
ARTICLE

THE EXECUTIVE POWER CLAUSE

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

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

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The Founding generation understood “executive power” to mean something both simple and specific: the power to execute law. This authority was constitutionally indispensable, but it extended only to the implementation of pre-existing legal norms and directives that had been created pursuant to some prior exercise of legislative authority. It wasn’t just that the use of executive power was subject to legislative influence in a crude political sense; rather, the power was conceptually an empty vessel until there were laws or instructions that needed executing.

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INTRODUCTION

Article II of the Constitution vests “the executive power” in a President of the United States.¹ The text of the provision is plain-spoken, even underwhelming at first glance. And yet what it meant to the founders is “one of the most important questions of any kind, on any subject, under the Federal Constitution”² This Article aims to resolve the historical debate. For the founders, “the executive power” meant the power to execute the law. Nothing more. And nothing less.

For the uninitiated, this conclusion may seem obvious on its face. And yet the meaning of the Executive Power Clause is not just immensely important; it is also “one of the most contested questions in constitutional law.”³ Broadly speaking, there are three interpretations.⁴ First, the cross-reference thesis. On this view, the clause has no standalone content; it simply refers to the more specific powers listed later in Article II, from the power to appoint officers to the power to receive ambassadors. Second, the law execution thesis. On this view, the clause grants the power to execute the laws and is otherwise an empty vessel until it has legislative instructions to carry out. Third, the royal residuum thesis. This last view reads the Executive Power Clause as granting all the powers typically possessed by an eighteenth-century “executive”—with the British Crown as the presumptive referent—except as specifically reallocated or prohibited elsewhere in the document.

¹ U.S. CONST. art. II., § 1.

² Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 383 (2008).

³ Michael McConnell, *The President Who Would Not Be King* 144 (unpublished manuscript) (on file with author).

⁴ For a full description of these positions and their consequences, see *infra* Part I.

It's hard to overstate the consequences of this dispute. The least aggressive version of the royal residuum reads the Executive Power Clause as a defeasible power authorizing the president to take any action he deems necessary in the realm of national security or foreign affairs, so long as neither the Constitution nor any specific statute forbids it.⁵ The most aggressive version reads it as indefeasible: that is to say, if it's the sort of thing the eighteenth-century British Crown could presumptively have done, then nothing short of the Constitution itself can stop our American President from it too.⁶ This has consequences of the highest order for real-world disputes ranging from the seizure of steel mills⁷ to the torture of suspected terrorists.⁸ On the defeasible version, the President might be able to engage in dragnet surveillance to gather intelligence on organizations associated with al-Qaeda, so long as statutes that authorize wiretapping only in more limited forms don't expressly prohibit its use in war.⁹ On the indefeasible version, the President might be able to bomb Syria for gassing its own civilians so long as he doesn't purport to formally declare "war."¹⁰

You don't have to be an originalist on questions like these to understand that it's immensely important to get the historical meaning right. For one thing, even those who think constitutional meaning evolves—clap your hands if you believe in precedent!—understand that original meaning is often one of the things worth having in view. For another, a great many constitutional

⁵ See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172-73 & n.10, 1184-85 (2019).

⁶ *Id.*

⁷ Cf. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 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.'").

⁸ Cf. Office of Legal Counsel, Memorandum to William J. Haynes II, Department of Defense General Counsel, Military Interrogation of Alien Unlawful Combatants Held Outside the United States 18-195 (Mar. 14, 2003) [hereinafter *Torture Memorandum*] ("[A]ny 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.'").

⁹ Cf. JOINT INSPECTORS GEN., *Unclassified Report on the President's Surveillance Program* 11 (July 10, 2009) (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").

¹⁰ Cf. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities 42 Op. O.L.C. ___, at *3-4 (May 31, 2018) (internal citations omitted) ("[T]he President, as Commander in Chief and Chief Executive, has the constitutional authority to deploy the military to protect American persons and interests without seeking prior authorization from Congress. . . . [This authority] arises from Article II of the Constitution, which makes the President the 'Commander in Chief . . .,' and vests in him the Executive Power.").

interpreters are indeed committed originalists,¹¹ ready to give sufficiently well-established original meaning not just significant but conclusive interpretive weight. And so what follows is valuable not only as history but as a source of guidance for some of the most important questions in a modern democracy.

This Article shows that the founders understood the opening sentence of Article II to vest exactly what it said: the power to execute the law. This essential element of governance comprised two core components: the authority to enforce private compliance with the law's negative prohibitions, and the authority to carry out projects assigned by law's affirmative authorizations.¹² Many founders thought the executive power also either functionally implied or logically entailed the authority to appoint "assistances" for its implementation.¹³ The Executive Power Clause thus represented an incredibly potent delegation to an incredibly important official. Indeed, the power it vested may have been the Constitution's single most controversial innovation—and not for lack of competition.¹⁴

The signal characteristic of executive power, however, was that it was substantively an empty vessel. The only thing the clause authorized the President to do was to carry out legal instructions created pursuant to some other authority. This fundamentally derivative characteristic meant that executive power was incapable of serving as even a defeasible source of independent substantive authority, let alone one that would be immune to legislative revision.¹⁵ While the founders disagreed vehemently about a great many questions relating to the separation of powers generally and the President specifically, this issue prompted no debate at all. The executive power meant the power to execute. Period.

The Article proceeds as follows. Part I summarizes the current state of the scholarship. Part II explores the founders' competing visions of the

¹¹ This includes at least four and probably five current Supreme Court Justices. For the Supreme Court Justices, see *Confirmation Hearing on the Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 242, 262 (2017) (statement of Judge Neil M. Gorsuch); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 465 (2006) (Statement of Judge Samuel A. Alito); *Confirmation Hearing on Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 182 (2005) (Statement of Judge John G. Roberts); Cass R. Sunstein & Eric A. Posner, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 502 (2016) (describing Justice Clarence Thomas as a self-proclaimed originalist); see also Alex Swoyler, *Brett Kavanaugh best described as 'originalist,' say legal scholars*, THE WASHINGTON TIMES (Sept. 3, 2018) <https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say/> [https://perma.cc/UA9N-STLE] (noting disagreement about how best to read Kavanaugh's jurisprudence).

¹² See *infra* Sections III.A and III.B.

¹³ See *infra* Section III.C.

¹⁴ See *infra* at 38-41.

¹⁵ See *infra* Section III.D.

presidency and the gradual emergence of a negotiated compromise between the imperatives of vigor and safety. Part III focuses on the Executive Power Clause as the central piece of that compromise, and shows that it vested the empty-vessel power to execute law. Part IV shows that the founders repeatedly rejected the concept of a royal residuum. The Conclusion sketches some implications of this research.

I. THREE VIEWS OF THE EXECUTIVE POWER CLAUSE

There are at least three ways to understand Article II's reference to the executive power.¹⁶ 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,¹⁷ national legislators,¹⁸ and a number of academics.¹⁹ On this view, the term is a convenient lexical handle for a grab bag of powers. The full contents are set out in the remainder of Article II. And nothing else goes in the bag. While this approach reads the Executive Power Clause as substantively prefatory, it does leave the clause with one significant job: clarifying that the listed powers belong to the President and no one else.

The second understanding, which I will call the "Law Execution" theory, gives the opening clause its own independent substantive content. On this

¹⁶ This Part's summary of scholarly positions both condenses and extends material from Mortenson, *supra* note 5.).

¹⁷ *Steel Seizure*, 343 U.S. at 641 (Jackson, J., concurring) ("I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."); *id.* at 632 (Douglas, J., concurring) (noting a similar view as Justice Jackson). Justice Burger's majority opinion in *INS v. Chadha* gestures at this view as well. 462 U.S. 919, 951 (1983) ("When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II.>").

¹⁸ See, e.g., DANIEL WEBSTER, *Speech on the Appointing and Removing Power* (Feb. 16, 1835), in 4 THE WORKS OF DANIEL WEBSTER 179, 187 (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.>").

¹⁹ See, e.g., 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) ("[T]he first sentence [of Article II] was merely a designation clause rather than a conferral of power."); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 309 (2009) ("[T]he Vesting Clause is not a residual source of plenary powers in the presidency."); see also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, 177 (5th rev. ed. 1984) (denying that Article II's grant of executive power is a viable source of unenumerated foreign affairs power); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 42-44 (1990) (same); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47 (1994) ("[T]he framers intended the Vesting Clause to vest constitutionally little more than the enumerated executive powers.>").

view—which has found support among Presidents,²⁰ Supreme Court justices,²¹ and scholars²²—“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 authorizes the President to connect legal imperative to physical reality: “Interpreting a law enacted by Congress to implement the legislative mandate,” the Supreme Court tells us, “is the very essence of ‘execution’ of the law.”²³ And no other provision of the Constitution gives it to the President as an affirmative enforcement authority rather than as the compliance obligation imposed by the Take Care clause.²⁴

The third understanding is what I will call the “Royal Residuum” theory. Advocates of this theory claim that “[b]ecause supreme executives in [many] countries had a similar basket of powers, it became common to speak of an

²⁰ Cf. WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 140 (1916) (denying that there is an “undefined residuum” of executive power and arguing that a President can only act “within the field of action plainly marked for him”).

²¹ E.g., *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (“The Founders . . . sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the [President] . . . the ultimate authority that, in respect to the other branches, the Constitution divides among many.”).

²² See, e.g., Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 618-20 (2018) (arguing that the Constitution’s drafters considered, but ultimately rejected, vesting the executive with the prerogatives of the British monarch); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 344 (2006) (“Whatever the proper scope of the president’s implied Article II authority, it remains in its essence a power to execute, not create, the law.”); Lucius Wilmerding, Jr., *The President and the Law* 67 POL. SCI. Q. 321, 334 (1952) (“[The Founding Fathers] had very precise, eighteenth-century notions about the definition of executive power: it was a power to carry into execution the national laws—that and nothing more.”). For some legal historians who appear possibly to embrace this view, see, for example, WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 5 (1965) M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 32 (1998) (describing the seventeenth century view of “executive power” as “the machinery by which the law was put into effect”); FRANCIS WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM 61 (1949) (describing the notion that the executive merely enforces law). Cf. Curtis Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551-52 (2004) (arguing that the historical sources “most relevant to the Founding” contain little support for claims of unenumerated executive power).

