all the executive powers of which the Government is capable.’”); Brief for the Petitioner at 4, *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16-1436), 2017 WL 3475820 (“‘The exclusion of aliens is a fundamental act of sovereignty’ that both is an aspect of the ‘legislative power’ and also ‘is inherent in the executive power to control the foreign affairs

constitutional possession of “the executive power.” Usually called the Vesting Clause Thesis, this view is said to date to a post-ratification pamphlet written by Alexander Hamilton.<sup>7</sup> It rests on a simple claim about the original understanding of the Constitution. Specifically: “[T]he executive power” was a term of art for a particular bundle of substantive powers held by the British Crown. In the same way that bestowing agency, guardianship, or bailment powers would convey a well-understood package of powers to an agent, guardian, or bailee, the vesting of “executive power” is said to have conveyed a bundle of authorities usually associated with kingship.<sup>8</sup>

From that starting point, the Vesting Clause Thesis derives the following rule: The constitutional President was understood to possess the same powers and privileges as the eighteenth-century British Crown, except when specifically limited by other provisions of the Constitution.<sup>9</sup> In its strongest form—which suggests that any limitation or reassignment would require very clear constitutional text—the Vesting Clause Thesis yields a powerful presumption of indefeasible<sup>10</sup> presidential authority in

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of the nation.” (emphasis added) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950))).

7. See Alexander Hamilton, *Pacificus No. 1* (1793), reprinted in 15 *The Papers of Alexander Hamilton* 33, 39 (Harold C. Syrett ed., digital ed. 2011) (“The enumeration [of specific presidential authorities later in Article II] ought rather therefore to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power [in the Executive Power Clause]; leaving the rest to flow from the general grant of that power . . .”).

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

9. See *infra* notes 40–45 and accompanying text (discussing the Vesting Clause Thesis in greater detail).

10. This Article shows that the Executive Power Clause is incapable of giving rise to *any* substantive foreign affairs authority, much less an indefeasible one. I note that here because there are versions of the Vesting Clause Thesis that view the powers it conveys as defeasible by legislative action—treating them as valid only in *Youngstown Zone Two*. See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (defining Zone Two as presidential action that has been neither authorized nor prohibited by Congress). But most modern Royal Residuum theorists view the suite of authorities as indefeasible—that is, valid even in *Youngstown Zone Three*. See *id.* at 637–38 (defining Zone Three loosely as presidential action that has been prohibited by Congress). This is not surprising: “If the President really has constitutional authority [under some express grant of power] to engage in certain conduct, it is very unclear why Congress should be allowed to limit its exercise, much less to make its exercise turn on the approval of other governmental actors.” Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 *B.U. L. Rev.* 375, 393 (2008); see also, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take*

the arenas of foreign affairs and national security. In a world where originalism is so influential, that's a big deal—especially since executive branch interpretation often proceeds either out of sight or without a clear path to judicial review.<sup>11</sup> Certainly the thesis loomed large in the real-world version of each controversy flagged above.

This Article lays the foundation for demonstrating that, as a historical claim about the document adopted by the Founders, the Vesting Clause Thesis is wrong. Historically speaking, there *was* a term of art for the basket of nonstatutory powers held by the British Crown. But that term was “royal prerogative.” Article II’s reference to “the executive power,” by contrast, referenced only one specific item in a very long list of royal authorities. Specifically, it meant the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power. As the leading English theorist of royal absolutism explained—with unmistakable disdain—the “executive power” was nothing more than “a power of putting [the] laws in execution.”<sup>12</sup> To be clear, even radical Whigs knew that the Crown had other powers besides the merely “executive.” But as a matter of well-established legal semantics, those powers were possessed *in addition to* “the executive power” rather than as *part of* it. For this reason, the first sentence of Article II simply cannot bear the weight of the Vesting Clause Thesis. It vests the executive power, not the royal prerogative.

If this is right, then three conclusions follow:

- First, the opening sentence of Article II vested exactly what it says: the power to execute the law, both by enforcing its negative prohibitions and by carrying out its affirmative projects.

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Care Clause, 91 Tex. L. Rev. 781, 856 (2013) (arguing that the President is entitled to refuse to comply with a law that “would interfere materially with the exercise of [a] constitutional power of the President (such as that over foreign affairs and national security)”); Saikrishna B. Prakash & Michael D. Ramsey, Foreign Affairs and the Jeffersonian Executive: A Defense, 89 Minn. L. Rev. 1591, 1593 (2005) [hereinafter Prakash & Ramsey, The Jeffersonian Executive] (“[T]he President has unilateral control . . . of those executive foreign affairs powers that are not otherwise allocated or shared.”); Saikrishna Prakash, Regulating Presidential Powers, 91 Cornell L. Rev. 215, 227, 236 (2005) (reviewing Harold J. Kent, *Presidential Powers* (2005)) (“[N]othing in the [Necessary and Proper Clause] even hints that executive powers derived from the general grant are more susceptible of congressional regulation.”). For the most usefully rigorous classification of the clashing taxonomies in play here, see Saikrishna Bangalore Prakash, A Taxonomy of Presidential Powers, 88 B.U. L. Rev. 327, 328 (2008).

11. See Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1196–97 (2006) (noting that in “a great many instances” of executive branch interpretation, the “question of judicial review does not arise” because of justiciability issues or because the matters implicate foreign affairs or national security).

12. Robert Filmer, *The Anarchy of a Limited or Mixed Monarchy* (1648) [hereinafter Filmer, *The Anarchy*], reprinted in *Patriarcha and Other Writings* 131, 136 (Johann P. Sommerville ed., Cambridge Univ. Press 1991). Filmer elaborated: “By these words of legislative, nomothetical and architectonical power, in plain English, [is understood] a power of making laws. And by gubernative and executive, a power of putting those laws in execution by judging and punishing offenders.” *Id.*

This was a mighty charge for a majestic office, and the manner of its delegation caused much anxiety. But it extended only to the implementation of substantive legal requirements and authorities that were created somewhere else. It wasn't just that the use of executive power was subject to legislative influence in a crude political sense. Rather, the power itself was fundamentally derivative. It was incapable of providing even a *defeasible* source of independent substantive authority, let alone one that was immune from legislative revision.

- Second, the Vesting Clause Thesis gets the original default rule of constitutional preeminence backward. Far from presuming that law cannot bind the President on questions of national security and foreign affairs, the Founders' Constitution presumed that the President must obey duly enacted statutes in those areas too—unless some other grant of Article II authority specifically rebutted that presumption. The contrary claim isn't just wrong; it's conceptually confused.
- Third, arguments that the President possesses a free-floating and indefeasible foreign affairs power cannot rest on historical claims about the Founding. They must rest instead on some form of what originalists call living constitutionalism—and in particular on a meticulous demonstration that such powers have in fact emerged over time.

Because the Vesting Clause Thesis is so entrenched in our constitutional culture, we must uproot it systematically—first by examining the intellectual currents of the late eighteenth century, and then by attending to what the Founders actually said and did before, during, and after the ratification debates. This Article lays the foundation for that project. Left for another day is a discussion of how the standard understanding of executive power was reflected—as it demonstrably was—in discussion and debate throughout the Founding and early Republic.<sup>13</sup> But the indispensable foundation for that forthcoming work is laid here: While the canonical commentators disagreed vigorously about how best to allocate the powers of government, the eighteenth-century *grammar* of their debate—both conceptually and semantically—was well established. Absent some evidence that the Founders ignored this background and adopted a basically unprecedented meaning of “executive power,” the first sentence of Article II would have been understood as vesting the wholly derivative authority to execute the laws, and nothing else.

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13. See, e.g., Julian Davis Mortenson, *The Executive Power Clause*, U. Pa. L. Rev. (forthcoming 2020) [hereinafter Mortenson, *The Executive Power Clause*] (on file with the *Columbia Law Review*) (showing that the conceptual framework explained in this Article was not just adopted but simply presumed by the Founders as they proposed, wrote, discussed, debated, and ratified the Constitution).

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

### I. THREE VIEWS OF THE EXECUTIVE POWER CLAUSE

To a lay audience, the questions we started with may seem easy: Surely the President isn’t above the law? Under the U.S. Constitution, however, the legislative code only frames the question about legality; it doesn’t necessarily answer it. Consider by contrast a jurisdiction where the answer really is that simple. In the United Kingdom, statutes control the Crown—full stop. Whether courts trace the origins of the proposition to dictum from the *Case of Proclamations*,<sup>14</sup> the statutory abrogation of royal suspension and dispensation,<sup>15</sup> or the evolution of political conventions after the Glorious Revolution,<sup>16</sup> the principle of legislative sovereignty has now been established for centuries:

[T]he most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme . . . . Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation . . . .<sup>17</sup>

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14. See *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5, [44] (“In the early 17th century *Case of Proclamations*, Sir Edward Coke CJ said that ‘the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.’” (citation omitted) (quoting *Case of Proclamations* (1610) 77 Eng. Rep. 1352, 1353; 12 Co. Rep. 74, 75 (KB))). Although Coke’s statement “may have been controversial at the time, it had become firmly established by the end of the century.” *Id.*

15. See *id.* at [40]–[47] (explaining that the prerogative powers of the Crown “were progressively reduced” in “a number of seminal events,” chief among which were “a series of statutes enacted in the twenty years between 1688 and 1707” that included the Bill of Rights, the Act of Settlement, the Claim of Right, and the Acts of Union).

16. See *R (Miller) v. Sec’y of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [26], overruled by [2017] UKSC 5.

17. *Id.* at [20]. See also A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 3–4 (Liberty Fund reprint 1982) (8th ed. 1915) (“Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that



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

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

The point here isn't the metaphysics of nationhood but the pragmatics of turf wars. No American political entity possesses anything like Parliament's plenary authority and legal supremacy. To the contrary, at the federal level, the Constitution parcels out discrete legal authorities—and only those authorities—to the various players in the system. Like a corporation's founding charter or an international organization's constitutive treaty, the Constitution conveys only those powers that the stakeholders choose to convey. This gives rise to a foundational principle of American governance: Any federal action that cannot trace its authority to some constitutional grant of power is, by definition, *ultra vires*.<sup>18</sup>

And that brings us back to the questions outlined above. Unlike the U.K. prime minister, the American President can't figure out whether he gets to act without legislative authorization—much less in violation of a statute—by making grand inquiries about the locus of sovereignty.

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no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”). For the most part, scholars now really only debate the extent to which Parliament could revise its own internal “manner and form” rules to restrict its own future ability to enact legislation. Compare Ivor Jennings, *The Law and the Constitution* 152–53 (5th ed. 1959) (“[T]he ‘legal sovereign’ may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.”), with Dicey, *supra*, at 24 n.48 (“[A] sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment.”). The U.K. courts do apply a clear-statement rule to these questions: Statutes do not bind the Crown unless that feature is either express or a necessary implication of their structure and function. *R (Black) v. Sec’y of State for Justice* [2017] UKSC 81 [36]–[37], [2018] AC 215.

18. That does not necessarily mean there must be some subjects the federal government can't regulate. Compare *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (“The enumeration of powers is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’” (alteration in original) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824))), with Richard Primus, *The Limits of Enumeration*, 124 *Yale L.J.* 576, 580 (2014) (“[W]hether the powers of Congress have as great a scope in practice as a general police power is a matter of contingency, not a matter of principle.”).

Instead, the conversation begins with a small-bore question: Is there some constitutional grant of presidential authority over this kind of wiretapping, torturing, bombing, or scrivening?<sup>19</sup> If there isn't, then he can't.<sup>20</sup> That conclusion follows necessarily: Either he has no legal authority at all (and so lacks the power *ab initio*), or he has only statutory authorization (and so his power is necessarily limited by the statute's restrictions). Either way, the President can't ignore the law.

So for questions like ours, the enumeration problem is central: What powers does the Constitution grant to the President? Well, it's a grab bag—and not a terribly big one. Article II begins by vesting “the executive Power” in the President.<sup>21</sup> After specifying the details of eligibility and election, the Constitution then names the President “Commander in Chief of the Army and Navy of the United States” and of the state militias “when called into the actual Service of the United States.”<sup>22</sup> In the realm of foreign affairs, the President has the power to “make Treaties” if two thirds of the Senate concurs, to “receive Ambassadors and other public Ministers,” and to “nominate” and “appoint” U.S. diplomats with senatorial consent.<sup>23</sup> On “extraordinary Occasions,” the President has the authority to convene both houses of Congress.<sup>24</sup> Finally, the President has an overarching obligation to “take Care that the Laws be faithfully executed” and must take an oath to “preserve, protect and defend the Constitution of the United States.”<sup>25</sup> When it comes to the provisions of Article II plausibly bearing on the questions at issue, that's more or less it.<sup>26</sup>

This Article focuses on the first of these enumerations. Its text has all the romance of a human resources circular: “The executive power shall

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

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

21. U.S. Const. art. II, § 1.

22. *Id.* § 2.

23. *Id.* §§ 2–3.

24. *Id.* § 3.

25. *Id.* §§ 1, 3.

26. To focus analytical attention, I am including only those powers that could plausibly be relevant to a presidential power to wiretap, torture, bomb, or scaven. Omitted from this list are the President's pardon power; the President's power to make various kinds of appointments of judges and other officers of the United States; and the President's power to “require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.” *Id.* § 2. I also haven't mentioned the veto, which is a legislative power granted in the President's capacity as a participant in the legislative process. See *id.* art. I, § 7.

be vested in a President of the United States of America.”<sup>27</sup> Yet this first sentence of Article II presents what Gary Lawson calls “one of the most important questions of any kind, on any subject, under the Federal Constitution.”<sup>28</sup> That’s because “the executive power” is the last best hope of Presidents who want to take action without legislative authorization.<sup>29</sup> (The other enumerations are of course relevant to—and possibly preclusive of—statutes touching on the kinds of activities they authorize.<sup>30</sup> But the universe of such activities is not large.)

There are at least three ways to understand Article II’s reference to the executive power. The first is what I will call the “Cross-Reference” theory, which understands “the executive power” as a content-free referent to the rest of Article II. This thin reading of the Executive Power Clause has been embraced by Supreme Court Justices,<sup>31</sup>

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27. *Id.* art. II, § 1.

28. See Lawson, *supra* note 10, at 383; see also Michael W. McConnell, *The President Who Would Not Be King* 124 (unpublished manuscript) (on file with the *Columbia Law Review*) (“[W]hether that Clause imparts any power to the President is one of the most contested questions in constitutional law.”).

29. See, e.g., Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 211 (Randall W. Bland et al. eds., 5th rev. ed. 1984) [hereinafter Corwin, *The President*] (noting the tendency in constitutional interpretation to “regard[] the ‘executive power’ clause as an always available peg on which to hang any and all unassigned powers in respect to foreign intercourse”); Charles C. Thach, Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* 139 (1922) (“[W]hether intentional or not, [the Executive Power Clause] admitted an interpretation of executive power which would give to the President a field of action much wider than that outlined by the enumerated powers.”); Lucius Wilmerding, Jr., *The President and the Law*, 67 *Pol. Sci. Q.* 321, 333 (1952) (“[T]he defenders of residual power [argue that] . . . the President has been granted by the Constitution itself a legal power to act in emergencies. If it be asked where in the Constitution this power is to be found, the questioner is referred to the opening sentence of Article II . . .”).

For originalists, the practical importance of this escape valve has only increased since work by Marty Lederman, David Barron, and Ingrid Wuerth has demonstrated that the Commander in Chief power was historically subordinate to legislative instructions on military policy, strategy, and tactics alike. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv. L. Rev.* 689, 696 (2008); Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 *Mich. L. Rev.* 61, 65–66 (2007).

30. Take a statute prohibiting presidential nomination of ambassadors. Most people would think the President legally entitled to ignore that statute and nominate ambassadors to his heart’s content. It should be noted that—strangely to modern ears, and at obvious odds with our assumptions about constitutional textualism—a persistent thread in the Founding debates suggests that at least some of the President’s textual powers could be eliminated by statute. See, e.g., *The Federalist* No. 73, at 371 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“Without [a veto], . . . [h]e might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote.”).

31. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.”); *id.* at 632–33 (Douglas, J., concurring) (“Article II which vests

legislators,<sup>32</sup> and a number of academics.<sup>33</sup> On this view, the term is a convenient lexical handle for a grab bag of powers. The full contents of that grab bag are set out in the remainder of Article II. And nothing else goes in the bag. While this approach reads the 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. That specification is more significant than it might seem. Repulsed by even the suggestion of kingship, some early state constitutions vested such powers in a committee rather than in one individual<sup>34</sup>—producing exactly the kinds of indecision, ineffectiveness, and delay that you would expect. And so on the Cross-Reference theory, a muscularly centralizing Constitution responded by using the Executive Power Clause to preclude the possibility of devolution to governance by committee.

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the ‘executive Power’ in the President defines that power with particularity.”). The majority opinion in *INS v. Chadha* gestures at this view as well: “When the Executive acts, he presumptively acts in an executive or administrative capacity *as defined in Art. II.*” 462 U.S. 919, 951 (1983) (emphasis added).

32. See Daniel Webster, Speech on the Appointing and Removing Power (Feb. 16, 1835), in 4 *The Works of Daniel Webster* 179, 187 (Boston, Little, Brown & Co. 18th ed. 1881) (“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.”).

33. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 49–52 (1994) (arguing that the President’s constitutional powers do not extend beyond Article II’s explicit provisions); 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) (concluding that historical evidence suggests that Article II, like Article I, was a mere designation clause rather than a conferral of power); Robert J. Reinstein, *The Limits of Executive Power*, 59 *Am. U. L. Rev.* 259, 263–64 (2009) (“This Article rejects the position that the Vesting Clause is a residual source of plenary presidential powers beyond those enumerated in Article II.”); see also Corwin, *The President*, *supra* note 29, at 177.

34. See, e.g., Md. Const. of 1776, art. XXVI, reprinted in 3 *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1686, 1695–701* (Francis Newton Thorpe ed., 1909) [hereinafter *Federal and State Constitutions*] (creating an executive council with veto power over many of the governor’s executive functions); N.H. Const. of 1784, pt. II, reprinted in 4 *Federal and State Constitutions*, *supra*, at 2453, 2465–66 (adding a council to the existing legislature, but no chief magistrate); Pa. Const. of 1776, § 3, reprinted in 5 *Federal and State Constitutions*, *supra*, at 3081, 3084 (“The supreme executive power shall be vested in a president and [twelve-person] council.”); Vt. Const. of 1777, ch. II, §§ 3, 17, reprinted in 6 *Federal and State Constitutions*, *supra*, at 3737, 3742, 3744 (“The supreme executive power shall be vested in a Governor and [twelve-person] Council.”); see also, e.g., Del. Const. of 1776, art. 7, reprinted in 1 *Federal and State Constitutions*, *supra*, at 562, 563 (establishing a chief magistrate elected by legislature); Ga. Const. of 1777, art. II, reprinted in 2 *Federal and State Constitutions*, *supra*, at 777, 778 (creating a governor selected by legislature); S.C. Const. of 1776, art. III, reprinted in 6 *Federal and State Constitutions*, *supra*, at 3241, 3243 (providing for the chief magistrate’s election by legislature); cf. N.Y. Const. of 1777, art. XXIII, reprinted in 5 *Federal and State Constitutions*, *supra*, at 2623, 2633–34 (vesting appointment power in a council).

The second understanding, which I will call the “Law Execution” theory, gives the opening clause its own independent substantive content. On this view—which has found support among Presidents,<sup>35</sup> Supreme Court Justices,<sup>36</sup> and scholars<sup>37</sup>—“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 spearhead the project of connecting legal imperative to physical reality: “Interpreting a law enacted by Congress to implement the legislative mandate,” the Supreme Court tells us, “is the very essence of ‘execution’ of the law.”<sup>38</sup> And no other provision of the Constitution gives it to the President as an affirmative enforcement authority rather than as a Take Care compliance obligation.<sup>39</sup>

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35. Cf. William Howard Taft, *Our Chief Magistrate and His Powers* 139–40 (1916) (“The true view of the Executive functions is . . . that the President can exercise no power which cannot be . . . traced to some specific grant of power or justly implied . . . within such express grant as . . . necessary to its exercise. . . . There is no undefined residuum of power which he can exercise . . .”).

36. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (equating the executive power with “energetic, vigorous, decisive, and speedy execution of the laws”).

37. See, e.g., Wilmerding, *supra* note 29, at 334 (arguing that the Founders intended Article II’s Executive Power Clause to confer only the limited power to carry into execution Congress’s laws); cf. Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 *UCLA L. Rev.* 309, 314, 344–59 (2006) (discussing the “executive Power” vested in the President and concluding that “the Constitution does not vest in the president a general, independent lawmaking power in foreign affairs”). For some legal historians who appear to embrace this view, see, for example, William B. Gwyn, *The Meaning of the Separation of Powers* 5 (1965) (“[S]eparation of powers . . . distinguishes between law-making and the implementation of the law in particular instances.”); M.J.C. Vile, *Constitutionalism and the Separation of Powers* 32 (1998) (citing several seventeenth-century sources in support of the claim that contemporaries understood executive power to mean “the machinery by which the law was put into effect”); Francis Wormuth, *The Origins of Modern Constitutionalism* 61–62 (1949) (finding that a binary legislative–executive separation of powers doctrine—with the judicial function acting as a subset of the latter—persisted through the middle of the eighteenth century); cf. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich. L. Rev.* 545, 581 n.146 (2004) (“[W]e do not necessarily disagree . . . that the term ‘executive power’ might have been understood by the Founders to refer generically to the authority to implement the laws.”).

38. *Bowsher v. Synar*, 478 U.S. 714, 732–33 (1986). Michael McConnell draws a nice distinction between “executing a *law* and executing a *power*.” McConnell, *supra* note 28, at 27. As he puts it, “[t]he former entails carrying into effect policies set by the lawmaker, and the latter entails both the making of policy and its execution.” *Id.*

39. For a terrific examination of the historical meaning of the Take Care Clause, see Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 *Harv. L. Rev.* (forthcoming June 2019) (manuscript at 9) (on file with the *Columbia*

The third understanding is what I will call the “Royal Residuum” Thesis.<sup>40</sup> (It’s often called the Vesting Clause Thesis, but that is an unhelpful description. All three theories have a Thesis about what is Vested by the Clause.) As described above, this understanding takes “the executive power” as a term of art referring to a well-understood bundle of authorities that went well beyond the specific enumerations elsewhere in Article II. “Because supreme executives in other countries had a similar basket of powers,” Royal Residuum theorists argue, “it became common to speak of an ‘executive power’ that encompassed an array of powers commonly wielded by monarchs.”<sup>41</sup> 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. . . .

But 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.<sup>42</sup>

Leaning heavily on two eighteenth-century writers to whom I will return below,<sup>43</sup> Royal Residuum theorists conclude that “[b]y using a common phrase infused with that meaning, the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power.”<sup>44</sup> For judges who subscribe to these claims, the doctrinal implications are straightforward: “[T]he

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*Law Review*) (“Our history . . . supports readings of Article II that tend to subordinate presidential power to congressional direction . . .”).

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

41. See Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* 31 (2015). Royal Residuum theorists often note that law execution is among the authorities conveyed by the Executive Power Clause. See, e.g., Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 701–04 [hereinafter Prakash, *Essential Meaning*] (“[T]he phrase ‘executive power’ comes from the principal or essential power of an executive—the power to execute the law.”).

42. Michael Stokes Paulsen, *Youngstown Goes to War*, 19 *Const. Comment.* 215, 237–38 (2002) (footnote omitted); see also John Yoo, *The Powers of War and Peace* 19 (2005) (citing “political theory” and “Anglo-American constitutional history” to claim that “the executive power was understood at the time of the Constitution’s framing to include the war, treaty, and other general foreign affairs powers”).

43. See *infra* section IV.B (discussing how modern Royal Residuum theorists have misunderstood Montesquieu and Thomas Rutherford).

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

‘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.”<sup>45</sup>

The Royal Residuum Thesis has been remarkably successful. Besides support from Supreme Court Justices,<sup>46</sup> prominent federal legislators,<sup>47</sup> leading executive branch officials,<sup>48</sup> and at least one President,<sup>49</sup> it is easily the dominant historical account among modern commentators.<sup>50</sup> Certainly,

45. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2099 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

46. See *id.*; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 680–84 (1952) (Vinson, J., dissenting) (rejecting proposition that “[t]he broad executive power granted by Article II . . . cannot, it is said, be invoked to avert disaster”); cf. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”).

47. See, e.g., 148 Cong. Rec. S2640 (daily ed. Apr. 15, 2002) (statement of Sen. Kyl) (“[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.”).

48. See, e.g., *Exercising Congress’s Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 73* (2007) (statement of Bradford Berenson, former Associate Counsel to the President) (“The 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.”); cf. Memorandum from Bill Barr to Rod Rosenstein, Deputy Att’y Gen. & Steve Engle, Assistant Att’y Gen. 13 (June 8, 2018) (on file with the *Columbia Law Review*) (“The authority to . . . remove principal Executive officers . . . [is] quintessentially Executive in character and among the discretionary powers vested exclusively in the President by the Constitution.”).

49. See Theodore Roosevelt, *An Autobiography* 357 (1903) (discussing Roosevelt’s belief that “the executive power was limited only by specific restrictions” in the Constitution or “imposed by Congress” and that it was both the President’s “right” and “duty” to do anything demanded by the nation unless the “action was forbidden by the Constitution or by the laws”). Roosevelt elaborated that “[u]nder this interpretation of executive power, I did and caused to be done many things not previously done.” *Id.*

50. See, e.g., Eugene V. Rostow, *President, Prime Minister, or Constitutional Monarch?* 6 (1989) (“The international powers of the nation are . . . to be deduced . . . from their matrix in international law . . . . In this [area] . . . , Congress is entrusted with specified legislative powers and the President with ‘the’ executive power of the United States, save for a number of exceptions noted in the document itself . . . .”); Phillip R. Trimble, *International Law: United States Foreign Relations Law* 21 (2002) (“[T]he Framers well understood the concept of executive power in British practice, [and] they . . . parcelled out its components to different branches of the new government, but they retained the residual executive power in the President. Unless the Vesting Clause is meaningless it incorporates the unallocated parts of Royal Prerogative.”); Robert F. Turner, *Repealing the War Powers Resolution* 54–56 (1991) (“[T]he Founding Fathers intended to grant the president *exclusive* control over foreign affairs, subject only to certain very important but limited *exceptions* spelled out in the text of the Constitution.”); Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. Miami L. Rev. 165, 177 (1988) (explaining that “the founding generation understood executive power as conferring a broad authority that extended beyond the mere execution of the laws” and that the Founders believed Article II to include “the conduct of foreign relations”); Gary Lawson &

the historical claim is expressed with sufficient frequency and confidence that, particularly in the wake of its seminal modern summation by Saikrishna Prakash and Michael Ramsey,<sup>51</sup> I had long assumed at least some version of it to be correct. 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—it would seem indefeasibly—with those aspects of kingly authority that have not been reallocated to other actors.

Take, for example, the now-retracted memo in which the Office of Legal Counsel advised George W. Bush’s Defense Department that it was legally entitled to torture suspected terrorists. The first sentence of Article II was front and center in explaining why the relevant criminal statutes would be unconstitutional as applied to torture by federal officials:

First, we discuss the constitutional foundations of the President’s power, as Commander in Chief and Chief Executive, to conduct military operations during the current armed conflict. . . .

. . . .  
 . . . The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause and by the Commander-in-Chief Clause. . . . [T]he structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the “executive Power shall be vested in a President of the United States of America.”<sup>52</sup>

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Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. Ill. L. Rev. 1, 41 (“[T]he ‘executive Power’ also includes foreign affairs powers that are not otherwise allocated to specific institutions by the Constitution.”); Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 Harv. J.L. & Pub. Pol’y 141, 141 (2006) (“[T]he eighteenth-century meaning of ‘executive’ power included foreign affairs powers as well as the more familiar power to execute the law. Thus, Article II, Section 1 of the U.S. Constitution . . . grants, in eighteenth-century terms, the power to execute the law plus foreign affairs powers.”); John C. Yoo, *Rejoinder, Treaty Interpretation and the False Sirens of Delegation*, 90 Calif. L. Rev. 1305, 1309 (2002) (“Article II’s Vesting Clause establishes a rule of construction that any unenumerated executive power, such as that over treaty interpretation, must be given to the President.”); McConnell, *supra* note 28, at 43 (“[E]xecutive’ power in the British system was whatever governmental power was left after subtracting the powers of the Parliament and of the courts.”); cf. Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 155 (2d ed. 1998) (“[F]unctions that in the English constitutional tradition [were] executive [included] the proroguing and adjourning of the assembly, the declaring of war and peace, the conduct of foreign relations, and . . . the exclusive right of pardon.”).

51. See Prakash & Ramsey, *Executive Power over Foreign Affairs*, *supra* note 44, at 252–56.

52. Office of Legal Counsel Torture Memorandum, *supra* note 2, at 2, 4–5 (footnote omitted) (citations omitted) (quoting U.S. Const. art. II, § 1). The memorandum devoted most of the first paragraph of a section titled “Commander-in-Chief Authority” to arguments



In the same vein, the Office of Legal Counsel later advised the Attorney General that, because of the President's "unique responsibility," as Commander in Chief and Chief Executive, for "foreign and military affairs" as well as national security," Barack Obama had constitutional authority to initiate the use of force against Libya without congressional approval.<sup>53</sup> And Justice Thomas argued that the Executive Power Clause, standing alone, justified presidential defiance of a statute that required the United States to issue a passport listing "Israel" as the place of birth for a young boy born in Jerusalem.<sup>54</sup>

To be sure, the Royal Residuum Thesis has met strong resistance as a basis for modern doctrine—certainly it has never commanded a majority on the Supreme Court. The principal textual criticism has been the redundancy it creates within Article II.<sup>55</sup> Other resistance has focused either on disputing the size of the historical bundle or contesting its methodological relevance today. As a historical matter, there are ongoing disputes even among proponents of the Royal Residuum Thesis about just how far the package of powers was understood to extend.<sup>56</sup> There is likewise at least some disagreement among advocates of the theory about whether the royal residuum sits in *Youngstown* Zone Two or Zone Three—that is, whether its contents were defeasible by an otherwise appropriate act of

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grounded in the Executive Power Clause. *Id.*; see also *id.* at 11 ("Because both '[t]he executive power and the command of the military and naval forces is vested in the President,' the Supreme Court has unanimously stated that it is '*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations.*'" (alterations in original) (quoting *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874))).

53. Office of Legal Counsel Libya Memorandum, *supra* note 6, at 6 (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993)) (citing U.S. Const. art. II, § 1, cl. 1; *id.* § 2, cl. 2).

54. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097–98 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

55. If "the executive power" presumptively includes the military and diplomatic authorities of the king, for example, then why should the Constitution specify the President's role as the Commander in Chief or his authority to receive ambassadors? Residuum theorists have responses to some, but not all, of these surplusage concerns. For example, they explain Article II's specific reference to the President's treaty power and appointments power (both of which were included in the royal prerogative) as being instances not of redundancy but of qualification. I'm not sure how much this back and forth is worth; either way it seems unlikely that the Framers were the superhumanly "fastidious draftsmen" of our fondest imaginings. See Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 Mich. L. Rev. 1, 6 (1972).

56. See, e.g., Calabresi & Prakash, *supra* note 8, at 569 n.108 ("Professor Calabresi . . . emphasizes that any constitutional residuum that exists is very limited in scope and reflects the fact that the President's powers are necessarily something of a historical grab bag of anomalies that could not be given to anyone else."); cf. Harold Hongju Koh, *The National Security Constitution* 76 (1990) (discussing "that nebulous grant" of executive power); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 22 (1993) ("[D]efenders of the 'residuum' position must be awarded the palm. . . . The real question, however, is the size of the palm.").

Congress.<sup>57</sup> And as a methodological matter, some critics deny that the original understanding (even where discernible) should decide modern separation of powers controversies. They emphasize, with strong support in Supreme Court doctrine, that considerations like functionalism and evolving historical practice also play an important role.<sup>58</sup>

Among constitutional originalists, however, the Royal Residuum Thesis remains dominant. At most, criticism of the historical claim—exemplified by the work of Martin Flaherty and Curt Bradley<sup>59</sup>—challenges particular bits of evidence offered by Royal Residuum theorists and contends that the Founders had more amorphous and varying views than the Thesis recognizes.<sup>60</sup> The real mistake of the Royal Residuum

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57. As noted in the introduction, this Article focuses on the content of the powers conveyed by the Executive Power Clause, rather than the subsequent question of whether any such powers are defeasible. If the President has no inherent power to wiretap, bomb, torture, or scaven, it follows a fortiori that he can't do so in violation of a statutory prohibition. For Royal Residuum theorists who appear to view at least some Executive Power Clause authorities as defeasible, see Monaghan, *supra* note 56, at 23–24 (“[A]n acceptable residuum argument . . . provides no basis for a claim that the President can disregard the will of Congress . . .”); McConnell, *supra* note 28, at 164 (“The defeasible character of this power follows from its status as residual: [O]nly authority not otherwise allocated is left to the President, so when Congress exercises one of its enumerated powers, it displaces presidential authority.”); see also Roosevelt, *supra* note 49, at 357 (“[T]he executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its Constitutional powers.”).

58. See *Zivotofsky*, 135 S. Ct. 2076 at 2086; *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”); Taft, *supra* note 35, at 135 (“Executive power is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution.”); cf. Robert Scigliano, *The President’s “Prerogative Power,” in* *Inventing the American Presidency* 236, 247 (Thomas E. Cronin ed., 1989) (“This is not the place to settle the dispute between Hamilton and Madison over the scope of the executive power—whether it relates to the execution of the laws . . . [or] also to foreign affairs. [But] Hamilton’s conception has largely won out in the practice of American government . . .”).

Note here, however, that even the Supreme Court’s discussion of evolving practice appears to lash that practice to the textual hook of “executive power”: “[T]he historical gloss on the ‘executive Power’ . . . has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown*, 343 U.S. 579 at 610–11 (Frankfurter, J., concurring)).

59. E.g., Bradley & Flaherty, *supra* note 37, at 551–52 (rejecting “executive power essentialism,” defined as “the proposition that the Founders had in mind, and intended the Constitution to reflect, a conception of what is ‘naturally’ or ‘essentially’ within executive power”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1729 (1996) [hereinafter Flaherty, *Most Dangerous Branch*] (seeking “to construct a narrative of constitutional development based not solely or even principally on primary materials, but rather on the wealth of historical scholarship that has recently been devoted to the Founding”).

60. See, e.g., Natelson, *supra* note 33, at 35 (arguing that a structural comparison to power-granting charters from the Founding Era supports the Cross-Reference theory of

Thesis, Flaherty and Bradley argue, is what they consider an ahistorical decision to seek an “essential” definition of executive power in the first place. In their view, that whole enterprise is misconceived from the get-go, partly because of “complexity within eighteenth-century political theory” and partly because “the constitutional Founders were [demonstrably] functionalists, willing to deviate from pure political theory and essentialist categories.”<sup>61</sup> As Flaherty has written elsewhere, “the sweep of events [following the American Revolution] belies the assumption that the formalist conception was a constant and renders improbable the notion that it became the consensus.”<sup>62</sup> It verges on law-office history to suggest otherwise.

In practice, this fundamentally equivocal criticism reduces to a caution flag of uncertainty, contingency, and historical contestation—a sort of standard historian’s warning that likely underwhelms executive branch lawyers and judges who must reach a binary yes-or-no decision. As Aziz Huq explains in his generally sympathetic account of the arguments advanced by scholars like Bradley and Flaherty as well as Peter Strauss, Lawrence Lessig, and Cass Sunstein:

[T]he leading work [criticizing the Royal Residuum thesis and associated theories] finds the text inescapably ambivalent. Such work instead situates the Constitution in what is described as a fluid, contested, and unstable eighteenth-century debate about the appropriate internal organization of government . . . . In consequence, [these scholars] decline to draw a strong conclusion from the Constitution’s text, preratification practice, or

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executive power); Reinstein, *supra* note 33, at 307–09 (arguing that the Constitution’s explicit textual allocation of other royal prerogatives supports the Cross-Reference theory of executive power). Given the lead their work takes in challenging the affirmative evidence offered by Residuum theorists, I am especially grateful to Curt and Marty for their close engagement with earlier drafts of this Article. While this Article suggests that they have erred in some important respects, they have the “music” of the Founding right—our bottom line on the separation of powers framework is quite close—and I have immense respect for the precision and care of their work.

61. See Bradley & Flaherty, *supra* note 37, at 551–52. This commitment frames their work as a careful series of engagements with individual elements of evidence previously offered by Royal Residuum theorists, seeking in each instance to show how that evidence does not necessarily bear the weight of Residuum theorists’ argument. Bradley and Flaherty aim, in other words, to negate or at least problematize the affirmative evidence offered by Royal Residuum theorists, and in particular to reject “a conception of ‘executive power’ as a defined category that can be distinguished from legislative powers.” See *id.* at 592; see also Bernard Bailyn, *The Ideological Origins of the American Revolution* 70–71 (enlarged ed. 1992) (“The clarity of modern assumption of a tripartite division of the functions of government into legislative, executive, and judicial powers did not exist for the colonists . . .”).

62. Flaherty, *Most Dangerous Branch*, *supra* note 59, at 1774; see also *id.* at 1734 (“Formalist catechism posits three discrete branches, each exercising one of three distinct powers. . . . No less importantly, formalist precepts consider legislative, executive, and judicial powers, which mark the proper domains of their respective branches, to be readily identifiable.”).

Founding-era interpretative conventions about the precise contours of each branch's authority.<sup>63</sup>

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

To be clear, this Article does not engage nonoriginalist arguments for an Article II residuum. The thesis defended here rests neither on the mistaken textualist premise that the Constitution must be read to avoid surplusage, nor on a contestable methodological commitment to custom and tradition as a source of constitutional meaning. Instead, the Article

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63. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 *Colum. L. Rev.* 1517, 1530–31 (2018) (reviewing Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (2017)) (footnotes omitted); see also Lawson & Seidman, *supra* note 50, at 41 (“[T]he term ‘executive Power’ clearly did not have a single, well-defined, universally understood meaning in the founding era . . . .”); *id.* at 42 (“[But] [a]t the risk of engaging a 144-page discussion in a few sentences: it does not suffice to say, as Professors Bradley and Flaherty convincingly say, that ‘executive Power’ was a messy, contested concept in the late eighteenth century.”); Victoria F. Nourse & John P. Figura, *Toward A Representational Theory of the Executive*, 91 *B.U. L. Rev.* 273, 290 n.118 (2011) (reviewing Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008)) (endorsing Bradley and Flaherty’s thesis “that executive-power essentialism ‘errs . . . in its presumption that America’s constitutional practitioners mechanically applied European political and legal theory” (quoting Bradley & Flaherty, *supra* note 37, at 572)). For better or worse, Prakash and Ramsey put it more pointedly: “[W]hile Bradley and Flaherty devote much energy to the Constitution’s creation, . . . [o]n the most important points they either concede our view, make only conclusory statements, or say nothing.” Prakash & Ramsey, *The Jeffersonian Executive*, *supra* note 10, at 1661.

As I will show, Bradley and Flaherty seem wrong in concluding that the Founders had contested, uncertain, or otherwise difficult-to-pin-down views on the conceptual content of “the executive power” as a specific authority of government. But the effective substance of what could be read as their ultimate (though unsubstantiated) conclusion—namely, that Royal Residuum theorists have not amassed enough evidence to dislodge what would otherwise appear to be the meaning of a word whose root is “execut-”—is certainly consistent with the meaning that I affirmatively establish here. See Bradley & Flaherty, *supra* note 37, at 581 n.146 (“[W]e do not necessarily disagree with Professor Prakash that the term ‘executive power’ might have been understood by the Founders to refer generically to the authority to implement the laws.”). But see Flaherty, *Most Dangerous Branch*, *supra* note 59, at 1778 (“[T]he Vesting Clause should not be read to grant the executive branch a prepackaged set of powers.”).

targets the Royal Residuum Thesis where it lives: as a descriptive historical assertion about the semantic content of a standard eighteenth-century legal concept. In that respect, the piece begins by agreeing with Royal Residuum theorists—thereby diverging sharply from Bradley and Flaherty—that the Founders *did* “ha[ve] in mind, and intend[] the Constitution to reflect, a conception of what is ‘naturally’ or ‘essentially’ within executive power.”<sup>64</sup> This project will show, however, that the meaning was unambiguously limited to law execution. And it will offer a fully worked-out explanation of how that authority operated in an integrated constitutional context.

## II. POLITICAL THEORY

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

I have not, of course, literally identified every book in Madison’s possession or limited myself to the holdings of one man. Rather, the man and his bookshelf stand in for the educated American public and the corpus of materials from which its understandings were drawn. That said, the bookshelf conceit is not entirely metaphorical. We know a lot about what the Founders were reading, partly from statistical analysis of citations in political debates and the contemporary press,<sup>65</sup> and partly from inventories of real bookshelves, often in the form of library catalogs, probate records, and purchase orders.<sup>66</sup> On the background of such

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64. Bradley & Flaherty, *supra* note 37, at 551–52 (rejecting this claim); see also *id.* at 685 (“There are a number of weaknesses in Madison’s analysis [as Helvidius]. . . . First, Madison, atypically for him, relies on essentialist reasoning . . . . Madison talks as if there are pure categories of executive and legislative power, and he simply disagrees with Hamilton about what those categories should look like.”). I’m with Madison here in two ways. I too think there were pure categories of executive and legislative power. And I too simply disagree with the Royal Residuum theorists about what those categories should look like.

65. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 *Am. Pol. Sci. Rev.* 189, 190–92 (1984) (analyzing 916 American political writings published during the Founding Era between 1760 and 1805).

66. See Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* 11–24 (Liberty Fund 1998) (1966) (surveying library catalogs during the eighteenth century); David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 *Am. Q.* 262, 262–64 (1976) (detailing the reception in America of major European Enlightenment authors); Minor Myers, Jr., *A Source for Eighteenth-Century Harvard Master’s Questions*, 38 *Wm. & Mary Q.* 261–62 (1981) (analyzing the

evidence—as processed by decades of painstaking work by archivists and intellectual historians—American historian Jack Rakove sketches the scholarly consensus about “those intellectual sources of influence that shaped the mental world of the revolutionary generation”:

There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone. They were also well-versed in the richly polemical literature of seventeenth- and eighteenth-century English politics; the moral philosophy and faculty psychology of the Scottish enlightenment; the disquisitions on public law of such European authorities as Grotius, Pufendorf, and Delolme; and, one might add *en passant*, the inheritance of English jurisprudence. American thinking about politics was no doubt also shaped by reading in the classics, the legacy of Newtonian science, and even the emphasis on sympathy in eighteenth-century philosophy and literature (which resonates strongly in their notions of representation). All of these writings shaped the intellectual context in which the Framers and Ratifiers acted. Whether we think of these ideas as big concepts whose evolution can be traced in a classic history-of-ideas mode, or as elements of ideologies like republicanism or liberalism, or as competing Foucauldian discourses, it seems evident that they were essential elements of the original language of American constitutionalism.<sup>67</sup>

The consequence for any intellectually serious version of originalism is clear. Confronted by a question about the Founders’ constitutional arrangement,

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sources of the master’s *quaestiones* at Harvard College as a barometer of political sentiment); see also, e.g., Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, at 5–6 (1934); Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries 1700–1799*, at ix–xiv (1978); Loren E. Smith, *The Library List of 1783: Being a Catalogue of Books, Composed and Arranged by James Madison, and Others, and Recommended for the Use of Congress on January 24, 1783, with Notes and an Introduction 1–6* (Jan. 30, 1969) (unpublished Ph.D. dissertation, Claremont Graduate School), [https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1089&context=cgu\\_etd](https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1089&context=cgu_etd) [<https://perma.cc/KQ3J-8V5R>].

67. See Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *Fordham L. Rev.* 1587, 1598–99 (1997) [hereinafter Rakove, *Fidelity Through History*] (footnotes omitted). For two classic accounts of intellectual influences on the Founders, see generally Bailyn, *supra* note 61; J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton Classics ed. 2016) [hereinafter Pocock, *Machiavellian Moment*]. For two excellent recent treatments of executive authority in the American political tradition, see generally Clement Fatovic, *Outside the Law: Emergency and Executive Power* (2009); Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (2009). For a good summary of the tradition surrounding the legal treatises relied on so heavily in this Article, see generally A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 *U. Chi. L. Rev.* 632 (1981). For a marvelously detailed survey of key Founding-Era sources, including some of the sources relied on in this project, see generally William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (Oct. 31, 2018) (unpublished manuscript) (on file with the *Columbia Law Review*).

we must start by turning to material like this to “reconstruct the underlying assumptions and concerns and the manifest events and experiences that presumably explain both authorial intentions and Ratifier understandings.”<sup>68</sup>

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

This Article does not resist that standard picture of contestation and uncertainty.<sup>69</sup> There is no question that—like the intellectual legacy to which they were heir—the colonists, revolutionaries, Philadelphia drafters, ratification polemicists, and state ratifiers expressed radically diverging views on the best allocation of national power. There is no question that the Constitution’s terms are abstract and incomplete in most respects, and nowhere more so than the allocation of foreign affairs powers. And

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68. See Rakove, *Fidelity Through History*, supra note 67, at 1598. Rakove describes some of the “fairly obvious” bodies of evidence that “set the intellectual and political background upon which the Framers and ratifiers acted.” Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *San Diego L. Rev.* 575, 581–82 (2009). These included “the sources that shaped the vocabulary and grammar of political discussions, or the traditions and texts that historians sometimes describe as political languages.” *Id.* Rakove identifies Machiavelli, Hobbes, Locke, Harrington, Montesquieu, Hume, Blackstone, and other authorities as having “their place” among these sources, as do “other modes of reasoning associated . . . with classical learning or the Commonwealth or Real Whig Tradition for which Trenchard and Gordon remain the most representative figures.” *Id.*

69. As Martin Flaherty has argued, we should be skeptical of any account that would require us to set aside the professional historical consensus about the Founders’ legal-political culture. See generally Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523 (1995) (citing canonical work by, inter alia, Willi Paul Adams, Bernard Bailyn, Edward Corwin, Jack P. Greene, Forrest McDonald, J.G.A. Pocock, Jack Rakove, John Philip Reid, and Gordon Wood). On this score, Flaherty is clearly correct that the historiography “reveals . . . people groping as best they could toward a workable conception of government from which only broad purposes can safely be inferred.” See Flaherty, *Most Dangerous Branch*, supra note 59, at 1755. He is also surely right that “the complex, messy, and at times contradictory ferment in constitutional thinking renders it unlikely at best that, by 1787, Americans had reached a consensus on the doctrine in anything like the precise, thoroughgoing manner that modern formalists prescribe.” See *id.*; see also *id.* at 1775 (“What strikes anyone who examines the era in any depth, especially those historians who have devoted years to the exercise, is its complexity, contradictions, and, at times, confusion.”).

it is obviously the case that both the ratifiers themselves and the politicians of the early Republic disagreed on a great many particular problems of application—if and when those problems even occurred to them in the first place.

And yet.

Even amidst this intellectual chaos-slash-ferment, some things were clear. If the Founders' *goals* were often irreconcilable, the *words* they used to describe and debate their proposals, criticisms, and counterproposals were—at least on some points—strikingly consistent. Of particular relevance here is how their disputes about institutional structure were consistently framed around what they often called the “complete” or “perfect” triad of legislative, executive, and judicial power as three conceptual phases in the life cycle of law.<sup>70</sup> This Article shows that formulation to have been a straightforward reflection of standard eighteenth-century understandings. If that's right, then the negotiated settlement of the Executive Power Clause *did* have a clear meaning. That meaning is the one that leaps off the face of the text: “[T]he executive power” meant “the power to execute.” My hope is that even unsympathetic readers will wind up finding this hard to unsee.

#### A. *The Historical Background*

The Founders came of age in the aftermath of a long constitutional struggle in the mother country. It is a fool's errand to offer even the most apologetically caveated summary of England's multicentury wobble toward parliamentary supremacy. But the political imaginary of that struggle was deeply entrenched in the Founders' minds, by way of schoolrooms, the political press, and widely published histories from authors across the political spectrum.<sup>71</sup> So we should begin by chalking out some

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70. See, e.g., James Wilson, Remarks at the Pennsylvania Ratifying Convention: Summary of Objections to the Constitution (Dec. 4, 1787) [hereinafter Wilson, Summary of Objections to the Constitution], reprinted in 2 The Documentary History of the Ratification of the Constitution 465, 468 (John P. Kaminski et al. eds., digital ed. 2009) [hereinafter Documentary History] (“This is not a *federal* government, but a complete one, with legislative, executive, and judicial powers. It is a *consolidating* government.”); see also *infra* note 302 and accompanying text. For an in-depth exploration of the Founder's conception of “complete government,” see Mortenson, The Executive Power Clause, *supra* note 13, at 33–39.

71. Histories and memoirs of the great struggle abounded. For some of the most important accounts available to the Founders, see generally 3–4 Oliver Goldsmith, The History of England, from the Earliest Times to the Death of George II (London, printed for T. Davies et al. 1771); 5–6 David Hume, The History of England, from the Invasion of Julius Caesar to the Revolution in 1688 (Liberty Fund 1983) (1778) [hereinafter Hume, History of England]; Edward Hyde, Earl of Clarendon, The History of the Rebellion and Civil Wars in England (Oxford, printed at the Theater 1704); Catherine Macaulay, The History of England, from the Accession of James I to That of the Brunswick Line (London, printed for J. Nourse et al. 1763–1783); Henry St. John, Viscount Bolingbroke, Remarks on the History of England (London, printed for R. Francklin 1743) [hereinafter Bolingbroke, Remarks on the History of England].



rudimentary context for the legal and political concepts that are discussed in depth below.<sup>72</sup>

The American Founders told themselves a story of English constitutionalism in which Parliament (and especially the Commons) led the struggle to wrest individual freedom from increasingly oppressive monarchs.<sup>73</sup> The path to that outcome was winding. While many Americans followed the English Whigs in imagining that Parliament's institutional identity was central to the "ancient constitution" of England,<sup>74</sup> it is now understood that English parliaments emerged not so much as institutions in their own right as ad hoc gatherings summoned by the Crown, especially when approval for taxation was needed.<sup>75</sup> During the long

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

73. Hamilton's Federalist 71 offers a typical summary:

[The] British House of Commons, from the most feeble beginnings, from the mere power of assenting or disagreeing to the imposition of a new tax, have, by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government; while they raised themselves to the rank and consequence of a coequal branch of the legislature; . . . [T]hey have been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments, as well in the Church as State . . . .

The Federalist No. 71, *supra* note 30, at 364 (Alexander Hamilton).

74. See J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* 47–53 (2d ed. 1987) (“[A]s the century progressed[,] assertions that the law was immemorial tended to be replaced by assertions that parliament, and especially a house of commons representing the property owners, was immemorial.”); see also Burgess, *supra* note 72, at 60–76 (agreeing that these arguments had rhetorical traction, but challenging Pocock's readings of specific commentators).

75. Thus, the famous words of Magna Charta:

No scutage nor aid shall be imposed in our kingdom, unless by common counsel of our kingdom . . . .

. . . .

And for obtaining the common counsel of the kingdom [before] the assessing of an aid . . . or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons . . . .

Magna Carta ch. 12, 14 (1215), reprinted in William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 274, 291 (1905). For an excellent recent account of how the medieval English parliament evolved, see generally J. R. Maddicot, *The Origins of the English Parliament 924–1327* (2010); F. W. Maitland, *The Constitutional History of England 177–90* (1920); K.B. McFarlane, *England in the Fifteenth Century: Collected Essays 1–20* (1981). For a classic though now disfavored “Whig history” account sketching a more institutionally cohesive view of medieval parliaments—one that more closely matches the Founders' sense of historical development than the modern historiography sketched in main text—see 2–3 William Stubbs, *The Constitutional History of England: In Its Origin and Development* (Oxford, Clarendon Press 2d ed. 1877–1878).

transition to modernity, a complicated variety of economic, religious, and political developments led parliamentary elections and debate to channel larger and more systematic ideological disputes among members of the British political elite.<sup>76</sup> And Parliament—or at least, significant factions within Parliament—began to develop a more particularized sense of institutional identity once assembled. With the arrival of the Stuarts in 1603, tensions between the Crown and Parliament as such increasingly crystallized around suspicion of the new dynasty's Catholic sympathies; dissatisfaction with the costs of court, government, and military adventures; and anxiety about the new King's pretensions to a divine-right absolutism.<sup>77</sup>

The end of the resulting struggle is well known. Certainly by the middle of the eighteenth century, the legislative institution of “the King-in-Parliament” had been recognized as conceptually sovereign and legally supreme over all competing institutions, and the Crown's direct participation in statutory enactment had been reduced to an empty formality.<sup>78</sup>

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76. For a good review of some of the social, economic, cultural, and religious pressures during this period, see generally Conrad Russell, *The Crisis of Parliaments: English History 1509–1660* (1971). Historians disagree on the extent to which Parliament developed a genuinely oppositional identity during the Tudor period. For works emphasizing the cooperative nature of Parliament's relationship with the Tudor Crown, see generally G.R. Elton, *The Parliament of England, 1559–1581* (1986); J.S. Roskell, *Perspectives in English Parliamentary History*, in 2 *Historical Studies of the English Parliament* 296 (E.B. Fryde & Edward Miller eds., 1970). For works giving more emphasis to an emerging sensibility of institutional conflict, see generally Jennifer Loach, *Parliament Under the Tudors* (1991); J.E. Neale, *Elizabeth I and Her Parliaments 1584–1601* (1957); Josh Chafetz, “In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation”: Late Tudor Parliamentary Relations and Their Early Stuart Discontents, 25 *Yale J.L. & Human.* 181 (2013).

77. For a classic account of the interwoven causes, see generally Conrad Russell, *The Causes of the English Civil War* (1990). For accounts focusing on the religious element, see generally David Cressy, *England on Edge: Crisis and Revolution, 1640–1642* (2006); *England's Wars of Religion, Revisited* (Charles Prior & Glenn Burgess eds., 2011). For accounts emphasizing the politics of nationhood and state formation, see, for example, Jonathan Scott, *England's Troubles: Seventeenth-Century English Political Instability in European Context* (2000); Austin Woolrych, *Britain in Revolution: 1625–1660* (2002). For accounts exploring socioeconomic change as a principal factor, see, for example, Lawrence Stone, *The Causes of the English Revolution 1529–1642*, at 26–41 (ARK Publ'g Co. 1986) (1972). For a dated but still classic account emphasizing the institutional-constitutional features typical of “Whig history,” see generally Samuel Rawson Gardiner, *The First Two Stuarts and the Puritan Revolution 1603–1660* (New York, Charles Scribner's Sons 1893).

78. Recall that under English constitutional theory the Crown was itself “a constituent part of the supreme legislative power.” See 1 William Blackstone, *Commentaries* \*261. By the Founding, the royal negative was absolute in theory but defunct in practice—1708 marked the last time it was used against a bill that had passed both houses of Parliament. See 18 *HL Jour.* 504, 506 (Mar. 11, 1708) (recording Queen Anne's withholding of royal assent to the Scottish Militia Bill); see also Walter Bagehot, *The English Constitution* 48 (Paul Smith ed., Cambridge Texts 2001) (1867) (“[The Queen] must sign her own death-warrant if the two Houses unanimously send it up to her. It is a fiction of the past to ascribe to her legislative power.”). For a terrific account of key legal conflicts between

The intermediate steps were complicated.<sup>79</sup> Over the course of the 1600s, the king clashed with (some) judges and (many) parliamentarians over royal interference with parliamentary privileges; over the promulgation of proclamations purporting to have the force of law; over judges' authority to interpret the law differently from the Crown; and over Parliament's power to restrict the operations of the Crown and its apparatus of government.<sup>80</sup> It took a civil war, a republican interregnum, and a tentative royal Restoration before the Glorious Revolution of 1688—involving the flight of James II and Parliament's installment of William and Mary in his place—led to a formal settlement that entailed (it quickly became clear) the total capitulation of any claim to constitutionally infeasible royal authority.<sup>81</sup>

Certainly by the Founding period, it was well-settled that English law had no separation of powers doctrine in the sense that American lawyers understand it today. The Crown simply had no powers that the legislature was bound to respect.<sup>82</sup> The analogy to common law is almost exact. For instance, eighteenth-century students of English law learned, correctly, that “the law” required contracts to include at least a peppercorn in consideration.<sup>83</sup> But—notwithstanding aggressive statutory interpretation and occasional vague rumblings of judicial review<sup>84</sup>—they also learned that if “the common law and a statute differ, the common law gives place to the statute.”<sup>85</sup> William Blackstone, whose landmark treatise on English law probably influenced the Founders more than any other single source,<sup>86</sup>

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Parliament and the sixteenth- and seventeenth-century English Crown, see generally Josh Chafetz, *Congress's Constitution* (2017).

79. For a recent survey of this period, see generally Peter Ackroyd, *Rebellion: The History of England from James I to the Glorious Revolution* (2014).

80. See *id.* at 147–48 (parliamentary privileges); *id.* at 37–38, 175–77 (royal proclamations); *id.* at 23–25 (judicial authority); *id.* at 243, 288 (parliamentary restrictions on the Crown).

81. See *id.* at 453–70.

82. See *supra* notes 14–17 and accompanying text.

83. Compare *Pillans & Rose v. Van Mierop & Hopkins* (1765) 97 Eng. Rep. 1035, 1038; 3 Burr. 1663, 1669–70 (KB) (challenging the doctrine), with *Rann v. Hughes* (1778) 2 Eng. Rep. 18, 21; 4 Bro. PC 27, 30–31 (HL) (reaffirming it).

84. Closely related to the problem of parliamentary sovereignty vis-à-vis royal prerogative is the problem of parliamentary sovereignty vis-à-vis natural law. But with some exceptions, see Goldsworthy, *supra* note 72, at 6–21 & *passim*, the two issues are typically explored as separate questions. For a concise discussion of the historiography of the relationship between Parliament and natural or fundamental law, see Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *Stan. L. Rev.* 843, 849–65 (1978); see also T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* 135–62 (1993); J. W. Gough, *Fundamental Law in English Constitutional History* 80–97 (1955).

85. 1 Blackstone, *supra* note 78, at \*89.

86. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“Blackstone . . . constituted the preeminent authority on English law for the founding generation . . .”); Baude & Campbell, *supra* note 67, at 22 (listing Blackstone’s *Commentaries* among the “most

generalized the point: “[T]here is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.”<sup>87</sup> Indeed, the English treatises taught that not just common law but all of English *constitutional* law existed only at the continued sufferance of Parliament: “[Parliament] can change and create afresh even the constitution of the kingdom and of parliaments themselves . . . .”<sup>88</sup>

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important English legal treatises” used by Americans in the eighteenth and nineteenth centuries); see also *infra* notes 188–189 and accompanying text.

87. 1 Blackstone, *supra* note 78, at \*91. For expressions of this view from both sides of the Founding debates, see, for example, Wilson, Summary of Objections to the Constitution, *supra* note 70, at 471 (“It has not been, nor, I presume, will it be denied, that somewhere there is, and of necessity must be, a supreme, absolute and uncontrollable authority. . . . Blackstone will tell you, that in Britain it is lodged in the British Parliament . . . .”); Agrippa XII, Mass. Gazette, Jan. 15, 1787, reprinted in 5 Documentary History, *supra* note 70, at 720, 722 (“A legislative assembly has an inherent right to alter the common law, and to abolish any of its principles, which are not particularly guarded in the constitution.”). For a concise discussion of both the original sources and the modern debate about Blackstone’s views on parliamentary supremacy, see John M. Finnis, Note, Blackstone’s Theoretical Intentions, 12 Nat. L.F. 163, 163 (1967) (“The methodology of the *Commentaries* has been ignored in recent discussion. But reflection on it establishes, contrary to received interpretations, both that Blackstone’s interest in natural law was real and sustained, and that his definition of municipal law was free from any reference to natural law.” (emphases omitted) (footnote omitted)).

88. 1 Blackstone, *supra* note 78, at \*161 (“[Parliament] can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call it’s power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo.”); see also Henry Finch, A Description of the Common Laws of England bk. II, ch. I, at 59 (London, printed for A. Millar 1759) (offering a similar observation). See generally Julian Hoppit, A Land of Liberty?: England 1689–1727, at 50 (2000) (“[E]very political society had to have a final arbiter. Few dissented that in the English case absolute authority resided only in legislative action, that is the agreed deliberations of Crown, Peers . . . and Commons.”); Paul Langford, A Polite and Commercial People: England 1727–1783, at 704 (2010) (“It would be difficult to exaggerate the overwhelming importance of Parliament in eighteenth-century England, hackneyed though it is as a historical theme.”).

This all led some commentators to conclude that England didn’t actually *have* a constitution in any legally significant sense. See, e.g., Letter IV, *in* Four Letters on Interesting Subjects 18 (Philadelphia, Styner & Cist 1776) (“The truth is, the English have no fixed Constitution. . . . [T]he legislative power, which includes king, lords and commons, is under [no restrictions]; and whatever acts *they* pass are laws, be they ever so oppressive or arbitrary.”); Thomas Paine, Rights of Man 97–98 (Gregory Claeys ed., Hackett Publ’g Co. 1992) (1791) (arguing that the British political arrangement is “merely a form of government without a constitution”); A Countryman II, New Haven Gazette, Nov. 22, 1787, reprinted in 3 Documentary History, *supra* note 70, at 471, 472 (“The famous English *Magna Charta* is but an act of Parliament, which every subsequent Parliament has had just as much constitutional power to repeal and annul as the Parliament which made it had to pass it at first.”); James Wilson, Speech at Pennsylvania Ratifying Convention (Nov. 24, 1787) (Thomas Lloyd version), reprinted in 2 Documentary History, *supra* note 70, at 350, 361 (“The British constitution is just what the British Parliament pleases.”).

By the time of the American Revolution, this had long since been true of royal authority in particular.<sup>89</sup> The previously sacrosanct *jus regium* of “dispensing with penall Lawes”<sup>90</sup> was the first item in the crosshairs of the Bill of Rights that defined the Glorious Revolution.<sup>91</sup> Starker still was the 1701 Act of Settlement’s dictation of succession<sup>92</sup> and marriage rights,<sup>93</sup> which even many pre-Civil War parliamentarians had understood as “inseparable prerogatives of the Crown and king.”<sup>94</sup> The seismic

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89. See, e.g., David Lieberman, *The Mixed Constitution and the Common Law*, in *The Cambridge History of Eighteenth-Century Political Thought* 319 (Mark Goldie & Robert Wokler eds., 2006) (noting the persistence of Jacobitical dissent, but emphasizing the “near complacency mid-[eighteenth-]century commentators displayed in treating once fiercely contested issues concerning the nature and authority of England’s monarch and parliament”); see also Peter Jupp, *The Governing of Britain 1688–1848*, at 83–102 (2006) (discussing the organic emergence of conventions around parliamentary supremacy in the decades following the Glorious Revolution).

90. See Edward Bagshaw, *The Rights of the Crown of England, as It Is Established by Law* 114 (London, printed for Simon Miller 1660); cf. *Case of Non Obstante, or Dispensing Power* (1606) 77 Eng. Rep. 1300, 1300; 12 Co. Rep. 18, 18 (KB) (“No Act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*; . . . this solely and inseparably is annexed to his person; and this Royal power cannot be restrained by any Act of Parliament . . .”).

91. See *An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown* (Bill of Rights) 1689, 1 W. & M. c. 2 (Eng.) (stating as its first substantive provision that “the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegal”). In a discussion of the controversial approval in *Godden v. Hales* of James II’s Test Act dispensations, Sir Robert Atkyns noted that:

[S]everal Acts of Parliament have been made in divers Cases, with express Clauses inserted in those Acts, to make void all *Non obstante’s* to the contrary of those Laws (which one would have thought would have been strong enough) and yet they all came to nothing: for the Judges heretofore have resolv’d that if the King grant a Dispensation from such Laws, with a Special *Non obstante* to any such Special Law, mentioning the very Law, that presently the force of that Law vanishes.

Robert Atkyns, *An Enquiry into the Power of Dispensing with Penal Statutes* 5 (London, printed for Timothy Goodwin 2d ed. 1689).

92. See *An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject* (Act of Settlement) 1700, 12 & 13 Will. 3 c. 2, § 1 (Eng.) (“That the most Excellent Princess Sophia[,] Electress and Dutchess Dowager of Hannover . . . be and is hereby declared to be the next in Succession in the Protestant Line to the Imperiall Crown . . .”).

93. See *id.* § 2 (prohibiting “all and every Person and Persons . . . who shall profess the Popish Religion or shall marry a Papist” from ascending the throne).

94. See Edward Coke, *Speech in Parliament* (Dec. 3, 1621), reprinted in 3 *The Selected Writings of Sir Edward Coke* 1213, 1213 (Steve Sheppard ed., 2003) [hereinafter *Selected Writings of Coke*] (“[I]nseparable prerogatives of the Crown and king. Marriage and leagues, war and peace, they are *arcana imperii* and not to be meddled with. If they were a petition of right that required an answer, I would never prefer it or give my consent to the preferring of it . . .” (footnote omitted)); see also Edward Coke, *Conference with the Lords in the Painted Chamber* (Mar. 8, 1621), reprinted in 3 *Selected Writings of Coke*, *supra*, at 1201, 1201 (“I will not meddle with the King’s prerogative, which is twofold: 1, absolute, as to make war, coin money, etc.; 2, or in things that concern *meum et*

implications of stripping such “prerogatives absolute” were well understood; earlier generations’ search for a theory to justify and describe some essential core of indefeasible royal authority simply ended.<sup>95</sup> This radical reworking of English parliamentary theory was thoroughgoing.<sup>96</sup> The prerogative was demystified.<sup>97</sup> It was no longer subdivided into aspects that were indefeasible (“prerogative absolute,” “prerogative indisputable,” or “*jus majestatis*”) and those that were not (“prerogative disputable” or “*jus praerogativae*”).<sup>98</sup> And it was shorn of its extralegal

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*tuum*, and this may be disputed of in courts of parliament.” (footnote omitted)). It’s possible that the ambiguity of Coke’s formulations—“not to be meddled with” and “I will not meddle with”—was no accident.

95. See, e.g., *Campbell v. Hall* (1774) 98 Eng. Rep. 1045, 1047–48; 1 Cowp. 204, 208–09 (KB) (recognizing full defeasibility of the king’s foreign affairs prerogative); see also, e.g., David Hume, *Essay VI: Of the Independency of Parliament* (1777) [hereinafter Hume, *Independency of Parliament*], reprinted in *Essays Moral, Political, and Literary* 42, 44 (Eugene F. Miller ed., 1987) (“The share of power, allotted by our constitution to the house of commons, is so great, that it absolutely commands all the other parts of the government.”). Hume further explained that “though the king has a negative in framing laws[] . . . this, in fact, is esteemed of so little moment, that whatever is voted by the two houses, is always sure to pass into a law, and the royal assent is little better than a form.” *Id.*

96. Compare, e.g., Robert Filmer, *The Free-holders Grand Inquest* (1679) [hereinafter Filmer, *The Free-holders Grand Inquest*], reprinted in *Patriarcha and Other Writings*, supra note 12, at 100 (resting claims about the king’s powers on “invincible reason from the nature of monarchy itself, which must have the supreme power alone”), and Bagshaw, supra note 90, at 113–14 (dividing “*Jus Regium*” into “*Jus Majestatis*,” which “is that which belongs to him as King, common to him, with other Princes, by the Law of Nature and Nations” and “*Jus Praerogativae*,” which “is that which belongs to him as King of England, and given to him by that Law alone”), with Edward Coke, *Speech in the Committee of the Whole House* (Apr. 26, 1628), reprinted in 3 *Selected Writings of Coke*, supra note 94, at 1266, 1267–68. Coke dismissed of the concept of “intrinsic” prerogative, which was, ostensibly, “entrusted [to the king] by God,” due “*jure divino*,” and was thus indefeasible by law: “[Those who use it] mean[] that intrinsic prerogative is not bounded by any law, or by any law qualified. [They say] we must admit this intrinsic prerogative an exempt prerogative, and so all our laws are out.” *Id.* (cautioning that “[w]e cannot yield to this”). For similar skepticism of the divine right of kings, see Philip Hunton, *A Treatise Of Monarchy* pt. I, ch. I, § 1, at 3–4 (London, printed for Richard Baldwin 1689) [hereinafter Hunton, *A Treatise of Monarchy*] (denying a divine “*scriptum est*” for “the endowing this or that person . . . with Sovereignty over a Community”); Algernon Sidney, *Discourses Concerning Government* ch. I, § 1, at 4 (London, n. pub. 1698) (describing the royalist position that the “[p]rerogative” was “[t]he *Royal Charter* granted to Kings by God”).

97. For more on the mystical aspects of the prerogative, see generally Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (1997); Francis Oakley, *Omnipotence, Covenant, and Order* (1984); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 *Va. L. Rev.* 575, 600–03 (2008).

98. See, e.g., *Case of Non Obstante, or Dispensing Power* (1606) 77 Eng. Rep. 1300, 1300–01; 12 Co. Rep. 18, 18–19 (KB) (“No [Act] can bind the King from any Prerogative which is sole and inseparable to his person . . . . [B]ut in things which are not incident solely and inseparably to the [King], but belong to every subject, and may be severed, an Act of Parliament may absolutely bind the King . . . .”); *Case of Penal Statutes* (1605) 77 Eng. Rep. 465, 465; 7 Co. Rep. 36, 36 (KB) (“[T]his confidence and trust is so inseparably

pretensions.<sup>99</sup> Following the lead of the parliamentary jurist Edward Coke, English law had worked its way from the milder proposition that “the Common law hath so admeasured the prerogatives of the King, that they should not take away, nor prejudice the inheritance of any [man]”<sup>100</sup>

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joined and annexed to the [King] in so high a point of sovereignty . . . for it was committed to the King by all his subjects for the good of the commonwealth.”); Edward Coke, Speech in the Committee of Grievances (Feb. 19, 1621) [hereinafter Coke, Speech in the Committee of Grievances], reprinted in 3 Selected Writings of Coke, *supra* note 94, at 1199 (“There is prerogative indisputable, and prerogative disputable. Prerogative indisputable, is that the king hath to make war: disputable prerogative is tied to the laws of England; wherein the king also hath divers prerogatives as *nullum tempus*.”); 2 Henry de Bracton, *On the Laws and Customs of England 166–67* (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (“Those connected with justice [and] peace belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown . . . [P]rivileges, . . . though they belong to the crown, may nevertheless be separated from it and transferred to private persons . . .” (footnotes omitted)). See generally Burgess, *supra* note 72, at 115–44, 161–62 (describing Jacobean consensus regarding a “duplex view of kingship” grounded in the distinction between “legal (or ordinary) prerogative” and “absolute (or extraordinary) prerogative”).

99. Locke struck confusion into generations of American constitutional commentators by using the *English* legal term “prerogative” to name the discretionary conceptual space wherein governing magistrates under *any* system of social organization might sometimes need to go beyond the laws. See John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government* (1690) [hereinafter Locke, *Second Treatise*], reprinted in *Two Treatises of Government and A Letter Concerning Toleration* ch. XIV, §§ 159–168, at 171–75 (Ian Shapiro ed., Yale Univ. Press 2003).