²³ *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

²⁴ For a terrific account of the historical meaning of the Take Care Clause, which imposed a compliance obligation that was distinct from the authorization conveyed by the Executive Power Clause, see Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2112 (2019) (“The history we present . . . supports readings of Article II that tend to subordinate presidential power to congressional direction.”).

'executive power' that encompassed an array of powers commonly wielded by monarchs."²⁵ 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 [T]he 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.²⁶

For judges who subscribe to these claims, the doctrinal implications are straightforward: "the 'executive Power' vested in the President by Article II includes the residual foreign affairs powers of the Federal Government not otherwise allocated by the Constitution."²⁷

The Royal Residuum thesis has been remarkably successful. Besides express support from Supreme Court justices,²⁸ national legislators,²⁹ leading executive branch officials,³⁰ and at least one president,³¹ it is easily the dominant historical account among modern commentators.³² The

²⁵ SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 31 (2015).

²⁶ Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 237-38 (2002); see also JOHN YOO, *THE POWERS OF WAR AND PEACE* 19 (2005) (citing "political theory" and "Anglo-American constitutional history" to assert that "the executive power was understood at the time of the Constitution's framing to include the war, treaty, and other general foreign affairs powers").

²⁷ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2099 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

²⁸ See *id.*; *Steel Seizure*, 343 U.S. 579, 708 (1952) (Vinson, C.J., dissenting) (rejecting the proposition that "[t]he broad executive power granted by Article II . . . cannot . . . be invoked to avert disaster").

²⁹ 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.").

³⁰ E.g., *Exercising Congress's Constitutional Power to End a War: Hearing Before S. Comm. on the Judiciary*, 110th Cong. 73 (2007) (statement of Bradford Berenson, former Assoc. 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.").

³¹ THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 389 (1913) ("My belief was that it was not only [the President's] right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.").

³² The canonical modern summation is Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253-54 (2001). For other typical examples, see, for example, PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 21 (2002) ("Unless the Vesting Clause is meaningless it incorporates the unallocated parts of Royal Prerogative."); ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* 55 (1991) (describing foreign affairs authorities vested elsewhere in the Constitution as "exceptions to the large grant of executive power to the president"); Charles J. Cooper, *What the Constitution Means by Executive*

consequences of that success are stark, at least for originalists willing to stick with the full logical consequences. If the Executive Power Clause really is a royal residuum, then the President is endowed with those aspects of kingly authority that have not been reallocated to other actors. The Executive Power Clause was front and center, for example, in the now-retracted memo advising President George W. Bush's Defense Department that it could torture suspected terrorists without legal consequences for committing war crimes.³³ So too with the Office of Legal Counsel's later advice that, because of the president's "unique responsibility, as Commander in Chief and Chief Executive, for 'foreign and military affairs,' as well as national security," President Barack Obama had constitutional authority to initiate the use of force against Libya without congressional approval.³⁴ And Justice Thomas argued that the Executive Power Clause, standing alone, justified presidential defiance of a statute that required the U.S. to issue a passport listing "Israel" as the place of birth for a young boy born in Jerusalem.³⁵

Particularly among constitutional originalists, the residuum thesis is dominant. At most, criticism of the historical claim waves a caution flag of uncertainty, contingency, and historical contestation. As Aziz Huq's generally sympathetic account explains, even the strongest critics of the royal residuum "decline to draw a strong conclusion from the Constitution's text, preratification practice, or Founding-era interpretative conventions about the precise contours of each branch's authority."³⁶ It is here that this Article picks up the challenge.

Power, 43 U. MIAMI L. REV. 165, 177 (1988) ("[T]he founding generation understood executive power as conferring a broad authority that extended beyond the mere execution of the laws."); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006); Michael D. Ramsey, *The Textual Basis of the President's Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL'Y 141, 141 (2006) (stating that the Vesting Clause "grants, in eighteenth-century terms, the power to execute the law plus foreign affairs powers"); Eugene Rostow, *President, Prime Minister, or Monarch?*, 83 AM. J. INT'L L. 740, 742 (1989) ("No one has ever improved on Hamilton's definition of executive power. All governmental power that is neither legislative nor judicial, he said, is executive."); John C. Yoo, *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 3, at 198 ("[T]he executive power comprises all unassigned national power that is neither legislative nor judicial in nature. In effect, this encompasses the "strict" executive power plus the prerogatives powers as truncated by the constitutional text.") .

³³ See Torture Memorandum, *supra* note 8, at 18-19.

³⁴ Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6 (2011).

³⁵ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2101 (2015) (Thomas, J. concurring in the judgment in part and dissenting in part).

³⁶ 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)). For examples of such basically equivocal historical criticism of residuum theory, see, e.g., Bradley & Flaherty, *supra* note 22, at 552 (noting that the residuum theory "fails to take account of complexity within eighteenth-century political theory, the experience of

What follows will not only refute the residuum thesis as a claim about original understanding, but also offer an affirmative replacement theory that is both historically and theoretically coherent. In earlier work, I laid the intellectual foundation for this claim by showing that the Law Execution understanding of “executive power” pervaded the eighteenth century bookshelf. The earlier article showed that, for late-eighteenth-century English speakers, “the ‘executive power’ was nothing more than ‘a power of putting [the] laws in execution.’”³⁷ That conclusion, however, only teed up the real question. The most important task still remains: to show that this dictionary definition was in fact reflected in both the drafting and ratification of the Constitution itself.

It is therefore the project of this Article to show that the ordinary Law Execution understanding of executive power pervaded the drafting and ratification of the Constitution itself. The sources relied on are varied, but at bottom the claim is grounded on an exhaustive review of every instance of the word root “exec-” in three major collections spanning millions of words: the 29-volume Documentary History of the Ratification of the Constitution,³⁸ the 34-volume Journals of the Continental Congress,³⁹ and the 26-volume Letters of

state constitutionalism before 1787, and the Founders’ self-conscious rejection of the British model of government”); Reinstein, *supra* note 19, at 309 (“The powers delegated to the President in Article II do not suggest a residue of unspecified powers that can be characterized as ‘executive’ in nature.”). For some typical responses from residuum advocates, see, e.g., Lawson & Seidman, *supra* note 32, at 42 (“At the risk of engaging a 144-page discussion in a few sentences: it does not suffice to say, as Professors Bradley and Flaherty convincingly say, that ‘executive Power’ was a messy, contested concept in the late eighteenth century.”); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1661 (2005) (“[W]hile Bradley and Flaherty devote much energy to the Constitution’s creation . . . [o]n the most important points they either concede our view, make only conclusory statements, or say nothing.”).

³⁷ Mortenson, *supra* note 5 at 1169, 1173 (reporting on a review of more than a thousand works of political, theological, and legal theory, as well as some forty dictionaries).

³⁸ The Documentary History is a collection of “records of town meetings, legislative proceedings, convention journals and debates, and forms of ratification; personal papers, such as letters, memoirs, and diaries; diplomatic correspondence; and printed primary sources, such as newspaper articles, broadsides, and pamphlets.” For the Documentary History, I have personally read each document flagged by the “exec-” search, taking care in each instance to read the entire flagged document and any others potentially helpful for understanding its context.

³⁹ The Journals of the Continental Congress are a collection of “the records of the daily proceedings of the Congress as kept by the office of its secretary” as supplemented by materials from other sources. Journals of the Continental Congress, LIBRARY OF CONGRESS, <https://memory.loc.gov/ammem/amlaw/lwjc.html> [<https://perma.cc/9YPV-CUK5>]. The initial review of documents flagged by an “exec-” search in this collection was done by a team of Michigan law students. We worked in an intensively collaborative process, with careful up-front training and weekly discussions about potentially useful documents as they emerged. I then read all documents that the research assistants flagged as potentially useful, taking care in each instance to read the entire flagged document and any others potentially helpful for understanding its context.

Delegates to the Continental Congress.⁴⁰ That work was supplemented by a similar search through numerous state databases.⁴¹ From there, the leads followed have been varied, inductive, and less categorizable, but those three collections form the core of evidence on which this Article establishes its claim. On the strength of that research, this Article concludes that founders *did* “ha[ve] in mind, and intend[] the Constitution to reflect, a conception of what is ‘naturally’ or ‘essentially’ within executive power.”⁴² That meaning, however, was unambiguously limited to Law Execution.

II. MAPPING THE ARTICLE II SETTLEMENT

A. *America in Crisis*

To properly frame the question of how the founders arrived at the Executive Power Clause, we must start with a wide-angle lens. What prompted the Constitutional Convention? Why did a sense of crisis emerge so quickly after the revolutionary triumph of 1781? Why did the founders so radically transform the national system of government? The following

⁴⁰ The Letters are a collection of “documents written by delegates that bear directly upon their work during their years of actual service in the First and Second Continental Congresses,” including “letters from delegates . . . diaries, public papers, essays, and other documents”). Letters of Delegates to Congress, LIBRARY OF CONGRESS, <https://memory.loc.gov/ammem/amlaw/lwdg.html> [<https://perma.cc/6RNX-9CR9>]. As with the Journals, the initial review of documents flagged by an “exec-” search in this collection was done by a team of Michigan law students. We worked in an intensively collaborative process, with careful up-front training and weekly discussions about potentially useful documents as they emerged. I then read all documents that the research assistants flagged as potentially useful, taking care in each instance to read the entire flagged document and any others potentially helpful for understanding its context.

⁴¹ This leg of the research is ongoing. Collections reviewed to date include the following: *Maryland Province/State, Journals of the Council/State*, LLMC Digital at llmc.com (reviewing materials from 1777 to 1790); *New Jersey Constitutional Materials*, LLMC Digital, at llmc.com; *New Jersey Laws*, LLMC Digital, at llmc.com (reviewing materials from 1704-1800); *New York Constitutional Materials*, LLMC Digital, at llmc.com (reviewing materials from 1754-1788); *New York Legislative Materials*, LLMC Digital, at llmc.com (reviewing materials from 1776-1800); *New York Executive Materials*, LLMC Digital, at llmc.com (reviewing materials from 1776-1778); *Early State Records (Virginia)*, LLMC Digital, at llmc.com; THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790. THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776 AND THE COUNCIL OF CENSORS (1825); THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 (1966); THE JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY (1832); THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY (1867).