In this regard, compare the Tory politician Bolingbroke’s narrowing of the Lockean formulation to include only unauthorized (rather than prohibited) action: “Q. *What do’st thou mean by the Royal Prerogative?* A. A Discretionary Power in the King to act for the Good of the People where the Laws are silent, *never contrary to Law, and always subject to the Limitations of Law.*” Henry St. John, Viscount Bolingbroke, *The Freeholder’s Political Catechism* 6 (London, printed for J. Roberts 1733) (second emphasis added). Locke, by contrast, had famously included both unauthorized and prohibited action within his definition. See Locke, *Second Treatise*, *supra*, § 160, at 172 (“This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative . . .”). Compare also the Earl of Strafford’s formulation when defending himself against charges of treason, in particular by arguing that he had been following the king’s command. See *The Tryal of Thomas, Earl of Stafford: The Fourth Article* (Mar. 26, 1641), in 8 John Rushworth, *Historical Collections of Private Passages of State, Weighty Matters in Law, Remarkable Proceedings in Five Parliaments, 1618–1648*, at 175, 182 (London, printed for John Wright & Richard Chiswell 1680) (statement of the Earl of Strafford) [hereinafter *Historical Collections*] (“[T]he Prerogative, as long as it goes not against the Common Law . . . is the Law of the Land, and binds, as long as it transgresses not the Fundamental Law of the Land, being made provisionally for preventing . . . a Temporary Mischief, before an [Act] can give a Remedy.”).

100. See *Case of Proclamations* (1610) 77 Eng. Rep. 1352, 1353; 12 Co. Rep. 74, 75 (KB) (“[T]he King by his Proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.”); see also Edward Coke, *The Second Part of the Institutes of the Lawes of England* (1642), reprinted in 2 Selected

to the more radical conclusion that “the King hath no prerogative, but that which the law of the land allows him.”<sup>101</sup>

Never again could a king say “you neither mean [to] *nor can* hurt My Prerogative.”<sup>102</sup> To the contrary, William and Mary recognized the full implications of the Glorious Revolution by “solemnly Promis[ing]” at their coronation to “[g]overne the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same.”<sup>103</sup> Eighteenth-century legal commentators followed suit, contrasting the king’s “divers Prerogatives which the Law gives unto him” with the sovereign supremacy of Parliament’s “absolute Power in all Cases . . . to make Laws,” noting that “if the Parliament itself err, as it may, this may not be

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Writings of Coke, *supra* note 94, at 745, 886 (“[T]he best inheritance that the Subject hath, is the Law of the Realme.”).

101. See *Case of Proclamations*, 77 Eng. Rep. at 1354; 12 Co. Rep. at 75. Even before the Glorious Revolution, Matthew Hale—no mild proponent of royal authority—was cautiously but unmistakably embracing the point:

[T]hose rights which the king hath are in him absolutely, perpetually and hereditarily, whereby as he or his issues inheritable cannot, upon any pretence whatsoever either of abuse in him or public good of the state, either be deprived of the whole power regal, which is a deposition, or of any spark of that gem, any prerogative or power which he hath in right of his regality, *without his consent*.

Matthew Hale, *The Prerogatives of the King* 15 n.1 (D.E.C. Yale ed., Selden Soc’y 1976) [hereinafter Hale, *Prerogatives of the King*] (emphasis added). In other words, the king could not be deprived of his prerogative unless Parliament enacted a statute without his veto. See *id.* In his preface to the 1736 edition of Hale’s *History of the Pleas of the Crown*, legal writer Sollom Emlyn noted that upon Charles II’s reinstatement as monarch, Hale—who was “no inconsiderable promoter” of the Restoration—was “not for making a surrender of all, and receiving the king without any restrictions; on the contrary he thought this an opportunity not to be lost for limiting the prerogative, and cutting off some useless branches, that served only as instruments of oppression.” Sollom Emlyn, Preface to 1 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, at ii (London, E. & R. Nutt & R. Gosling 1736) [hereinafter Hale, *History of the Pleas of the Crown*].

The royalist Edward Bagshaw was to the same effect: “That this Kingly Government be according to the Laws of the Land, . . . by legal, not by arbitrary power.” See Bagshaw, *supra* note 90, at 101. Bagshaw argued that because the Crown was so “encircled with good Laws,” it was “scarce possible for a King of England to fall into Tyranny, for he neither speaketh, nor acteth, nor judgeth, nor executeth, but by his Writt, by his Laws, by his Judges, and Ministers, and both these sworne to him . . . to execute justice to his People.” *Id.* at 105. Accordingly, it was plain that the king—“in respect of his Duty and Office, in respect of his Oath, in respect of the Dignity and Honour of his Crown, and the good of his People”—would govern his people “by the Laws of the Land.” *Id.* at 122.

102. See Charles I, Response to the Petition of Right, 3 HL Jour. 841, 844 (June 7, 1628) (emphasis added); see also HC Jour. 622 (Nov. 1601) (statement of Sir George Moore) (“We know the power of her Majesty cannot be restrained by any Act, why therefore should we thus talk? Admit we should make this Statute with a *Non obstante*, yet the Queen may grant a Patent with a *Non obstante*, to cross this *Non obstante*.”).

103. See An Act for Establishing the Coronation Oath 1688, 1 W. & M. c. 6, § 3 (Eng.). Thanks to Andrew Kent for this reference.



reversed in any Place but in Parliament.”<sup>104</sup> Even political theorists who were generally sympathetic to monarchy felt no need to hedge:

[T]hough in [the King’s] political capacity of one of the constituent parts of the Parliament, that is, with regard to the share allotted to him in the legislative authority, the King is undoubtedly Sovereign, and only needs alledge his will when he gives or refuses his assent to the bills presented to him; yet, in the exercise of his powers of Government, he is no more than a Magistrate, and the laws, whether those that existed before him, or those to which, by his assent, he has given being, must direct his conduct, and bind him equally with his subjects.<sup>105</sup>

This hard-won legacy of subjecting the Crown to the rule of law was key to the Founders’ self-image as heirs to a revolutionary tradition of liberty, seized by “that patriotic spirit which prompted the illustrious English barons to extort Magna Charta from their tyrannical king, John.”<sup>106</sup> However much the Founders otherwise disagreed, they tended to share the

104. See Finch, *supra* note 88, bk. II, ch. I, at 57, 59 (footnote omitted). Oliver Goldsmith’s vision of the Long Parliament choosing which elements of prerogative to keep and which elements to chuck was typical:

Hitherto we have seen the commons in some measure the patrons of liberty and of the people; boldly opposing the stretches of illegal power, or repressing those claims which, tho’ founded on custom, were destructive of freedom. . . . Had they been contented with resting here, after abridging all those privileges of monarchy which were capable of injuring the subject, and leaving it all those prerogatives that could benefit, they would have been considered as the great benefactors of mankind, and would have left the constitution pretty nearly on the same footing on which we enjoy it at present.

<sup>3</sup> Goldsmith, *supra* note 71, at 239.

105. Jean de Lolme, *The Constitution of England* bk. I, ch. IV, at 71 (London, printed for G. Robinson & J. Murray 4th ed. 1784) [hereinafter de Lolme, *The Constitution of England*]. In the original French, de Lolme wrote:

Mais, au lieu qu’en sa capacité politique de l’un des ordres du parlement, c’est-à-dire, par rapport à la portion qui lui compète de la puissance législative, il est souverain, & n’allègue que sa volonté lorsqu’il donne ou refuse son consentement; chargé de l’administration publique, il n’est que magistrat, & les loix, soit celles qui existoient avant lui, soit celles auxquelles par son assentiment il a donné l’existence, doivent diriger sa conduite, & l’obligent aussi bien que ses sujets.

<sup>1</sup> Jean de Lolme, *Constitution de l’Angleterre* 65 (Geneva, Barde, Manget & Co. 1789) [hereinafter de Lolme, *Constitution de l’Angleterre*]. On Genevan and British political theorist Jean de Lolme’s monarchical sympathies, see Iain McDaniel, Jean-Louis DeLolme and the Political Science of the English Empire, 55 *Hist. J.* 21, 30–38 (2012). For typically stirring American rhetoric on this point, see Patrick Henry’s speech to the Virginia Ratifying Convention: “[I]f the King of England attempted to take away the rights of individuals, the law would stand against him.—The acts of Parliament would stand in his way—The Bill, and Declaration of Rights would be against him. The common law is fortified by the Bill of Rights.” Patrick Henry, *Speech to the Virginia Ratifying Convention* (June 19, 1788), reprinted in 10 *Documentary History*, *supra* note 70, at 1387, 1394.

106. See *Tar and Feathers*, *Indep. Gazetteer* (Philadelphia), Oct. 2, 1787, reprinted in 2 *Documentary History*, *supra* note 70, at 152, 153.

view that the spirit of parliamentary liberty was less corrupted in the New World than in the home country and to think any new government would be measured by its ability to embody and protect that spirit.<sup>107</sup>

### B. *The Execution Problem*

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

A longstanding challenge for governance theorists was the problem of closing the gap between law and reality. Like the classical philosophy<sup>108</sup> and Christian theology<sup>109</sup> on which it drew, English jurisprudence

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107. See Bailyn, *supra* note 61, at 122–43; Pocock, *Machiavellian Moment*, *supra* note 67, at 506–47; Wood, *supra* note 50, at 91–124. For an account emphasizing the Founders' interest in establishing an independent executive branch, see Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding 184–203* (2014).

108. E.g., Aristotle, *Ethica Nicomachea* bk. X, *in* 9 *The Works of Aristotle* 1172a, 1179a (W.D. Ross trans., Clarendon Press 1925) (“[A]rguments . . . are not able to encourage the many to nobility and goodness. For these do not by nature obey the sense of shame, but only fear, and do not abstain from bad acts because of their baseness but through fear of punishment . . . . What argument would remould such people?”); Plato, *Laws* bk. III, *in* 5 *The Dialogues of Plato* 676, 689 (London, B. Jowett trans., Oxford Univ. Press 3d ed. 1892) (“[W]hen the soul is opposed to knowledge, or opinion, or reason, . . . that I call folly, just as . . . when the multitude refuses to obey their rulers and the laws; or, . . . in the individual, when fair reasonings have their habitation in the soul and yet do . . . the reverse of good.”).

109. Punishment for violating God's law was a central concern in the first Anglo-American Great Awakening. See, e.g., Jonathan Edwards, *God's Sovereignty in the Salvation of Men*, *in* 8 *The Works of President Edwards with a Memoir of His Life* 105, 110 (New York, S. Converse 1830) [hereinafter *Works of Edwards*] (“The justice of God requires the punishment of sin.”); Jonathan Edwards, *Safety Fullness, and Sweet Refreshment, to Be Found in Christ*, *in* 8 *Works of Edwards*, *supra*, at 355, 359 (“Every jot and tittle of the law must be fulfilled, heaven and earth shall be destroyed, rather than justice should not take place; there is no possibility of sin's escaping justice.”); John Wesley, *Upon Our Lord's Sermon on the Mount: Discourse 1*, *in* 5 *The Works of the Rev. John Wesley*, A.M. 247, 247–48 (London, John Mason 3d ed. 1829) (“[T]he Lord our Governor, whose kingdom is from everlasting, and ruleth over all; the great Lawgiver, who can well enforce all his laws, being ‘able to save and to destroy,’ yea, to punish . . .”).

Relatedly, the uncertain relationship between sin and consequence was one of the oldest and hardest problems of Judeo-Christian theology:

*According to the Will of a Legislator God cannot permit Sin:* For that would be, as if he should declare Sin to be Lawful, which implies a Contradiction. But God as Decreeing Events *does at least permit Sin;* that is, he does not do all he can to hinder it from being. . . . [A]ll Laws are about possible things. *But God that he may execute his Decreeing Will, prepares and sets in order the Means.*

had long marked a distinction between law's content in theory and its enforcement on the ground. By the Founding Era, the classic English formulation was summarized in Matthew Hale's pathbreaking treatise:

[W]e must observe a threefold effect of law. (1) The obligation on conscience. (2) The penalty. (3) The irritation or making void of an act done contrary to the direction of the law. The first proceeds from the directive power of the law; the two latter from the coercive power of the law.<sup>110</sup>

This distinction between directive and coercive (or "coactive") power had long been central to discussions of governance and administration.<sup>111</sup> Directive power was understood as that quality of rules which makes them legally binding on their objects. But both in theory<sup>112</sup> and in

Samuel Pufendorf, *The Divine Feudal Law: Or, Covenants with Mankind, Represented* § 71, at 159–63 (Simone Zurbuchen ed., Theophilus Dorrington trans., 2002) (1695) (quoting Pierre Jurieu, *De Pace inter Protestantibus ineunda consultatio* (Utrecht, 1688)); see also St. Augustine, *The City of God* bk. 1, ch. 8, in *2 A Select Library Of The Nicene and Post-Nicene Fathers of the Christian Church* 1, 5 (Buffalo, Philip Schaff ed., Marcus Dods trans., Christian Literature Co. 1887) ("For if every sin were now visited with manifest punishment, nothing would seem to be reserved for the final judgment; on the other hand, if no sin received now a plainly divine punishment, it would be concluded that there is no divine providence at all."); Job 38:2, 4 (King James) ("Who is this that darkeneth counsel by words without knowledge? . . . Where wast thou when I laid the foundations of the earth? [D]eclare, if thou hast understanding.").

110. Hale, *Prerogatives of the King*, supra note 101, at 176; see also id. at 14 ("There are three powers in laws, (1) *Potestas coercens* or *coactiva*. (2) *Potestas directiva*, [and (3) *Potestas irritans actus contrarios*." (alterations in original)). The "irritans" power included the ability of courts to refuse to give effect to unlawful acts, including those of the Crown. See, e.g., Henry Parker, *Observations upon Some of His Majesties Late Answers and Expresses* 44 (n.p., n. pub. 1642) ("[I]n all irregular acts where no personall force is, Kings may be disobeyed, their unjust commands may be neglected, not only by communities, but also by single men sometimes."). While Hale's works on royal power appear not to have been published until the twentieth century, they were kept in the library at Lincoln's Inn where they served as a standard teaching and research reference for many, including Blackstone, who cited Hale extensively. See Introduction to Hale, *Prerogatives of the King*, supra note 101, at ix–xi, lvix–lxi. Their influence might be analogized to that of the Hart & Wechsler teaching materials before their publication.

111. Thomas Aquinas was a standard referent in the English discourse:

The sovereign is said to be "exempt from the law," as to its coercive power; since [ . . . ] law has no coercive power save from the authority of the sovereign. . . . [This does not mean that] the sovereign is . . . exempt from the law, as to its directive force; but [that] he should fulfil it to his own free-will and not of constraint.

See Saint Thomas Aquinas, *Summa Theologica* pt. I-II, question 96, art. 5, Reply to Objection 3, at 2327 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947), digitized in Saint Thomas Aquinas, *Summa Theologica* (Christian Classics Ethereal Library n.d.).

112. The classic example was the Crown. Henry Parker observed that "[t]he King as to His own person, is not to be forcibly repelled in any ill doing, nor is He accountable for ill done, Law has only a directive, but no coactive force upon his person . . ." Parker, supra note 110, at 44. Similarly, Hale noted that the king was regularly "bound in conscience to observe all such laws as either by the common law or statutes extend[ed] to him." Hale,

practice,<sup>113</sup> not all rules can be enforced against the people to whom they are directed. As the leading seventeenth-century theorist of royal power put it, “[g]overnment as to coercive power was after sin, because coercion supposeth some disorder, which was not in the state of innocency.”<sup>114</sup> The problem of disobedience thus required government to have not only the power to formulate rules directing people’s behavior but also the power to force people to comply.

In addition to a power of making rules, then, any not-perfectly-virtuous society required a power of enforcing rules—a power of execution. *Bracton*, the great medieval English treatise, was unequivocal: “[I]t is useless to establish laws unless there is someone to enforce them.”<sup>115</sup> The immensely influential Coke exhorted similarly in his much-admired Charge at the Norwich Assizes: “The life and strength of the Laws, consisteth in the execution of them: For in vaine are just lawes Inacted, if not justly executed.”<sup>116</sup> This observation became a standard opening move for virtually any ambitious discussion of law and government.<sup>117</sup> Prolific

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Prerogatives of the King, *supra* note 101, at 176. However, the king was “not subject to the penalty of law, at least where the penalty [was] personal” and so “acts by him done or omitted contrary to the tenor of those laws or customs” made him “not liable to any personal loss or damage.” *Id.* at 177.

113. See, for example, your local highway.

114. Filmer, *The Anarchy*, *supra* note 12, at 145. As for the directive power, Filmer observed that “the condition of human nature requires it, since civil society cannot be imagined without power of government.” *Id.* As long as “men continued in the state of innocency,” they might not “need the direction of Adam in those things which were necessarily and morally to be done, yet things indifferent—that depended merely on their free will—might be directed by the power of Adam’s command.” *Id.*

From the opposite end of the political spectrum, Parker invoked a similarly Christian theological framework to make the same point:

Man being depraved by the fall of *Adam* grew so untame and uncivill a creature, that the Law of God written in his brest was not sufficient to restrayne him from mischief, . . . and therefore without some magistracy to provide new orders, and to judge of old, and to execute according to justice, no society could be upheld, without society men could not live, and without lawes men could not be sociable, and without authority somewhere invested, to judge according to Law, and execute according to judgement, Law was a vaine and void thing . . . .

Parker, *supra* note 110, at 13.

115. 2 *Bracton*, *supra* note 98, at 166; see also *id.* at 19 (“[I]f laws fail, justice will be extirpated . . . .”); *id.* at 304 (“Nor does it suffice [for a judge] to have jurisdiction unless he has the power of coercion . . . .”). For a terrific overview of the historiography on the treatise known as *Bracton*, see Thomas McSweeney, *English Judges and Roman Jurists: The Civilian Learning Behind England’s First Case Law*, 84 *Temp. L. Rev.* 827, 831–36 (2012).

116. Edward Coke, *Speech and Charge at the Norwich Assizes (1607)* [hereinafter *Coke, Speech and Charge at the Norwich Assizes*], reprinted in 2 *Selected Writings of Coke*, *supra* note 94, at 523, 554.

117. See, e.g., Cesare Beccaria, *An Essay on Crimes and Punishments* 5 (London, printed for J. Almon 1767) (“Laws are the conditions, under which men, naturally independent, united themselves in society.”); *id.* at 6 (“But it was not sufficient only to establish [laws]; it was also necessary to defend [them] . . . . Some motives . . . were necessary[] to prevent

writer Daniel Defoe's formulation serves well as a précis of conventional eighteenth-century wisdom: "[T]he Vigour of the Laws consists in their Executive Power; Ten thousand Acts of Parliament signify no more than One single Proclamation, unless the Gentlemen, in whose hands the Execution of those Laws is placed, take care to see them duly made use of . . . ."<sup>118</sup>

Metaphors for the point were varied and colorful: the motion of bodies, the speaking of thoughts, and the voicing of melodies. The famous cartoon *Leviathan* on the frontispiece of Thomas Hobbes's masterwork drew on a long tradition of such corporeal imagery,<sup>119</sup> its author describing "Publique Ministers . . . that have Authority . . . to procure the Execution of Judgements given" as providing "service, answerable to that of the Hands in a Bodie naturall."<sup>120</sup> Other commentators deployed more

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the despotism of each individual from plunging society into its former chaos. Such motives are the punishment established against the infractors of the laws."); 2 Jean Jacques Burlamaqui, *The Principles of Natural and Politic Law* pt. III, ch. IV, at 416–17 (Peter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1748) ("[T]he right of executing . . . [laws], and . . . punishing [violators], belongs originally to society in general, and to each individual in particular; otherwise . . . laws, which nature and reason impose on man, would be entirely useless . . . if no body had the power of putting them in execution, or of punishing [their] violation."); John Cowell, *The Institutes of the Lawes of England* 2 (London, Tho. Roycroft 1651) [hereinafter Cowell, *Institutes*] ("[I]t is requisite likewise, [t]hat there be Magistrates ordained, [so that] the Lawes may be put in execution; for it were to little purpose that there should be Lawes, if there were not some to govern by those Lawes."); Thomas Hobbes, *Leviathan* 147–48 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("Lawes are of no power to protect them, without a Sword in the hands of a man, or men, to cause those laws to be put in execution."); Henry Home, Lord Kames, *The Hereditary and Indefeasible Right of Kings*, in *Essays upon Several Subjects Concerning British Antiquities* 193 (Edinburgh, printed for A. Kincaid 1747) ("A Society of any Extent cannot be without Government. The Members must have Laws to determine their Differences, and they must have Rulers to put their Laws in Execution."); Samuel von Pufendorf, *De Officio Hominis et Civis Juxta Legem Naturalem* bk. II, ch. XI, at 122 (James Brown Scott ed., Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682) [hereinafter Pufendorf, *On the Duty of Man and Citizen*] ("[I]t is in vain that laws are passed, if the rulers allow them to be violated with impunity, it is accordingly their duty to have charge of the execution of the same . . . ."); Samuel Pufendorf, *On the Law of Nature and of Nations in Eight Books* bk. VII, ch. 4, reprinted in *The Political Writings of Samuel Pufendorf* 93, 223 (Craig L. Carr ed., Michael J. Seidler trans., Oxford Univ. Press 1994) [hereinafter Pufendorf, *Law of Nature and Nations*] ("[P]assing laws which you are unable to put into effect is a hollow exercise . . . .").

118. Daniel Defoe, *The Poor Man's Plea* 23 (London, printed for A. Baldwin 2d ed. 1698). Defoe further argued that without the "[c]oncurrence" of the English gentry, which had an important role in the execution of law, all "the Laws, Proclamations, and Declarations in the World [would] have no Effect." *Id.*

119. See Hobbes, *supra* note 117, at 2 fig.2.

120. *Id.* at 169. For more examples of prominent treatise writers using corporeal metaphors for both law and government, see Jean Bodin, *The Six Books of a Commonweale* 7 (London, Richard Knolles trans., printed for G. Bishop 1606) ("[A] commonweale cannot long stand if it be . . . destitute of those . . . things necessary for the life of man; no more than can a man long live whose mind is so strongly ravished with the contemplation of high things, that he forgetteth to eate or drinke . . . ."); John Davies, *A Report of Cases and*

musical analogies, observing that “lawes without execucion, be no more profitable, than belles without clappers,”<sup>121</sup> or that “the Law . . . is indeed an excellent Instrument to make harmony and concord in the Commonwealth: but the best Lute that ever was made could never make musick of it self alone, without the learned hand of the Lute-player.”<sup>122</sup> The point was visceral: The laws must “follow every subject, as the shadow follows the body”<sup>123</sup>—for “what a livelesse fond thing would Law be, without any judge to determine it, or power to enforce it . . . ?”<sup>124</sup>

The legal and political writings inherited by the Founders were fairly obsessed with execution. The treatise known as *Bracton* returned metro-nomically to the pairing of judgment and execution—in both practical<sup>125</sup> and jurisdictional<sup>126</sup> terms. Later authors likewise framed their inquiries

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Matters in Law, Resolved and Adjudged in the King’s Courts in Ireland 23–24 (Dublin, printed for Sarah Cotter 1762) [hereinafter Davies, Report of Cases in Ireland] (“Again, the Law is nothing else but a Rule which is made to measure the actions of men. But a *Rule* is dead, and measures nothing, unless the hand of the Architect do apply it.”); Jean-Jacques Rousseau, *The Social Contract* bk. III, ch. 11, at 135 (Maurice Cranston trans., Penguin Books 1968) (1762) (“The legislative power is the heart of the state, the executive power is the brain, which sets all the parts in motion. The brain may become paralysed and the individual still live[] . . . but as soon as his heart stops functioning, the creature is dead.”).

121. John Ponet, *A Shorte Treatise of Politike Power* 6 (n.p., n. pub. 1556); see also Johannes Althusius, *Politica* 177 (Frederick S. Carney ed. & trans., Liberty Fund 1995) (1617) (“Law should be accurately and precisely executed. For law without execution is like a bell without a clapper. It would be as if the magistrate were mute or dead.”).

122. Davies, Report of Cases in Ireland, supra note 120, at 23–24.

123. Beccaria, supra note 117, at 147.

124. Parker, supra note 110, at 13–14. Theologian John Bramhall also described the operation of laws in a Hobbesian state of nature when he wrote that Hobbes:

maketh the laws of nature to be laws and no laws: Just as *a man and no man, hit a bird and no bird, with a stone and no stone, on a tree and no tree:* not *laws* but *theorems*, laws which required not *performance* but *endeavours*, laws which were silent, and could not be put in execution in the state of nature.

John Bramhall, *The Catching of Leviathan, or the Great Whale, in Castigations of Mr. Hobbes: His Last Animadversions in the Case Concerning Liberty and Universal Necessity* 449, 569 (London, E.T. 1658).

125. See 2 Bracton, supra note 98, at 308 (“[Justice’s] jurisdiction is extended to all matters necessary to determine the suit, so far as judgment and the execution of judgment are concerned . . .”); 4 Bracton, supra note 98, at 278 (“In civil causes . . . it seems that clerks may not save themselves from answering in the secular forum in pleas which belong to the crown and dignity of the king, because the king can order execution of the judgment without prejudice to the ecclesiastical dignity . . .”).

126. See 3 Bracton, supra note 98, at 46 (“The plaint ought to be made to him who has jurisdiction, as the prince, and not to everyone who has jurisdiction unless he also has coercion, so that he may order execution of his judgment.”). However, “ecclesiastics,” according to *Bracton*, “though they have jurisdiction in some matters . . . have neither cognisance nor coercion with respect to lay fee.” *Id.* If ecclesiastics “demanded execution [by the sheriff], the sheriff would disobey them with imputiny . . .” *Id.* (alteration in original); see also 4 Bracton, supra note 98, at 249 (“Of spiritual and temporal things and their accessories . . . which must be determined in the ecclesiastical forum . . . and in the same

as an exploration of administrative mechanisms for putting parchment law into effect. The introduction to the jurist and politician John Davies's seminal work on Irish common law celebrated the king, not so much for his majesty's gracious gift of English law to the lucky nation of Ireland as for creating an administrative apparatus to implement it.<sup>127</sup> Coke prefaced the first volume of his *Reports* by explaining that its publication was prompted "when [he] considered how by her Majesties princely care and choice, her Seates of Justice have beene ever for the due execution of her Lawes."<sup>128</sup> And Francis Bacon's *Elements of Common Law* was framed around an appeal to a set of royal reforms—compared by the author to those of the Byzantine emperor Justinian<sup>129</sup>—aimed at facilitating the execution of law.<sup>130</sup> This idea recurs persistently in legal treatises,<sup>131</sup>

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way if a plea is sued in the secular forum . . . cognisance of the principal matter will not . . . belong to the ecclesiastical judge."); 4 Richard Burn, *The Justice of the Peace and Parish Officer* 42 (London, W. Strahan & W. Woodfall 15th ed. 1785) [hereinafter Burn, *Justice of the Peace and Parish Officer*] (offering a similar observation on the pairing of judgment and execution).

127. See Davies, *Report of Cases in Ireland*, supra note 120, at 1 ("King John made the first division of Counties in Ireland, published the Laws of England, . . . commanded the due execution thereof[,] . . . [and] erected the courts of justice . . ."). To that end, and to "put English Laws in execution [in Ireland]," the King "brought with him many learned persons in the law, and other Officers and Ministers of all sorts . . ." Id.

128. Edward Coke, *Preface to Part One of the Reports* (1660), reprinted in 1 *Selected Writings of Coke*, supra note 94, at 5; see also Edward Coke, *Preface to Part Nine of the Reports* (1613) [hereinafter Coke, *Preface to Part Nine of the Reports*], reprinted in 1 *Selected Writings of Coke*, supra note 94, at 291 (describing the constitutional law of England as structured around the goal "[t]hat the Subject might be kept from offending, that is, that Offences might be prevented both by good and provident Laws and by the due Execution thereof").

129. See Francis Bacon, *The Elements of the Common Laws of England* (1630) [hereinafter Bacon, *The Common Law*], reprinted in Lord Bacon's *Law Tracts* 24–25 (London, printed for D. Browne 2d ed. 1741) ("The same desire long after did spring in the Emperor *Justinian* . . . who[,] having peace in the heart of his Empire . . . chose it for a monument and honour of his government[] to revisit the *Roman* lawes from infinite volumes . . . into one competent and uniform corps of laws.").

130. See id. at 26 ("Your Majesty's reign having been blessed from the highest with inward peace, and falling into an age, wherein if science be increased, conscience is rather decayed, and if mens wits be great, their wills be greater, and wherein also laws are multiplied in number, and slackened in vigour and execution . . ."). Bacon's constitutional survey of English government focuses on the various actors' power "to execute" law and justice. See id. at 109–63 (explaining the powers and duties of the sheriffs, hundreds, justices of the peace, and judges of the assizes); see also Francis Bacon, *New Atlantis* (1627) [hereinafter Bacon, *New Atlantis*], reprinted in Francis Bacon: *A Selection of His Works* 417, 439 (Sidney Warhaft ed., Macmillan Publ'g Co. 1985) ("The governor assisteth, to the end to put in execution by his public authority the decrees and orders . . .").

131. See, e.g., John Fortescue, *De Laudibus Legum Angliae* 80 (Cambridge, A. Amos ed., Cambridge University 1825) (1775) ("[T]he King's Sheriff . . . executes within his county all mandates and judgments of the King's Court of Justice . . ."); cf. 3 Burn, *Justice of the Peace and Parish Officer*, supra note 126, at 1–35 ("Justices of the peace are judges of record, appointed by the king . . . for the conservation of the peace, and for the

reported case law,<sup>132</sup> and theoretical writings,<sup>133</sup> and eighteenth-century statute books were dotted with provisions aimed at “the more effectual execution of . . . Laws.”<sup>134</sup>

C. *Execution: The King’s Defining Role*

The practical need for a constitutional cudgel was obvious. Luckily for the English, they had one ready at hand: the king.<sup>135</sup> The standard formulation emphasized that “[t]o rule well a king requires two things, arms and laws, that by them both times of war and of peace may be rightly ordered. For each stands in need of the other.”<sup>136</sup> The English treatise writers tended understandably to focus on the second:

For this is true freedom in a Prince, to be loved at home, and feared abroad, to be able to defend his own people at home from oppression and violence by his Laws, without the help of an Army; to keep and conserve all his Subjects in happy peace, by a sword made of Parchment and Paper in his Laws, and not by a Sword made up of Iron and Steel in his Armies.<sup>137</sup>

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execution of divers things comprehended within their commission, and within divers statutes committed to their charge.”).

132. See, e.g., *Calvin’s Case*, or the *Case of the Postnati* (1608) 77 Eng. Rep. 377, 391; 7 Co. Rep. 1 a, 12 a (KB) (“So in our usual commission of assise, of gaol delivery, of oyer and terminer, of the peace, &c. power is given to execute justice . . .”); *The Chamberlain of London’s Case* (1590) 77 Eng. Rep. 150, 151; 5 Co. Rep. 62 b, 63 a (KB) (“[O]rdinances, constitutions, or by-laws are allowed by the law, which are made for the true and due execution of the laws or statutes of the realm, or for the well government and order of the body incorporate.”).

133. See, e.g., Helvetius, *Essays on the Mind and its Several Faculties* 139 (London, n. pub. 1759) (“[L]aws made for the happiness of all would be observed by none, if the magistrates were not armed with the power necessary to put them in execution.”).

134. E.g., 1773, 13 Geo. 3 c. 31, § 4 (Gr. Brit.) (expanding personal jurisdiction in larceny cases); see also 1786, 26 Geo. 3 c. 82, § 6 (Gr. Brit.) (revising standards of proof in tax-evasion cases).

135. Or Queen, *faute de mieux*.

136. 2 Bracton, *supra* note 98, at 19 (“If arms fail against hostile and unsubdued enemies, then will the realm be without defense; if laws fail, justice will be extirpated; nor will there be any man to render just judgment.”); see also Niccolo Machiavelli, *The Prince* 51 (Daniel Donno ed. & trans., Bantam Books 1966) (1513) [hereinafter Machiavelli, *The Prince*] (“The two most essential foundations for any state, whether it be old or new, or both old and new, are sound laws and sound military forces.”). Thanks to John Hudson for pointing out that this formulation appears to date at least to Justinian’s *Institutes*, still well known in the eighteenth century. See D. Justiniani, *Institutionum* bk. IV, at 1 (George Harris trans., London, printed for C. Bathurst & E. Withers 1756) (“The imperial dignity should be supported by arms, and guarded by laws, that the people, in time of peace as well as war, may be secured from dangers and rightly governed.”).

137. Bagshaw, *supra* note 90, at 104; see also Fortescue, *supra* note 131, at 2–3 (“[A]s you divert and employ yourself so much in feats of arms, so I could wish to see you zealously affected towards the study of the laws; because, as wars are decided by the sword, so the determination of justice is effected by the laws . . .”) (footnote omitted); Ranulf de Glanville, *A Treatise on the Laws and Customs of the Kingdom of England*, at xxxvi (London, J. Beames trans., A.J. Valpy 1812) (“The Regal Power should not merely be



The king's role in creating and interpreting law was one of seventeenth-century England's most hotly disputed constitutional controversies.<sup>138</sup> But when it came to its execution, everyone agreed that the king—or someone like him—was indispensable.<sup>139</sup>

[Y]our Majesty is in a double respect the life of our Laws; once, because without your authority they are but *litera mortua*; and again because you are the life of our peace, without which laws are put to silence, and as the vital spirits do not only maintain and move the body, but also contend to perfect and renew it; so your sacred Majesty, who is *anima legis*, doth not only give unto your laws force and vigour but also hath bin careful of their amendment and reforming . . . .<sup>140</sup>

As Chief Justice of the King's Bench Thomas Billing explained in the fifteenth century, “[I]t pertains to every king by reason of his office to do justice and grace, justice in executing the laws, &c, and grace in granting pardon to felons . . . .”<sup>141</sup> To suggest otherwise was to misunderstand the office: “[W]hat is the King himself, but the clear Fountain of Justice? [A]nd what are the Professors of the Law but the Conduit-pipes deriving and conveying the streams of his Justice to all the subjects of his several Kingdoms?”<sup>142</sup>

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decorated with Arms to restrain Rebels and Nations making head against it and its realm, but ought likewise to be adorned with Laws for the peaceful governing of its Subjects and its People.”). Of course, the reality didn't always live up to the aspiration. See, e.g., Jupp, *supra* note 89, at 6 (noting the spotty nature of law enforcement as actually exercised at the local level).

138. See, e.g., Bagshaw, *supra* note 90, at 76 (“[N]ever any Bill passed in Parliament for a Law (the King being within the Realme) by the Lords and Commons alone, without the Kings personall assent in Parliament to the Bill, as he that gave life and being to the Law . . .”).

139. See, e.g., Althusius, *supra* note 121, at 177 (“[C]ommonwealths thrive only so long as good laws, which are the soul of a commonwealth, are respected in them. The magistrate has been constituted for the sake of executing law, and in this sense he is a living law . . .”); John Milton, *A Defence of the People of England* (1692) [hereinafter Milton, *Defence of the English People*], reprinted in 2 *The Prose Works of John Milton* 5, 106 (Philadelphia, John W. Moore 1847) (“[T]he parliament is the supreme council of the nation, constituted and appointed by a most free people, and armed with ample power and authority . . . to consult together upon the most weighty affairs of the kingdom; the king was created to put their laws in execution.”); William Camden, *Discourse Concerning the Prerogative of the Crown* (1617), in Frank Smith Fussner, *William Camden's “Discourse Concerning the Prerogative of the Crown,”* 101 *Proc. Am. Phil. Soc'y* 204, 213 (1957) (“Next to the making of laws the execution of them is the most material, which wholly dependeth upon the king, no man having any authority to put any thing into execution but as his deputy . . .”).