⁴² Bradley & Flaherty, *supra* note 22, at 551-52 (disagreeing with this proposition).

account barely qualifies as even a sketch of the consensus historiography.⁴³ But it's worth letting the founders' own words speak to the urgency they felt about their governments' inability to execute the law. Grasping the intensity of that concern is essential to understanding why the executive power was so central to the settlement that resulted.

1. The Critical Period

The 1780s were a time of experimentation and failure, hope and disappointment, uncertainty and—increasingly as the decade wound on—anger. By the time politicians began exploring serious constitutional reform, Americans shared a broad sense of crisis. Any number of alarm bells were ringing. The states were descending into a destructive economic competition that European powers were only too happy to exploit.⁴⁴ Both national and state budgets were in a parlous state.⁴⁵ One American wrote of state finances in 1787 that “their Ars will be through their breeches before they can buy new ones,”⁴⁶ and only George Washington's maudlin-like-a-fox intervention may have stopped an infantry revolt after Virginia and Rhode Island vetoed national taxes that would have covered the soldiers' unpaid wages.⁴⁷ The states' inability to coordinate left them militarily vulnerable to “little

⁴³ For more detail on any particular point see the scholarship referenced in the footnotes. For an excellent survey of the traditional historiography of the era's politics, see Martin Flaherty's *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1758-79 (1996).

⁴⁴ For a highly readable overview of the foreign affairs dimensions of Critical Period politics, see NORMAN A. GRAEBNER, RICHARD DEAN BURNS, & JOSEPH M. SIRACUSA, FOREIGN AFFAIRS AND THE FOUNDING FATHERS: FROM CONFEDERATION TO CONSTITUTION, 1776-1787 (2011); see also, JACK RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 243-274 (1979) (focusing on connection between domestic factions and international relations); Patrick O'Brien, *Inseparable Connections: Trade, Economy, Fiscal State, and the Expansion of Empire, 1688-1815*, in 2 OXFORD HISTORY OF THE BRITISH EMPIRE 53 (1998) (focusing on commercial relationships and competition); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 952-1014 (2010) (focusing on international power politics).

⁴⁵ See, e.g., RAKOVE, *supra* note 44 at 275-329.

⁴⁶ Archibald Stuart, *Letter to John Breckinridge, Richmond* (Oct. 21, 1787), in 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 89, 89 (John P. Kaminski et al. eds., 1988) [hereinafter DHRC].

⁴⁷ See THOMAS FLEMING, THE PERILS OF PEACE: AMERICA'S STRUGGLE FOR SURVIVAL AFTER YORKTOWN 271 (2007) (“Gentlemen,” [Washington] said, “You will permit me to put on my spectacles, for I have not only grown grey but almost blind in the service of my country.”); see also *id.* at 253 (describing the Rhode Island and Virginia decisions). Washington did more than just pull their heart strings; he also wrote a circular to the government of all thirteen states putting his immense political capital behind major reform of the system. George Washington, *To the Executives of the States*, PROVIDENCE U.S. CHRON., Mar. 15, 1783, reprinted in 13 DHRC *supra* note 46, at 60 (1981).

insurgents”⁴⁸ like the “ignoble contemptible Shays,”⁴⁹ to “depredations of the savages”⁵⁰ as white settlers pressed ever harder on the frontier, and to slave rebellions, the great terror of the south.⁵¹

All of this gave rise to a mood of intense crisis. Regardless of whether the Philadelphia drafting convention exceeded its remit by producing an entirely new governing document,⁵² many Americans understood that profound change was afoot. As one Pennsylvanian argued in June 1787:

The present Confederation may be compared to a *hut* or *tent*, accommodated to the emergencies of war—but it is now time to erect a castle of durable materials, with a tight roof and substantial bolts and bars to secure our persons and property from violence, and external injuries of all kinds.⁵³

Americans were happy to hold forth on any number of failures by their governments. But a common theme was clear: the ardent expectations for republicanism had come a cropper. In Gordon Wood’s classic account,

[t]he belief that the 1780’s, the years after the peace with Britain, had become the really critical period of the entire Revolution was prevalent everywhere during the decade

⁴⁸ Federal Farmer, Letters to the Republican, Letter V (Nov. 8, 1787), in 19 DHRC, *supra* note 46, at 203, 239 (2003); *see also id.* (describing these “insurgents” as “men in debt, who want no law”).

⁴⁹ David Daggett, Oration Delivered in New Haven (July 4, 1787), *reprinted* in 13 DHRC, *supra* note 46, at 160, 162 (1981).

⁵⁰ *Extract of a Letter from Augusta*, CHARLESTON COLUMBIAN HERALD, Oct. 15, 1787, *reprinted* in 3 DHRC, *supra* note 46, at 223, 223 (1978); *see also id.* (warning it would require “martial law” to repel). For more on diplomacy, trade, and conflict with Native American tribes, see, e.g., KATHLEEN DUVAL, *THE NATIVE GROUND: INDIANS AND COLONISTS IN THE HEART OF THE CONTINENT* (2007); PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* (2008). For a work exploring the cultural salience of this fear, see NICOLE EUSTACE, *PASSION IS THE GALE: EMOTION, POWER, AND THE COMING OF THE AMERICAN REVOLUTION* (2012).

⁵¹ *See, e.g.*, HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (1993); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009) (arguing that the fear of slave rebellions directly influenced the Constitution’s militia and suspension clauses). The comments of Convention delegates, at least as recorded by Madison and other notetakers, were often indirect on this point. *But see, e.g.*, 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 371 (Max Farrand ed., 1966) [hereinafter *FARRAND’S RECORDS*] (Oliver Ellsworth) (pointing out, perhaps archly, that “the danger of insurrections . . . will become a motive to kind treatment of the slaves”).

⁵² For two of the best narrative accounts of drafting and ratification in all their contextual complexity, see CLINTON ROSSITER, *1787: THE GRAND CONVENTION* (1966) (discussing the drafting convention), and PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788* (2011) (discussing the ratification debates). For a one-volume analysis synthesizing some key ideological and legal themes of debate, see JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997).

⁵³ PHILA. INDEP. GAZETTEER, June 27, 1787, *reprinted* in 13 DHRC, *supra* note 46, at 147, 148 (1981).

The move for a stronger national government thus became something more than a response to the obvious weaknesses of the Articles of Confederation. It became as well an answer to the problems of the state governments . . . , [which James Madison called] “so frequent and so flagrant as to alarm the most steadfast friends of Republicanism”⁵⁴

For many, the signal failure of their governments was the inability to cope with the willful persistence of factions in domestic politics. There had always been reason to doubt, of course, whether political disagreement could really be resolved by pat reference to the general will.⁵⁵ But in the late 1780s such skepticism was typically presented as a new insight “discovered”⁵⁶ during America’s experimentations in governance after the revolution. As James Madison put it at the Convention, “what we once thought the Calumny of the Enemies of Republican Govts. is undoubtedly true—There is diversity of Interest in every Country the Rich & poor, the D[e]btor. & Cr[edit]or. the followers of different Demagogues, the diversity of religious Sects”⁵⁷

In truth, few of these social divisions were new. But many revolutionaries appear to have pinned sincere hopes on political salvation through the self-restraint of a virtuous republic. Here too, however, hard experience dashed

⁵⁴ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, 393, 467 (1998); see also Sidney, PHILA. INDEP. GAZETTEER, June 6, 1787, reprinted in 13 DHRC, *supra* note 46, at 88 (1981) (“[T]he melancholy experience we have had of the folly, instability, and tyranny of single legislatures” should lead Americans “to banish those dangerous experiments in government out of our country”). In a letter published in a Maryland newspaper, another citizen made a similar argument,

[T]o attempt to form a virtuous republic on the unqualified principles of representation is as vain as to expect a carriage to run with wheels only on one side.—Wheels will be added on the other, and the machine once set in motion down hill will never stop until it carries us to the bottom”

A Farmer, *VII (Part 1)*, BALT. MD. GAZETTE, Apr. 4, 1788, reprinted in 12 DHRC, *supra* note 46, at 473, 476 (2015).

⁵⁵ See generally DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989) (discussing New Model Army debates at Putney in 1647). I tend to agree with Merrill Jensen that “the leaders of the Revolution . . . took party politics for granted . . . gloried in partisan warfare, and . . . used methods as invariably deplored but as invariably used by practitioners of the art of politics in every age.” MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781*, xxv (1940).

⁵⁶ *Americanus, I*, N.Y. DAILY ADVERTISER, Nov. 2, 1787, reprinted in 19 DHRC, *supra* note 46, at 171, 173 (2003) (“It has also been discovered, that faction cannot be expelled even from a *Representative* body, while possessed *singly* of the whole of the Legislative power.”).

⁵⁷ 1 FARRAND’S RECORDS, *supra* note 51, at 108 (James Madison). The scholarship on these various axes of American identity and interest is extensive, to say the least. For socio-economic dimensions, see, e.g., JAMES HENRETTA, *THE EVOLUTION OF AMERICAN SOCIETY, 1700–1815: AN INTERDISCIPLINARY ANALYSIS* (1973); FORREST MCDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 143–66 (1985); GARY NASH, *THE URBAN CRUCIBLE: THE NORTHERN SEAPORTS AND THE ORIGINS OF THE AMERICAN REVOLUTION* (1986).

dreams of a New World birthing New Citizens. Americans, it turned out, were no more intrinsically virtuous than anyone else:

It is idle to expect more virtue in an American than in an individual of any other nation. . . . Human nature is the same in all parts of the world, bad is the best We see in America the same vices, as abroad, and we are not backward in the practice of both wit and ingenuity in cultivating them.⁵⁸

This cheery assessment was shared by Federalists⁵⁹ and Anti-federalists⁶⁰ alike, and the implication was clear. There was no reason to expect that American virtue would ever live up to the dearest hopes of revolutionary theorists. “[I]t must be evident to all by this time that our Utopian Ideas were to[o] fine spun for Execution”⁶¹

2. The Execution Problem

That brings us to the whole reason for adopting the Executive Power Clause in the first place: the systemic failure of execution throughout much of American governance, and above all else at the national level. “Our Laws are generally good,” wrote one merchant; “[i]t is the administration that gives us pause.”⁶² The Governor of Maryland was more blunt: “the demands of

⁵⁸ John De Witt, *IV*, AM. HERALD, Nov. 19, 1787, reprinted in 4 DHRC, *supra* note 46, at 265, 266 (1997).