140. Bacon, *The Common Law*, *supra* note 129, at 23–24.

141. 1 Hale, *History of the Pleas of the Crown*, *supra* note 101, at 102 (quoting Chief Justice Thomas Billing in *In re Bagot's Case*, YB 9 Edw. 4, fol. 1b (1469) (Eng.)).

142. Davies, *Report of Cases in Ireland*, *supra* note 120, at 21; see also Bagshaw, *supra* note 90, at 56 (noting that “the regard the Law hath to the person of the Supream Governour, esteeming him the Head of the Law, and the Fountain of Justice”); 2 Bracton, *supra* note 98, at 167 (“For to do justice, [give] judgment and preserve the peace is the

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

[F]or the law and the king's writs be the things[] by which a man is protected and holpen; and so, during the time that a man in such case is out of the king's protection, he is out of helpe and protection by the king's Law, or by the king's writ.<sup>143</sup>

This was true not only for those who physically departed the realm but also for anyone expelled from the body politic in a metaphorical sense, as by a *praemunire facias*.<sup>144</sup> Even ritual formulations (“The King is dead; long live the King!”) recognized that interregnum meant the death of law: “[I]t is a general uncontested Rule, That upon the Death of a King in actual Possession of the Crown, his Heir is a King . . . before his Coronation[,] for without a King to execute the Laws, Justice must fail[,] and therefore it is a Maxim[,] that the King never dies.”<sup>145</sup>

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crown[,] without which it can neither subsist nor endure.” (first alteration in original)); Coke, Speech and Charge at the Norwich Assizes, *supra* note 116, at 530–31 (“To Kings, Rulers, Judges, and Magistrates, this sentence is proper: *Vos Dei estis*; you are Gods on earth: when by your execution of Justice and Judgement, the God of heaven is by your actions represented . . .”). For a colonial example distinguishing “the executive power” from other branches of prerogative and noting of the king that “possessing the executive power of the laws, it is his peculiar duty to see such act carried into execution,” see, for example, *Godwin v. Lunan*, Jeff. 96 (Gen. Ct. Va. 1771) (recording counsel's argument in a case brought by churchwardens and vestrymen against a licentious minister).

143. 1 Edward Coke, *The First Part of the Institutes of the Laws of England*; or, a Commentary upon Littleton bk. 2, ch. 11, § 199, at 129b (Francis Hargrave & Charles Butler eds., London, Luke Hansard & Sons 16th ed. 1809) (1628) [hereinafter *Coke on Littleton*]. Hobbes gave this formulation a nasty twist, at least from the king's perspective: “The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.” Hobbes, *supra* note 117, at 153. For an even more daring version, see the doctrinally-sound-but-common-sense-deficient treason convict quoted in Hale's *The History of the Pleas of the Crown*: “[T]he king being convicted by the pope may be lawfully slaughtered by any whatsoever, for this is the execution of the supreme sentence of the pope, as the other is the execution of the law.” 1 Hale, *History of the Pleas of the Crown*, *supra* note 101, at 117 (emphasis omitted).

144. See 1 *Coke on Littleton*, *supra* note 143, bk. 2, ch. 11, § 199, at 130a (“The judgement in a *praemunire* is[] that the defendant shall be . . . out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king, and that his body shall remaine in prison at the king's pleasure.”). The *praemunire facias* offense was “[s]o odious” that “[an attained man] might have bin slaine . . . without danger of law.” *Id.*

145. 1 William Hawkins, *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters Relating to That Subject, Digested Under Their Proper Heads* ch. 17, § 19, at 36 (London, Eliz. Nutt 1716) [hereinafter *Hawkins, Pleas of the Crown*]; see also Edward Coke, *The Third Part of the Institutes of the Lawes of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1644), reprinted in 2 *Selected Writings of Coke*, *supra* note 94, at 944, 963–64 (“[T]he Crown descend to the rightfull heire, he is *Rex* before Coronation: for by the Law of England there is no

The king's role as the executor of law was so conceptually central to his identity that it was literally criminal to disrespect it. Thus, to refuse a royal request for assistance with the execution of law was to commit a misprision contempt against the king's prerogative.<sup>146</sup> It was also a crime, not only to accuse the king of failing to execute the law but even simply to suggest that he might not be doing so with sufficient vigor.<sup>147</sup> It was no accident that the first item in Parliament's Grand Remonstrance complained about King Charles I's failure to provide for "the due execution of those good laws which have been made for securing the liberty of your subjects."<sup>148</sup>

#### D. *Toward a Separation of Powers*

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

[B]oldness is ever blind; for it seeth not dangers and inconveniences. Therefore it is ill in counsel, good in execution; so that the right use of bold persons is that they never command in chief, but be seconds and under the direction of others. For in counsel it is good to see dangers, and in execution not to see them, except they be very great.<sup>149</sup>

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interregnum: . . . for by the law there is always a King, in whose name the lawes are to be maintained, and executed, otherwise Justice should faile.”).

146. See Hale, *Prerogatives of the King*, supra note 101, at 268–70 (“[T]he king hath . . . [a] power of commanding the person of any man . . . [i]n reference to the public service of the kingdom, . . . [either] (1) In point of advice, (2) In point of office or service, [or] (3) In point of defence or safety.”); 1 Hawkins, *Pleas of the Crown*, supra note 145, ch. 22, § 1, at 59 (explaining that misprisings not amounting to “misprision of treason” include “[r]efusing to assist the King for the Good of the Public[]” and “[d]isobeying the King’s lawful Commands”).

147. See 1 Hawkins, *Pleas of the Crown*, supra note 145, ch. 23, §§ 1–2, at 60 (explaining that it was a “contempt[] against the King’s Person or Government” to “charg[e] the Government with . . . weak Administration”).

148. See *The Grand Remonstrance, with the Petition Accompanying It* (Dec. 1, 1641), reprinted in *The Constitutional Documents of the Puritan Revolution 1625–1660*, at 202, 205 (Samuel Rawson Gardiner ed., Oxford Univ. Press 1906). The Grand Remonstrance offered the King some two hundred bits of constructive criticism. See id. at 202–32.

149. Francis Bacon, *Of Boldness* (1625), reprinted in *Francis Bacon: A Selection of His Works*, supra note 130, at 74, 74–75; see also John Locke, *An Essay Concerning Human Understanding* bk. II, ch. 30, § 4, at 373–74 (Peter H. Nidditch ed., Clarendon Press 1979) (1690) [hereinafter *Locke, On Human Understanding*] (“For a Man to be undisturbed in Danger, sedately to consider what is fittest to be done, and to execute it steadily, is a mixed Mode, or a complex *Idea* of an Action which may exist.”); id. ch. 31, § 3, at 376 (offering a similar view). This distinction between counsel and execution carried through to *The Federalist Papers*. See *The Federalist* No. 70, supra note 30, at 357 (Alexander Hamilton) (“In the legislature, promptitude of decision is oftener an evil than

*Bracton*—at least as inherited by eighteenth-century readers—often returned to an equestrian metaphor for the same point: “[S]ince the heart of a king ought to be in the hand of God, let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice.”<sup>150</sup>

Commentators also worried about other human frailties to which even God’s lieutenant might be subject. The most candid urged realism: “[N]o advantage in moral policy can be lasting, which is not founded on the indelible sentiments of the heart of man. Whatever law deviates from this principle will always meet with a resistance, which will destroy it in the end . . . .”<sup>151</sup> Sometimes they acknowledged that the king himself could be wicked; popular tropes about Bad King John and humpbacked Richard were often tolerated or even cultivated by subsequent dynastic coalitions.<sup>152</sup> More often, though, these worries were framed in terms of bad advice from “Evil Counsellors, and Corrupt and Arbitrary Ministers of State”<sup>153</sup> who were themselves malicious or just ignorant. Other writers

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a benefit. The differences of opinion, and the jarrings of parties in that department . . . often promote deliberation and circumspection . . . .”). Hamilton elaborated that the legislature “constantly counteract[s] those qualities in the Executive, which are the most necessary ingredients in its composition—vigour and expedition, and this without any counterbalancing good.” *Id.*

150. 2 *Bracton*, *supra* note 98, at 305. In a similar vein was Cesare Beccaria’s anxiety—in work that generally celebrated vigorous execution—about “the unbounded licentiousness of ill-directed power, which has continually produced so many authorized examples of the most unfeeling barbarity.” *Beccaria*, *supra* note 117, at 3–4.

151. *Beccaria*, *supra* note 117, at 8. Discussing the sovereign’s right to punish, *Beccaria* observed that “[n]o man ever gave up his liberty[] merely for the good of the public. Such a chimera exists only in romances.” *Id.* *Machiavelli*, as usual, was more blunt: “I deem it best to stick to the practical truth of things rather than to fancies. . . . [I]t is necessary that a prince who is interested in his survival learn to be other than good . . . .” *Machiavelli*, *The Prince*, *supra* note 136, at 61–62; see also *id.* at 69 (“[I]t is often necessary to act against mercy, against faith, against humanity, against frankness, against religion in order to preserve the state.”).

152. See, e.g., William Shakespeare, *Richard III* act 3, sc. 1, ll. 130–31 (Gary Taylor et al. eds., Oxford Univ. Press 2016) (“Because that I am little, like an ape, He thinks that you should bear me on your shoulders.”); An Excellent Ballad of King John and the Abbott of Canterbury, English Broadside Ballad Archive, <http://ebba.english.ucsb.edu/ballad/32487/xml> [<https://perma.cc/VUK9-GH95>] (last visited Feb. 1, 2019) (“I Will tell you a Story, a Story anon, Of a noble Prince and his Name was King John; For he was a Prince, and a Prince of great Might, He held up great Wrongs and he put down great Rights.”).

153. See William Penn, *England’s Great Interest in the Choice of This New Parliament: Dedicated to All her Free-Holders and Electors* (1679), reprinted in *The Political Writings of William Penn* 384, 384 (Andrew R. Murphy ed., Liberty Fund 2002) (emphasis omitted). Penn argued that it was the work of Parliament to remove counselors who had “giv[en] the King Wrong Measures” and “[a]lienat[ed] his Affections from his People.” *Id.* The Grand Remonstrance likewise ritually forswore “the least intention to lay any blemish upon [the King’s] royal person, but only to represent how [his] royal authority and trust have been abused.” *The Grand Remonstrance*, *supra* note 148, at 203. Parliament went on to describe “those evils under which we have now many years suffered, are fomented and cherished by a corrupt and ill-affected party” made up of “[t]he Jesuited Papists,” “[t]he Bishops,” and various “Councillors and Courtiers [who] for

focused on society at large and the factions to which it gave rise, whether religious, regional, socioeconomic, or otherwise.<sup>154</sup>

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

[After the origin of civil society,] it was soon therefore provided that lawes agreeable to the dictates of reason should be ratified by common consent, and that the execution and interpretation of those Lawes should be intrusted to some magistrate, for the preventing of common injuries betwixt Subject and Subject[.] [B]ut when it after appeared that man was yet subject to unnaturall destruction, by the Tyranny of intrusted magistrates, a mischief almost as fatall as to be without all magistracie, how to provide a wholsome remedy therefore, was not so easie to be prevented. . . . [Even] if it be agreed upon, that limits should be prefixed to Princes, and judges appointed to decree according to those limits, yet an other great inconvenience will presently affront us; for we cannot restraine Princes too far, but we shall disable them from some good, as well as inhibit them from some evill, and to be disabled from doing good in some things, may be as mischievous, as to be inabled for all evils at meere discretion. Long it was ere the world could . . . finde out an orderly meanes whereby to avoid the danger of unbounded prerogative on this hand, and too excessive liberty on the other: and scarce has long experience yet fully satisfied the mindes of all men in it.<sup>155</sup>

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private ends have engaged themselves to further the interests of some foreign princes." *Id.* at 206–07.

154. See, e.g., Niccoló Machiavelli, *Discourses on Livy* 211–12 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press 1996) (1517) [hereinafter Machiavelli, *Discourses on Livy*] (“But as to sects, these renewals are also seen to be necessary by the example of our religion, which would be altogether eliminated if it had not been drawn back toward its beginning . . . brought back into the minds of men what had already been eliminated there.”); Parker, *supra* note 110, at 23 (“The composition of Parliaments . . . takes away all jealousies, for it is so equally, and geometrically proportionable, and all the States . . . contribute their due parts therein, that [none] can be of any extreame predominance, the multitude loves Monarchy better then Aristocracy, and the Nobility . . . prefer it as much beyond Democracy . . .”); Mons. de Voltaire, *A Commentary on the Book of Crimes and Punishments, in An Essay on Crimes and Punishments*, *supra* note 117, at 182 [hereinafter Voltaire, *Commentary*] (“Would you prevent a sect from overturning the state . . . The only methods . . . to be taken with a new sect, are, to put to death the chief and all his adherents . . . or to tolerate them . . . . The first method is that of a monster; the second of a wise man.”).

155. Parker, *supra* note 110, at 13–14. Hamilton picked up this thread in the New York Convention debates:

There are two objects in forming systems of government—Safety for the people, and energy in the administration. When these objects are united, the certain tendency of the system will be to the public welfare. If the latter object be neglected, the people’s security will be as certainly

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

The start of an answer came as more of a (hotly disputed) assertion than a solution as such: The king was said to be subject to law. This point goes back to *Bracton*.<sup>156</sup>

[While the] king has no equal within his realm . . . [he] must not be under man but under God and under the law, because law makes the king, . . . for there is no *rex* where will rules rather than *lex*. . . . And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicegerent on earth he is, . . . [and who] willed himself to be under the law that he might redeem those who live under it.<sup>157</sup>

Both the manuscript lineage and the best reading of this portion of *Bracton* are disputed; it is at least debatable whether it was an exhortation<sup>158</sup>

sacrificed, as by disregarding the former. Good constitutions are formed upon a comparison of the liberty of the individual with the strength of government: If the tone of either be too high, the other will be weakened too much.

Alexander Hamilton, Remarks at the New York Convention Debates (June 25, 1788), reprinted in 22 Documentary History, supra note 70, at 1877, 1890.

156. Reading *Bracton* this way probably involved some degree of wishful thinking about Merrie England—not to mention genuine ignorance about what we now know about the text’s authorship and repeated revisions. Compare J.L. Barton, *The Mystery of Bracton*, 14 J. Legal Hist. 1 (1993) (defending the “traditional” view crediting royal judge Henry de Bracton with authorship of the core elements of the treatise), with Paul Brand, ‘The Age of Bracton,’ 89 Proc. of the Brit. Acad. 65 (1996) (arguing that Bracton was more likely a reviser rather than the author of the treatise).

157. 2 Bracton, supra note 98, at 33 (footnotes omitted). *Bracton* was an authoritative citation even in the early United States:

Did the people of the United States intend to bind the several States by the Executive power of the national Government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of Bracton, his maxim, I believe, has been deemed a good one “*Supervacuum esset leges condere, nisi esset qui leges tueretur.*” “It would be superfluous to make laws, unless those laws, when made, were to be enforced.”

*Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 464–65 (1793) (Wilson, J.) (quoting *Bracton*); see also *A Farmer I*, Balt. Md. Gazette, Feb. 15, 1788 [hereinafter *A Farmer I*], reprinted in 11 Documentary History, supra note 70, at 306, 311 (“Henry Bracton a cotemporary lawyer and judge, who has left us a compleat and able treatise on the laws of England, is thus clear and express—*Omnes quidem sub rege, ipse autem sub lege*, all are subject to the King, but the King is subject to the law . . .”). For more on the republication and early modern influence of *Bracton*, see, for example, Ian Williams, *A Medieval Book and Early-Modern Law: Bracton’s Authority and Application in the Common Law c. 1550–1640*, at 79 Legal Hist. Rev. 47 (2011).

158. See 2 Bracton, supra note 98, at 305 (“[H]e is a king as long as he rules well but a tyrant when he oppresses by violent domination . . . . Let him . . . temper his power by law . . . that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver . . . .” (footnotes omitted)); id. at 306 (“Nothing is more fitting for a

or a doctrinal statement of present legal obligation.<sup>159</sup> Either way, the notion of a king subject to law persisted. Quoting *Bracton* without citation, Richard Hooker—one of England’s first systematic constitutional theorists and in general an enthusiastic monarchist<sup>160</sup>—put it simply: “[S]o is the power of the [English] king over all and in all limited, that unto all his proceedings the law itself is a rule.”<sup>161</sup> On Hooker’s account, this was England’s great boon:

Happier that people whose law is their king in the greatest things, than that whose king is himself their law. Where the king doth guide the state, and the law the king, that commonwealth is like an harp or melodious instrument, the strings whereof are tuned and handled all by one, following as laws the rules and canons of musical science.<sup>162</sup>

Certainly counternarratives existed; the relationship between municipal law and the king was a central point of disagreement between Crown and Parliament during the seventeenth century.<sup>163</sup> By the Founding Era,

sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, . . . for the law makes him king.” (footnotes omitted).

159. See 2 Bracton, *supra* note 98, at 110 (“The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him.” (footnotes omitted)); *id.* at 305–06 (“[S]ince he is the minister and vicar of God on earth, [the king] can do nothing save what he can do *de jure* . . .”). *Bracton* further noted that the king could not do “anything rashly put forward of his own will” but only what had been “rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.” *Id.*

160. For a typical sentiment, see, for example, Richard Hooker, *Of the Laws of Ecclesiastical Polity* bk. VII, ch. ii (1593), reprinted in 3 *The Works of Richard Hooker* 140, 345–46 (Oxford, Clarendon Press 7th ed. 1874) (“Unto kings by human right, honour by very divine right, is due; man’s ordinances are many times presupposed as grounds in the statutes of God . . . . So God doth ratify the works of that sovereign authority which kings have received by men.”).

161. *Id.* bk. VIII, ch. ii, at 353.

162. *Id.* at 352. Hooker emphasized that this meant “not only the law of nature and of God, but [the] very national or municipal law consonant thereunto.” *Id.*; see also, e.g., Fortescue, *supra* note 131, at 26 (“A King of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political.”). Machiavelli’s commentary on republics did not focus on England, of course, but it nicely crystalized this celebration of legally limited magistracy. See Machiavelli, *Discourses on Livy*, *supra* note 154, at 118 (“[T]he states of princes have lasted very long, the states of republics have lasted very long, and both have had need of being regulated by the laws. For a prince who can do what he wishes is crazy; a people that can do what it wishes is not wise.”). Note that Machiavelli’s defense of the Roman dictatorship relied largely on its legalized nature: “[A] republic will never be perfect unless it has provided for everything with its laws and has established a remedy for every accident and given the mode to govern it.” *Id.* at 74–75; see also *id.* at 75 (“[T]hose republics that in urgent dangers do not take refuge either in the dictator or in similar authorities will always come to ruin in grave accidents.”).

163. Compare, e.g., Robert Filmer, *Patriarcha* (1680), reprinted in *Patriarcha and Other Writings*, *supra* note 12, at 1, 43–44 (asserting that “in effect the king doth swear to keep no laws but such as in his judgment are upright” and that “the prerogative of a king

however, there was no question: The Crown was subject to law—or at least, to its directive force.<sup>164</sup>

But that only displaced the question. We can tell the king he is subject to law. But what if he doesn't listen? As Parker observed: "'Twas not difficult to invent Lawes, for the limiting of supreme governors, but to invent how those Lawes should be executed or by whom interpreted, was almost impossible, *nam quis custodiat ipsos custodes . . . ?*"<sup>165</sup> For that, the writers of the seventeenth and eighteenth century began to explore the idea of separate government powers in the well-ordered commonwealth. There were two steps to this thought.

The first step was recognizing a matter of empirical fact: Debates about political legitimacy aside, governance in any moderately sophisticated state requires institutional specialization. In the chain of events that bring law from a thought to an enacted rule to a lived reality, different institutions typically play different roles. The philosopher John Locke's taxonomy of legislative, executive, and federative (in other words, foreign affairs and national security) powers of the government was the Founders' most important referent.<sup>166</sup> But the descriptive point long predated Locke. Already in the thirteenth century, *Bracton* was groping toward the distinction between a legislative power<sup>167</sup> and an implementing power in its executive and judicial guises.<sup>168</sup> By the sixteenth and seventeenth centuries, the commentary had long since found greater

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is to be above all laws, for the good only of them that are under the laws"), and The Grand Remonstrance, supra note 148, at 215 (contending that "[t]he most public and solemn sermons before His Majesty were . . . to advance prerogative above law" and to urge that "[t]he government must be set free from all restraint of laws concerning our persons and estates"), with, e.g., John Milton, *The Tenure of Kings and Magistrates* (1649), reprinted in *The Major Works* 273, 278 (Stephen Orgel & Jonathan Goldberg eds., 1991) ("[A]ll kings and magistrates at their first instalment to do impartial justice by law: who, upon those terms and no other, received allegiance from the people, that is to say, bond or covenant to obey them in execution of those laws which they . . . had themselves made or assented to.").

164. See Finch, supra note 88, bk. I, ch. III, at 32 ("Statutes to suppress Wrong, or to take away Fraud, bind the King [although] he is not named."); Hale, *Prerogatives of the King*, supra note 101, at 14 ("[A]s to the directive power of the law, the king is bound by it . . . (1) [b]y his office . . . [and] (2) [b]y his oath at his coronation."); see also supra section II.A (discussing the emergence of parliamentary sovereignty). For one example of Founding citations to *Bracton* on this exact point, see *A Farmer I*, supra note 157, at 311.

165. Parker, supra note 110, at 13–14.

166. See Locke, *Second Treatise*, supra note 99, §§ 143–148, at 164–65.

167. See supra note 159 and accompanying text (discussing *Bracton's* commentary on the king as subject to the laws).

168. See 2 *Bracton*, supra note 98, at 26 ("The public interest also requires that there be magistrates appointed in the state, for through such persons, men pre-eminent in the doing of justice, the law is given effect. For it is of little value that law exists in the state if there are none to administer it."); see also *id.* at 22 ("We must see what law is. Law is a general command, the decision of judicious men, the restraint of offences knowingly or unwittingly committed, the general agreement of the *res publica*.").



precision. Davies, for example, explained in the preface to his treatise that:

[I]n every Commonwealth, when it once begins to flourish, and to grow rich and mighty, the people grow proud withall, and their pride makes them contentious and litigious, so as there is need of many Laws to bridle them, and many Officers to execute those Laws, and many Lawyers to interpret those Laws, and all little enough: as when a body grows full and gross, it needs more physick then when it was lean.<sup>169</sup>

Coke's classic commentary on Littleton used a similarly corporeal metaphor in distinguishing between law's three phases—announcement, interpretation, and enforcement: "The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The processe and the execution, which is the life of the law consisteth in the king's writs."<sup>170</sup> Hale likewise distinguished between "*jurisdictio* or *potestas legem ferendi*, or *jurisdictio nomothetica*" and "*jurisdictio legem dicendi* or *distribuendi*,"<sup>171</sup> and Hobbes noted that "the two arms of a Commonwealth, are *Force*, and *Justice*; the first whereof is in the King; the other deposited in the hands of the Parliament."<sup>172</sup> Many others were to the same effect.<sup>173</sup>

169. Davies, Report of Cases in Ireland, *supra* note 120, at 16.

170. 1 Coke on Littleton, *supra* note 143, bk. 2, ch. 11, § 199, at 130a.

171. Hale, Prerogatives of the King, *supra* note 101, at 169. The crucial distinction was between the nomothetical creation of a new forward-looking rule and the executory application of existing rules to past action: "The supreme jurisdiction of parliament acts either *deliberative* where it makes laws or *judicative* when it gives judgment. The first respects the future . . . . The second respects the past and is not properly *qua tale* a law but a supreme judgment unexaminable." *Id.* at 181. Hale further divided *jurisdictio legem dicendi* or *distribuendi* into the judicial power ("[a] power to give judgment") and the executive power ("[a] power to compel the parties to come to judgment and to execute the judgment given"). *Id.* at 179.

172. Hobbes, *supra* note 117, at 186. The reference to "Justice" here is to creating laws pursuant to the social compact, not merely to their adjudication, for which Hobbes tended to use the more specific word "judicature" and which he tended to divide from "execution" of rulings. See, e.g., *id.* at 125 (defining "the Right of Judicature" as the right "of hearing and deciding all Controversies, which may arise concerning Law, either Civill, or Naturall, or concerning Fact").

173. For other examples of this distinction between prescription and execution, see Geoffrey Gilbert, *The Law of Evidence* 254 (London, printed for J.F. & C. Rivington et al., 4th ed. 1777) (distinguishing between officers with power to render judgment and officers with power to execute warrants issued thereunder); Helvetius, *supra* note 133, at 162 ("[M]ankind . . . will enter into conventions with each other, and these conventions will be their first laws; when they have formed laws, they will entrust some persons with the care of seeing them put in execution, and those will be the first magistrates."); Hunton, *A Treatise of Monarchy*, *supra* note 96, pt. I, ch. I, § 3, at 5–6 ("In respect of its degrees [government] is *Nomothetical* or *Architectonical*, and *Gubernative* or *Executive*. And in respect of the subject of its residence, there is an ancient and usual distinction of it into *Monarchical*, *Aristocratical* and *Demeocratical*"); Parker, *supra* note 110, at 13 (using the standard tripartite formula to discuss society's need for at least three institutions: "some magistracy to provide new orders, and to judge of old, and to execute according to justice," without which "no society could be upheld"); Pufendorf, *On the Duty of Man and Citizen*, *supra*

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

The sovereign, who represents the society itself, can only make general laws, to bind the members; but it belongs not to him to judge whether any individual has violated the social compact, or incurred the punishment in consequence. For in this case, there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused, who denies it. It is necessary then that there should be a third person to decide this contest; that is to say, a judge, or magistrate, from whose determination there should be no appeal; and this determination should consist of a simple affirmation, or negation of fact.<sup>174</sup>

This prescriptive assertion had been fiercely contested both in theory<sup>175</sup> and in practice.<sup>176</sup> But by the late eighteenth century, it was received wisdom—certainly among the commentators and legal theorists on whom the Founders most relied, with Blackstone,<sup>177</sup>

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note 117, bk. I, ch. II, at 14 (“[T]he power to oblige, that is, to impose an inward necessity, and the power to force or compel by penalties to observe the law, resides exclusively in the lawgiver, and in him to whom has been committed the maintenance and execution of the laws.”).

174. Beccaria, *supra* note 117, at 11–12. The Founders were much impressed by Cicero as a classical antecedent in this respect. See, e.g., An Impartial Citizen VI, Petersburg Va. Gazette, Mar. 13, 1788, reprinted in 8 Documentary History, *supra* note 70, at 492, 493, 502, 503 n.14 (“Cicero, the most learned, and perhaps the wisest of the ancient Romans . . . expresses his detestation of [special bills affecting individuals only] in the most nervous and energetic language.”).

175. See, e.g., Hobbes, *supra* note 117, at 225 (“There is a Sixth doctrine, plainly, and directly against the essence of a Common-wealth; and ‘tis this, *That the Sovereign Power may be divided*. For what is it to divide the Power of a Common-wealth, but to Dissolve it; Powers divided mutually destroy each other.”); see also, e.g., Bodin, *supra* note 120, at 159–60 (“[T]he first and chiefe marke of a soveraigne prince . . . [is] to give lawes to all his subjects . . . without consent of any other . . . . For if a prince be bound not to make any law without consent of [any other] . . . hee is then no soueraigne.”).

176. See, e.g., Darnel’s Case (or the Case of the Five Knights) (KB 1627), in 3 Cobbett’s Complete Collection of State Trials 1, 51–59 (London, T. C. Hansard 1809) (“[I]f a man be committed by the commandment of the king, he is not to be delivered by a Habeas Corpus in this court . . .”).

177. See 1 Blackstone, *supra* note 78, at \*154 (“It is . . . necessary for preserving the ballance of the constitution, that the executive power should be a branch, . . . not the whole, of the legislature. The total union of them . . . would be productive of tyranny . . .”); *id.* at \*155 (“[E]very branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for . . . they mutually keep each other from exceeding their proper limits.”); *id.* at \*269 (“In this . . . separate existence of the judicial power, in a peculiar body of men, nominated . . . but not removable at pleasure, by the crown, consists one

Locke,<sup>178</sup> and Montesquieu<sup>179</sup> being the standard referents.<sup>180</sup> The Anglo-Irish essayist Jonathan Swift was typical in criticizing Hobbes for “confound[ing] the [e]xecutive with the [l]egislative power”: “[A]ll well-instituted [s]tates,” Swift argued, “have ever placed them in different hands.”<sup>181</sup> Even treatises on rather banal topics of private law would signal their intellectual bona fides by reciting the standard point.<sup>182</sup> And

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main preservative of . . . liberty; which cannot subsist long . . . unless the administration of common justice be . . . separated both from the legislative and . . . the executive power.”).

178. See Locke, *Second Treatise*, supra note 99, § 143, at 164 (“[I]t may be too great a temptation . . . for the same person, who have the power of making laws, to have . . . power to execute them, whereby they may exempt themselves from obedience to [those] laws . . . and suit the law, both in its making, and execution, to their own private advantage.”).

179. See 1 M. de Secondat, Baron de Montesquieu, *The Spirit of Laws* bk. XI, ch. VI, at 222 (Thomas Nugent trans., London, printed for J. Nourse & P. Vaillant 5th ed. 1773) [hereinafter *Montesquieu, The Spirit of Laws*] (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . lest the same monarch enact tyrannical laws, to execute them in a tyrannical manner.”); id. (“[T]here is no liberty, if the judiciary power be not separated from the legislative and executive.”). For the original French, see 1 M. de Secondat, Baron de Montesquieu, *De l’esprit des Lois* bk. XI, ch. vi, at 312 (London, n. pub., new ed. 1768) [hereinafter *Montesquieu, De l’Esprit des Lois*] (“Lorsque dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutive, il n’y a point de liberté; parce qu’on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques, pour les exécuter tyranniquement.”); id. (“Il n’y a point encore de liberté si la puissance de juger n’est pas séparée de la puissance législative et de l’exécutive.”).

180. Genevan legal and political theorist Jean-Jacques Burlamaqui, for example, argued that one way to secure “the most perfect liberty” was to “invest the person, who enjoys the honours and title of sovereignty, with only a part of the supreme authority” and to “lodge the other in different hands, [such as in] in a council or parliament.” 2 Burlamaqui, supra note 117, pt. II, ch. II, at 346. He contended that, “with regard to [m]onarchies,” the “military and legislative powers, together with that of raising taxes,” should be “lodged in different hands, to the end that they may not be abused.” Id. Similarly, de Lolme observed that:

[T]he English Constitution has not only excluded from any share in the Execution of the laws, those in whom the People trust for the enacting of them, but it has also taken from them what would have had the same pernicious influence on their deliberations—the hope of ever invading that executive authority, and transferring it to themselves.

De Lolme, *The Constitution of England*, supra note 105, bk. II, ch. X, at 281; see also 2 de Lolme, *Constitution de l’Angleterre*, supra note 105, at 28 (“Et il ne suffisoit pas d’ôter aux législateurs l’exécution des loix, par conséquent l’exemption, qui en est la suite immédiate; il falloit encore leur ôter ce qui eût produit les mêmes effets, l’espoir de jamais s’attribuer cette autorité exécutive.”).

181. 4 Jonathan Swift, *The Sentiments of a Church-of-England Man*, in *The Works of Dr. Jonathan Swift* 63, 87 (London, printed for C. Bathurst 1751).

182. See, e.g., William Jones, *An Essay on the Law of Bailments* 18 (Boston, Samuel Etheridge 1796) (“The constitution of Rome was originally excellent; but . . . *C. Octavius* [imposed a] new form of government [that] was in itself absurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the state both executive and legislative, was a tyrannous ordinance . . .”).

commentators—both British<sup>183</sup> and Continental<sup>184</sup>—focused frequently on this separation as a principal cause for England’s celebrated liberty and prosperity.<sup>185</sup> In Blackstone’s famous paraphrase of Montesquieu, England was “the only nation in the world where political or civil liberty is the direct end of it’s constitution.”<sup>186</sup>

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183. See Davies, Report of Cases in Ireland, supra note 120, at 5–6 (“[English law] doth excell all other Laws in upholding a free *Monarchie*, which is the most excellent form of Government, exalting the Prerogative Royall, and being very tender and watchfull to preserve it, and yet maintaining withall the ingenious Liberty of the Subject.”); Finch, supra note 88, at i (“If the Laws of England do deservedly surpass the Laws of all other Countries in the Perfection of their Nature, the Excellency of their Constitution, and especially in that Spirit of Freedom and Liberty which they breathe upon the Subject; . . . an unpleasing Peculiarity of Fate [still] attend[s] them . . .”). In one example of the many North American celebrations of this point, “Curtius” wrote:

[S]hould [the President] remind of a Government, once justly dear to us—then let us enquire, where, among foreign nations, are the people who may boast like Britons? In what country is justice more impartially administered, or the rights of the citizen more securely guarded? . . . [H]ad we been justly represented in the Parliament of Great-Britain; to this day we should have gloried in the peculiar, the distinguished blessings of our political Constitution.

Curtius I, N.Y. Daily Advertiser, Sept. 29, 1787, reprinted in 19 Documentary History, supra note 70, at 63, 64.

184. See Francois Marie Arouet de Voltaire, Letter VIII on the Parliament, in Letters Concerning the English Nation 40, 42–43 (Lenox Hill reprt. 1974) (1926) (“The *English* are the only people upon earth who have been able to prescribe limits to the power of Kings by resisting them.”); see also 2 Burlamaqui, supra note 117, pt. II, ch. II, at 347 (“[I]s not England at present a proof of the excellency of mixed governments? Is there a nation, every thing considered, that enjoys a higher degree of prosperity or reputation?” (footnote omitted)). Like many early modern commentators (and perhaps along with the British constitution itself), Burlamaqui sometimes conflated mixed government in the sense of social estates with separation of powers in the sense of a tripartite Lockean division. But in context, he is here clearly referencing the separation of powers.

185. See 1 Blackstone, supra note 78, at \*143–145 (celebrating the “liberties of Englishmen,” the protections they enjoy against “every species of compulsive tyranny and oppression”).

186. 1 Blackstone, supra note 78, at \*145; see also 1 Montesquieu, The Spirit of Laws, supra note 179, bk. XI, ch. VI, at 237 (“*Harrington*, in his *Oceana*, . . . enquired into the utmost degree of liberty, to which [a] [state] constitution . . . may be carried. . . [F]or want of knowing the nature of real liberty, he [pursued] an imaginary one; and that he built a Chalcedon, though he had a Byzantium before his eyes.”); 1 Montesquieu, De l’Esprit des Lois, supra note 179, bk. XI, ch. 6, at 334 (“*Arrington*, [dans] *Oceana*, a aussi examiné quel étoit le plus haut point de liberté où la constitution d’un état peut être portée. Mais on peut dire de lui, qu’il n’a cherché cette liberté qu’après l’avoir méconnue; & qu’il a bâti Chalcedoine, ayant le rivage de Bisance devant les yeux.”).

## III. LEGAL DOCTRINE

A. *The Umbrella Term for the Crown's Nonstatutory Powers Was "The Royal Prerogative"*

That brings us to the late eighteenth-century English constitution and the semantic conventions used by legal treatises and political theorists alike to describe the powers of the Crown. Blackstone's *Commentaries* make a useful expositional scaffold, both because they are so well written and because they were so important to the mainstream American understanding of English law. Published over four years beginning in 1765, Blackstone's multivolume treatise was as influential in the United States as it was in England<sup>187</sup>—on constitutional questions, perhaps even more so. That's not to say that it was influential in shifting the law; if anything, Blackstone was behind the times in his presumably willful silence about the Commons's political dominance of the Crown.<sup>188</sup> But for Americans like James Madison, Blackstone's treatise was the "book which is in every man's hand"—central to pedagogy, drafting, and litigation alike as the standard restatement of the formal constitutional law of England.<sup>189</sup>

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187. See *supra* notes 67–68 and accompanying text.