⁵⁹ See, e.g., Letter from James Madison to Thomas Jefferson, (Oct. 24 & Nov. 1, 1787), in 8 DHRC, *supra* note 46, at 97, 104 (“Experience . . . shews” that “prudent regard” for the “general and permanent good of the whole . . . has little effect on individuals, and perhaps still less on a collection of individuals; and least of all on a majority with the public authority in their hands.”). NEWPORT HERALD, July 3, 1788, reprinted in 25 DHRC, *supra* note 46, at 339, 343 (2012) (“The scene now before us is truly dark” because of “the want of public virtue” and “the neglect or abuse of public and private advantages” arising from “the dishonesty and villainy of some individuals, but principally [from] that blindness and infatuation which governs at large”).

⁶⁰ See, e.g., Cato, *V*, N.Y. J., Nov. 22, 1787, reprinted in 19 DHRC, *supra* note 46, at 276, 278 (2003) (“[Y]ou do not believe that an American can be a tyrant? If this be the case you rest on a weak basis, Americans are like other men in similar situations”); A Federal Republican, *A Review of the Constitution*, PHILA. FREEMAN’S J., Nov. 28, 1787, reprinted in 14 DHRC, *supra* note 46, at 255, 264-65 (1983) (quoting Montesquieu’s observation that “ministers of restless dispositions have [often] imagined that the wants of the state were those of their own little and ignoble souls” and noting “[t]hat this may happen here, we have a right, and indeed ought to suppose”).

⁶¹ John Pintard wrote,

Were we all as upright as Yourself & a very few others Mankind might be ruled by opinion, but as that can never be the case in an extensive dominion the Laws ought to be sufficient & the executive powerful enough to restrain the turbulent & support the peaceable members of Society

Letter from John Pintard to Elisha Boudinot (Sept. 22, 1787), in 19 DHRC, *supra* note 46, at 47, 47-48 (2003)

⁶² Letter from Logan & Story to Stephen Collins (Nov. 2, 1787), in 8 DHRC, *supra* note 46, at 141, 141 (1988).

government are uncomplained with, . . . and your executive reduced to the most humiliating condition, and exposed to the most mortifying animadversions and censures.”⁶³ Political and legal theorists, of course, had been grappling with this execution problem for centuries. But many Revolutionary-era governments managed to distinguish themselves as award-winningly bad at executing the laws they so loved to enact.

Hamilton’s version of the point may have been tendentious: “It is said a republican government does not admit a vigorous execution. It is therefore bad; for the goodness of a government consists in a vigorous execution.”⁶⁴ But even the arch-republican Richard Price knew there were problems, alerting his beloved Americans in a published letter from London that

[a]t present the power of Congress in Europe is an object of derision rather than respect, at the same time the tumults in New-England, the weakness of Congress, the difficulties and sufferings of many of the states, and the knavery of the Rhode-Island Legislature, form subjects of triumph in this country. The conclusion is that you are falling to pieces, and will soon repent of your independence.⁶⁵

George Washington agreed with Price that the national government was literally a joke, calling congressional requisitions “little better than a jest and a bye word throughout the Land.”⁶⁶ And one Federalist pamphleteer waxed metaphorical in making the same point:

I scarcely need tell you that Congress is but a name, that her resolutions are cyphers. She is fallen into contempt. Our union is slender: exists rather in idea than in reality—in the shadow than in the substance. Her present state is the grief of the friends of the union, the source of the fears of strangers and the subject of the ridicule of enemies Without a government which can employ and improve the power of the whole to national purposes we are

⁶³ Letter from Governor William Paca and Council to Maryland Assembly (May 6, 1783), in VOTES AND PROCEEDINGS OF THE SENATE OF THE STATE OF MARYLAND (1783).

⁶⁴ 1 FARRAND’S RECORDS, *supra* note 51, at 304, 310 (Alexander Hamilton).

⁶⁵ Richard Price, *On the American Government*, PHILA. INDEP. GAZETTEER, May 16, 1787, reprinted in 13 DHRC, *supra* note 46, at 100, 101 (1981). Price kept pushing the point over the course of the year. See, e.g., *Richard Price to William Bingham*, PHILA. INDEP. GAZETTEER, June 20, 1787, reprinted in 13 DHRC, *supra* note 46, at 133, 134 (1981) (reprinted by at least 24 different newspapers) (“[T]he Federal Government, in particular, is unsettled, and, I suppose, will continue so, ‘till insignificance and discredit amongst foreign powers, and internal distresses of wars oblige them to give it *due strength and energy*.”).

⁶⁶ Letter from George Washington to John Jay (Aug. 15, 1786), in THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 208-09 (Henry P. Johnston ed., 1971) (1891) (“If you tell the Legislatures they have violated the treaty of peace and invaded the prerogatives of the confederacy they will laugh in your face.”).

an headless trunk: a monster in creation. Thirteen bodies without one soul to inspire, pervade and move the complicate, unwieldy and nameless machine.⁶⁷

Many blamed these problems on the dissipation of the Spirit of '76, which was now sooner seen as an idiosyncrasy of war than as a sign of special American virtue.⁶⁸

Practically speaking, the Confederation's fatal flaw—and this is by now as standard an observation in the scholarship as it was during the Founding⁶⁹—was that the national government relied heavily on the states to execute its measures. Instead of a reliably complete government staffed by committed national officials, the Continental Congress was “a diplomatic corps”⁷⁰

⁶⁷ Numa, *Political and Moral Entertainment VII*, HAMPSHIRE GAZETTE, Sept. 5, 1789, reprinted in 4 DHRC, *supra* note 46, at 7, 8-9 (1997); see also, e.g., Editor's Note, 13 DHRC, *supra* note 46, at 159 (“Robert R. Livingston told the New York Society of the Cincinnati that ‘I sicken at the sight’ of the federal government. Congress, he continued, was ‘a nerveless council, united by imaginary ties, brooding over ideal decrees, which caprice, or fancy, is at pleasure to annul, or execute . . .’”).

⁶⁸ “During the war,” one Federalist wrote, “the fear of a powerful enemy answered all the purposes of the most energetic government. But as soon as that fear was removed, . . . its powers . . . became a dead letter, for the fear of common danger was gone.” A Native of Virginia, *Observations upon the Proposed Plan of Federal Government*, VA. INDEP. CHRON., Apr. 2, 1788, reprinted in 9 DHRC, *supra* note 46, at 655, 656 (1990); see also *id.* (“As soon as peace took place, confusion in every department of Congress, ruin of public and private credit, decay of trade, and loss of importance abroad, were the immediate consequences of the radical defects in the Confederation.”). For others making this point, see, e.g., Speech of Simeon Baldwin (July 4, 1788), in 18 DHRC *supra* note 46 at 235 (1995) (“[T]he glory of the United-States—where is it? It expired with that patriot warmth which once united our councils, opened our purses, and strengthened our arms without the force of law.”); Statement of Alexander Hamilton, *New York Ratification Debates* (June 20, 1788), in 22 DHRC, *supra* note 46, at 1704, 1730 (2008) (“[D]uring the War that Governt. only gave advice and the Patriotism of the People made them Execute the measures And even then where there was less Danger the Citizens were more Inactive—”); Publicola, *Address to the Freemen of North Carolina*, ST. GAZETTE OF N.C., Mar. 27, 1788, reprinted in 16 DHRC, *supra* note 46, at 493, 495 (1986) (“Our zeal during the war supplied the want of good government . . .”); An Old Soldier, CONN. GAZETTE, Jan. 4, 1788, reprinted in 15 DHRC, *supra* note 46, at 256, 257 (1984) (“[D]uring the late war . . . the recommendations of Congress, like a decree from above, were implicitly obeyed. . . . But peace . . . has made us fat, and we have waxed wanton.”).

⁶⁹ See, e.g., JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1-3, 153-211 (1986); ALISON LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 126-135 (2010). For a representative example of the standard execution strategy, see 16 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 144-45 (Feb. 9, 1780) (Worthington Chauncey Ford ed., 1908) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS] (resolving to appoint a committee to ask the Pennsylvania executive branch to convene its legislature to “carry[] into execution the above resolves” seeking the procurement of 50,000 barrels of flour or wheat).

⁷⁰ James Monroe, Some Observations on the Constitution (c. May 25, 1788) (not generally circulated), in 9 DHRC, *supra* note 46, at 844, 850 (1990).

plagued by chronic absenteeism.⁷¹ And the states were often disinclined to carry out its instructions.⁷² As John Jay wrote on the eve of the Convention:

[The existing Congress] may resolve, but cannot execute either with dispatch or with secrecy—In short, they may consult, and deliberate, and recommend, and make requisitions, and they who please may regard them. From this new and wonderful system of Government, it has come to pass, that almost every national object of every kind, is at this day unprovided for.⁷³

In response, Congress became almost a parody of itself, creating first a committee to explore solutions to the “public embarrassments”⁷⁴ of their execution problem;⁷⁵ then a committee to explore the implementation of the

⁷¹ See, e.g., Motion of Charles Pinckney (Aug. 16, 1785), in 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 629-30 (“[I]t has not been in [Congress’s] power to keep nine States upon the floor—a number without which any important resolution cannot be passed . . . [T]his arises from some of the States not sending any, and others having but two members attending . . .”); 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 113-16 (Nov. 14, 1781) (“Ordered, That the President write to the executives of the states, requesting the attendance of delegates from such states as are not represented, and urging the necessity of sending forward and keeping up a representation in Congress for conducting the affairs of the United States”).

⁷² For a sampling on this point, see, e.g., A Native of Virginia, *supra* note 68, reprinted in 9 DHRC, *supra* note 46, at 656, 656 (“Congress might advise, or recommend measures; might approve the conduct of some States, and condemn that of others; might preach up public faith, honour, and justice: But was this sufficient to preserve a union of thirteen States, or support a national government? It had no authority . . .”); BALT. MD. GAZETTE, May 22, 1787, reprinted in 13 DHRC, *supra* note 46, at 112, 112 (1981) (reprinted by 18 other newspapers) (“In short, [the Confederation Congress] may DECLARE every thing, but can DO nothing. If any thing can be added to this description of the impotence of our federal Government, it must be a total want of authority over its own members.”).

⁷³ A Citizen of New-York (John Jay), An Address to the People of the State of New York (Apr. 15, 1788), in 20 DHRC, *supra* note 46, at 922, 930; see also, e.g., Americanus, I, VA. INDEP. CHRON., Dec. 5, 1787, reprinted in 8 DHRC, *supra* note 46, at 200, 201 (1988) (“It was found, that a want of energy prevailed in our national Assembly, and that jealousies pervaded our local legislatures; that the pressing requisitions of Congress were treated with haughty contempt . . .”); Statement of Alexander Hamilton (Jan. 28, 1783), in 25 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 872 (urging that the general revenue “be collected by officers under the appointment of Congress,” who would “deriv[e] their emoluments from & consequently [be] interested in supporting the power of Congress”).

⁷⁴ 17 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 525 (June 17, 1780) (“Resolved, That the United States, from New Hampshire to South Carolina, inclusive, . . . be requested, at this critical juncture, to inform Congress . . . what measures they have taken in consequence of the several resolutions . . .”). Such simultaneously peevisish and plaintive requests for updates from the states on their execution of national law were a common occurrence. Cf. 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 261 (Mar. 16, 1778) (“Resolved, That the governors and presidents of the said states be earnestly requested to transmit to Congress, as soon as possible, attested copies of the acts passed by their respective legislatures, in pursuance of recommendations of Congress . . .”).

⁷⁵ 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 236 (Mar. 6, 1781) (appointing James M. Varnum, James Madison, and James Duane “to prepare a plan to invest the United States in Congress assembled with full and explicit powers for effectually carrying into execution in the several states all acts or resolutions passed agreeably to the Articles of

solutions identified by the first committee;⁷⁶ and then still more committees to take over the implementation and execution of specific national portfolios.⁷⁷ What apparatus there was often fell prey to infighting—as with the furious complaints from the national Treasurer of Loans about the “very reprehensible [and] extremely disgusting” behavior of the Board of Treasury, including its refusal to conduct business “between the hours of nine and twelve in the forenoon” and its insistence on transacting even “the most trivial affairs in writing only.”⁷⁸ By the end they were grasping at straws. At least one delegate thought the path to respect might run through the garment district, urging his colleagues to adopt a resolution requiring that “the President of Congress shall in future while in the Chair be seated in his robes”⁷⁹

In truth, writes Gordon Wood, “by the middle eighties Congress had virtually collapsed.”⁸⁰ And so the sense of urgency around getting the laws executed pervaded the Philadelphia discussions, both in- and out-of-doors. “Let us be under one vigorous government, established on liberal principles,” exhorted one Philadelphia newspaper, “possessed of coercion and energy sufficient to pervade and invigorate the whole—we will then rise immediately

Confederation”). Varnum’s appointment at least may have signaled the mood of the committee; he had written to a friend the month before that “in the United States[, the] Manners are generally corrupt, & the Laws but feebly executed.” Letter of James M. Varnum to Horatio Gates (Feb. 15, 1781), in 16 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, 716 (Paul H. Smith ed., 1986) [hereinafter LETTERS OF DELEGATES]. For the Committee’s report, see 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 893–96 (Aug. 22, 1781) (listing several dozen recommendations reforming the national government).

⁷⁶ 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 896 (Aug. 22, 1781) (“Resolved, That a Comtee [sic] be appointed to prepare a representation to the several States of the necessity of these supplemental powers and of pursuing in the modification thereof, one uniform plan.”).

⁷⁷ For a more detailed discussion of the Continental Congress’s experimentations with governance, see Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 44 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154 [https://perma.cc/ABC4-ZQQZ] (internal citations omitted) (“By the time of the [constitutional] convention, congressional delegates were executing the body’s legislation variously ‘by themselves,’ through ‘committees’ both ad hoc and formalized, through individual agents, and through the creation and supervision of institutionalized ‘boards’ of governance.”).

⁷⁸ 17 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 779–80 (Aug. 25, 1780); see also *id.* (emphasizing that “even . . . officers in the department” had been subjected to this rigamarole, and bemoaning Treasury’s “unintelligible and impracticable” orders). It does not appear that Treasury exercised its right of reply.

⁷⁹ Motion of Charles Pinckney (Aug. 19, 1785), in 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69 at 649. And yes, the delegates promptly appointed a committee to explore the question. *Id.* at 649 n.2.

⁸⁰ WOOD, *supra* note 54, at 464; see also RAKOVE, *supra* note 44, at 192–215, 275–296, 333–352 (detailing Congress’s ineffectiveness and the failure of various efforts to reform national administration under the Articles).

into the highest consideration”⁸¹ Inside the convention hall, Governor Edmund Randolph opened the proceedings with a speech that focused almost completely on the Confederation’s execution problem.⁸² This single-mindedness turned out to be basically common ground, with the delegates generally agreeing that “[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.”⁸³ Even comparatively anti-consolidationist members of the Convention acknowledged the political reality that “[t]he Language of the people has been that Congs. ought to have the power of collecting an impost and of coercing the States when it may be necessary.”⁸⁴

This theme carried over full force into the ratification debates, where the Confederation’s inability to take meaningful practical action was the butt of relentless criticism. The basic challenge was simple— “What is advice, recommendation, or requisition? It is not Government”⁸⁵—and Federalists from Connecticut,⁸⁶ Maryland,⁸⁷ Massachusetts,⁸⁸ New York,⁸⁹ North

⁸¹ Virginia Gentleman, PHILA. INDEP. GAZETTEER, (June 26, 1787), *reprinted in* 13 DHRC, *supra* note 46, at 145, 146-47 (1981) (citing “contempt [Americans] have so universally incurred on account of the weakness of government”).

⁸² See 1 FARRAND’S RECORDS, *supra* note 51, at 18-20 (Edmund Randolph).

⁸³ 2 FARRAND’S RECORDS, *supra* note 51, at 9 (James Madison). Roger Sherman offered a typical republican concession of the point at the Convention: “The complaints at present are not that the views of Congs. are unwise or unfaithful, but that that their powers are insufficient for the execution of their views.” 1 FARRAND’S RECORDS, *supra* note 51, at 341 (Roger Sherman). See also, e.g., 1 FARRAND’S RECORDS, *supra* note 51, at 43 (Gouverneur Morris) (“The federal gov. has no such compelling capacities”); see also 1 FARRAND’S RECORDS, *supra* note 51, at 284-85 (Alexander Hamilton) (similar); 1 FARRAND’S RECORDS, *supra* note 51, at 70 (James Wilson) (similar).

⁸⁴ 1 FARRAND’S RECORDS, *supra* note 51, at 491-92 (Gunning Bedford); see also *id.* at 491 (“We must like Solon make such a Governr. as the people will approve.”).

⁸⁵ Letter of Nathaniel Peaslee Sargeant to Joseph Badger (1788), *in* 5 DHRC, *supra* note 46, at 563, 563; see also *id.* at 564 (“What security is it possible to have under such a Government? A Government without energy, without power.”).

⁸⁶ E.g., Oliver Walcott, Sr., Speech in the Connecticut Convention (Jan. 9, 1788), *in* 15 DHRC, *supra* note 46, at 312, 315 (1984) (“It is generally agreed, that the present confederation is inadequate to the exigencies of our national affairs.”).

⁸⁷ E.g., Aristides, Remarks on the Proposed Plan, Annapolis (Jan. 31, 1788), *in* 11 DHRC, *supra* note 46, at 229, 247 (2015) (“At this moment, congress is little more than a name, without power to effect a single thing”).

⁸⁸ E.g., Statement of James Bowdoin, Massachusetts Ratification Debates (Jan. 23, 1788), *in* 6 DHRC, *supra* note 46, at 1313, 1317-18 (2000) (noting that because the national government lacked “any power of coercion the requisitions of Congress, have in most of the States, been little regarded”); Remarker, INDEP. CHRON., Jan. 17, 1788, *reprinted in* 5 DHRC, *supra* note 46, at 734, 737 (1998) (“We have long seen the futility of a nominal power in Congress, unsupported by reality Bare recommendations have been too long slighted and the delinquency of some States hath engendered evils in them all.”).

⁸⁹ E.g., Statement of Robert R. Livingston, New York Ratification Debates (June 19, 1788), *in* 22 DHRC, *supra* note 46, at 1681, 1686 (2008) (“[W]ith the addition of a few powers, those [the national government] possessed were competent to the purposes of the Union. But . . . the defect of the system rested in the impossibility of carrying into effect the rights invested in them by the

Carolina,⁹⁰ Pennsylvania,⁹¹ South Carolina,⁹² and Virginia⁹³ competed to make the point most forcefully. As one bit of doggerel put it:

Nor can you boast this present hour,
 The shadow of the form of power;
 For what's your congress or its end?
 A power to advise and recommend;
 To call for troops, adjust your quotas,
 And yet no soul is bound to notice;
 To pawn your faith to the utmost limit,
 But cannot bind you to redeem it
 Can utter oracles of dread
 Like Friar Bacon's brazen head;
 But should a faction e'er dispute 'em
 Has ne'er an arm to execute 'em.⁹⁴

States."); *id.* at 1693 ("[M]any powers were given, yet they were withheld, by withholding the means of executing them."); *see also* Letter of John Brown Cutting to William Short (c. Jan. 9, 1788), in 14 DHRC, *supra* note 46, at 492, 493-97 (1983) ("[T]he confederation of 1781—"a Code thus feebly formed thus carelessly executed"—"was from the first formation of it unsustainable . . . and in short built upon the unstable breath of State Legislatures who might and did puff its contexture and edicts into empty air at pleasure.").