188. Some have suggested that the Founders' reverence for Blackstone left them "unfamiliar[] with the English developments." See Berger, *supra* note 55, at 9 n.45. This may have been true for the less sophisticated. But plenty knew the real state of affairs. For a mere sampling, see, for example, Notes of James Madison on the Convention (July 24, 1787), reprinted in 2 *The Records of the Federal Convention of 1787*, at 99, 104 (Max Farrand ed., 1911) [hereinafter *Farrand's Records of the Federal Convention*] (recording Gouverneur Morris's contention that "the real King, [is] the Minister"); Marcus II, Norfolk and Portsmouth J., Feb. 27, 1788, reprinted in 16 *Documentary History*, *supra* note 70, at 242, 246 ("[E]very body knows that the whole movements of their government, where a Council is consulted at all, are directed by their *Cabinet Council*, composed entirely of the principal officers of the great departments . . ."). Marcus II also distinguished "the constitutional ideas" of England from "what the present practice really is." *Id.* at 244. For additional examples, see *The Federalist* No. 76, *supra* note 30, at 385–86 (Alexander Hamilton) (discussing the actual political relationship between Commons and the Crown); George Nicholas, Remarks at the Virginia Convention Debates (June 4, 1788), reprinted in 9 *Documentary History*, *supra* note 70, at 915, 925 ("[T]he House of Commons . . . entirely controul the operation of government, even in those cases where the King's prerogative gave him nominally the sole direction."); A Farmer V (Part II), *Balt. Md. Gazette*, Mar. 28, 1788, reprinted in 12 *Documentary History*, *supra* note 70, at 448, 449 ("I must insist that [the British government] was hardly a government at all, until it became simplified by the introduction and regular formation of the effective administration of responsible ministers, on its present system . . ."); Civis Rusticus, To Mr. Davis, *Va. Indep. Chron.*, Jan. 30, 1787, reprinted in 8 *Documentary History*, *supra* note 70, at 331, 337 ("The King of England can make peace or declare war; can make treaties, but, whenever the Commons disapprove of the measures by which these have been brought about, we know the consequences . . ."). For more on the robust transatlantic legal culture, see, for example, Mary Sarah Bilder, *Colonial Legal Culture and the Empire* 1–11 (2008); Daniel Hulsebosch, *Constituting Empire* 203–06 (2005).

189. See James Madison, Remarks at the Virginia Convention Debates (June 18, 1788), reprinted in 10 *Documentary History*, *supra* note 70, at 1371, 1382. Even Blackstone's sharpest critics acknowledged—indeed, were motivated by—the pervasiveness

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

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

1. The "legislative" authority, defined as the "right" of "*making* . . . the laws"; and
2. The "executive" authority, defined as the "right" of "*enforcing* the laws."<sup>190</sup>

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

In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.<sup>191</sup>

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

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of his influence. See Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), in Thomas Jefferson: Political Writings 57, 58 (Joyce Appleby & Terrance Ball eds., 2004) ("[T]he honied Mansfieldism of Blackstone became the Student's Hornbook, [and] from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.").

190. 1 Blackstone, *supra* note 78, at \*146. This classification of two discrete conceptual powers of government persists as an organizing principle throughout the book. See, e.g., *id.* at \*338 ("In a former chapter of these Commentaries we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere."). Blackstone continues, "We have hitherto considered the former kind only; namely the supreme legislative power or parliament, and the supreme executive power, which is the king: and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates." *Id.*

191. *Id.* at \*146–147.

He starts with Parliament—the political entity vested with the legislative power. The treatise’s second chapter surveys the basic elements of that entity’s identity, structure, and powers.<sup>192</sup> The structural discussion describes the entity’s constituent parts: King, Lords, and Commons.<sup>193</sup> Blackstone describes the varying process by which particular human beings were selected to fulfill the role of each part.<sup>194</sup> He also explores the basic operations of the entity as a real-world decisionmaker: how Parliament was convened,<sup>195</sup> the process by which it passed laws,<sup>196</sup> and the process by which those laws were handed off for execution.<sup>197</sup> In addition to surveying Parliament’s constitutional structure, Blackstone conducts a close review of its substantive authorities, entitlements, and privileges.<sup>198</sup> First among these was, of course, the legislative power itself: the authority to enact forward-looking rules of legal compulsion.<sup>199</sup> But the suite of powers and authorities held by Parliament also included the legislators’ right to speak freely on the floor of Parliament<sup>200</sup> and a more general immunity from arrest while actively engaged in parliamentary service.<sup>201</sup>

With Parliament sorted, Blackstone then turns in his third chapter to the political entity vested with the executive power: “The Person of the King.”<sup>202</sup> Over the next two hundred pages, Blackstone conducts a methodical analysis of the structural and institutional characteristics of the Crown. First, he describes the process by which “the English nation . . . mark[s] out with precision, *who* is that single person”—i.e., the rules of “the royal succession.”<sup>203</sup> Then he describes the constitution, legal rights, and juridical relations of the individuals and institutions appurtenant to the Crown: in particular “The King’s Royal Family”<sup>204</sup> and “The Councils Belonging to the King,” from “the high court of parliament” and “the peers of the realm” to “the judges of the courts of law” and the “privy council.”<sup>205</sup> The treatise then turns to “The King’s Duties,” especially “the duty . . . to govern his people according to law,” with close attention to the historical evolution of the coronation oath.<sup>206</sup>

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192. See *id.* at \*146–189.

193. See *id.* at \*153–160.

194. See *id.* at \*170–180.

195. See *id.* at \*150–153.

196. See *id.* at \*181–185.

197. See *id.* at \*185–186.

198. See *id.* at \*160–170.

199. See *id.* at \*160–162.

200. *Id.* at \*164.

201. *Id.* at \*164–165.

202. See *id.* at \*190–347.

203. See *id.* at \*190–217.

204. *Id.* at \*219–226.

205. *Id.* at \*227–232.

206. *Id.* at \*233–236.

Only after this lengthy discussion of the Crown's institutional characteristics does Blackstone finally arrive at the question of most interest for modern purposes: a discussion of the substantive "rights and capacities which the king enjoys alone."<sup>207</sup>

This suite of substantive authorities had a name: "The King's Prerogative."<sup>208</sup> As discussed above, by Blackstone's time, the prerogative had long since been consigned in its entirety to what American constitutional lawyers would call *Youngstown Zone Two*.<sup>209</sup> That is to say, it represented a residual and defeasible authority for Crown action in areas that Parliament—or more precisely the "King-in-Parliament"—had not (yet) chosen to occupy. Like the common law more generally, the prerogative as described by Blackstone thus provided the default rule of decision for questions of Crown authority—until Parliament chose, by contrary or supplementary legislation, to displace it.<sup>210</sup>

The first royal authority was—as we have already seen—the "supreme executive power," specifically defined as "the right of enforcing the laws."<sup>211</sup> The full list of Crown prerogatives, however, goes on (and

207. *Id.* at \*237–337.

208. *Id.* at \*237; see also *id.* at \*190 ("[I]t matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute."). Blackstone further classifies the direct royal prerogative into three principal subcategories: those that pertain to "the king's royal *character*"; those that pertain to "his royal *authority*"; and those that pertain to "the royal *income*." *Id.* at \*240. The middle category in turn includes two aspects: those that "respect . . . this nation's intercourse with foreign nations" and also those that "respect . . . this nation's . . . own domestic government and civil polity." *Id.* at \*252; see also *id.* at \*260. The last category includes the king's "ordinary revenue." *Id.* at \*281–306. Blackstone also includes his discussion of the king's "extraordinary revenue" in the same chapter but makes clear that the latter references nonprerogative powers of taxation that are granted by statute. *Id.* at \*306–337.

Other writers similarly distinguished between different categories of prerogative. See, e.g., Coke, Speech in the Committee of Grievances, *supra* note 98, at 1199–200 (distinguishing "prerogative indisputable" and "prerogative disputable"); Thomas Egerton, Chancellor Ellesmere, A Coppie of a Wrytten Discourse Concerning the Royall Prerogative (c. 1604), *in* Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* 197, 197–201 (1977) (treating the judicial power as an "absolute prerogative" that could be delegated, unlike discretionary royal powers); Hale, *Prerogatives of the King*, *supra* note 101, at 145 (drawing a distinction between the king's "powers" and "prerogatives," with the latter defined as those which conduce to his "support and dignity").

209. See *supra* note 10 and accompanying text (discussing *Youngstown Zone Two* in relation to the Royal Residuum Thesis).

210. For more on parliamentary supremacy, see *supra* section II.A.

211. See I Blackstone, *supra* note 78, at \*146–147. Blackstone's chapter-opening formulation for this particular authority was strikingly similar to the Executive Power Clause: "The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen . . ." *Id.* at \*190. Blackstone was not the only prominent writer who prefigured the Founders' various formulations in Article II. See, e.g., Obadiah Hulme, *An Historical Essay on the English Constitution* 29 (London, printed for Edward & Charles Dilly 1771) ("There were three things essentially necessary, to form a Saxon



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

- the sovereign and sacred nature of the royal person;<sup>212</sup>
- a personal immunity from suit;<sup>213</sup>
- a personal exemption from the rules of laches and negligence;<sup>214</sup>
- the “sole power of sending [a]mbassadors to foreign states, and receiving [a]mbassadors at home”;<sup>215</sup>
- the power “to make treaties, leagues, and alliances with foreign states and princes”;<sup>216</sup>
- “the sole prerogative of making war and peace”;<sup>217</sup>
- “the prerogative of granting safe-conducts”;<sup>218</sup>
- the right to be “a constituent part of the supreme legislative power” with “the prerogative of rejecting such provisions in parliament, as he judges improper”;<sup>219</sup>

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government[:] . . . a court of council, a court of law, and a chief magistrate . . . [who] . . . was vested with the executive authority to administer the constitution . . . and . . . to take care that every man, within his jurisdiction paid . . . obedience to law.”). Some writers suggested that the power to execute the law was a separate branch of authority from those powers denoted as royal prerogative. See e.g., Bolingbroke, *Remarks on the History of England*, supra note 71, at 82 (“A King of *Great Britain* is that supreme Magistrate, who has a *negative Voice* in the *Legislature*. He is entrusted with the *executive Power*; and several other Powers and Privileges, which we call *Prerogatives*, are annex'd to this Trust.”). That distinction makes no analytical difference for present purposes; either way, “executive power” meant the execution of laws rather than a shorthand for the full suite of royal authorities.

212. See 1 Blackstone, supra note 78, at \*242; see also Hale, *Prerogatives of the King*, supra note 101, at 15 (“[T]he king in case of such acts done contrary to the directive power of the law is not subject to the coercive power of the law in respect of the sacredness and sublimity of his person . . .”).

213. See 1 Blackstone, supra note 78, at \*242; see also Hale, *Prerogatives of the King*, supra note 101, at 15 (“This is one of the principal reasons of the maxim in law that the king can do no wrong . . .”); A Letter Concerning Libels, Warrants, and the Seizure of Papers 6 (London, printed for J. Almon 2d ed. 1764) (“The King can do no wrong . . .” (emphasis omitted)).

214. See 1 Blackstone, supra note 78, at \*247; see also John Surrebutter, *The Pleader's Guide: A Didactic Poem* bk. I, at 12 (London, printed for T. Cadell 1796) (“How long soe'er a Cause is stay'd / By Orders, Rules, and Motions Made / On Points by learned Counsel mooted / The KING can never be nonsuited.”).

215. 1 Blackstone, supra note 78, at \*253.

216. *Id.* at \*257.

217. *Id.*; see also Hale, *Prerogatives of the King*, supra note 101, at 169 (“power of peace and war”); A Letter Concerning Libels, Warrants, and Seizures, supra note 213, at 6 (“treaties of peace and war”).

218. 1 Blackstone, supra note 78, at \*259.

219. *Id.* at \*261; see also Bagshaw, supra note 90, at 76 (“[N]ever any Bill passed in Parliament for a Law (the King being within the Realme) by the Lords and Commons alone, without the Kings personall assent in Parliament to the Bill, as he that gave life and

- the role of “the generalissimo, or the first in military command”,<sup>220</sup>
- the “sole power of raising and regulating fleets and armies”,<sup>221</sup>
- “the prerogative of appointing *ports* and *havens*”,<sup>222</sup>
- “the erection of beacons, light-houses, and sea-marks”,<sup>223</sup>
- “the power . . . of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties”,<sup>224</sup>
- “the right of erecting courts of judicature”,<sup>225</sup>
- the ultimate role of prosecutor;<sup>226</sup>
- the power of “*pardonning* offenses”,<sup>227</sup>
- the “prerogative of issuing proclamations” that “enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary”,<sup>228</sup>
- “the sole power of conferring dignities and honors”,<sup>229</sup>

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being to the Law . . .”). Hale flipped the formulation, though to the same practical effect. See Hale, Prerogatives of the King, *supra* note 101, at 171 (concluding that “the power legislative resides in the king alone, though so qualified that he cannot enact a new law without the advice and assent of the three estates assembled in parliament”); cf. Parker, *supra* note 110, at 7 (“[T]he Law had trusted the King with a Prerogative to discontinue Parliaments . . .”).

220. 1 Blackstone, *supra* note 78, at \*262; see also Bagshaw, *supra* note 90, at 113–14 (noting the king’s “chief command of the *Militia*”); Hale, Prerogatives of the King, *supra* note 101, at 117–32 (discussing the king’s powers under martial law and *jus belli*).

221. 1 Blackstone, *supra* note 78, at \*262.

222. *Id.* at \*263–264; see also Coke, Preface to Part Nine of the Reports, *supra* note 128, at 290 (“*chief Ports of the Sea*”); Hale, Prerogatives of the King, *supra* note 101, at 286 (“[C]oncerning the customs of the king, for maintaining . . . ports and havens, and the power of appointing, opening and shutting of them.”).

223. 1 Blackstone, *supra* note 78, at \*264.

224. *Id.* at \*265.

225. *Id.* at \*267; see also 2 Bracton, *supra* note 98, at 166 (“Also justice and judgment [and everything] connected with jurisdiction, that, as a minister and vicar of God, he may render to each his due.” (footnote omitted)).

226. 1 Blackstone, *supra* note 78, at \*268; see also A Letter Concerning Libels, Warrants, and Seizures, *supra* note 213, at 6 (explaining “the direction of crown-prosecutions”).

227. 1 Blackstone, *supra* note 78, at \*269; see also Bagshaw, *supra* note 90, at 113–14 (describing “the pardonning of Offences”).

228. 1 Blackstone, *supra* note 78, at \*270; see also Case of Proclamations (1610) 77 Eng. Rep. 1352, 1353; 12 Co. Rep. 74, 75 (KB) (“[A] thing which is punishable by the Law, . . . if the King prohibit it by his proclamation, before that he will punish it, and so warn his subjects . . . there if he commit it after, this as a circumstance aggravates the offence; but he by proclamation cannot make a thing unlawful . . .”); Hale, Prerogatives of the King, *supra* note 101, at 172 (“[I]t is the [king’s] prerogative . . . and those only who derive it from him, either as his ministers or by custom, to make open proclamation. The king nevertheless cannot by these make or introduce a new law or add a new penalty to an old law or abrogate any law.” (citation omitted)).

229. 1 Blackstone, *supra* note 78, at \*271; see also Bagshaw, *supra* note 90, at 114 (“the giving of Honour”); Coke, Preface to Part Nine of the Reports, *supra* note 128, at 290 (“[h]onors”).

- “the prerogative of erecting and disposing of offices”;<sup>230</sup>
- “the prerogative of conferring privileges upon private persons”;<sup>231</sup> such as converting aliens into citizens, or “erecting corporations”;<sup>232</sup>
- “the establishment of public marts, or places of buying and selling, . . . with the tolls thereto belonging”;<sup>233</sup>
- “the regulation of weights and measures”;<sup>234</sup>
- the power to coin money and “give it authority or make it current”;<sup>235</sup>
- the role of “supreme governor of the national church”;<sup>236</sup>

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230. 1 Blackstone, *supra* note 78, at \*272; see also, e.g., Bagshaw, *supra* note 90, at 114 (“the making of Judges and Officers”); 2 Bracton, *supra* note 98, at 306–07 (“[S]ince he cannot unaided determine all causes [and] jurisdictions, that his labour may be lessened, the burden being divided among many, he must select from his realm wise and God-fearing men . . . who will judge the people of God equitably . . .” (second alteration in original)); cf. Hale, *Prerogatives of the King*, *supra* note 101, at 105 (“[T]he weight, multiplicity and variety of the occasions and emergencies of a kingdom doth necessarily require assistances *adhiberi saltem in regiae sollicitudinis adminiculum, [dum] licet non in imperii participationem.*” (second alteration in original)); *id.* at 268–70 (noting that the king has the “power of commanding the person of any man . . . [i]n reference to the public service of the kingdom, and that in these three particulars: (1) In point of advice, (2) In point of office or service, [and] (3) In point of deference or safety”); A Letter Concerning Libels, Warrants, and Seizures, *supra* note 213, at 6 (“appointments to offices in the state”).

This prerogative was the focus of Charles I’s answer to the Nineteen Propositions of Parliament:

It is demanded, That Our Councillors, all chief Officers both of Law and State, Commanders of Forts and Castles, and all Peers hereafter made . . . be approved of (that is, chosen) by [Parliament] . . .

. . . .

These being past, we may be waited on bare-headed; we may have Our hand kissed . . . [B]ut as to true and reall Power We should remain but the outside, but the Picture, but the signe of a King.

Charles I, *His Majesties Answer to the Nineteen Propositions of Both Houses of Parliament* (June 18, 1642), reprinted in Joyce Lee Malcolm, *The Struggle for Sovereignty* 145, 161–62 (Liberty Fund 1999) (emphases omitted).

231. 1 Blackstone, *supra* note 78, at \*272; see also Cowell, *Institutes*, *supra* note 117, at 5 (noting that the king “may grant privileges at pleasure, as to single persons, as to Corporations and Colleges, provided they become not injurious to a third person”).

232. 1 Blackstone, *supra* note 78, at \*272.

233. *Id.* at \*274; see also Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“places of public trade, fairs and markets”).

234. 1 Blackstone, *supra* note 78, at \*274; see also Hale, *Prerogatives of the King*, *supra* note 101, at 173 (“weights and measures”).

235. 1 Blackstone, *supra* note 78, at \*276; see also Bagshaw, *supra* note 90, at 114 (“the coining of Money”); Hale, *Prerogatives of the King*, *supra* note 101, at 299–305 (“money and coin”).

236. 1 Blackstone, *supra* note 78, at \*279–280; cf. Hale, *Prerogatives of the King*, *supra* note 101, at 11 (“[T]he king hath that supreme ecclesiastical power in him.”); 1 Hawkins,

- the right to “all the lay revenues, lands, and tenements . . . which belong to an archbishop’s or bishop’s fee”;<sup>237</sup>
- the right to “send one of his chaplains to be maintained by [each] bishop”;<sup>238</sup>
- the right to “all the tithes arising in extraparochial places”;<sup>239</sup>
- the right to a share of the profits of the lower clergymen;<sup>240</sup>
- the right to all of “the rents and profits” of various types of Crown lands;<sup>241</sup>
- all “profits arising from the king’s ordinary courts of justice”;<sup>242</sup>
- the right to all whale and sturgeon caught near the English shore;<sup>243</sup>
- the right to certain goods washed up on the land from shipwrecks;<sup>244</sup>
- the right to silver or gold mines<sup>245</sup> and various other categories of “treasure-trove” that are discovered;<sup>246</sup>
- the right to “goods stolen, and waived or thrown away by the thief in his flight”;<sup>247</sup>
- the right to “valuable animals as are found wandering” without an apparent owner;<sup>248</sup>

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Pleas of the Crown, *supra* note 145, ch. 19, at 49 (recognizing “appealing to *Rome* from any of the King’s Courts” as a praemunire felony “against the Prerogative of the Crown”).

237. 1 Blackstone, *supra* note 78, at \*282.

238. *Id.* at \*283.

239. *Id.* at \*284.

240. See *id.* at \*284–285.

241. *Id.* at \*286.

242. *Id.* at \*289.

243. See *id.* at \*290; see also *The Case of Swans* (1592) 77 Eng. Rep. 435, 435–36; 7 Co. Rep. 15 b, 15 b–16 a (KB) (“All white Swans not marked, having gained their natural liberty . . . may be seized to the King’s use by his prerogative . . . as a Swan is a Royal fowl; . . . and so [] whales and sturgeons are Royal Fish, and belong to the King by his prerogative.”); 2 Bracton, *supra* note 98, at 167 (“great fish, sturgeon, waif, things said to belong to no one”); Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“[animals] *ferae naturae*” (alteration in original)).

244. See 1 Blackstone, *supra* note 78, at \*290; see also 2 Bracton, *supra* note 98, at 167 (“wreck”); Coke, *Preface to Part Nine of the Reports*, *supra* note 128, at 290 (“[w]reck”); Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“[*b]ona vacantia*, wreck”).

245. See 1 Blackstone, *supra* note 78, at \*276–277; see also Hale, *Prerogatives of the King*, *supra* note 101, at 286 (describing the king’s right to “mines and minerals, and therein his seignory in case of royal mines, tin and lead”).

246. 1 Blackstone, *supra* note 78, at \*295; see also 2 Bracton, *supra* note 98, at 167 (“treasure trove”); Coke, *Preface to Part Nine of the Reports*, *supra* note 128, at 290 (“[t]reasure found”) Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“[*b]ona vacantia*, . . . treasure trove”).

247. 1 Blackstone, *supra* note 78, at \*296–297.

248. *Id.* at \*297–298; see also Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“[animals] *ferae naturae*” (alteration in original)).

- the right to any other “goods in which no one else can claim a property”;<sup>249</sup>
- the right to lands and goods forfeited in punishment for various offenses;<sup>250</sup>
- the right to lands escheated for a defect in either the testament or the heirs;<sup>251</sup> and
- “the custody of idiots” and their estates.<sup>252</sup>

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

Nor did the authorities on this list originate with Blackstone. He was just describing, in the fashion of a modern nutshell, his own generally unremarkable take on what amounted to black letter administrative law. The particular authorities varied somewhat from summary to summary, but the gist was remarkably consistent, as was the use of the legal term “prerogative” to *name* this grab bag of powers that originated in the Crown itself rather than from some parliamentary grant of authority.<sup>253</sup> To be sure, eighteenth-century writers regularly used “prerogative” in the same loose sense we use it today—as a generic power, privilege,

249. 1 Blackstone, *supra* note 78, at \*298–299; see also 2 Bracton, *supra* note 98, at 167 (“Also . . . [things] . . . by occupation and apprehension, [as] of another’s property, as where a thing is cast away and taken to be abandoned.” (alterations in original)); Hale, *Prerogatives of the King*, *supra* note 101, at 286.

250. 1 Blackstone, *supra* note 78, at \*299–300; see also Coke, Preface to Part Nine of the Reports, *supra* note 128, at 290 (“[c]hattels of Felons and Fugitives”); Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“*Bona confiscata et forisfacta*, (i) per exigent, (ii) per utlary, (iii) per fugam, (iv) per false appeal, ou omission in appeal, (v) per premunire, (vi) per felony de se vel de alio.”).

251. See 1 Blackstone, *supra* note 78, at \*303.

252. *Id.* at \*303–306; see also Hale, *Prerogatives of the King*, *supra* note 101, at 286 (“*Custodiae*, (i) infantium, (ii) fatuorum, (iii) temporalium.”).

253. See, e.g., Francis Bacon, *Cases of Treason* (1641), reprinted in Lord Bacon’s *Law Tracts*, *supra* note 129, at 178–81 (cataloguing a list of prerogative powers); 2 Bracton, *supra* note 98, at 166–67 (“It is clear that the lord king [has all] dignities, [it is the lord king] himself who has ordinary jurisdiction and power over all who are within his realm.” (alterations in original) (citation omitted)); Camden, *supra* note 139, at 205–15 (cataloguing a list of prerogative powers); Coke, Preface to Part Nine of the Reports, *supra* note 128, at 288, 290–91 (listing the royal prerogatives as part of a constitutional law discussion of “the whole frame of the ancient Common Laws of this Realm”); de Lolme, *The Constitution of England*, *supra* note 105, bk. I, chs. IV–VI, at 71–84 (describing the prerogative powers of the king); James Wilson, *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* 33 (Philadelphia, William & Thomas Bradford 1774) (outlining the powers of the king, who was “entrusted with the direction and management of the great machine of government”).

entitlement, or even just a general id-like willfulness.<sup>254</sup> But as a term of art in the context of constitutional law, “prerogative” had a very specific meaning: “all powers, preheminences, and priviledges, which the law giveth to the crowne.”<sup>255</sup> The writers are both precise and explicit about what was for them a schoolboy distinction between “the prerogative” as the basket category for royal power and “the executive power” as *one specific authority among a great many* in that basket.<sup>256</sup> They even used

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254. Compare Bobby Brown, *My Prerogative*, *on* Don't Be Cruel (MCA 1988) (“They say I'm crazy / I really don't care / That's my prerogative / . . . Why don't they just let me live (Tell me why) / I don't need permission / Make my own decisions (Oh) / That's my prerogative / It's my prerogative”), with, e.g., William Staunford, *An Exposition of the King's Prerogative* fol. 5 (London, Rychard Tottel 1567) (“[P]rerogative is as much to saye as a privilege or preeminence that any person hath before another whiche as it is tollerable in some, so it is most to be permitted and allowed in a prince or, souveraine governor of a realme.”). For an infinitely more serious survey of the various ways the word was used in its more abstract and colloquial senses, including during the ratification debates, see generally Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 *Buff. L. Rev.* 557 (2018) (canvassing Revolutionary- and Founding-Era uses of “prerogative” to discuss entitlements to, inter alia, personal authority, political sovereignty, self-determination, property protection, and “order, peace, and the preservation of existing . . . hierarchies,” as well as the power not just to break but even to make the laws). Steilen effectively “challenges the view of ‘prerogative’ as a discretionary authority to act outside the law,” rightly concluding, regarding the less technical uses, that “[i]t is enough to make one's head spin.” *Id.* at 557, 547. His findings match mine: The term most assuredly was used in many ways other than as a legal term of art. But its technical meaning was the same for transatlantic lawyers in that era as it is for U.K. lawyers now: “the residue of powers which remain vested in the crown.” *R (Miller) v. Sec'y of State for Exiting the European Union* [2017] UKSC 5, [44].

255. 1 Coke on Littleton, *supra* note 143, bk. 2, ch. 5, § 125, at 90b; see also, e.g., Francis Bacon, *An Essay of a King* 5 (London, printed for Richard Best 1642) [hereinafter Bacon, *Essay of a King*] (describing the prerogatives of the king); Bagshaw, *supra* note 90, at 83–84 (using “prerogative” in a way that suggests Coke's definition); Cowell, *Institutes*, *supra* note 117, at 238–39 (“But there are some [actions] which . . . are inherent in the Crown by reason of the Kings Priviledg and Prerogative.”); Staunford, *supra* note 254, at fol. 5 (offering a similar perspective on prerogative). For case law on this point, see, for example, *Case of Convocations* (1610) 77 Eng. Rep. 1350, 1350; 12 Co. Rep. 71, 72 (KB) (describing four sources of legally binding authority: “prerogative of the king,” “the common law,” “statute law,” and “custome of the realm”).

256. See, e.g., Bolingbroke, *Remarks on the History of England*, *supra* note 71, at 82 (“He is entrusted with the *executive Power*[ ] and several other Powers and Privileges, which we call *Prerogatives*, are annex'd to this Trust.”); Edmund Burke, *Thoughts on the Present Discontents* (1770), reprinted in 2 *The Writings and Speeches of Edmund Burke* 242, 258, 277 (Paul Langford & William B. Todd eds., 1982) (canvassing “the discretionary powers which are necessarily vested in the Monarch” after noting that “[t]he power of the crown, almost dead and rotten as Prerogative, has grown up anew, with much more strength, and far less odium, under the name of Influence”); 5 Hume, *History of England*, *supra* note 71, at 349 (stating that Parliament had “gradually encroach[ed] on the executive power of the crown, which forms its principal and most natural branch of authority”); Aequus, *From the Craftsman*, *Mass. Gazette & Bos. Newsl.*, Mar. 6, 1766, reprinted in 1 *American Political Writing During the Founding Era, 1760–1805*, at 62, 65–66 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter *American Political Writing*] (cataloguing powers wielded by the Crown and Parliament over the colonies, including “the executive power of government” as one item in a long list of authorities including many of the typical

the same terminology when describing the chief magistrates of other nations.<sup>257</sup>

Before we transition to a closer focus on the executive power as a single element of the royal prerogative, it's worth stepping back to recall the big-picture structure of Blackstone's analysis. First he discussed the entity that possessed the legislative power: Parliament.<sup>258</sup> His discussion covered both the structural law of that entity's formation and constitution<sup>259</sup> and also the entity's substantive authorities and entitlements—including but not limited to the legislative power.<sup>260</sup> Next, he walked through the exact same steps in analyzing the entity that possessed the executive power: the Crown.<sup>261</sup> Once again, he began with a detailed discussion of the structural constitutional law of that entity.<sup>262</sup> And once again he then turned to a detailed discussion of the substantive authorities and entitlements of that entity—including but not limited to the executive power.<sup>263</sup>

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

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

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prerogatives); see also William Guthrie, *A New Geographical, Historical, and Commercial Grammar* 162 (London, printed for Charles Dilly & George Robinson 7th ed. 1782) ("The king of Scotland had no negative voice in parliament; nor could he declare war, . . . or conclude any other public business . . . without the advice and approbation of parliament. The prerogative of the king was so bounded, that he was not even entrusted with the executive part of the government."); id. at 477 (noting that the Spanish privy-council has "the direction of all the executive part of government," while the Spanish council of war "takes cognizance of military affairs only").

257. See, e.g., Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution of 1791 and the Extent of the Amendments Which Ought to Be Applied* 7 (London, printed for J. Johnson 1792) (cataloguing the French King's constitutional powers with a similar distinction between "the executive . . . power" and a number of other distinct authorities including "much of the legislative power," the ability to require various revenues, and the war powers); Walter Moyle, *Democracy Vindicated: An Essay on the Constitution and Government of the Roman State* 5 (Norwich, J. March 1796) ("[Romulus] founded his dominion[] . . . [upon] his standing body of guards; his great revenue in lands; the sole power of the executive, and part of the legislative; and last of all, the administration of justice, and the command of the armies, which were the great branches of the royal prerogative.").

258. See supra note 192 and accompanying text.

259. See supra notes 193–197 and accompanying text.

260. See supra note 198 and accompanying text.

261. See supra note 202 and accompanying text.

262. See supra notes 203–206 and accompanying text.

263. See supra note 207 and accompanying text.

We already know Blackstone's answer: It was simply "the right . . . of enforcing the laws."<sup>264</sup> In keeping with the nutshell quality of his constitutional discussion more generally, this was just the rote recitation of a terminological commonplace. Locke was but one in a long line of commentators who contrasted the "legislative power" as "a right to direct how the force of the commonwealth shall be employed" with the "executive power," which "see[s] to the execution of the laws that are made, and remain in force."<sup>265</sup> According to Whig politician Algernon Sidney's martial formulation, "[t]he Sword of Justice comprehends the legislative and the executive Power: the one is exercised in making Laws, the other in judging Controversies according to such as are made."<sup>266</sup> And using "executive power" as the word for law-implementation was no Anglo-American idiosyncrasy. As the seminal international law theorist Emmerich Vattel explained:

The executive power naturally belongs to the sovereign[]—to every conductor of a people: he is supposed to be invested with it, in its fullest extent, when the fundamental laws do not restrict it. When the laws are established, it is the prince's province to have them put in execution. To support them with vigour, and to make a just application of them to all cases that present themselves, is what we call rendering justice.<sup>267</sup>

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264. 1 Blackstone, *supra* note 78, at \*146; see also *supra* note 190 and accompanying text.

265. Locke, *Second Treatise*, *supra* note 99, §§ 143–144, at 164. Remember that this is precisely how Blackstone defined "executive power" as well—as the rule-implementing counterpart to legislative power's capacity to create rules in the first place. See *supra* note 190 and accompanying text.

266. Sidney, *supra* note 96, ch. III, § 10, at 295; see also James Harrington, *The Commonwealth of Oceana* (1656), reprinted in *The Political Works of James Harrington* 155, 174 (J.G.A. Pocock ed., Cambridge Univ. Press 1977) [hereinafter *Political Works of Harrington*] ("[T]he hand of the magistrate is the executive power of the law, so the head of the magistrate is answerable unto the people that his execution be according unto the law; by which Leviathan may see that the hand or sword that executes the law is . . . not above it.").

267. Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* bk. I, ch. XIII, § 162 at 187 (Knud Haakonssen et al., eds., Liberty Fund 2008) (1797). Other Continental commentators were to the same effect. De Lolme began his chapter titled "Of the Executive Power" by defining it as "[t]he first prerogative of the King, in his capacity of Supreme Magistrate, [which] has for its object the administration of Justice." de Lolme, *The Constitution of England*, *supra* note 105, bk. I, ch. IV, at 72. De Lolme characterized the executive power in terms of its role in implementing legislative enactments. See *id.* at 71 ("When the Parliament is prorogued or dissolved, it ceases to exist; but its laws still continue to be in force: the King remains charged with the execution of them, and is supplied with the necessary power for that purpose."). In the original French, in his chapter titled "Du pouvoir executif," de Lolme wrote: "Lorsque le parlement est prorogé ou dissous, il cesse d'exister; mais les loix subsistent: le roi est chargé de l'exécution, est muni du pouvoir nécessaire pour la procurer." 1 de Lolme, *Constitution de l'Angleterre*, *supra* note 105, at 65. Indeed, de Lolme relied on this understanding of executive power to explain why the monarch could not himself be subject to coercive judicial process. See de Lolme, *The*



Nor was the terminology ideologically inflected or otherwise conceptually contested. To the contrary, even arch-royalists like the man known to Founding-Era Americans as “the prostituted, rotten Sir Robert Filmer”<sup>268</sup> knew that the “executive power” was limited to law execution. That’s why Filmer and other critics of parliament *resisted* a description of the king’s power that was limited to those terms:

By these words of legislative, nomothetical and architectonical power, in plain English, [is understood] a power of making laws. And by gubernative and executive, a power of putting those laws in execution by judging and punishing offenders.<sup>269</sup>

It’s hard to overstate the uniformity of this point. As Jean-Jacques Rousseau explained almost a hundred years later, it just wasn’t that complicated a concept: “[T]he executive power . . . is only the instrument for applying the law.”<sup>270</sup>

Constitution of England, *supra* note 105, bk. I, ch. VIII, at 93 (“It is true, the King himself cannot be arraigned before Judges; because, if there were any that could pass sentence upon him, it would be they, and not he, who must finally possess the executive power . . .”); 1 de Lolme, *Constitution de l’Angleterre*, *supra* note 105, at 86. (“Le roi lui-même est, il est vrai, hors de l’atteinte des tribunaux, parce que, s’il en étoit un qui put le juger, ce seroit ce tribunal & non pas lui, qui auroit finalement le pouvoir exécutif . . .”). Rousseau likewise conceptualized the executive and legislative powers as interlocking and complementary functions. See Rousseau, *supra* note 120, bk. II, ch. 2, at 70 (“[A] declaration of [the general] will is an act of sovereignty and constitutes law . . . [O]ur political theorists, unable to divide the principle of sovereignty, divide it in its purpose; they divide it into power and will, divide it, that is, into executive and legislative . . .”).