⁹⁰ *E.g.*, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 21-22 (Jonathan Elliot ed., 1836) (William Davie) [hereinafter ELLIOT'S DEBATES] ("Another radical vice in the old system . . . was, that it legislated on states, instead of individuals; and that its powers could not be executed but by fire or by the sword . . .").

⁹¹ *E.g.*, An American, PA. GAZETTE, May 21, 1788, *reprinted in* 9 DHRC, *supra* note 46, at 833, 836 (1990) ("[W]e have not constitutional powers to execute our own desires, even within our own jurisdiction <dominions>").

⁹² *E.g.*, A Back Wood's Man, CHARLESTON COLUMBIAN HERALD, May 8, 1788, *reprinted in* 27 DHRC, *supra* note 46, at 277, 278 (2016) ("[T]he inefficacy of our laws, which though they answered the purpose pretty well, during our late troubles, are notwithstanding in their present state, inadequate to the execution of domestic or foreign regulations . . .").

⁹³ *E.g.*, Nov. Anglus, NORFOLK & PORTSMOUTH J., Dec. 12, 1787, *reprinted in* 8 DHRC, *supra* note 46, at 235, 235 ("A want of energy in the laws of some States, and a want of their execution in others . . ."). For a satisfyingly sarcastic version of the point, see Statement of Edmund Randolph, Virginia Ratifying Convention (June 6, 1788), in 9 DHRC, *supra* note 970, at 986 (1990) ("We humbly supplicate, that it may please you to comply with your federal duties! We implore, we beg your obedience! Is not this, Sir, a fair representation of the powers of Congress? . . . Their authority to recommend is a mere mockery of Government.").

⁹⁴ A Federalist, CHARLESTON CITY GAZETTE, May 16, 1788, *reprinted in* 27 DHRC, *supra* note 46, at 284, 284 (2016). The verse is from John Trumbull's "M'Fingal." *See* JOHN TRUMBULL,

A central theme for many Federalist authors was thus precisely how *well* the laws would be executed under the draft Constitution. However much some modern thinkers may minimize the “errand boy” nature of Law Execution,⁹⁵ the founders never made that mistake:

[H]ow humiliating is our present situation . . . [H]ow necessary for the union is a coercive principle. No man pretends the contrary. We all see and feel this necessity. The only question is, shall it be a coercion of Law, or a coercion of arms . . . [W]e must establish a national government, to be enforced by the equal decisions of Law, and the peaceable arm of the magistrate.⁹⁶

M'FINGAL: A MODERN EPIC POEM IN FOUR CANTOS (1782). It doesn't get any better. Thanks to Jo Ann Davis for explaining that the “brazen head” allusion is to a failed enchantment in Robert Greene's *Friar Bacon and Friar Bungay* (1630).

⁹⁵ HARVEY C. MANSFIELD, TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 2-3 (1989) (“[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”); *Steel Seizure*, 343 U.S. 579, 708 (1952) (Vinson, C.J., dissenting) (“Under this messenger-boy concept” of the Presidency, “the President must confine himself to sending a message to Congress recommending action”).

⁹⁶ Oliver Ellsworth, Speech in the Connecticut Convention (Jan. 7, 1788), in 15 DHRC, *supra* note 46, at 273, 279 (1984) (reprinted in 15 other newspapers).

Time and again, it was the lead point raised or first issue discussed: at the Philadelphia drafting convention;⁹⁷ at the Pennsylvania⁹⁸ and Connecticut⁹⁹ ratifying conventions; in public propaganda;¹⁰⁰ and in private correspondence.¹⁰¹

Certainly the Federalist Papers rarely lost an opportunity to laud the constitutional fix for the Articles' "great and radical error"¹⁰² of leaving its government "destitute even of the shadow of constitutional power to enforce

⁹⁷ 1 FARRAND'S RECORDS, *supra* note 51, at 19 (Edmund Randolph) ("[T]he prospect of anarchy from the laxity of government every where.").

⁹⁸ James Wilson opened the Pennsylvania Convention with a speech hammering on the point. And then his final stemwinder—which stretched over two sessions and according to Yeates's notes lasted more than two and a half hours—focused almost entirely on the new government's capacity to execute its law and other legislative projects. On his opening speech, see James Wilson, Opening Speech to the Pennsylvania Ratifying Convention (Nov. 24, 1787), *in* 2 DHRC, *supra* note 46, at 333, 335 (1976) ("He forcibly contrasted the imbecility of our present Confederation with the energy which must result from the proffered Constitution."); *cf.* Alexander J. Dallas, Version of Wilson's Speech (Nov. 24, 1787), *in* 2 DHRC, *supra* note 46, at 340, 348 ("In short, sir, the tedious tale disgusts me . . ."). For a pithy summary of Wilson's endless closing pitch, see James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 11, 1787), *in* 2 DHRC, *supra* note 46, at 550, 570 (1976) ("It is of great consequence to us and our posterity whether we shall continue under a Confederation without efficient powers to carry its purposes into execution, despised abroad and without credit at home; or whether we shall adopt a system of Union; with energetic powers, which can effectually carry into execution such measures as may be calculated and devised for the common safety."). For a perhaps unreliably florid recapitulation of the latter, compare James Wilson, Speech to the Pennsylvania Ratifying Convention (Morning Session) (Dec. 11, 1787), *reprinted in* 2 DHRC, *supra* note 46, at 550, 557-58 (1976)("[A]fter making a law, they cannot take a single step towards carrying it into execution."), with James Wilson, Speech to the Pennsylvania Ratifying Convention (Afternoon Session) (Dec. 11, 1787), *reprinted in* 2 DHRC, *supra* note 46, at 571, 580-81 (1976)("Congress may recommend, they can do more, they may require, but they must not proceed one step further.").

⁹⁹ Oliver Ellsworth opened the ratifying convention with a speech focusing entirely on the need for a more energetic system. "The present is merely advisory. It has no coercive power . . . [H]ave we not seen and felt the necessity of such a coercive power? . . . The Constitution before us is a complete system of legislative, judicial, and executive power. It was designed to supply the defects of the former system . . ." Ellsworth, *supra* note 96, at 245-48 (reprinted in 20 other newspapers); *see also id.* at 246 (surveying the "coercive power" of various European executives to "execute decrees" and "set their unwieldy machine of government in motion"). William Samuel Johnson came next, and doubled down: "Our commerce is annihilated; our national honour, once in so high esteem, is no more . . . The gentleman's arguments have demonstrated that a principle of coercion is absolutely necessary." William Samuel Johnson, Speech in the Connecticut Convention (Jan. 4, 1788), *reprinted in* 15 DHRC, *supra* note 46, at 243, 248 (reprinted in sixteen other newspapers).

¹⁰⁰ James McHenry, Speech to Maryland House of Delegates (Nov. 29, 1787), *reprinted in* 14 DHRC, *supra* note 46, at 279, 279-80 (1983) ("[T]he Journals of Congress are nothing more than a History of expedients, without any regular or fixed system, and without power to give them efficacy or carry them into Execution . . . [T]here is no power, no force to carry their Laws into execution, or to punish the Offenders who oppose them.").

¹⁰¹ *See, e.g.,* Letter from the Reverend James Madison to James Madison (c. Oct. 1, 1789), *reprinted in* 8 DHRC *supra* note 46, at 31, 31 (1988) (noting as first concern the need for "ready Compliance amongst ye Bulk of ye People of America, with federal Measures").

¹⁰² THE FEDERALIST NO. 38 (James Madison), *reprinted in* 15 DHRC, *supra* note 46, at 353, 355 (1984).

the execution of its own laws.”¹⁰³ (To be honest, Publius was a little obsessed with the need for enforcement authority.¹⁰⁴ As the generally sympathetic Charles Johnson wrote to James Iredell, “I am surprised that he should have thought it necessary to take so much pains to establish, what appears at the first glance, at least to me, an incontrovertible truth”¹⁰⁵) Nor was the Madison-Hamilton-Jay troika unusual in this respect. Many Federalist propagandists defended the draft constitution first and foremost as a solution for the Confederation’s “very certain” lack of “vigor enough to carry [its] *actually delegated* power into execution”¹⁰⁶ The very existence of “union can never be supported,” said another Federalist, “without definite and effectual laws which are co-extensive with their occasions, and which are supported by authorities and laws which can give them execution with energy”¹⁰⁷ What the constitution principally offered was thus “an energetic government capable of putting in execution prohibitory laws uniformly throughout the states.”¹⁰⁸ And on and on and on.¹⁰⁹

¹⁰³ THE FEDERALIST NO. 21 (Alexander Hamilton), *reprinted in* 14 DHRC, *supra* note 46, at 414, 414 (1983).

¹⁰⁴ For just a few of the longer passages, see, for example, THE FEDERALIST NO. 16 (Alexander Hamilton), *reprinted in* 14 DHRC, *supra* note 46, at 339, 341 (1983) (“It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.”); THE FEDERALIST NO. 27 (Alexander Hamilton), *reprinted in* 15 DHRC, *supra* note 46, at 95, 97 (1984) (“[T]here is good ground [under the draft Constitution] to calculate upon a regular and peaceable execution of the laws of the Union”); THE FEDERALIST NO. 3 (John Jay), *reprinted in* 13 DHRC, *supra* note 46, at 555, 557 (1981) (“[U]nder the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner”). Even Publius’s discussion of the legislative powers of the draft federal government emphasized the point. See THE FEDERALIST NO. 45 (James Madison), *reprinted in* 15 DHRC, *supra* note 46, at 476, 480 (1984) (“[T]he new Constitution . . . does not enlarge [the Confederation’s] powers; it only substitutes a more effectual mode of administering them.”).

¹⁰⁵ Letter from Charles Johnson to James Iredell (Jan. 14, 1788), *in* 15 DHRC, *supra* note 46, at 363, 363 (1984) (“[T]hat the States, united under one efficient government, properly balanced, will be much more powerful . . . than the States disunited into distinct, independent governments, or separate confederacies.”).

¹⁰⁶ A Freeman, *I*, PA. GAZETTE, Jan. 23, 1788, *reprinted in* 15 DHRC, *supra* note 46, at 453, 456 (1984).