268. A Farmer I, *supra* note 157, at 309; see also, e.g., John Adams, *The Letters of Novanglus, to the Inhabitants of the Colony of Massachusetts-Bay* (Jan. 23, 1775), reprinted in 2 *The Adams Papers* 226, 231 (Sarah Martin ed., 2008–2019) (excoriating an opposing pamphleteer as a “foul mouthed scold, deserv[ing] [only] silent contempt” for “mak[ing] no scruples to advance the principles of Hobbs and Filmer, boldly”). Despite his role as designated boogeyman, Filmer was fourth on James Madison’s shopping list of political writers for the library of the Continental Congress. See *Report on Books for Congress* (Jan. 23, 1783), reprinted in 6 *The Papers of James Madison* 62, 84–85 (J.C.A. Stagg ed., 2010).

269. Filmer, *The Anarchy*, *supra* note 12, at 136. Not once does the greatest theoretician of royal power describe the full suite of royal powers as “the executive power.” Along with all well-socialized Englishmen, his word for the king’s full suite of authorities was “the royal prerogative.” *Id.* Hunton relied on the same conceptual categorization in noting that “[i]n respect of its degrees [government is] *Nomothetical* or *Architectonical*, and *Gubernative* or *Executive*. And in respect of the subject of its residence, there is an ancient and usual distinction of it into *Monarchical*, *Aristocratical*, and *Democratical*.” Hunton, *A Treatise of Monarchy*, *supra* note 96, pt. I, ch. I, § 3, at 5–6. Hunton distinguished between the conceptual executive power of government and the entity called a monarchy, and criticized both parliamentary resistance theory and divine-right absolutism. *Id.*; see also Philip Hunton, *A Vindication of the Treatise of Monarchie*, ch. V, § 2, at 39 (London, G. M. 1644) (noting that “[the King] is the sole Principle and fountaine from whence the execution of all Law and Justice flowes to his people by inferiour Officers and Courts, all whose Authoritie is derivatively from him as its head,” but asking rhetorically, “is not the Legislative Power the supreme?”).

270. Rousseau, *supra* note 120, bk. III, ch. 15, at 142. For other examples, see William Mollyneux, *The Case of Ireland Being Bound by Acts of Parliament in England* 43–44

In the most significant sense, Rousseau’s “only” was completely accurate: “[T]he executive power” didn’t encompass other authorities. In another way, though, it might mislead modern ears—because, let’s be clear, this was a hugely important authority. As discussed at length above, the execution problem may have been the single greatest concern of political and legal thinkers over the course of English history. In recognizing this power as perhaps the king’s defining authority, Blackstone was thus once again following an illustrious list of predecessors. From *Bracton*<sup>271</sup> to Hume<sup>272</sup>—with a chorus of thinkers as diverse as Bacon,<sup>273</sup> James I,<sup>274</sup> Milton,<sup>275</sup> and Filmer<sup>276</sup> in between—English law had for centuries recognized the king’s coercive power to “punish and compel wrongdoers”<sup>277</sup> as his “principal and most natural branch of authority.”<sup>278</sup>

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(London, printed for J. Almon & M. Hingeston 1770) (explaining “the *judiciary* and *executive* Parts of the Law, and the Ministers and Process thereof”); Samuel Rutherford, *Lex Rex: The Law and the Prince* question xxi, at 178–79 (London, printed for John Field 1644) (discussing “[a] Power executive of Laws more in the King, a Power legislative more in the Parliament”).

271. See 2 *Bracton*, supra note 98, at 166–67.

272. See 5 Hume, *History of England*, supra note 71, at 349 (stating that Parliament had “been gradually encroaching on the executive power of the crown, which forms its principal and most natural branch of authority”).

273. See Bacon, *Essay of a King*, supra note 255, at 3 (explaining the prerogative to “animate[] the dead letter [of the law], making it active toward all his Subjects *praemio & poena* [such as by reward and by punishment]”).

274. James I publicly admonished his son, “[T]hat as yee are a good Christian, so yee may be a good King . . . in establishing and executing, (which is the life of the Law) good Lawes among your people . . .” James I, *Basilikon Doron* bk. 2 (1616), reprinted in *The Political Works of James I*, at 3, 18 (Charles Howard McIlwain ed., 1918). Over the course of the brief pamphlet, James returned to his exhortations about “executing . . . Lawes” sixteen times. See *id.* at 18–42. The record does not reflect whether he also advised his son neither to borrow nor to lend.

275. See Milton, *Defence of the English People*, supra note 139, at 106 (“[T]he king was created to put . . . laws in execution.”).

276. See Filmer, *The Free-holders Grand Inquest*, supra note 96, at 114 (“[T]here be a power in kings both to judge when the laws are duly executed, and when not; as also to compel the judges if they do not their duty.”).

277. See 2 *Bracton*, supra note 98, at 166.

278. See 5 Hume, *History of England*, supra note 71, at 349. For a mere sample of this kind of celebration of the king’s law enforcement power—in both its judicial and executive guises—see, for example, 2 *Bracton*, supra note 98, at 166–67; Cowell, *Institutes*, supra note 117, at 2; Ellesmere, supra note 208, at 197 (discussing the king’s absolute but delegable prerogative to “punish the guiltie”); Hobbes, supra note 117, at 126 (“[T]o the Sovereign is committed the Power of Rewarding . . . and of Punishing with corporall, or pecuniary punishment, or with ignominy every Subject according to the Law he hath formerly made . . .”); John Nalson, *The King’s Prerogative and the Subject’s Privileges Asserted According to the Laws of England* 108 (London, printed for J. Walthoe 1684) (relying on a close analysis of *Magna Carta* to infer the Crown’s power and obligation to deliver “[e]xecution of [j]ustice”); James Otis, *The Rights of the Colonies Asserted and Proved* 71 (London, reprinted for J. Almon 1764) (“The supreme *legislative*, and the supreme *executive*, are a perpetual check and balance to each other. . . . Here, the King appears, as represented by his judges, . . . as supreme executor of the commonwealth; and

This “power to compel the parties to come to judgment and to execute the judgment given”<sup>279</sup> was celebrated especially in judicial opinions, which saw “a King’s Crown [as] an hieroglyphic of the laws, where justice, &c. is administered,”<sup>280</sup> and public law treatises, which “take it for granted, [t]hat the King, being the supreme Magistrate of the Kingdom, [is] intrusted with the whole executive Power of the Law.”<sup>281</sup>

It was precisely because the Crown’s defining authority was “the sole exercise of the executive power” that the king was “therefore by our English lawyers called ‘the universal judge of property’—‘the fountain of justice’—‘the supreme magistrate of the kingdom, intrusted with the whole executive power of the law.’”<sup>282</sup> And it was for that same reason that the Crown’s implementation of this particular prerogative was the principal measure of its performance: If a legislature is “denominated good, from the goodness of its laws,” then “[t]he goodness of executive government” for its part “consists in [the] due administration of the laws already made.”<sup>283</sup>

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

The singular feature of this constitutionally indispensable authority was its derivative and subsequent character—and therefore its conceptual subordination *ab initio*. Certainly as a matter of the specific constitutional law of England, the executive power was subject to plenary control and instruction by parliamentary legislation.<sup>284</sup> But conceptually speaking, this wasn’t a merely contingent feature of Parliament’s political and

he never shines brighter, but on his throne, at the head of the supreme legislative.”); see also Edmund Plowden, *The Commentaries or Reports of Edmund Plowden* 237 (London, Catharine Lintot & Samuel Richardson 1761) (reporting *Willion v. Berkley*, 3 Eliz.) (“[T]he King has in him three Things, viz. Power, Justice, and Mercy; Power to do, Justice to enforce him to do, and Mercy to restrain him from doing . . . so that every Subject may claim from him Justice, and the King is forced by Justice to do that which he ought.”).

279. Hale, *Prerogatives of the King*, supra note 101, at 179; see also *id.* at 191 (discussing the power of “coercion” as “that whereby the judicative power is acted” and the king “may enforce the person complained of to come to judgment and to execute it”).

280. *Calvin’s Case, or the Case of the Postnati* (1608) 77 Eng. Rep. 377, 390; 7 Co. Rep. 1 a, 1 b (KB).

281. 2 Hawkins, *Pleas of the Crown*, supra note 145, ch. 1, § 1, at 2 (London, Eliz. Nutt & R. Gosling 1721) (pivoting from Book I’s discussion of the substantive “nature of criminal offenses” to Book II’s procedural–structural discussion of “in what manner the offenders are to be brought to punishment”).

282. Letter by J., *Bos. Evening Post* (May 23, 1763), reprinted in 1 *American Political Writing*, supra note 256, at 25–26; see also, e.g., Noah Webster, *The Revolution in France* 15–16 (New York, George Bunce & Co. 1794) (“[P]roperty must be placed under the protection of law; and the laws must receive an energy from a well-constituted executive power, that shall ensure a due execution.”).

283. Nathaniel Niles, *Two Discourses on Liberty* (June 5, 1774), reprinted in 1 *American Political Writing*, supra note 256, at 270.

284. See supra section II.A (discussing the emergence of parliamentary sovereignty).

military supremacy. Rather, the subordinacy of “executive power” was one of its constitutive features: Without some preexisting intention or instruction, that power is an empty vessel that has nothing *to execute*.<sup>285</sup> This conceptual point was nowise a tendentious claim of Whigs, republicans, or commonwealthmen. It was simply intrinsic to the concept in eighteenth-century vocabulary—both in the governance context and in the world at large.

1. *The “Empty Vessel” Nature of Executive Power in General.* — To begin with, the conceptual subservience of executive power to legislative power was just a special case of executive power in general. While law was certainly the default object of execution in political theory, “executive power” in its most generic sense referenced the ability and authority to take a plan, intention, or instruction, and bring that mentally formulated state of affairs into actual being.<sup>286</sup>

This distinction was central to eighteenth-century theories of human perception and cognition.<sup>287</sup> Rousseau’s account, for all its naiveté by the standards of modern neuroscience, beautifully captures the standard eighteenth-century framework:

Every free action has two causes which concur to produce it, one moral—the will which determines the act; the other physical—the strength which executes it. When I walk towards an object, it is necessary first that I should resolve to go that way and secondly that my feet should carry me. When a paralytic resolves to run and when a fit man resolves not to move, both stay where they are. The body politic has the same two motive powers—and we can make the same distinction between will and strength—the former is *legislative power* and the latter *executive power*.<sup>288</sup>

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285. As Hunton wrote:

[P]ower being either the *Legislative* or the *Gubernative*. In a mixed Monarchy, sometimes the mixture is the seat of the *Legislative* power, which is the chief of the two. . . . For if the Legislative be in one [body], then the Monarchy is not mixed but simple, for that [that is, the legislative power] is the superior, if that be in one, all else must needs be so too: By Legislative, I mean the power of making new Laws . . . .

Hunton, *A Treatise of Monarchy*, supra note 96, pt. I, ch. IV, § 2, at 26.

286. As more than one dictionary explained, “To Execute” meant “to put a law, or any thing planned, in practice.” See Francis Allen, *A Complete English Dictionary* (London, printed for J. Wilson & J. Fell 1765) [hereinafter Allen, *Complete English Dictionary*]; see infra Part V for more dictionary definitions than you can shake a stick at.

287. See, e.g., Locke, *On Human Understanding*, supra note 149, bk. II, ch. 21, § 47, at 263 (“For the mind [has] in most cases . . . power to *suspend* the execution and satisfaction of any of its desires . . . .”); see also David Hume, *A Dissertation on the Passions* § 1, in *2 Essays and Treatises on Several Subjects* 178 (London, printed for T. Cadell 1777) (“The Will exerts itself, when either the presence of the good or absence of the evil may be attained by any action of the mind or body.”).

288. Rousseau, supra note 120, bk. III, ch. 1, at 101; see also id. ch. 4, at 112 (“He who makes the law knows better than anyone how it should be executed and interpreted. So it

The notion of an “executive power” as the enacting force which transforms intentions into reality was as pervasive among theologians as it was among philosophers of the mind: “It is the distinguishing Character of a rational Creature, to propose to himself an End, and then to pursue that End in proper Methods; hence Logicians tell us, the End is first in the Intention, and last in the Execution . . . .”<sup>289</sup> And so it was, according to Saint Thomas Aquinas, that “operation belongs to the executive power; and the act of the will does not follow the act of the executive power, on the contrary execution comes last.”<sup>290</sup>

The act of execution thus often had a rote or even marionette quality, with the influential treatise writer William Hawkins describing “[c]onjurers, who by force of certain Magick Words endeavor to raise the Devil, and compel him to execute their Commands”<sup>291</sup> and Francis Bacon describing officers who “execute the experiments so directed” by another officer.<sup>292</sup> Not for nothing did the phrases “executors and administrators”<sup>293</sup>

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might seem that there could be no better constitution than one which united the executive power with the legislative; in fact, this very union makes that form of government deficient . . . .”).

289. Gilbert Tennent, Sermon on Corinthians 10:31 (1743), *in* *Twenty Three Sermons upon the Chief End of Man* 40 (Philadelphia, William Bradford 1744) [hereinafter *Tennent Sermons*]. In a separate sermon, Tennent made this comparison to the two great powers of government explicit: “The *Law* must be enacted by *competent Power* and Authority; because Legislation, as well as the Execution thereof, are Acts of Government.” Gilbert Tennent, Sermon on Deuteronomy 32:4 (1743), *in* *Tennent Sermons*, *supra*, at 278; see also Samuel Davies, *The Good Soldier: Extracted from a Sermon Preached to a Company of Volunteers, Raised at Virginia, August 17, 1755*, at 3 (London, n. pub. 2d ed. 1755) (“[T]rue Courage . . . will render Men vigilant and cautious against Surprizes, prudent and deliberate in concerting their Measures, and steady and resolute in executing them.”).

290. Aquinas, *supra* note 111, at pt. I-II, question 16, art. 1 Objection 2, at 1475; see also *id.* pt. III *supp.*, question 32, art. 6, at 6027 (“Now there are in us three principles of action; the first is the directing principle, namely, the cognitive power; the second is the commanding principle, namely, the appetitive power; the third is the executive principle, namely, the motive power.”). Aquinas also observed:

Now the thing willed is not only the end, but also the means. And the last act that belongs to the first relation of the will to the means, is choice . . . . Use, on the other hand, belongs to the second relation of the will, in respect of which it tends to the realization of the thing willed. Wherefore it is evident that use follows choice; provided that by use we mean the will’s use of the executive power in moving it.

*Id.* pt. I-II, question 4, art. 4, at 1479.

291. 1 Hawkins, *Pleas of the Crown*, *supra* note 145, ch. 3, § 1, at 5.

292. Bacon, *New Atlantis*, *supra* note 130, at 456.

293. See, e.g., *Slade’s Case* (1602) 76 Eng. Rep. 1072, 1077; 4 Co. Rep. 91 a, 94 b (KB) (“executors or administrators”); Bacon, *The Common Law*, *supra* note 129, at 142 (“executors or administrators” of a principal); John Cowell, *A Law Dictionary: Or, the Interpreter of Words and Terms* (London, printed for D. Browne et al. 1708) (using “executor or administrator” in the definitions of “Administration” and “Inventory”); Stewart Kyd, *A Treatise on the Law of Bills of Exchange and Promissory Notes* 24 (London, printed for J. Johnson et al. 3d ed. 1795) (noting the “executors, administrators, and assigns” of a principal). The formulation recurred in statutes as well. E.g., 1605–1606,

and “execution and administration”<sup>294</sup> become formulaic. Indeed, Justinian’s *Institutes* taught that if you went beyond your instructions, you were no longer engaged in execution: You could no longer intelligibly speak of your actions as a manifestation of executive power.<sup>295</sup> Execution also had a significant association with success: not merely an attempt to perform the plan but the actual consummation thereof.<sup>296</sup> In this vein, three standard objects of “execution” were a judicial writ,<sup>297</sup> a legal judgment,<sup>298</sup> and a creative work.<sup>299</sup>

1. *The “Empty Vessel” Nature of Executive Power in a Constitutional Context.* — Applying “executive power” to the special case of state action was thus pretty straightforward. It was the implementing power: the authority to deploy the massed force of the state to bring legislated intentions into effect, especially the laws and their intended consequences. Notably, this concept of bringing-into-being extended to all decisions

3 Jac. 1 c. 5, § 14 (Eng.) (“[S]uch Recusants . . . shall be disabled to be Executor[s] or Administrator[s] . . .”); 1697–1698, 9 Will. 3 c. 35, § 1 (Eng.) (noting that the second conviction for “deny[ing] the Christian Religion” resulted in being “disabled . . . to be [a] Guardian[,] . . . Executor, or Administrator”).

294. Finch, *supra* note 88, bk. I, ch. III, at 32 (discussing the “constituting [of] a new Sheriff, *viz.* for the Execution and Administration of Justice”).

295. See Justinian, *supra* note 136, bk. III, ch. XXVII, § 8, at 89–90 (“He, who executes a mandate ought not to exceed the bounds of it . . .”); see also Finch, *supra* note 88, bk. II, ch. IX, at 77 (discussing “[o]fficers negligent or corrupt, who do not execute their office as of right they ought”).

296. Writers sometimes played on an obvious double meaning: “If, upon judgment to be hanged by the neck till he be dead, the criminal be not thereby killed, but revives, the sheriff must hang him again: for the former hanging was no execution of the sentence . . .” Richard Burn, *New Law Dictionary* 287 (Dublin, Brett Smith 1792) [hereinafter Burn, *New Law Dictionary*]; see also Beccaria, *supra* note 117, at 153 (“The importance of preventing even attempts to commit a crime sufficiently authorises a punishment; but, as there may be an interval of time between the attempt and the execution . . .”); Henry St. John, Viscount Bolingbroke, *Letters on the Study and Use of History* 182 (n.p., JJ. Tourneisen 1791) (“The emperor . . . attempted little against France, and the little he did attempt was ill ordered, and worse executed.”); 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* 509 (Philadelphia, printed for P. Byrne 1806) (“The breaking and entry of the mansion in the night must be with intent to commit some felony therein . . . whether the felonious intent be executed or not.”); The Grand Remonstrance, *supra* note 148, para. 81, at 218 (“[S]uch violent intentions were not brought into execution.”); *id.* para. 176, at 228 (“[I]f by God’s wonderful providence their main enterprise upon the city and castle of Dublin had not been detected and prevented upon the very eve before it should have been executed.”).

297. See generally Anthony Fitz-Herbert, *The New Natura Brevium* (London, A. Strahan & W. Woodfall 9th ed. 1794) (1534) (describing various types of judicial writs).

298. Examples are ubiquitous. For a specific dictionary definition, see Burn, *New Law Dictionary*, *supra* note 296, at 280 (“EXECUTION (in civil cases), signifies the obtaining of actual possession of any thing acquired by judgment of law.”); see also, e.g., Matthew Hale, *The History of the Common Law of England* 23–24 (Charles M. Gray ed., 1971) (1713) (discussing the “Coertion or Excution” of an ecclesiastical court judgment).

299. See, e.g., Hobbes, *supra* note 117, at 275 (discussing “the execution of some supernaturall work”); Plowden, *Preface*, *supra* note 278, at v (“And in order that I might execute this Work with the utmost Sincerity and Truth . . .”).

about state action of any sort—which for their part could only be designated by an exercise of *legislative* power. That’s why Locke begins with the broadest possible definition of legislation: “The legislative power is that, which has a right to direct how the force of the commonwealth shall be employed . . . .”<sup>300</sup> The implementation of authoritatively formulated intent was intrinsic to the very concept of the executive function, both grammatically and in principle.

By the Founding, the implementary essence of executive power was most often expressed in terms of Locke’s vision of law as an interlocking tripartite phenomenon: First the law must be *legislated*, then in at least some cases it must be *adjudicated*, and then its requirements must be *executed*. While this trinitarian scheme still dominates our modern understanding of the law-related functions of government, it’s worth noting that many joined Blackstone in describing the essential powers of government as *two* interlocked halves of a whole: the “legislative . . . authority” as “the right . . . of making . . . the laws,” and the “executive authority” as “the right . . . of enforcing” them.<sup>301</sup> This uncertainty about whether to classify judicial power as a distinct authority or as a subset of executive power ran deep,<sup>302</sup> but for present purposes it doesn’t matter in the slightest. That’s because all formulations were identical on the crucial point: Exercising “the executive power” meant bringing the legislated intentions of society into being. As Obadiah Hulme put it in his much-praised *Historical Essay on the English Constitution*: “The king, who is in the constant exercise, of the executive power, in the state, always did the business of the state; and therefore, it immediately falls within his province, to see any plan, of national utility, put into execution . . . .”<sup>303</sup>

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

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300. Locke, Second Treatise, *supra* note 99, § 144, at 164.

301. 1 Blackstone, *supra* note 78, at \*146; see also *supra* note 190 and accompanying text.

302. As a colonial pamphlet explained:

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

Letter IV, *supra* note 88, at 21; see also, e.g., A Farmer of New Jersey, Observations on Government, New York, Nov. 3, 1787, reprinted in 19 Documentary History, *supra* note 70, at 181, 183 (proposing “[t]hat the [draft Constitution’s] executive be divided into THREE GRAND DEPARTMENTS,” headed by “The President . . . The Chief Justice . . . [and] [t]he Superintendent of Finance”); Speech of Nathaniel Fiennes (Feb. 9, 1640), in 4 Historical Collections, *supra* note 99, at 174, 178 (London, printed for Richard Chiswell & Thomas Cockerill 1692) (“And here, Mr. *Speaker*, give me leave to lament the Condition of this our Church of *England*. . . . As to the Executive part, which consisteth in the exercise of Ecclesiastical Jurisdiction, therein I note also two Disorders, *Confusion* and *Corruption* . . . .”).

303. Hulme, *supra* note 211, at 182.

You have a Governor, it may be urged, vested with the *executive* powers or the powers of *administration*. In him and in your Council is lodged the power of *making laws*. You have *Judges* who are to *decide* every cause affecting your lives, liberty or property. Here is, indeed, an appearance of the several powers being *separated* and *distributed* into *different* hands for checks one upon another . . . .<sup>304</sup>

To put it mildly, such constitutional formulations about the “execution” of “law” were pervasive, including both those that used the specific phrase “executive power” and those that did not.<sup>305</sup>

This definition of executive power necessarily entailed both its subsequence and its subordination to the legislative power. As pastor Gad Hitchcock explained in his famous 1774 Election Day sermon—before an audience that included the British military governor for Massachusetts—“the executive power is strictly no other than the legislative carried forward, and of course, controlable by it.”<sup>306</sup> Scottish philosopher David Hume summarized the matter as an uncontroversial and fully generalizable point of political theory: “[T]he executive power *in every government* is altogether subordinate to the legislative . . . .”<sup>307</sup> A long and diverse list of commentators—

304. Cont’l Cong., Appeal to the Inhabitants of Quebec (Oct. 26, 1774), reprinted in 1 American Political Writing, supra note 256, at 231, 236. The Americans continued helpfully explaining to their northern neighbors that this was just an illusion, a “tinsel’d . . . ‘sepulchre’ for burying your lives, liberty and property.” Id.

305. For a tiny inlet in the vast sea of such usages, see, for example, Beccaria, supra note 117, at 117 (“a magistrate, the executor of the laws”); id. at 176 (“Clemency is a virtue which belongs to the legislator, and not to the executor of the laws . . . . Let, then, the executors of the laws be inexorable, but let the legislator be tender, indulgent, and humane.”); Cowell, Institutes, supra note 117, at 2 (“[I]t is requisite likewise, [t]hat there be Magistrates ordained, . . . [so that] the Lawes may be put in execution . . . .”); 2 Hugo Grotius, The Rights of War and Peace 1031 (Richard Tuck ed., Liberty Fund 2005) (1625) (“[I]n a Civil State [religion’s function] is partly supplied by the Laws, and the easy Execution of the Laws; whereas . . . in the universal Society of Mankind, the Execution of Right is very difficult . . . and the Laws are very few, . . . [deriving] their Force chiefly from the Fear of a Deity . . . .”); Hobbes, supra note 117, at 231 (“[T]he procuration of *the safety of the people* . . . should be done . . . by a generall Providence, contained in publique Instruction, both of Doctrine, and Example; and in the making, and executing of good Lawes . . . .” (emphasis omitted)); Voltaire, Commentary, supra note 154, at xvii (“[T]his law, like many others, remained unexecuted . . . .”); The Grand Remonstrance, supra note 148, at 205 (pleading for the “due execution of those good laws which have been made for securing the liberty of [the King’s] subjects”).

306. Gad Hitchcock, An Election Sermon (Boston 1774), reprinted in 1 American Political Writing, supra note 256, at 281, 295 (“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 generally Lindsay Swift, The Massachusetts Election Sermons: An Essay in Descriptive Bibliography (Cambridge, John Wilson & Son Univ. Press 1897).

307. Hume, Independency of Parliament, supra note 95, at 44 (emphasis added). Hume clarified that this was a global point, distinct from the English Crown’s practical need for money. See id.; see also David Hume, Essay XVI: Idea of a Perfect Commonwealth



including but not limited to parliamentary partisans like William Prynne,<sup>308</sup> Philip Hunton,<sup>309</sup> and John Locke<sup>310</sup>—were in accord.<sup>311</sup> That’s why the great eighteenth-century historian Catherine Macaulay could call it

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(1777), reprinted in *Essays Moral, Political, and Literary*, supra note 95, at 512, 526 (stating that “the legislative power [is] always superior to the executive”).

308. Prynne explored the point at some length:

Military Affaires of the kingdome heretofore, have usually, even of right, (for their originall determining, counselling, and disposing part) beene Ordered by the Parliament; *the executive, or ministeriall part onely*, by the King . . . . To instance in particulars.

First, the denouncing of warre against forraine enemies, hath been usually concluded and resolved on by the Parliament, before it was proclaimed by the King . . . .

. . . .

Secondly, All preparations belonging to warre by Land and or Sea, have in the grosse and generall, beene usually ordered, limited and settled by the Parliaments . . . .

William Prynne, *The Sovereigne Power of Parliaments and Kingdomes* (1643), reprinted in 1 David M. Hart, *Tracts on Liberty by the Levellers and Their Critics* (1638–1659) 315, 323, 328 (David M. Hart & Ross Kenyon eds., 2015) (emphasis added).

309. See Hunton, *A Treatise of Monarchy*, supra note 96, pt. I, ch. IV, § 2, at 26 (“[S]upreme power [is] either the *Legislative*, or the *Gubernative* . . . [and] the *Legislative* power . . . is the chief of the two.”).

310. See Locke, *Second Treatise*, supra note 99, §§ 149–150, at 166 (“[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 . . . .”).

311. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring in the judgment) (“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.”); 2 Burlamaqui, supra note 117, at 394, pt. III, ch. I, at 403–04 (“Among the essential parts of sovereignty, we have given the first rank to the legislative power . . . .” (emphasis omitted)); Charles Chauncy, *Civil Magistrates Must Be Just, Ruling in the Fear of God* (1747), reprinted in 1 *Political Sermons of the American Founding Era, 1730–1805*, at 148 (Ellis Sandoz ed., 1998) [hereinafter *Political Sermons*] (“[T]he laws are the rule for the executive powers in the government.”). Consider also pastor Samuel Sherwood’s entreaty in his famous Revolutionary War sermon:

[R]ulers considered either in their legislative or executive capacity . . . must be just. Particularly,

1. There is justice to be observed in making laws. The legislative authority is usually stiled supreme. The power of making laws is undoubtedly the highest in every society. The executive officers are obliged to observe the rule prescribed them by the legislators . . . .

. . . .

2. Rulers considered in their executive capacity as putting laws in executive, must be just. Executive officers are obliged to proceed according to the received and established laws of their country.

Samuel Sherwood, *A Sermon, Containing Scriptural Instructions to Civil Rulers, and All Free-born Subjects* (Aug. 31, 1774), reprinted in 1 *Political Sermons*, supra, at 375, 387, 389.

“absurd”—strictly as a matter of logic—for Charles I to claim sovereignty over the estates, “since no power can be superior to the legislative; and if the King is not part of the legislative, he can be only the executive, which is a power subordinate to the legislative.”<sup>312</sup> And that’s likewise why writers seeking to limit magistrates to the executive power could describe the “executive branch of government” as being charged “only to perform, (without a will of their own), what the constitution and representation enacts.”<sup>313</sup>

Far from disagreeing, even the most royalist writers emphasized—often with some disdain—that “the executive power” by definition “derived from” the legislative power. The divine right theorist Filmer was especially contemptuous: “When the law must rule and govern the monarch, and not the monarch the law, he hath at the most but a gubernative or executive power.”<sup>314</sup> It was precisely because of the subsequent and subordinate nature of this power that Filmer *rejected* it as the basis for the English king’s powers: “[A] limited monarch must govern according to law only. Thus is he brought from the legislative to the gubernative or executive power only.”<sup>315</sup> Other writers sympathetic to the monarchy were similarly dismissive of “executive power” as a factotum’s charge. The German jurist Samuel Pufendorf observed that it “is characteristic of a minister or a bare executor” to “have the strength by which you may compel others, but only if another decides that it should be brought to bear.”<sup>316</sup> Old Whig parliamentarian Edmund Burke scolded “many on the continent” who “altogether mistake the condition of a King of Great Britain” as “an executive officer.”<sup>317</sup> To the contrary, Burke explained, “[h]e is a real King,” certainly “if he will not trouble himself with contemptible details, nor wish to degrade himself by becoming a party from little squabbles.”<sup>318</sup> The less-categorizable Adam Smith captured a similarly dismissive flavor: “The leading men of

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312. See 3 Macaulay, *supra* note 71, at 6 n\*.

313. See *Of the Distribution of Authority, in Rudiments of Law and Government Deduced from the Law of Nature* (1783), reprinted in 1 *American Political Writing*, *supra* note 256, at 565, 585, 587.

314. Filmer, *The Anarchy*, *supra* note 12, at 136. For the same point in a more neutral register, see Bolingbroke’s observation that “the executive power [is] trusted to the prince, to be exercised according to such rules and by the ministry of such officers as are prescribed by the laws and customs of this kingdom.” Henry St. John, Viscount Bolingbroke, *A Dissertation upon Parties: Letter XIII* (1734), reprinted in *Bolingbroke: Political Writings* 1, 124 (David Armitage ed., 1997).

315. Filmer, *The Anarchy*, *supra* note 12, at 136 (“When the law must rule and govern the monarch, and not the monarch the law, he hath at the most but a gubernative or executive power.”).

316. Pufendorf, *Law of Nature and Nations*, *supra* note 117, bk. VII, ch. 4, at 223.

317. Letter from Edmund Burke to a Member of the [French] National Assembly (1791), reprinted in 8 *The Writings and Speeches of Edmund Burke*, *supra* note 256, at 294, 331 (L.G. Mitchell & William B. Todd eds., 1989).

318. *Id.* at 332.

America . . . feel, or imagine, that if their assemblies . . . should be so far degraded as to become the humble ministers and executive officers of [the British] parliament, the greater part of their own importance would be at an end.”<sup>319</sup>

At times, Burke was even more explicit about the narrow scope of executive power, not only recognizing its “mere” implementary nature but going out of his way to emphasize that it did *not* include the authority to make decisions about foreign and military affairs. Listen to his mockery of the revolutionary French government: “[I]n their hurry to do every thing at once,” he jibed, “[they] have forgot one thing that seems essential, and which, I believe, never has been before, in the theory or the practice, omitted by any projector of a republic.”<sup>320</sup> What was it? “[A] Senate, or something of that nature and character.”<sup>321</sup> And why did the omission matter? Burke thought a government with only legislative and executive officers might forget to designate anyone to conduct foreign affairs:

Never, before this time, was heard of a body politic composed of one legislative and active assembly, and its executive officers, without such a council; without something to which foreign states might connect themselves; something to which, in the ordinary detail of government, the people could look up; something which might give a bias and steadiness, and preserve something like consistency in the proceedings of state. Such a body kings generally have as a council. A monarchy may exist without it; but it seems to be in the very essence of a republican government. It holds a sort of middle place between the supreme power exercised by the people, or immediately delegated from them, and the mere executive.<sup>322</sup>

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

All of this is to say that Blackstone was neither confused nor idiosyncratic when he described the executive power as the power to enforce the

319. 2 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* bk. IV, ch. VII, at 231 (London, printed for W. Strahan and T. Cadell 1776). For a similar rhetorical flavor from an American Revolutionary, see Letter from James Mitchell Varnum to William Greene (Apr. 1781), in 17 *Letters of Delegates to Congress: March 1–August 31, 1781*, at 115, 117 (Smith et al. eds., 1990) (“Our Time is consumed in trifling executive Business, while Objects of the greatest Magnitude are postponed, or rejected as subversive in their Nature, of democratical Liberty.”).

320. Edmund Burke, *Reflections on the Revolution in France* (1790) [hereinafter Burke, *Reflections on the Revolution in France*], reprinted in 8 *Writings and Speeches of Edmund Burke*, supra note 256, at 53, 245.

321. *Id.*

322. *Id.* at 245–46, 273 (summarizing Burke’s “few remarks on the constitution of the supreme [that is, legislative] power, the executive, the judicature, the military, and on the reciprocal relation of all these establishments”).

law. Here as in most other respects, the eighteenth century's greatest law treatise was just reciting a relatively bland restatement of conventional wisdom.<sup>323</sup> Even at the most royalist stage of the political story traced in section II.A, and even according to the most royalist writers, this conceptual understanding of “the executive power” was common currency—simply a special case of the same phrase when applied to human affairs in general. It was the power to execute a law or project that had been separately authorized by some other source of government authority: perhaps a statute; perhaps the common law; perhaps a royal decree issued pursuant to a different branch of prerogative. The key conceptual point was that “executive power” referred to the downstream implementing authority, not to its upstream authorization. Without a source, you can't have a fountain;<sup>324</sup> without a planet, the idea of a satellite makes no sense.<sup>325</sup>

#### IV. WHY HAVE RESIDIUM PROPONENTS MISUNDERSTOOD THIS EVIDENCE?

We are left with a puzzle. In the face of such overwhelming evidence, how did the Royal Residuum Thesis come to conflate the overarching category of royal prerogative with a single sub-item on the incredibly long list of authorities that it included? How could a Supreme Court

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323. See, e.g., 4 Goldsmith, *supra* note 71, at 338–39 (explaining that the Commons was “armed with no legal executive powers to compel obedience”); Letter from Abbé de Mably to John Adams, *in* Remarks Concerning the Government and Laws of the United States of America 41, 65 (Dublin, printed for Moncrieffe et al. 1785) (“Let us now come to the executive power, without which it were a[] useless task to frame a law.”). Daniel Shute, a Congregationalist minister and delegate to the Massachusetts convention, espoused a similar view in an election sermon to the Massachusetts governor and house of representatives:

The welfare of the province . . . [is the] purpose [for which] the legislative and executive powers are to be exercised. But laws are useless in a state, unless they are obeyed; nor will putting the executive power into the best hands avail to the designed purpose, if there is not proper application made to it . . . for in proportion to the want of this application the most excellent *code* of laws will be a dead letter. It is necessary . . . to give life and energy to the laws in producing the designed happy effects.

We [thus] have good laws; and magistrates appointed to put *those* laws into execution . . .

Daniel Shute, *An Election Sermon* (Boston 1768), reprinted in 1 *American Political Writing*, *supra* note 256, at 109, 132.

324. See Davies, *Report of Cases in Ireland*, *supra* note 120, at 21 (“[W]hat is the King himself, but the clear Fountain of Justice? [A]nd what are the Professors of the Law but the Conduit-pipes deriving and conveying the streams of his Justice to all the subjects of his several Kingdoms?”).

325. See Peres [Perez] Fobes, *An Election Sermon* (Boston 1795), reprinted in 2 *American Political Writing*, *supra* note 256, at 990, 1003 (developing a metaphor of government as a solar system to note that “a number of secondaries perform their judicial circuits in periodical times” and “are attended with satellites of executive power”).

Justice wind up writing the following, catastrophically incorrect summary of the evidence:

Founding-era evidence reveals that the “executive Power” included the foreign affairs powers of a sovereign State. . . .  
 . . . William Blackstone, for example, described the executive power in England as including foreign affairs powers . . . .

. . . .  
 This view of executive power was widespread at the time of the framing of the Constitution. . . . Given this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the “executive Power” vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution.<sup>326</sup>

Not one sentence in that excerpt is right. For the moment, though, focus only on Justice Thomas’s claim about the Founding Generation’s “pervasive view of executive power.”<sup>327</sup> How could he have gotten it so wrong?

This Part will focus on three reasons, starting with mistakes in the scholarship on which Justice Thomas relies.<sup>328</sup> First and most important, while looking for evidence in the historical materials, Royal Residuum theorists have systematically confused two different things: (1) the use of the phrase “executive power” to reference a *conceptual power* capable of being “vested,” and (2) the use of the phrase “the executive” as a metonym for *the political entity* in which that conceptual power was vested. Second, Royal Residuum theorists have misread an idiosyncratic taxonomy adopted by the eighteenth-century authors Thomas Rutherford and Montesquieu, who didn’t actually contradict the fundamental conceptual structure described above at all. The third reason is a little different. It has to do not with errors made by the theory’s champions but with the ready audience they find in many lawyers and academics. Some listeners’ receptivity may of course result from what they *want*

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326. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2098–99 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part). I did try to warn him. See Julian Davis Mortenson, *The Supreme Court Should Stay Far Away from the Vesting Clause in Zivotofsky* [sic], *Lawfare* (Oct. 29, 2014), <https://www.lawfareblog.com/supreme-court-should-stay-far-away-vesting-clause-zivotofsky> [<https://perma.cc/B2AL-94AB>] (“My only point here is to urge any Justice who considers the Vesting Clause argument to take a couple of hours and read Blackstone—or at least assign the first nine chapters of Book I of the *Commentaries* to a clerk.”).

327. *Zivotofsky*, 135 S. Ct. at 2099.

328. Royal Residuum theorists are surely influenced, it must be said, by an ambiguous passage from Alexander Hamilton’s multi-essay defense of the Washington Administration’s right to state out loud its interpretation of various treaty obligations. See *supra* note 7 (citing Hamilton’s first *Pacificus* pamphlet). I don’t think Hamilton erred so much as he sought to wring a meaning from Article II that he was famously unable to win at the Convention itself. Not for nothing was he known as “one of the best legal minds in the country.” Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* (forthcoming 2019) (manuscript at 120) (on file with the *Columbia Law Review*).

presidential power to be—a bias to which none of us is immune. The more significant reason, however, seems to be a common misunderstanding of what the Founders meant by a “separation” of powers in the first place.

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

By far the most important mistake of the Royal Residuum Thesis is its systematic conflation of two different things: (1) the Constitution’s use of “executive” to describe a particular power of government with (2) the historical sources’ use of “executive” as metonymy for the political entity that possesses both that particular power *and also many others*. It’s hard to overstate the pervasiveness of this error.<sup>329</sup> So far as I can tell, every single piece of evidence from pre-Framing commentary cited in support of the Thesis—other than the misunderstanding of Rutherford and Montesquieu discussed below—is a trivially demonstrable conflation of these two meanings.

At bottom, the point is simple. The eighteenth-century practice of referring to presidents, governors, prime ministers, stadtholders, and emperors as “the executive” was an everyday metonymy:<sup>330</sup> the use of something associated with the referent as a name for the referent itself, like talking about “head” of cattle or “boots” on the ground. This was neither semantically confused nor substantively controversial: Today, we likewise use “the executive” as shorthand for our governors, presidents, and prime ministers because they all count the executive power as *one* of

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329. It is worth noting that, while unmistakable, the error is perhaps understandable. It is akin to the linguistic phenomenon of semantic drift, which describes the process by which a word or phrase evolves to mean something very different from its original meaning over time. Consider, for example, the path of words like “terrible” and “awful,” where widespread error by prescriptive lights eventually changed the meaning of both terms. Cf. J.D. Sadler, *Semantics: The Ups and Downs*, 68 *Classical J.* 262 (1973). Certainly, scholars on both sides of the Executive Power Clause debate have been tempted by this error. In addition to the examples below, see, for example, Flaherty, *Most Dangerous Branch*, *supra* note 59, at 1774 (“[T]he [Northwest] Ordinance . . . accord[ed] the governor an absolute veto over legislation [and] the ‘power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.’ This was arguably ‘executive’ authority; British monarchs and royal colonial governors possessed these powers into the eighteenth century.” (quoting *The Northwest Territorial Government*, 1 *Stat.* 50, at § 11 (1789)). Without wading into the debates over corpus linguistics—which doubtless has its uses—the metonymy error’s persistence even among those who have looked closely at the texts leaves me skeptical that database corpus techniques could shed much light on the Executive Power Clause.

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

their authorities. But not even the most aggressive Residuum theorist would claim that *all* authorities held by “an executive” in this metonymic sense are part of “the executive power” in the relevant conceptual sense. Partly that’s because the claim is obviously wrong: Everyone agrees, for example, that the President’s veto is a quintessentially legislative act.<sup>331</sup> More profoundly, however, the problem is that this would turn the linguistic logic of metonymy upside down. Rather than using the part as shorthand for the whole, this move crams all the features of the whole into the part. And that’s exactly backward.

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

1. This boy is called a youth.
2. This boy has ears.
3. Therefore, it is an intrinsic feature of youth to have ears.<sup>332</sup>

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

And yet that is exactly what virtually all of the evidence for the Royal Residuum Thesis involves. There are far too many examples to list. But the error comes in two different versions. The first involves (1) accurately flagging an author’s metonymic reference to the king as “the executive” or “the executive authority,” and then (2) mistakenly concluding that *all* of the royal powers later described by the author are therefore

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331. See *supra* note 26 (outlining the President’s powers).

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

1. This boy is the young person in our group.
2. This boy has ears.
3. Therefore, it is an intrinsic feature of being “young” to have ears.

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

conceptually “executive.” The leading scholarly argument for the Royal Residuum Thesis, for example, states:

According to Blackstone, the executive power ‘is the delegate or representative of his people’ who transacts with ‘another community’ because it is impossible for individuals of one community to transact directly ‘the affairs of that state’ with another.<sup>333</sup>

What Blackstone actually says in the cited text, however, is: “[T]he king is the delegate or representative of his people,” and “the king therefore, as in a center” must “transact the affairs of that state.”<sup>334</sup> It’s only (much) earlier that Blackstone uses the shorthand “executive power”—in its metonymic sense—to refer to the king.<sup>335</sup>

A second version of the error involves (1) accurately flagging an author’s observation that the king has the “executive power” of government, but then (2) mistakenly suggesting that the all the *other* prerogatives later described by the author are therefore part of that “executive power” as well. So, for example, the leading modern Royal Residuum theorists assert: “Emmerich de Vattel, a leading European writer on the law of nations, said that the ‘conductor’ or ‘sovereign’ of a nation had the ‘executive power’ and *consequently* could enter into treaties, send emissaries, engage in war, and control the nation’s ambassadors.”<sup>336</sup> But what Vattel actually wrote in the quoted passages was that:

The executive power naturally belongs to the sovereign—to every conductor of a people: he is supposed to be invested with it, in its fullest extent, when the fundamental laws do not restrict it. When the laws are established, it is the prince’s province to have them put in execution. To support them with

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333. Prakash & Ramsey, *Executive Power over Foreign Affairs*, supra note 44, at 269 (quoting 1 Blackstone, supra note 78, at \*252).

334. 1 Blackstone, supra note 78, at \*252. The relevant excerpt reads in its entirety as follows:

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates . . . .

Id.

335. See, e.g., id. at \*136, \*141, \*154, \*164. Of course, the king did have these powers. But that doesn’t mean that they were part of “the *executive* power.” Indeed, Blackstone later refers to the king’s absolute negative as “a constituent part of the supreme legislative power.” Id. at \*261. And no one, least of all Blackstone, sees the veto as “executive” in the conceptual sense.

336. Prakash & Ramsey, *Executive Power over Foreign Affairs*, supra note 44, at 270 (emphasis added) (quoting E. de Vattel, *The Law of Nations or the Principles of Natural Law* 69, 100, 160–61, 235–36, 393 (photo. reprint 1993) (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758)).



vigour, and to make a just application of them to all cases that present themselves, is what we call rendering justice. And this is the duty of the sovereign, who is naturally the judge of his people.<sup>337</sup>

This is, of course, the textbook definition of executive power explained at length above; indeed, Vattel turned immediately from this point to an extended discussion of the judicial function, which had historically been associated with the executive power in its law enforcement sense.<sup>338</sup> It was only much later in Vattel's discussion that he turned to the chief magistrate's authority to enter treaties and send ambassadors.<sup>339</sup> And in those contexts, Vattel doesn't use any variant of "executive" to describe the magistrate; rather, he refers to "the sovereign."<sup>340</sup> Far from suggesting that the latter powers are "consequent[]" to the "executive power," Vattel makes clear that they have nothing to do with it—they are simply different branches of what the English called prerogative.<sup>341</sup>

Make no mistake: Blackstone (and many others) did say that—in *addition* to the executive power—the king claimed a range of foreign affairs powers as part of his prerogative.<sup>342</sup> And Blackstone (and many others) did variously refer to the Crown as "the executive," "the executive magistrate," "the executive part of government," and sometimes even "the

337. Vattel, *supra* note 267, bk. I, ch. XIII, § 162, at 187. Vattel used the phrase "executive power" only one other time in the work. See *id.* bk. II, ch. XVII, § 282, at 418. That use, too, was in the proper, conceptual sense. And that use, too, was obviously in reference to the execution of law: "[W]ise and free people have too often seen, by the experience of other nations, that the laws are no longer a firm barrier and secure defence, when once the executive power is allowed to interpret them at pleasure." *Id.* Prakash and Ramsey cite to the 1916 *Classics of International Law* translation of Vattel's text, but the substance of the two translations is identical in this respect.

338. See *id.* §§ 163–168, at 187–91.

339. See *id.* bk. II, ch. XII, §§ 154–156, at 338–40.

340. See *id.*

341. For a similar example, consider the leading Royal Residuum advocates' claim that "Jean De Lolme . . . described the King's executive power as including the ability to serve as 'the representative and depository of all the power and collective majesty of the nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war and making peace.'" Prakash & Ramsey, *Executive Power over Foreign Affairs*, *supra* note 44, at 270 (quoting J.L. De Lolme, *The Constitution of England* 50 (photo. reprint 1999) (London, A. Hancock 1821)). But de Lolme didn't say that at all. His chapter "Of the Executive Power" ("Du pouvoir exécutif") follows his chapter "Of the Legislative Power" ("Puissance législative"). In the first paragraph, it notes that "[w]hen the Parliament is prorogued or dissolved, . . . its laws still continue to be in force: the King remains charged with the execution of them, and is supplied with the necessary power for that purpose." De Lolme, *Constitution of England*, *supra* note 105, bk. I, ch. IV, at 71 (emphasis added). De Lolme then goes on to catalogue the king's *other* prerogatives, starting with the unequivocally legislative right to veto proposed enactments: "the share allotted to him in the legislative authority" by way of "giv[ing] or refus[ing] his assent to the bills presented to him." *Id.* De Lolme's reference to foreign affairs powers comes about eighth in a list of additional authorities that he discusses *after* the king's executive power. *Id.* at 73.

342. See 1 Blackstone, *supra* note 78, at \*252–261.

executive power.”<sup>343</sup> But neither of those facts, nor both in combination, supports the erroneous claim that “William Blackstone . . . described the executive power [in its conceptual sense] . . . as including foreign affairs powers.”<sup>344</sup> Instead, Blackstone described *the Crown* as having various foreign affairs powers, in addition to the distinct power to execute the laws. And he used “the executive” as a shorthand for the political entity, rather than as an umbrella category for the activity or function. So long as you bear this simple grammatical distinction in mind, the bookshelf evidence offered for the Royal Residuum Thesis simply evaporates as you read it.

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343. See *id.* at \*336 (“We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king’s majesty . . . [and] the power of the executive magistrate, or prerogative of the crown . . .”); *id.* at \*336–337 (“[The post-Restoration reforms] put together give the executive power so persuasive an energy with respect to the persons themselves . . . as will amply make amends for the loss of external prerogative . . . . The stern commands of prerogative have yielded to the milder voice of influence.”). De Lolme deployed the same usage:

But all these general precautions to secure the rights of the Parliament, that is, those of the Nation itself, against the efforts of the executive Power, would be vain, if the Members themselves remained personally exposed to them. Being unable openly to attack, with any safety to itself, the two legislative bodies, and by a forcible exertion of its prerogatives, to make, as it were, a general assault, the executive power might, by subdividing the same prerogatives, gain an entrance, and sometimes by interest, and at others by fear, guide the general will, by influencing that of individuals.

De Lolme, *Constitution of England*, supra note 105, bk. I, ch. VIII, at 96–97. For an American example, consider Article I, Section 10 of the Constitution, prohibiting states from “enter[ing] into any Agreement or Compact . . . with a foreign Power” without the permission of Congress. U.S. Const. art. I, § 10, cl. 3.

There is one sentence in which Blackstone could be read to refer casually to the king’s powers as “constitu[ing] the executive power of the government.” See 1 Blackstone, supra note 78, at \*281 (“[H]aving . . . considered at large those branches of the king’s prerogative, which contribute to his royal dignity, and constitute the executive power of the government . . .”). In context—not least since the subset of powers referenced include the Crown veto, *id.* at \*250, \*261, which everyone including Blackstone agreed was legislative under his classification—this seems best read as a metonymic reference to the constitution of the entity of the Crown. To read it as a considered conceptual reference to a function of government would require rejecting the entire organization of Blackstone’s constitutional framework, see supra notes 192–207 and accompanying text, ignoring Blackstone’s own repeated definitions of “executive power,” see supra note 190 and accompanying text, ignoring his unvarying use of “prerogative” rather than “executive power” to describe the conceptual authorities throughout the referenced section, see 1 Blackstone, supra note 78, at \*236–279, and contradicting every other contemporary treatment of the question, see supra notes 253–257 and accompanying text. Even if it’s semantically possible to misread the sentence in isolation, the Founders would have to be shown to have done so for the error to be relevant to Article II. I can find no reference to this sentence—let alone a misreading of it—anywhere in the *Documentary History of the Ratification of the Constitution*.

344. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2099 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

B. *The Second Scholarly Error: Misunderstanding “Internal Executive” and “External Executive”*

The second source of confusion is rooted in the idiosyncratic taxonomy of two eighteenth-century writers—the minor Rutherforth and the major Montesquieu. Modern advocates of the Royal Residuum Thesis have relied on snippets from Montesquieu<sup>345</sup> and Rutherforth<sup>346</sup> in a way that is both inaccurate and also disproportionate to their taxonomy’s contemporary significance.<sup>347</sup> In this section I will show that the Royal

345. E.g., Prakash & Ramsey, *Executive Power over Foreign Affairs*, supra note 44, at 268 (“Montesquieu . . . helped usher in the late eighteenth-century view that the executive power had domestic and foreign affairs components.”); Prakash & Ramsey, *The Jeffersonian Executive*, supra note 10, at 1632–35, 1637 (“Montesquieu categorized foreign affairs powers as executive powers.”).

346. E.g., Prakash & Ramsey, *Executive Power over Foreign Affairs*, supra note 44, at 269–70 (identifying Rutherforth as a “prominent eighteenth-century writer[] [who] identified foreign affairs power as executive power”); Prakash & Ramsey, *The Jeffersonian Executive*, supra note 10, at 1638–39 (“Rutherforth . . . confirms the conventional description of powers, and the conventional definition of foreign affairs powers as executive.”).

347. Modern Royal Residuum authors have also relied on a set of resolutions passed by a county assembly in Essex County, Massachusetts. See Theophilus Parsons, *The Essex Result* (1778), reprinted in *1 American Political Writing*, supra note 256, at 480; Prakash & Ramsey, *The Jeffersonian Executive*, supra note 10, at 1643–44; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Calif. L. Rev.* 167, 231–32 (1996) [hereinafter Yoo, *The Continuation of Politics*]. That reliance seems quite mistaken.

As a substantive matter, the *Essex Result* simply adopts the taxonomic distinction introduced by Rutherforth and Montesquieu, with the same focus on *actions* taken—a reading underscored by its author’s comments at the Massachusetts ratifying convention a decade later. See Mortenson, *The Executive Power Clause*, supra note 13, at 46 (describing Theophilus Parsons’s discussion of “executive power” in the Massachusetts convention). That said, I leave it in a footnote here because, so far as I can tell, the *Essex Result* seems to have had no impact outside of Massachusetts. I have yet to see a single contemporaneous source supporting the proposition that it was any more influential on the national debate than the hundreds of other pamphlets that appeared in the second half of the eighteenth century. (The 1859 remembrance of the author’s son—almost eighty years later—is neither contemporaneous nor exactly neutral.) So far as I can tell, it is not cited even once—by author, by town of origin, or by paraphrase—in the documents collected during almost five decades of work by the team responsible for *The Documentary History of the Ratification of the Constitution*. Besides the 1859 memoir of Parsons *filis*, see Theophilus Parsons, *Memoir of Theophilus Parsons, Chief Justice of the Supreme Judicial Court of Massachusetts* 454 (Boston, Ticknor & Fields 1859), the earliest citation appears to be in Charles Thach’s 1922 description of the *Result* as a “document, from the pen of a future State chief justice, [which] may be fairly considered as representative of conservative Massachusetts opinion.” Thach, supra note 29, at 44 (providing no citation other than the memoir of Theophilus Parsons’s son).

To be clear, the *Essex Result* is a terrific piece of work, and well worth study. Substantively, though, it is even less relevant to the Royal Residuum Thesis than Montesquieu or Rutherforth, because it expressly declares the external executive beyond its scope of discussion. That said, it is indeed “a most remarkable document.” Vile, supra note 37, at 165; see also Willi Paul Adams, *The First American Constitutions* 21 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers, Inc. expanded ed. 2001) (1940) [hereinafter Adams, *The First American Constitutions*]. I cannot find the slightest indica-

Residuum Thesis's heavy reliance on these two writers is substantively mistaken.<sup>348</sup> Not only was the taxonomy of Montesquieu and Rutherford idiosyncratic, but even taken on its own terms, their framework does not actually support a royal residuum at all. To the contrary, their discussion necessarily rejects it, for exactly the same reasons that the rest of the literature does too.

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

[T]he executive power is either internal or external. We may call it internal when it is exercised upon objects within the society; when it is employed in securing the rights[,] or enforcing the duties of the several members, in respect either of one another or of the society itself. And we may call it external executive power, when it is exercised upon objects out of the society; when it is employed in protecting either the body or the several members of it against external injuries . . . .<sup>349</sup>

Montesquieu said something similar: “In every government there are three sorts of power: the legislative; the executive [*la puissance exécutrice*], in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law.”<sup>350</sup> Note that his definition was even narrower than Rutherford's, identifying both forms of executive power as involving the authority to implement strictly *legalized* entitlements and authorizations.

1. *Montesquieu's Taxonomy of “Executive Power” Was Just an Expository Tool to Organize His Otherwise Standard Use of the Concept.* — First and most important, the substance of Rutherford and Montesquieu's discussion reflected an entirely standard understanding of “the executive power” as a general concept. Their taxonomic wrinkle was no conceptual revolution. It served simply to highlight the rather mundane point that government force can be directed in one of two directions: inward or outward. In *both* realms, “the executive power” is the power to execute—the power to follow through on a plan, desire, or instruction. It is just that the

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tion, however, that Parsons's work registered in, let alone influenced, the national discussion. I would be grateful to be alerted to any evidence I have missed.

348. Cf. Bradley & Flaherty, *supra* note 37, at 563–64 (2004) (suggesting that Montesquieu's discussion is unclear and self-contradictory); see also Vile, *supra* note 37, at 93–101 (making similar points).

349. 2 Thomas Rutherford, *Institutes of Natural Law* 59 (Philadelphia, printed for William Young 3d ed. 1799) [hereinafter Rutherford, *Institutes of Natural Law*].

350. 1 Montesquieu, *The Spirit of Laws*, *supra* note 179, bk. XI, ch. VI, at 221. In the original French, Montesquieu wrote, “Il y a, dans chaque état trois sortes de pouvoirs; la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, & la puissance exécutrice de celles qui dépendent du droit civil.” 1 Montesquieu, *De l'Esprit des Lois*, *supra* note 179, bk. XI, ch. VI, at 311.

power is “internal” when performed internally; “external” when performed externally.

If you read Rutherford’s entire discussion of government powers, the point is not subtle:

The legislative is the joint understanding of the society, directing what is proper to be done, and is therefore naturally superior to the executive, which is the joint strength of the society exerting itself in taking care that what is so directed shall be done.<sup>351</sup>

A leading review of his *Institutes* zeroed in on precisely this point: The internal and external versions were conceptually indistinguishable aspects of the same power to carry out an *a priori* instruction or plan. “It may be called internal,” the reviewer wrote, “when exercised upon members of the society; external, when exercised upon persons neither belonging to the society, nor residing in it . . . .”<sup>352</sup>

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

be given . . . to magistrates or permanent bodies, because they are not exercised on any private subject; *one being no more than the general will of the state, and the other the execution of that general will.*<sup>353</sup>

It’s for that reason that his account so tightly associated the separation of powers with the protection of liberty: “There would be an end of every thing, were the same man, or the same body, . . . to exercise those three powers, that of enacting laws, that of executing the public resolutions,

351. 2 Rutherford, *Institutes of Natural Law*, supra note 349, at 79. Rutherford argued that “legislative power is thus found to be superior to executive, when they are considered in the abstract.” *Id.* In other words, the legislative power controls the executive power when both terms are used in the sense of functions of government rather than as metonymic references to the political entities to which they are contingently vested.

352. Rutherford’s *Institutes of Natural Law*, Monthly Rev., July 1756, at 217, 219 [hereinafter Review of Rutherford’s *Institutes*]. For another political theorist’s reference to executive power as the motive force or the power of action, see, for example, Nathaniel Bacon, *The Continuation of an Historical and Political Discourses of the Laws and Government of England* 18 (London, printed for John Starkey 1682) (noting that privy councilors’ obligation to “do right in Judgment” concerns “immediately the King in his politick capacity, but trencheth upon all Laws of the Kingdom, in the executive power; and all the motions in the whole Kingdom, either of Peace or War”).

353. 1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 225 (emphasis added). For the original French, see 1 Montesquieu, *De l’Esprit des Lois*, supra note 179, bk. XI, ch. VI, at 315–16 (“Les deux autres pouvoirs pourroient plutôt être donnés à des magistrats ou à des corps permanens, parce qu’ils ne s’exercent sur aucun particulier, n’étant, l’un, que la volonté générale de l’état; & l’autre, que l’exécution de cette volonté Générale.”).

and [that] of trying the [crimes] of individuals.”<sup>354</sup> Every single example in Montesquieu’s weirdly celebrated sentence about the “law of nations” executive<sup>355</sup> thus relates to the implementation of a plan—a plan that he has just finished telling us is defined *in its entirety* by an exercise of the relevant *legislative* power, wherever that happens to be vested.<sup>356</sup>

Understanding the conceptual subordinacy of execution to legislative intention, however, doesn’t even require this close a reading of their respective accounts. This is because both authors go out of their way to insist that the executive power is conceptually every bit as subordinate to

354. 1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 222. In the original French: “Tout serait perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d’exécuter les résolutions publiques, & celui de juger les crimes ou les différents des particuliers.” 1 Montesquieu, *De l’Esprit des Lois*, supra note 179, bk. XI, ch. VI, at 312–13. Montesquieu further wrote:

In the republics of Italy, where these three powers are united, . . . [t]he same body of magistrates are possessed, as executors of the laws, of the whole power they have given themselves in quality of legislators . . . . . . . [T]hey have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions.

1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 223. In the original French:

Dans les républiques d’Italie, où ces trois pouvoirs sont réunis . . . . . [l]e même corps de magistrature a, comme exécuteur des lois, toute la puissance qu’il s’est donnée comme législateur. Il peut ravager l’état par ses volontés générales; & comme il a encore la puissance de juger, il peut détruire chaque citoyen par ses volontés particulières.

1 Montesquieu, *De l’Esprit des Lois*, supra note 179, bk. XI, ch. VI, at 313–14.

355. See *infra* section IV.B.2; see also 1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 222 (“By the [executive power,] [the magistrate] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”); 1 Montesquieu, *De l’Esprit des Lois*, supra note 179, bk. XI, ch. VI, at 311 (“Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions.”); cf. James Harrington, *A Discourse Upon This Saying: The Spirit of the Nation is Not Yet to be Trusted With Liberty; Lest It Introduce Monarchy, or Invade the Liberty of Conscience* (1659), reprinted in *Political Works of Harrington*, supra note 266, at 735, 740 (highlighting the use of “executive power . . . in the *management* . . . of a war or treaty with foreign States” (emphasis added)).

356. Rousseau is almost identical in this respect:

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

Rousseau, supra note 120, bk. II, ch. 2, at 71. As he later explains, “The public force thus needs its own agent to call it together and put it into action in accordance with the instructions of the general will, . . . and in a sense to do for the public person what is done for the individual by the union of soul and body.” *Id.* bk. III, ch. 1, at 102.

the legislative power when acting on foreign objects as it is when acting domestically. Again, Rutherford couldn't be more explicit:

[T]he external executive power, in its own nature, is no more an independent power of acting without being controlled by the legislative, than the internal executive power is. Even in those civil societies, where the particular constitution has left this power discretionary in some instances, it does not suffer it to be so in all.<sup>357</sup>

This is exactly how Rutherford's eighteenth-century contemporaries understood him: "The Doctor is of opinion, that the executive power is derived from, and ought always to be held, as, in a very great measure, dependent upon, and originally subordinate to, the legislative."<sup>358</sup> And again Montesquieu is to the same effect: Not only was the external executive power just "the execution of [the] general will" as defined by the legislative power, but the terms of that execution could be dictated totally by the entity possessing the legislative power.<sup>359</sup>

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

We act as a nation, when, through the organ of the legislative power, which speaks the will of the nation, and by means of the executive power which does the will of the nation, we enact laws, form alliances, make war or peace, dispose of the public money, or do any of those things which belong to us in our collective capacity.<sup>360</sup>

Certainly that had been the constitutional law of England since at least the 1701 Act of Settlement,<sup>361</sup> and as expressed more saliently for the

357. 2 Rutherford, *Institutes of Natural Law*, supra note 349, at 66.

358. Review of Rutherford's *Institutes*, supra note 352, at 219. Note that final formulation: "[O]riginally" here means not "at first" but "as a matter of its origin." The subsequence and subordinacy of executive power were as true when applied to external objects as they were to internal objects.

359. See Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 225. Montesquieu twice emphasized that, unless the head magistrate had the right to participation in lawmaking, his conduct of foreign affairs could be entirely stripped away by legislative prescription. See *id.* at 231 ("Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers."); *id.* at 233 ("The executive power, pursuant to what has been already said, ought to have a share in the legislature by the power of rejecting, otherwise it would soon be stripped of its prerogative.").

360. Anna Letitia Barbauld, *Sins of Government, Sins of the Nation; or, a Discourse for the Fast 3* (London, printed for J. Johnson 1793).

361. See An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject (Act of Settlement) 1700, 12 & 13 Will. 3 c. 2, § 3 (Eng.) (prohibiting monarchs not born in England from engaging "in any Warr for the

Revolutionaries in cases like the 1774 decision in *Campbell v. Hall*, which barely paused on the point in discussing the Crown's foreign affairs prerogative as the basis for a peace treaty with France in the Caribbean.<sup>362</sup> This was likewise true in the realm of theoretical commentary, where writers observed without fear of contradiction that the various foreign affairs powers were fully subject to direction by legislative power.<sup>363</sup>

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Defence of any Dominions or Territories which do not belong to the Crown of England, without the Consent of Parliament").

362. See *Campbell v. Hall* (1774) 98 Eng. Rep. 1045, 1048; 1 Cowp. 204, 209 (KB). The opinion observed that:

[I]f the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion . . . from the power of Parliament . . . ; and so in many other instances which might be put.

*Id.* Note that *Campbell*, like all eighteenth-century questions of prerogative authority, is a *Youngstown Zone Two* case. See *id.* at 1048; 209–10 ("It is left by the constitution to the King's authority to grant or refuse a capitulation . . . [N]o man ever said the Crown could not do it."). On the contemporary salience of *Campbell v. Hall*, see 1 John Philip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 158 (1986) (noting "the discussion it generated during the months leading up to the American Revolution").

The colonists might also have been struck by reports of the parliamentary debate about King George III's introduction of Hessian mercenaries into Gibraltar and Minorca without parliamentary approval in 1776. See 18 William Cobbett, *Cobbett's Parliamentary History of England, from the Earliest Period to the Year 1803*, at 798–824 (London, T.C. Hansard 1813). The opposition claimed that this violated the Bill of Rights' prohibition on keeping a standing army within the kingdom, the Mutiny Bill's limitation on the size of British army, and the Act of Settlement's prohibition against placing foreigners in any military "office, or place of trust." *Id.* at 799–800, 825. Supporters of the government responded by arguing that the statutes did not apply under the circumstances, and by suggesting that an Act of Indemnity be passed to immunize any illegal behavior. But none of them argued that the Crown was legally entitled to ignore the statute. *Id.* at 801–12.

363. See Locke, *Second Treatise*, *supra* note 99, § 149, at 166, § 153, at 168 ("[T]here can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate," such that "the federative power [is] both ministerial and subordinate to the legislative"). Compare in this respect the Antifederalist "Federal Farmer's" logical extension of Rutherford's geographical subdivision of executive power to the other two powers of government:

In the second place it is necessary, therefore, to examine the extent, and the probable operations of some of those extensive powers proposed to be vested in this [national] government. These powers, legislative, executive, and judicial, respect internal as well as external objects. Those respecting external objects, as all foreign concerns, commerce, imposts, all causes arising on the seas, peace and war, and Indian affairs, can be lodged no where else, with any propriety, but in this [national] government.

Federal Farmer, Letter III, *Letters to the Republican*, Oct. 10, 1787, reprinted in 19 *Documentary History*, *supra* note 70, at 203, 224.



2. *Montesquieu's Taxonomy of Executive Power Was Odd and Unrepresentative.* — Notably, Montesquieu and Rutherford's presentational choice to divide the universe of executive power into these taxonomic categories was highly unrepresentative. Certainly as a matter of English law, "the executive power" was a completely distinct branch of royal authority from the military and foreign affairs powers—a point by itself decisive in a Constitution so thoroughly steeped in Anglo-American legal concepts. But so far as I can tell, Rutherford and Montesquieu stood alone among political theorists in this taxonomy more generally. Indeed, both thinkers acknowledged that "[t]hese two branches of the executive power may, if we like these names better, be called civil and military."<sup>364</sup> So they may. And so they typically were: The standard way to incorporate foreign affairs into governance theory was as a *subject matter*—a competence, to borrow a term from modern European Union law—no different in principle from building lighthouses, or coining money, or conferring honors.<sup>365</sup>

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364. See 2 Rutherford, *Institutes of Natural Law*, supra note 349, at 59; see also 1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. XIX, at 264–65 (comparing how "in a commonwealth the same magistrate ought to be possessed of the executive power, as well civil as military[,] whereas in a monarchy "some [officers that have] the civil executive, and others the military executive power, which does not necessarily imply a despotic authority"). Besides the Essex Result, I have come across only one other contemporary author who comes close to using their taxonomy. See John Brand, *An Historical Essay on the Principles of Political Associations in a State* 126 (London, printed for T.N. Longman & J. Owen 1796) ("The remaining heads of this comparison will relate to the executive power of the Crown, judicial and military . . .").

365. See Althusius, supra note 121, at 53 (listing as distinct portfolios "the executive functions and occupations necessary and useful to the provincial association [that is, legislature;]" "the distribution of punishments and rewards by which discipline is preserved in the province;" "the provision for provincial security;" "the mutual defense . . . against force and violence;" and many others); cf. Vile, supra note 37, at 16–17 (distinguishing between the "tasks' of government" and the "functions' of government"). Althusius goes on to distinguish at great length between what he repeatedly refers to as the administrator's *executive* function as to general right and what he describes as the separate and distinctive function of "arms and war" among many other "special right[s]." Althusius, supra note 121, at 182–83. Compare these special rights with id. at 175–76 ("General right, in turn, involves . . . the enactment and execution of useful laws, and the administration of justice . . .").

For other examples, see Beccaria, supra note 117, at 119 (distinguishing between "the interior power, which defends the laws, and the exterior, which defends the throne and kingdom"); Burke, *Reflections on the Revolution in France*, supra note 320, at 273 (describing "the supreme [that is, legislative] power, the executive, the judicature, [and] the military" as separate branches of government authority); 2 Cornelius Van Bynkershoek, *Quaestionum Juris Publici* bk. II, ch. XIII, at 211 (James Brown Scott ed., Tenney Frank trans., Clarendon Press 1930) (1737) ("[T]he counsellors of the States-General who have charge of the state treasury and the exaction of the contributions . . . do not possess executive power in the several provinces, nor any jurisdiction, nor any military authority without permission of the Estates."); Hobbes, supra note 117, at 166–70 (discussing "publique ministers" whose portfolios involve "special Administration; that is to say, charges of some speciall businesse, either at home, or abroad," and describing departments for the economy, the armed forces, the judiciary, the execution of judgments,

To be sure, many thought that the various foreign affairs competences ought *usually* to be vested in the same hands that held the executive power.<sup>366</sup> But that was all contingent political dickerings—such debates had nothing to do with essentialist claims about the “executive” nature of such competences. To the contrary, the same people often asserted that similar practical considerations meant that the chief magistrate should also hold powers that were on *nobody’s* account “executive”: the veto or negative,<sup>367</sup> the power to raise money,<sup>368</sup> and in some cases the power to enact law itself.<sup>369</sup>

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and the wielding of diplomatic power); Locke, *Second Treatise*, supra note 99, §§ 146–148, at 165 (describing the “distinct” and “natural” power called “federative,” which “contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the commonwealth”).

In a similar vein, see 2 Burlamaqui, supra note 117, pt. I, ch. VII, at 320 (“[T]he body of the nation reserves to itself the legislative power . . . [and] it gives the king the military and executive powers . . .”). Burlamaqui’s chapter “Of the Parts of Sovereignty” left no doubt that he was distinguishing here between a Lockean executive power and a Lockean federative power. See *id.* ch. VIII, at 322–25. He there describes “the legislative power,” “the coercive power,” “the judiciary power,” and an unnamed assortment of foreign affairs powers to “guard the people against strangers, and to procure to them, by leagues with foreign states, all the necessary aids and advantages.” *Id.* at 323–24. And de Lolme likewise distinguished between the executive, federative, and legislative powers. See de Lolme, *The Constitution of England*, supra note 105, bk. I, ch. V, at 74 (“The [English] King not only unites in himself all the branches of the Executive power,—he not only disposes, without controul, of the whole military power in the State,—but he is moreover . . . Master of the Law itself, since he calls up, and dismisses, at his will, the Legislative Bodies.”).