¹⁰⁷ A Citizen of Philadelphia, Remarks on the Address of Sixteen Members (Oct. 18, 1787), *reprinted in* 13 DHRC, *supra* note 46, at 297, 304 (1981); *see also id.* (“[T]he superlative authority and energetic force vested in congress and our federal executive powers . . . extensive as they are, are not greater than is necessary for our benefit”).

¹⁰⁸ Letter from New York (Oct. 24 & 31 1787), *in* 3 DHRC, *supra* note 46, at 380, 381 (1978); *see also id.* at 387 (Oct 31, 1787) (observing that the Philadelphia convention resulted from “the opinion of a majority of the citizens of America that a national government, of energy and efficiency, ought to be established over the United States for the better security and promotion of the interests of the individual, as well as the confederated states”).

¹⁰⁹ For but a small further sampling, see, e.g., *Common Sense*, MASS. GAZETTE, Jan. 11, 1788, *reprinted in* 5 DHRC, *supra* note 46, at 693, 694 (1998) (“Men of penetration have grown weary of such a weak and inefficient system, and wish to lay it aside; and have substituted in its room, a government that shall be as efficacious throughout the union as this state government is throughout

What about the loose and diverse group of skeptics and outright opponents known to history as the Antifederalists? Certainly some contested the premise. Agrippa huffed that “our government . . . is respected from principles of affection, and obeyed with alacrity,”¹¹⁰ and Patrick Henry puffed that “the people of Virginia” have “manifested the most cordial acquiescence in the execution of the laws.”¹¹¹ But the urgency of such denials just betrayed the power of the argument.¹¹² Indeed, for the most part Antifederalists *agreed*

the Massachusetts.”); Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), in 10 DHRC, *supra* note 46, at 1623, 1623, 1626 (1993) (“Union is only to be preserved by a *Fædral Energetic* Government, and . . . the Articles of Confederation Possess not an Atom of such a Government . . . a strong & firm Govt. of wholesome laws, well executed, to protect the honest Peaceable Citizen From *Oppression, Licentiousness, Rapine & violence*, appear to me indispensibly necessary.”); *A Freeholder*, VA. INDEP. CHRON., Apr. 9, 1788, reprinted in 9 DHRC, *supra* note 46, at 719, 727 (1990) (“[T]his constitution . . . gives an energy and dignity to the supreme legislative and executive powers, of which energy and dignity the present Congress have not even the shadow . . .”); One of the People, PA. GAZETTE, Oct. 17, 1787, reprinted in 2 DHRC, *supra* note 46, at 186, 188 (1976) (noting that while “no one state can carry into effect their impost laws,” the new government “will have energy and power to regulate your trade and commerce, to enforce the execution of your imposts, duties and customs”).

¹¹⁰ Agrippa, *XII*, MASS. GAZETTE, Jan. 15, 1787, reprinted in 5 DHRC, *supra* note 46, at 720, 721 (1998). Agrippa was notably insistent on the point. *See also* Agrippa, *II*, MASS. GAZETTE, Nov. 27, 1787, reprinted in 4 DHRC, *supra* note 46, at 322, 323 (1997) (“[T]he sheriffs, have in no case been interrupted in the execution of their office . . . [T]he law has been punctually executed”); Agrippa, *I*, MASS. GAZETTE, Nov. 23, 1787, reprinted in 4 DHRC, *supra* note 46, at 303, 304 (1997) (“It is now conceded on all sides that the laws relating to civil causes were never better executed than at present.”); *cf.* *NAKED GUN* (Paramount Pictures 1988) (“Nothing to see here. Please disperse.”).

¹¹¹ Statement of Patrick Henry, Va. Ratification Debates (June 5, 1788), in 9 DHRC, *supra* note 46, at 943, 954 (1990); *see also id.* (“What could be more awful than their unanimous acquiescence under general distresses? Is there any revolution in Virginia? Whither is the spirit of America gone? Whither is the genius of America fled?”). The Virginia delegates chased their tails on this question for some time. *See* Virginia Ratification Debates (June 7, 1788), in 9 DHRC, *supra* note 46, at 1006, 1016-46 (1990) (recounting a multi-session back-and-forth among James Madison, Edmund Randolph, and Patrick Henry).

¹¹² *See also, e.g.,* A Plebeian: An Address to the People of the State of New York (1788), in 20 DHRC, *supra* note 46, at 942 (2004) (“[A]ll the powers of rhetoric . . . are employed to paint the condition of this country, in the most hideous and frightful colours . . . [But the] laws are as well executed as they ever were, in this or any other country.”); Benjamin Gale, Speech at a Town Meeting (Nov. 12, 1787), in 3 DHRC, *supra* note 46, at 420, 422 (1978) (“All these combining have raised a mighty outcry of the weakness of the federal government . . . But, gentlemen, have not we the same power we ever have had . . . If any opposition is made to government, has not our sheriffs power to call to their assistance the militia to support him in the execution of his office, and is it not so in every state in the Union.”); Statement of John Lansing, New York Ratification Debates (June 28, 1788), in 22 DHRC, *supra* note 46, at 1976, 1999 (2008) (“Sir, have the states ever shewn a disposition not to comply with the requisitions? We shall find that, in almost every instance, they have, so far forth as the passing the law of compliance, been carried into execution.”).

with the diagnosis, both privately¹¹³ and publicly.¹¹⁴ Brutus was typical in “acknowledg[ing] . . . that the powers of Congress, under the present confederation, amount to little more than that of recommending,”¹¹⁵ and Centinel called it “universally allowed” that “extraordinary difficulties [have] hitherto impeded the execution of the confederation”¹¹⁶

Rather than denying the problem, Antifederalists typically responded by warning that the draft Constitution went too far in fixing it. The new government’s dramatically improved enforcement power, they urged, would overshoot the mark and result in tyranny.¹¹⁷ “The publick mind, I fear,” worried Cornelius, “is at this critical juncture, prepared to do the same that almost every people, who have enjoyed an excessive degree of liberty have done before;—to plunge headlong into the dreadful abyss of Despotick

¹¹³ See Letter from Richard Henry Lee to John Adams (Sept. 3, 1787), in 8 DHRC, *supra* note 46, at 9, 9 (1988) (“The present federal system, however well calculated it might have been for its designed ends if the States had done their duty, under the almost total neglect of that duty, has been found quite inefficient and ineffectual—The government must be both Legislative and Executive, with the former power paramount to the State Legislatures in certain respects essential to federal purposes.”).

¹¹⁴ See The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, PA. PACKET, Dec. 18, 1787 [hereinafter Dissent of the Minority], reprinted in 2 DHRC, *supra* note 46, at 617, 618-19 (1976) (“[T]he annual requisitions were set at naught by some of the states, while others complied with them by legislative acts, but were tardy in their payments The Congress could make treaties of commerce, but could not enforce the observance of them”); Statement of William Grayson, Virginia Ratification Debates (June 11, 1788), in 9 DHRC, *supra* note 46, at 1142, 1169 (1990) (“I admit that coercion is necessary in every Government in some degree, that it is manifestly wanting in our present Government, and that the want of it has ruined many nations.”); Statement of Samuel Jones, New York Ratification Debates (June 25, 1788), in 22 DHRC, *supra* note 46, at 1877, 1904 (2008) (“[A] fact universally known, that the present confederation had not proved adequate to the purposes of good government.”); Town of Preston Instructions to State Convention Delegates (Nov. 12, 1787), in 3 DHRC, *supra* note 46, at 438, 439 (1978) (calling for a series of amendments while expressing “our ardent wish that an efficient government may be established over these states” with “sufficient provision made for carrying into execution all the powers vested in government”). The “Federal Farmer” was notably preoccupied with this issue in his first three letters. See, e.g., Federal Farmer, *supra* note 48, at 18-19 (“[T]he interest I have in the protection of property, and a steady execution of the laws, will convince you, that, if I am under any bias at it, it is in favor of any general system which shall promise those advantages.” (footnote omitted)).

¹¹⁵ Brutus, IX, N.Y. J., Jan. 17, 1788, reprinted in 15 DHRC, *supra* note 46, at 393, 397 (1984).

¹¹⁶ Centinel, IV, PHILA. INDEP. GAZETTEER, Nov. 30, 1787, reprinted in 14 DHRC, *supra* note 46, at 317, 318-19 (1983); see also *id.* (conceding that “the present confederation is inadequate to the objects of the union,” while cautioning that these difficulties were “temporary” and should not be attributed to irreparable “defects in the [Confederation] system itself”).

¹¹⁷ See, e.g., A Countryman, AM. HERALD, Jan. 21, 1788, reprinted in 5 DHRC, *supra* note 46, at 757 (1998) (“Are we to give up every thing dear to us, because it is demanded by a set of men, who, while they make the demand, exhibit a spirit of despotism—equalled only by that of the Batons of the Germanic Empire . . . over their vassals[?]”); The Impartial Examiner, I, VA. INDEP. CHRON., Mar. 5, 1788, reprinted in 8 DHRC, *supra* note 46, at 459, 463 (1988) (“[C]an any one think that there is no medium between want of power, and the possession of it in an unlimited degree? Between the imbecility of mere recommendatory propositions, and the sweeping jurisdiction of exercising every branch of government over the United States to the greatest extent?”).

Government.”¹¹⁸ Dire warnings abounded about execution running amok, from “swarms” of enforcement agents¹¹⁹ to the “military execution”¹²⁰ of the national laws.¹²¹ Cato’s litany of predictions was typical, including in its special concern for taxation:

118 Cornelius, *HAMPSHIRE CHRON.*, Dec. 11, 18, 1787, *reprinted in* 4 DHRC, *supra* note 46, at 410, 416 (1997); *see also id.* (suggesting that the “great embarrassments under which we have laboured” could be remedied by narrower amendments facilitating tax collection and the regulation of commerce). At the Virginia ratifying convention, one Antifederalist had some fun on this score: “We are now told . . . that every calamity is to attend us . . . unless we adopt this Constitution. . . . [T]he Carolinians from the South, mounted on alligators, I presume, are to come and destroy our corn fields and eat up our little children!” Statement of William Grayson, Virginia Ratification Debates (June 11, 1788), *reprinted in* 9 DHRC, *supra* note 46, at 1142, 1167 (1990).