366. See Locke, *Second Treatise*, supra note 99, § 148, at 165 (“Though . . . the executive and federative power of every community be really distinct in themselves, yet they are hardly . . . separated, and placed at the same time in the hands of distinct persons: for both of them requiring the force of the society for their exercise, it is almost impracticable . . .”). Pufendorf likewise wrote:

[I]t follows that in a state there ought necessarily to be in the hands of some one person the authority to unite and arm as many citizens in any peril or occasion, as shall seem to be needed for the common defence, in view of the enemy’s force, and again, to make peace with the enemy, as often as it shall be profitable to do so. This power will rest with the same one also who has the authority to exact punishments, since no one can of right force citizens to arms and to the expense of war, except the one who can also punish the recalcitrant.

Samuel Pufendorf, *Two Books of the Elements of Universal Jurisprudence* bk. II, at 384 (Thomas Behme & Knud Haakonssen eds., William Abbott Oldfather trans. 1931, Liberty Fund 2009) (1672) [hereinafter Pufendorf, *Elements of Universal Jurisprudence*].

367. See 1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 222 (“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive powers.”).

368. See Pufendorf, *Law of Nature and Nations*, supra note 117, bk. VII, ch. 4, at 223–24 (“[I]t is obvious that the right of war and peace, and the right to impose taxes, cannot be separated from [punitive power]. . . . [N]o one can . . . compel citizens to take up arms, or to assume the expenses of war and peace, unless he can . . . punish those who do not comply.”).

369. See *id.* at 223 (“For if the legislative authority belongs in the end to one part and the punitive power to another, fundamentally and independently to each, either the former will necessarily be without substance or the latter will minister to it.”); see also Hobbes,

The Founders rightly declined to confuse this distinction between subject matter (competence) and conceptual function (power).<sup>370</sup> There is much more to say on this score, but for the moment, let some statistics refute the claim that we should treat the Rutherford–Montesquieu presentational taxonomy as anything other than idiosyncratic. The most comfort their writings offer to the Royal Residuum Thesis is a single sentence by Montesquieu that—shorn completely of context and squeezed for every conceivable semantic ambiguity—reads as follows: “By the [executive power][,] [the magistrate] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”<sup>371</sup> This quote from Montesquieu is littered throughout the modern commentary, invoked as a shibboleth by those who claim a presidential power to ignore the law in the realm of national security and foreign affairs.<sup>372</sup>

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supra note 117, at 117–21 (describing sovereign power); Pufendorf, *Elements of Universal Jurisprudence*, supra note 366, bk. I, at 204 (“[A] pact gives the civil laws their origin, because by it there is established a supreme sovereignty, in whose hands is the authority to enact laws in a gathering subject to it.”).

370. We do not treat executive power as having subject matter subcategories: an environmental executive power, and a criminal executive power, and a postal executive power, and an international armed conflict executive power, and so on. Certainly in each case, the conceptual power (that of bringing a desire into being) is applied to a topic area, or competence. But it’s *all* executive power, and the subdivisions are thoroughly unilluminating.

Montesquieu got a lot right. But—as some of the Founders pointed out—his conceptual structure wandered. See, e.g., *Americanus V*, *N.Y. Daily Advertiser* (Dec. 12, 1787), reprinted in 19 *Documentary History*, supra note 70, at 397, 397–98 (“Tho’ the Spirit of Laws contains a fund of useful and just observations on Government, . . . it is evidently defective. His general divisions of Government into different species . . . do not convey to the mind clear and distinct ideas of different qualities really existing in the nature of things.”); *A Farmer V* (Part I), *Balt. Md. Gazette*, Mar. 25, 1788, reprinted in 12 *Documentary History*, supra note 70, at 431, 431 (“[I]t is much to be questioned whether the full and free political opinion of any one great luminary of science, has been fairly disclosed to the world—Even when the great and amiable Montesquieu had hazarded a panegyric on the English constitution, he shrinks back with terror . . .”); cf. *The Federalist No. 47*, supra note 30, at 246–50 (James Madison) (glossing Montesquieu’s views with reference to the actual operation of English law, so that “we may be sure then not to mistake his meaning in this case”).

371. 1 Montesquieu, *The Spirit of Laws*, supra note 179, bk. XI, ch. VI, at 222. For the original French:

Il y a dans chaque état trois sortes de pouvoirs, la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, & la puissance exécutrice de celles qui dépendent du droit civil. . . . Par la seconde, [le prince ou le magistrat] fait la paix ou la guerre, envoie ou reçoit des ambassades, établit, la sûreté, prévient les invasions.

1 Montesquieu, *De l’Esprit des Lois*, supra note 179, bk. XI, ch. VI, at 311.

372. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting this sentence); Prakash & Ramsey, *Executive Power over Foreign Affairs*, supra note 44, at 265–66, 268 (paraphrasing this sentence); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely’s War and Responsibility*, 34 *Va. J. Int’l L.*

If the quote were as central to the founding generation's conception of the executive power as these commentators believe, surely the Founding generation would have mentioned it. Yet they did not—not once, not even in passing, and surely not to assert that an executive could ignore duly enacted law.

The gargantuan-though-still-unfinished *Documentary History of the Ratification of the Constitution of the United States* has compiled all archival records relating to the Constitution's drafting and ratification from every state except North Carolina.<sup>373</sup> None of these documents contain the phrase "internal executive," "external executive," or their cognates. For his part, Montesquieu is cited by name 166 times. But *not one* of these citations quotes, paraphrases, or even mentions the quote on which more or less the entire intellectual pedigree for the Royal Residuum Thesis hangs. To the contrary: *Every single citation* to Montesquieu's discussion of the separation of powers invokes the portion of his discussion where "the executive power" unambiguously means the execution of domestic law.<sup>374</sup> (I suspect this is because that passage is the one paraphrased by

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903, 931 n.106 (1994) (quoting this sentence); Yoo, *The Continuation of Politics*, supra note 347, at 174, 201 (quoting this sentence).

373. See generally *Documentary History*, supra note 70.

374. For one Royal Residuum theorist agreeing that Montesquieu's separation of powers nostrum must be read as using "executive power" in the law execution sense, see Prakash, *Essential Meaning*, supra note 41, at 747 ("[O]ne can only make sense of Montesquieu's famous separation maxim if one regards him as subscribing [in that passage] to a modern conception of executive power—as all powers to execute the law except for the judicial power."). Blackstone's reference is likewise to one of Montesquieu's unambiguous uses of the phrase "executive power" in the standard sense of executing the legislative will as to internal law. Even uncredited, this Blackstonian paraphrase surfaced regularly. See, e.g., *Cont'l Cong.*, supra note 304, at 236 (citing "the authority of a name which all Europe reveres" for the proposition that "[t]here is no liberty, if the power of judging be not separated from the legislative and executive powers").

Montesquieu himself rarely deployed the taxonomy created in his chapter on the government of England. I have found very few occasions in his work where he does so to refer to the conceptual power rather than as metonymy for the entity which possesses that power. Most are simply indeterminate. See, e.g., 1 *Montesquieu, The Spirit of Laws*, supra note 179, bk. XI, ch. XV, at 250 (noting that the decemvirate controlled all powers of government, including "the whole legislative, the whole executive, and the whole judicial"); id. ch. VI, at 227 (noting that both the people and the Senate had a "part of the executive"); id. bk. II, ch. III, at 18 (stating that rulers in aristocracy "are invested both with the legislative and executive authority"); id. bk. IX, ch. I, at 186 (observing that a captured town is "deprived not only of the executive and legislative power, but moreover of all human property").

Those references that do not just gesture at a general anticentralization principle are, frankly, confused even on Montesquieu's own taxonomy. One such reference relates to the scope of the Roman Senate's powers. Montesquieu notes that "[s]o great was the share the senate took in the executive power that . . . foreign nations imagined that Rome was an aristocracy." Id. ch. XVII, at 254. The next sentence then lists a series of what could be read as examples that begin with acts that not even Montesquieu would understand as executive: "dispos[ing] of the public money" and "farm[ing] out the revenue." Id. Further confusing things, Montesquieu seems later to define even the *implementation* of foreign

Blackstone, who a great many Founders actually read in some depth.<sup>375</sup>) As for Rutherford, he's cited one single time in the ratification discussions—for the proposition that adopting the Constitution would not absolve debtors of their obligations to the United States.<sup>376</sup> Publius didn't even spell the guy's name right.<sup>377</sup>

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

Besides the misreadings described above, the Royal Residuum Thesis offers no other support for its claims about Madison's bookshelf or the intellectual foundation on which the Revolutionary and Founding debates took place.<sup>378</sup> But there's something else worth saying about the success of the Thesis—a more speculative observation that has less to do

affairs intentions as "legislative"—which certainly cannot be the case either under his taxonomy or anyone else's. See *id.* at 254 ("In the earliest times, when the people had some share in the affairs relating to war or peace, they exercised rather their legislative than their executive power."). In the same vein, Montesquieu seems to define the "granting . . . of permission [to] borrow[]" as conceptually executive in nature. See 2 *id.* bk. XXII, ch. XXII, at 128–30. It is ambiguous as to whether this connection described the *motivation* for the Senate's permission (it had a government to run!) or the *essence* of the Senate's permission. If the latter it is confused on Montesquieu's own account, since he explains that the Senate did so by "enact[ing] decrees," which is unequivocally legislative on his earlier taxonomy. See *id.* at 129.

375. The better-educated Founders can be found commenting condescendingly on their peers' lack of genuine familiarity with Montesquieu. There are more literate examples, but one of my favorites is "The News-Mongers' Song for the Winter of 1788," which ran in part: "Write something at random, you need not be nice / *Public spirit, Montesquieu, and great Dr. Price.*" The News-Mongers' Song for the Winter of 1788, *Alb. Gazette* (Nov. 15, 1787), reprinted in 14 *Documentary History*, *supra* note 70, at 117.

Blackstone, by contrast, was to American lawyers what the Bible was to Protestants. A petty drama illustrating the point played out at the Pennsylvania Convention when Representative William Findley produced the third volume of Blackstone's *Commentaries* to show "incontrovertibly" that "the learned Chief Justice [Thomas McKean] and Counselor [James Wilson] from the city" had made errors the previous day for which "if [Findley's] son had been at the study of the law for six months . . . , [Findley] should be justified in whipping him." William Findley, *Remarks at the Pennsylvania Convention* (Dec. 10, 1787), reprinted in 2 *Documentary History*, *supra* note 70, at 532; see also Bailyn, *supra* note 61, at 24 (noting that most writers' citations to nonlegal sources were poorly understood "window dressing").

376. See *Federalist No. 84*, *supra* note 30, at 487 n.4 (Alexander Hamilton) (citing "Vide Rutherford's *Institutes*, Vol. 2, Book II, Chapter X, Sections XIV and XV").

377. See *id.* It's unlikely that Publius's spelling can be explained as a matter of variable eighteenth-century orthography. Rather, it seems to be a slip of the pen for a completely different person: Samuel Rutherford, a seventeenth-century parliamentarian who wrote a well-known defense of limited monarchy called *Lex Rex*. For an unrelated citation to that work, see *supra* note 270.

378. Royal Residuum theorists do have other arguments grounded on political practice during the Revolution, the Founding, and the Early Republic. Those will be taken up in subsequent work. For the moment, suffice it to say that I do not believe Residuum theorists make any arguments about background political and legal theory that have been left unaddressed in this Article.

with the errors of Royal Residuum champions, and more to do with the mistaken premises of some in their audience. Specifically, many non-specialists—that is to say, lawyer-generalists who have no expertise in either constitutional history or eighteenth-century political theory—have confused intuitions about what the constitutional “separation” of powers actually entails.

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

It is the proud boast of our democracy that we have “a government of laws, and not of men.” Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, and not of men.”

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government.<sup>379</sup>

Justice Scalia thus equates the Federal Constitution’s allocation of powers with the Massachusetts Constitution’s statement that only the chief magistrate may exercise any portion of the executive power. He then bolsters the case—without noticing that he has shifted from conceptual powers to institutional organization—by noting that “the Founders conspicuously and very consciously declined to sap the Executive’s strength . . . by dividing the executive power. Proposals to have multiple executives . . . were rejected.”<sup>380</sup> This shows, Scalia says, that Article II’s vesting of “the executive power” in the President “does not mean *some of* the executive power, but *all of* the executive power.”<sup>381</sup>

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

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379. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (citing Mass. Const. of 1780, pt. 1, art. XXX, reprinted in 3 *Federal and State Constitutions*, supra note 34, at 1888, 1893).

380. *Id.* at 698–99.

381. *Id.* at 705; see also *id.* at 709 (“It is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.”); cf. Flaherty, *Most Dangerous Branch*, supra note 59, at 1734 (“The Court’s formalist cases teach what ‘every schoolchild learns,’ at least those schoolchildren who are headed to the Office of Legal Counsel. Formalist catechism posits three discrete branches, each exercising one of three distinct powers.”).

being embarrassed by this feature of the Constitution, Federalists embraced it:

Is there any one branch, in which the whole legislative and executive powers are lodged? No. The legislative authority is lodged in three distinct branches properly balanced: *The executive authority is divided between two branches*; and the judicial is still reserved for an independent body, who hold their office during good behaviour.<sup>382</sup>

As Hamilton explained, this distribution of powers “is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the great scrutiny with success.”<sup>383</sup> Madison agreed that while “[i]t is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments,” it is likewise true that “the degree of separation which the maxim requires . . . can never in practice be duly maintained” “unless these departments be so far connected and blended as to give to each a constitutional control over the others.”<sup>384</sup>

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382. Alexander Hamilton, Remarks at New York Convention Debates (June 27, 1788) [hereinafter Hamilton, Remarks at New York Convention Debates (June 27, 1788)], reprinted in 22 Documentary History, supra note 70, at 1921, 1953 (emphasis added) (Childs’s notes). Madison’s discussion of the point in Federalist 47 is canonical, at least among historians of the period:

The constitution of Massachusetts . . . declares “that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them.” This declaration corresponds precisely with the doctrine of Montesquieu . . . . In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the [Massachusetts] Constitution have, in this last point at least, violated the rule established by themselves.

The Federalist No. 47, supra note 30, at 248 (James Madison).

383. Hamilton, Remarks at New York Convention Debates (June 27, 1788), supra note 382, at 1953.

384. The Federalist No. 48, supra note 30, at 251 (James Madison). As Federalists never tired of pointing out, this was perfectly consistent with Montesquieu. See Adams, The First American Constitutions, supra note 347, at 40 (explaining that “[a] complete tyranny is established by [] a combination of powers,” which “Montesquieu . . . had warned against”); cf. Richard Neustadt, Presidential Power: The Politics of Leadership 33 (1960) (describing “separated institutions *sharing* power”).

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

In what *other* sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive?<sup>385</sup>

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

To Scalia's credit, he was later persuaded to reject the Royal Residuum Thesis as yielding "a presidency more reminiscent of George III than George Washington."<sup>386</sup> But his confusion in *Morrison* exemplifies the mistaken mental shorthand that makes some audiences such fertile ground for claims about such a thesis. If you move from the (correct) observation that each branch is associated primarily with one power to the (incorrect) conclusion that all acts by that branch represent an exercise of that power, then the Royal Residuum Thesis might seem quite intuitive. But that doesn't make it any less wrong, at least as a matter of history.

## V. DICTIONARIES

In light of the sources canvassed above, it should come as no surprise that the literally uncontradicted dictionary definition of executive power in the Founding Era was "the power to execute." For someone immersed in the historical materials, this makes perfect sense. The words "execute" and "execution" were commonly used in the eighteenth century for the act of bringing an intention into being, often in places where it would now be more typical to say "do" or "finish" or "perform." And yet seeing the definitions below may startle people who have read only Royal Residuum Thesis scholarship. That's because it's central to Royal Residuum claims that eighteenth-century readers shared some special, counterintuitive-by-modern-lights understanding of "executive" that involved *more* than just the power to execute law. There was obviously more to the word: It would disrespect the President to confine him to his

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385. See *Morrison*, 487 U.S. at 706.

386. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2126 (2015) (Scalia, J. dissenting). I certainly do not mean to suggest that Justice Scalia's conclusion here was affected by purposive reasoning or legislative history. He may well have conducted in camera textual analysis not reflected on the face of his opinion.



enumerated powers, supplemented only by the role of executing legislative commands. Or so the instinct goes—and it's quite misguided.

In 1808, the first edition of Noah Webster's dictionary made a typical distinction between "executive" as an adjective and "executive" as a noun.<sup>387</sup> As a noun, "executive" meant "the person or council administering a government."<sup>388</sup> Other dictionaries agreed: When used as a noun, "executive" meant "the person or body in the administration of a country who puts the laws in force—thus distinguished from the legislative and judicial bodies."<sup>389</sup> The Executive Power Clause obviously uses executive in the adjectival sense, and it is that sense on which the remainder of this Part focuses.<sup>390</sup>

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387. Noah Webster, *A Compendious Dictionary of the English Language* 109 (Conn., Sidney's Press 1806) [hereinafter Webster, Dictionary]. For other dictionaries that take the same care with this distinction, see, for example, Caleb Alexander, *The Columbian Dictionary of the English Language* (Boston, Isaiah Thomas & Ebenezer T. Andrews 1800) ("Executive, eks-'ek'u-tiv, *n.* the chief magistrate; Executive, eks-e'u-tiv, *a.* having power to act, or to carry laws into execution"); James Stormonth, *A Dictionary of the English Language* 338 (New York, Frank F. Lovell & Co. 1800) ("*n.* egz-ek-u-tiv, the person or body in the administration of a country who puts the laws in force . . . distinguished from the legislative and judicial bodies; the governing person or body; *adj.* pert. to the governing body: having the power to put the laws in force; not legislative or judicial . . .").

388. Or the "executive power" for short. Webster also listed another synonym for this entity: "Execútioner, *n.* a man who puts the law in force." Webster, Dictionary, *supra* note 387, at 109.

A number of other dictionaries and encyclopedias defined *the entity* referred to as the executive power. They generally observed that the executive power-qua-entity possessed its homonym power-qua-authority, without elaboration on what the latter actually was. For example, the *Encyclopedia Britannica* defined "EXECUTIVE POWER" as:

The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen, for the time being. . . .

The executive power, in this state, hath a right to a negative, in parliament, *i.e.*, to refuse assent to any acts offered [by parliament], or otherwise the two branches of the legislative power would, or might, become despotic.

4 *Encyclopedia Britannica* (Edinburgh, J. Balfour & Co. et al. 2d ed. 1779) (citation omitted); see also Giles Jacob, *A New Law Dictionary* (London, W. Strahan & W. Woodfall 10th ed. 1782) (almost verbatim). For shorter versions obviously cribbed from these longer entries, see, for example, 2 Ephraim Chambers, *Cyclopaedia, or a Universal Dictionary of Arts and Sciences* (London, printed for J. F. & C. Rivington et al. 1788) ("EXECUTIVE power, supreme, is by the constitution of these kingdom's lodged in a single person, the king or queen, for the time being. See CROWN"); 2 William Henry Hall, *The New Royal Encyclopaedia* (London, printed for C. Cooke 1788) (almost verbatim); 2 George Selby Howard, *The New Royal Cyclopaedia and Encyclopedia* 853 (London, printed for Alex Hogg 1788) (almost verbatim). The *Encyclopaedia Perthensis* was almost verbatim, though included a mention of the French Directorate. 9 *Encyclopaedia Perthensis*; or *Universal Dictionary of the Arts, Sciences, Literature* 215–16 (Edinburgh, John Brown 2d ed. 1816).

389. Stormonth, *supra* note 387, at 338 ("the governing person or body").

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

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

- “having the quality of executing or performing”<sup>391</sup>
- “having power to act”<sup>392</sup>
- “having power to act”<sup>393</sup>
- “(adj from execute) having the quality of executing, having the power of execution”<sup>394</sup>
- “that which may be done, or is able to do; . . . [*exécutoire*, F.] serving to execute”<sup>395</sup>
- “[*executoire*, F.] that which may be done or is able to do, or pertaining to executing”<sup>396</sup>
- “being invested with a Power to act”<sup>397</sup>
- “that which may be done, or which is able to do”<sup>398</sup>
- “that has the power of doing a thing, by virtue of a proper authority”<sup>399</sup>
- “having power to act”<sup>400</sup>
- “having a power, or tending, to act”<sup>401</sup>
- “active, able to act”<sup>402</sup>
- “having power to execute”<sup>403</sup>
- “having power to act”<sup>404</sup>

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391. Allen, Complete English Dictionary, supra note 286.

392. A Dictionary of the English Language (London, W. Stewart 1794).

393. A General and Complete Dictionary of the English Language (London, printed for W. Peacock 1785).

394. John Ash, The New and Complete Dictionary of the English Language (London, printed for Edward Dilly et al. 1775).

395. Nathan Bailey, A Universal Etymological English Dictionary (Edinburgh, Neill & Co. 1783).

396. Nathan Bailey, Dictionarium Britannicum (London, printed for T. Cox 2d ed. 1736).

397. A Vocabulary, or Pocket Dictionary (Birmingham, John Baskerville 1765).

398. Benjamin Norton Defoe, A Compleat English Dictionary (Westminster, printed for John Brindley et al. 1735).

399. Thomas Dyche & William Pardon, A New General English Dictionary (London, printed for C. & R. Ware et al. 13th ed. 1768).

400. William Enfield, A General Pronouncing Dictionary 103 (London, Plummer & Brewis 5th ed. 1816).

401. John Entick, Entick’s New Spelling Dictionary 138 (London, printed for Charles Dilly new ed. 1787).

402. Daniel Fenning, The New and Complete Spelling Dictionary (London, printed for S. Crowder 2d ed. 1773).

403. A. Fisher, An Accurate New Spelling Dictionary and Expositor of the English Language (London, printed for A. Fisher 6th ed. 1788).

404. George Fulton & George Knight, A General Pronouncing and Explanatory Dictionary of the English Language 124 (Edinburgh, Walter & Greig 4th ed. 1814).

- “having power to act”<sup>405</sup>
- “having power to act”<sup>406</sup>
- “having the quality of executing or performing. They are the nimblest, agil, strongest instruments, fittest to be executive of the commands of the souls. *Hale*”<sup>407</sup>
- “having the power to put in act the laws”<sup>408</sup>
- “that serves to execute”<sup>409</sup>
- “that which may be done, or is able to do”<sup>410</sup>
- “having power to act”<sup>411</sup>
- “that which may be done, or is able to do”<sup>412</sup>
- “having power to act, active”<sup>413</sup>
- “having the quality of executing or performing.—They are the nimblest, agil, strongest instruments, fittest to be *executive* of the commands of the souls. *Hale*”<sup>414</sup>
- “[from execute or executoire, Fr.] . . . Having the quality of executing or performing. *Executive* of the commands of the soul. *Hale*”<sup>415</sup>
- “having power to act”<sup>416</sup>
- “[h]aving power to act”<sup>417</sup>

405. A Dictionary of the English Language (London, J. Jarvis 1793).

406. The Philadelphia School Dictionary of the English Language 90 (Philadelphia, Benjamin Johnson 2d ed. 1806).

407. 1 Samuel Johnson, A Dictionary of the English Language (London, printed for J. F. & C. Rivington et al. 6th ed. 1785) [hereinafter, Johnson, Dictionary of the English Language]. Johnson’s dictionaries were widely abridged by other editors. See, e.g., Joseph Hamilton, Johnson’s Dictionary of the English Language in Miniature 79 (London, printed for Lee & Hurst 8th ed. 1797) (“Exec’utive, a. having power to act.”). I have not included such abridgments in this list.

408. Stephen Jones, A General Pronouncing and Explanatory Dictionary of the English Language (London, printed for Vernor & Hood 3d ed. 1798).

409. John Kersey, A New English Dictionary (London, printed for L. Hawes et al. 8th ed. 1772).

410. James Manlove, New Dictionary of All Such English Words (London, printed for J. Wilcox 1741).

411. A Pronouncing Dictionary of the English Language 97 (London, printed for J.W. Myers 1796).

412. A New Complete English Dictionary 218 (Edinburgh, David Paterson 2d ed. 1740).

413. William Perry, The Royal Standard English Dictionary 229 (Worcester, n. pub. 1st American ed. 1788).

414. 9 Encyclopaedia Perthensis, *supra* note 388, at 215.

415. Joseph Nicol Scott, A New Universal Etymological English Dictionary (London, printed for T. Osborne et al. new ed. 1772) [hereinafter Scott, Etymological Dictionary].

416. William Scott, A New Spelling, Pronouncing, and Explanatory Dictionary of the English Language 114 (Edinburgh, printed for C. Elliot et al. 1786).

417. John Walker, A Dictionary of the English Language (London, printed for T. Becket 1779).

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

- “having the quality of executing or performing. Active, or putting into execution, opposed to deliberative or legislative”<sup>418</sup>
- “having the quality of executing. Active, or putting into execution, opposed to deliberative or legislative”<sup>419</sup>
- “having the quality of executing or performing. Active, or putting into execution, opposed to *deliberative* or *legislative*”<sup>420</sup>
- “having the quality of executing or performing. Active, or putting into execution, opposed to deliberative, or legislative”<sup>421</sup>
- “having the quality of executing or performing; active, not deliberative, not legislative”<sup>422</sup>
- “having the quality of executing or performing. Active, or putting into execution, opposed to deliberative or legislative”<sup>423</sup>

Definitions that offer more detail about the *object* of execution in a government context are clearer still: It is the execution *of law*, precisely as you would expect from the commentators and theorists on whom these definitions drew. Here are the Founding-Era dictionary definitions of “executive” that offer a more particularized specification of what the “executive” power of governance meant:

- “having power to act, or to carry laws into execution”<sup>424</sup>
- “the being invested with a power to act, do, or execute, having authority to put the laws in force”<sup>425</sup>
- “having the quality of executing. *Hale*.—Not legislative, having the power to put in act the laws. *Swift*”<sup>426</sup>

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418. James Barclay, *A Complete and Universal English Dictionary on a New Plan* (London, printed for John Rivington & Sons et al. 1782) (emphasis omitted).

419. Frederick Barlow, *The Complete English Dictionary* (London, printed for Frederick Barlow 1772).

420. Daniel Fenning, *The Royal English Dictionary* (London, printed for L. Hawes et al. 4th ed. 1771).

421. Charles Marriott, *The New Royal English Dictionary* (London, printed for J. Wenman 1780).

422. William Perry, *The Synonymous, Etymological, and Pronouncing English Dictionary* (London, T. Gillet 1805).

423. William Rider, *A New Universal English Dictionary* (London, W. Griffin 1759).

424. Alexander, *supra* note 387.

425. John Marchant, *English Dictionary* (London, n. pub. 1760).

426. Thomas Browne, *The Union Dictionary* (London, J.W. Myers 1800).

- “having the quality of executing or performing. Active; having the power to put in act the laws”<sup>427</sup>
- “having the quality of executing or performing. Active; having the power to put in act the laws”<sup>428</sup>
- “Active; not deliberative; not legislative; having the power to put in act the laws. The Roman emperors were possessed of the whole legislative as well as *executive* power. *Addison*. Hobbes confounds the *executive* with the legislative power, though all well instituted states have ever placed them in different hands. *Swift*”<sup>429</sup>
- “[from *execute*.] Having the quality of executing or performing—Active; not deliberative; not legislative; having the power to put in act the laws”<sup>430</sup>
- “Active; not deliberative; not legislative; having the power to put in act the laws.—The Roman emperors were possessed of the whole legislative as well as *executive* power. *Addison’s Freeholder*.—Hobbes confounds the *executive* with the legislative power, though all well instituted states have ever placed them in different hands. *Swift*”<sup>431</sup>
- “Having the power of putting in act the laws, active, not legislative or deliberative. The legislative as well as executive power. *Addison*”<sup>432</sup>
- “Having the quality of executing or performing; active, not deliberative, not legislative, having the power to put in act the laws”<sup>433</sup>
- “pert. to the governing body; having the power to put the laws in force; not legislative or judicial; active”<sup>434</sup>

Now the kicker. A handful of dictionaries do reference the full phrase “executive power” precisely as used in the Executive Power Clause: a term of art for a conceptual authority that is capable of being vested in a government entity. I have found five such definitions. Each of them

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427. An Universal Dictionary of the English Language (Edinburgh, Alexander Donaldson & John Reid 1763).

428. 1 J. Johnson, *The New Royal and Universal English Dictionary* (London, printed for A. Millard & R. Dorsley 1763).

429. Johnson, *Dictionary of the English Language*, *supra* note 407 (citing the second definition).

430. William Kenrick, *A New Dictionary of the English Language* (London, printed for John & Francis Rivington et al. 1773).

431. 9 *Encyclopaedia Perthensis*, *supra* note 388, at 215 (citing the second definition).

432. Scott, *Etymological Dictionary*, *supra* note 415.

433. Thomas Sheridan, *A Complete Dictionary of The English Language* (London, C. Dilby 2d ed. 1789).

434. Stormonth, *supra* note 387, at 338. In the entry immediately previous, Stormonth makes clear he is using “governing” in the then-usual way, to refer to the “person or body” who “puts the laws in force.” See *id.*

defines “executive power” to mean exactly what an informed reader of Madison’s bookshelf would have expected: the power to execute plans, instructions, and authorities.

- “EXE’CUTIVE *Power*, (S.) The power of putting in execution”<sup>435</sup>
- “EXECUTORY or EXECUTIVE, that serves to execute; as *The executive Power*”<sup>436</sup>
- “Exécutive *Power*, *pouvoir d’exécuter*, potestas executorialis, Die Vollmacht etwas zu vollstrecken”<sup>437</sup>
- “Exécutive, a. Ex. Executive power, *pouvoir ou autorité d’exécuter*”<sup>438</sup>
- “*The executive power. Administratio; potestas aliquid administrandi*”<sup>439</sup>

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

#### CONCLUSION

When a moderately educated eighteenth-century reader—or really any literate American with access to a dictionary—saw the phrase “executive power,” they would have understood it as the power to execute plans, instructions, and above all else the laws. They would have understood the power as an empty vessel whose authority in any particular case depended entirely on the substantive decisions of the entity (sometimes the same one that held the power to execute) which possessed the *legislative* power to direct executive action.

That’s certainly not to say we’ve arrived at a comprehensive historical account of Article II as drafted. What settlement on presidential power did the drafting Framers think they had reached? What arrangement did the ratifying Founders think they were voting on? Doesn’t the “Law Execution” theory of the Executive Power Clause leave

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435. A Pocket Dictionary; or, Complete English Expositor (London, printed for J. Newbery 3d ed. 1765). A number of encyclopedia-style publications (including the *Encyclopedia Britannica*) include an encyclopedia-style discussion of the *political entity* “Executive Power.” See supra note 388 and accompanying text.

436. Edward Phillips, *The New World of Words: Or, Universal English Dictionary* 272 (London, printed for J. Phillips et al. 1706).

437. Nathan Bailey, *A Compleat English Dictionary; Oder, Vollständiges Englisch-Deutsches* 281 (Leipzig, Waysenhaus- und Frommannische Buchhandlung 1783).

438. Abel Boyer, *Boyer’s Royal Dictionary Abridged* (London, printed for Pote et al. 18th ed. 1794). The accent on the leading word indicates spoken stress. That is to say, this is from a list of definition of English terms in French.

439. Thomas Morell, *An Abridgment of Ainsworth’s Dictionary* (Philadelphia, Kimber & Conrad et al. 1st Am. ed. 1808).

a foreign affairs gap in the constitutional text?<sup>440</sup> A detailed answer requires deep engagement with a completely different set of historical materials—and perhaps a sturdier sense of civic confidence than the Royal Residuum Thesis seems to possess. But it is surely worth saying *something* about the power besides its bare semantic meaning: namely, a word on its contemptuous reception by theorists who yearn for a king.

Because, if mere execution is all there is to it, then wasn't this a rather milquetoast role? When Chief Justice Vinson called the merely executive President an "impotent" "automaton" or "messenger-boy,"<sup>441</sup> and when the arch-royalist Filmer dripped with disdain about a mere executive power,<sup>442</sup> weren't they right? Didn't at least some Founders think so too? Take Charles Pinkney who, at the Convention, "objected to the contemptible weakness & dependence of the Executive" that was created by Article II.<sup>443</sup> That's certainly Harvey Mansfield's view: "[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."<sup>444</sup>

I don't think so. Certainly it's wrong today. The modern statutory framework conveys a staggering amount of discretionary policy power to the executive branch. Very few of the legal constraints imposed on these delegated authorities are so precise as to rule out a politically plausible policy option in the realm of national security and foreign affairs.<sup>445</sup> But

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

441. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682, 708 (1952) (Vinson, J., dissenting, joined by Reed & Minton, JJ.)

442. See *supra* note 315 and accompanying text.

443. Notes of James Madison on the Convention (Sept. 15, 1787) (statement of Charles Pinkney), *in* 2 Farrand's Records of the Federal Convention, *supra* note 188, at 621, 632. Pinkney had changed his mind, or at least his tune, by the time he was opening the South Carolina ratifying convention with a stirring speech on behalf of the Constitution. See Charles Pinckney, Speech to the South Carolina Convention (May 14, 1788), *in* 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended By the General Convention at Philadelphia in 1787, at 318, 329 (Jonathan Elliot ed., 2d ed. 1891) ("We have . . . endeavored to infuse into this department that degree of vigor which will enable the President to execute the laws with energy and despatch.")

444. Harvey C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* 2–3 (1989).

445. See Andrew Kent & Julian Davis Mortenson, *Executive Power and National Security Power*, *in* the Cambridge Companion to the United States Constitution 261, 291 (Karen Orren & John W. Compton eds., 2018) (discussing constitutional and statutory

it was obtuse in the eighteenth century as well: The executive power has never been anything less than the nation's force mustered in service of the nation's will. That was why many authors saw England not only as being the freest and happiest of countries<sup>446</sup> but also as the country whose ruler was in fact the most powerful. Indeed, and perhaps ironically, the Crown could direct the power of a peerlessly vigorous nation that flourished precisely because of the various formal limitations on royal authority. By this measure, the American President would soon be stronger still. At a minimum, James Wilson observed, the President's powers were clearly "of such a nature as to place him above expressions of contempt."<sup>447</sup> Some Antifederalists made far less sanguine versions of the same point: "[T]hough not dignified with the magic name of King, he will possess more supreme power, than Great Britain allows her hereditary monarchs . . ."<sup>448</sup>

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

One consequence must be, to enlarge the sphere of discretion allotted to the executive magistrate. Even within the legislative limits properly defined by the [C]onstitution, the difficulty of accommodating legal regulations to a country so great in extent, and so various in its circumstances, has 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

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constraints on the President's national security powers); see also, e.g., Edward S. Corwin, *Total War and the Constitution* 39–40 (1947) (describing the "delegation of vast discretionary powers to the President to deal with a broadly defined subject-matter in furtherance of objectives equally broad"); Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 269 (1948) (describing World War I- and World War II-era statutes that conferred "extreme discretionary authority upon the President or his administration").

446. See *supra* notes 183–186 and accompanying text.

447. James Wilson, *Pennsylvania Ratification Debates* (Dec. 11, 1787; morning session), reprinted in 2 *Documentary History*, *supra* note 70, at 568.

448. Tamony, *Va. Indep. Chron.*, Jan. 9, 1788, reprinted in 8 *Documentary History*, *supra* note 70, at 286, 287. "Tamony" expressly connected this presidential power to foreign affairs authorities conveyed pursuant to the legislative power. See *id.*



regulations of a general nature, so as to suit them to the diversity of particular situations.<sup>449</sup>

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

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449. Report of the Virginia Resolves 1800, reprinted in 17 *The Papers of James Madison*, supra note 268, at 316.