119 *See* Statement of Melancton Smith, New York Ratification Debates (June 27, 1788), *in* 22 DHRC, *supra* note 46, at 1921, 1924 (2008) (“Will it not give occasion for an innumerable swarm of officers, to infest our country and consume our substance?”); John De Witt, *V*, *AM. HERALD*, Dec. 3, 1787, *reprinted in* 4 DHRC, *supra* note 46, at 351, 356 (1997) (“[T]hat swarm of revenue, excise, impost and stamp officers, Continental assessors and collectors, that your new Constitution will introduce among you . . . will, of themselves, be a STANDING ARMY to you . . . without the blessed assistance of any military corps.”); Dissent of the Minority, *supra* note 114, at 639 (“[J]udges, collectors, tax gatherers, excisemen, and the whole host of revenue officers will swarm over the land, devouring the hard earnings of the industrious, like the locusts of old . . .”); The Republican Federalist, *VII*, *MASS. CENTINEL*, Feb. 6, 1788, *reprinted in* 5 DHRC, *supra* note 46, at 869, 870 (1998) (“[T]he executive and judicial departments of the union, will necessarily produce through the Continent, *swarms* of officers . . .”). John DeWitt was so distraught about this point that he wrote two straight essays on it. *See also* John De Witt, *supra* note 58, at 269 (“A new set of Continental pensioned Assessors will be introduced into your towns, whose interest will be distinct from yours.— They will be joined by another set of Continental Collectors, still less principled and less adequate than the former.”).

120 *See* A Federal Farmer, Letter II to the Republican (Oct. 9, 1787), *in* 14 DHRC, *supra* note 46 at 25, 29 (“the general government, far removed from the people, and none of its members elected oftener than once in two years, will be forgot or neglected, and its laws in many cases disregarded, unless a multitude of officers and military force be . . . employed to enforce the execution of the laws. . . .”); Twenty-seven Subscribers, *N.Y.J.*, Jan. 1, 1788, *reprinted in* 20 DHRC, *supra* note 46, at 558, 558 (2004) (“do not be so irresolute as to be frightened out of your duty by any *pert* adventurer, whose principles may be despotic, from habit in the wars and whose ideas of government cannot be satisfied with less than military execution . . .”).

121 The Virginia ratifying convention saw especially long colloquies on the subject. *See* Virginia Ratification Debates (June 14, 1788), *reprinted in* 10 DHRC, *supra* note 46, at 1258, 1269-97 (1993) (recounting a debate involving Clay, Madison, Mason, Henry, Nicholas, Randolph, and Lee); *see also* Virginia Ratification Debate (June 16, 1788), *reprinted in* 10 DHRC, *supra* note 46, at 1299, 1299-1304, 1325 (1993) (describing a debate between Henry, Madison, and Pendleton). *See also, e.g.*, John De Witt, *V*, *AM. HERALD*, Dec. 3, 1787, *reprinted in* 4 DHRC, *supra* note 46, at 351, 353, 356 (1997) (warning that federal military power was an “infernal engine of oppression to execute their civil laws” and asking “[w]here is the standing army in the world” that has not “finally, tak[en] a chief part in executing its laws”); *Philadelphiensis, IV*, *PHILA. FREEMAN’S J.*, Dec. 12, 1787, *reprinted in* 14 DHRC, *supra* note 46, at 418, 420 (1983) (“[T]o carry the arbitrary decrees of the federal judges into execution, and to protect the tax gatherers in collecting the revenue, will be ample employment for the military . . .”); Interrogator, To Publius or the Pseudo-Federalist Post-1 (Dec. 1787) (unpublished manuscript), *reprinted in* 19 DHRC, *supra* note 46, at 342, 343 (2003) (“And does not the [Calling Forth?] Clause . . . involve a State of War and military Execution to the Persons who are the objects of it?” (emphasis omitted)).

[T]he necessity to enforce the execution of revenue laws (a fruitful source of oppression) on the extremes and in the other districts of the government, will incidentally, and necessarily require a permanent force, to be kept on foot—will not political security, and even the opinion of it, be extinguished? can mildness and moderation exist in a government, where the primary incident in its exercise must be force?¹²²

Given longstanding Country anxieties about a standing army, these reactions made some sense, at least for the most paranoid.¹²³ The key factor for our purpose is that both supporters and opponents understood the sales pitch for ratification to focus on a radically improved execution of national projects and prohibitions.

B. *The Presidency's Role in the Constitutional Solution*

That brings us to the President. Expanded legislative power was, of course, an essential element of the proposed constitutional solution, and there was angst aplenty about the federal courts' ability to enforce legal rights and obligations. But when it came to the execution problem, the Article II presidency was central. Certainly James Madison thought so. In a letter summarizing the proceedings for Thomas Jefferson, Madison listed executive power first among "the great objects which presented themselves" to the Convention.¹²⁴ The reason for this primacy was simple: The whole point of

¹²² Cato, *III*, N.Y.J., Oct. 25, 1787, reprinted in 19 DHRC, *supra* note 46, at 125, 128 (2003); see also Brutus, *IV*, N.Y.J., Nov. 29, 1787, reprinted in 19 DHRC, *supra* note 46, at 313, 317 (2003) ("If then this government should not derive support from the good will of the people, it must be executed by force, or not executed at all The convention seemed aware of this, and have therefore provided for calling out the militia to execute the laws of the union."). Brutus's first number was in much the same vein. See Brutus, *I*, N.Y.J., Oct. 18, 1787, reprinted in 19 DHRC, *supra* note 46, at 103, 113 (2003) ("[T]he government will be nerveless and inefficient, and no way will be left to render it otherwise, but by establishing an armed force to execute the laws at the point of the bayonet . . .").

¹²³ See, e.g., Luther Martin Addresses the House of Delegates (Nov. 29, 1787), reprinted in 11 DHRC, *supra* note 46, at 87, 93 (2015) ("Should the power of these Judiciaries be incompetent to carry this extensive plan into execution, other, and more certain Engines of power are supplied by the standing Army unlimited as to number or its duration, in addition to this Government has the entire Command of the Militia . . ."); Dissent of the Minority, *supra* note 114, at 617 (noting that "as standing armies in the time of piece are dangerous to liberty, they ought not to be kept up"). Cf. A Baptist, N.Y.J., Nov. 30, 1787, reprinted in 19 DHRC, *supra* note 46, at 331, 336-37, (2003) (suggesting that the new Congress would "call [the militia] out to execute the laws of the union," thereby "grievously oppressing the people, and greatly endangering public liberty").

¹²⁴ Letter from James Madison to Thomas Jefferson, *supra* note 59, at 98; see also *id.* ("1. to unite a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characters of Republican Government."); *id.* ("Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them . . ."). One of the most strangely persistent misunderstandings of Madison is the idea that he was uninterested in the executive branch or resistant to strong centralized authority. Clinton Rossiter had it right back in 1964: "I am far more impressed by the

the presidency was to cure the national government's inability to bring its laws, policies, and projects into anything like effective execution.¹²⁵

Many Federalists traced the Confederation's execution problem to an overreaction by their fellow citizens in the wake of independence. "[T]he immediate crush of arbitrary [British] power," they lamented, had prompted Americans to "lean too much . . . to the extreme, of weakening than of strengthening the Executive power in our own government."¹²⁶ In the throes of the Critical Period, however, even the staunchest republicans began to concede the need for *some* kind of office to "preside over our civil concerns, and see that our laws are duly executed,"¹²⁷ and even the smallest states eventually signed onto New Jersey's call for a new "federal Executive" vested with authority "to enforce and compel" and "carry[] into execution" "all Acts of the U. States in Congs. made."¹²⁸ The resulting presidency thus served as the Convention's answer to the following choice: "We must either . . . renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it."¹²⁹ As one North Carolina Federalist said of the President:

If he takes care to see the laws faithfully executed, it will be more than is done in any government on the continent; for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects mere ciphers.¹³⁰

Unfortunately, creating an executive magistrate wasn't just one of the most pressing questions. It was also one of the hardest. James Madison later explained to the Virginia convention that—while debates about "the organization of the General Government" were certainly "in all [their] parts,

large area of agreement between Hamilton and Madison than by the differences in emphasis that have been read into rather than [written] in their papers." CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 58 (1964).

¹²⁵ See 2 FARRAND'S RECORDS, *supra* note 51, at 52 (Gouverneur Morris) ("It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy & utility of the Union among the present and future States.").

¹²⁶ Marcus, *III*, NORFOLK & PORTSMOUTH J., Mar. 5, 1788, *reprinted in* 16 DHRC, *supra* note 46, at 322, 326 (1986) (emphasis omitted).

¹²⁷ 1 FARRAND'S RECORDS, *supra* note 51, at 85 (Benjamin Franklin).

¹²⁸ 1 FARRAND'S RECORDS, *supra* note 51, at 245 (New Jersey Amendments); *see also id.* (requesting an executive who could "enforce and compel an obedience to such Acts, or an Observance of such Treaties"). OK, not Rhode Island. But they weren't even there.

¹²⁹ 2 FARRAND'S RECORDS, *supra* note 51, at 52 (Gouverneur Morris); *see id.* ("It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy & utility of the Union among the present and future States.").

¹³⁰ 4 ELLIOT'S DEBATES, *supra* note 90, at 136 (Archibald Maclaine).

very difficult”—there was “a peculiar difficulty in that of the Executive.”¹³¹ At times, the difficulty seemed almost paralyzing. The Convention’s discussion of the subject began with a motion “that the Executive consist of a single person.” Then:

A considerable pause ensuing, and the Chairman asking if he should put the question, Doctr. Franklin observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put.

Mr. Rutledge animadverted on the shyness of gentlemen on this and other subjects.¹³²

Whence this weird silence among delegates who—John Rutledge’s reference to “other subjects” notwithstanding—had so far showed no detectable reticence on any other topic? Surely it was due in part to the identity of their presiding officer, “whose election [as President] will doubtless be unanimous, unless he declines the trust”¹³³ But that can’t be the whole story: indeed, the topic of presidential power prompted an identically awkward “silence” when introduced at the North Carolina ratification debates, where General Washington was nowhere to be found.¹³⁴

The founders’ persistent “embarrass[ment]”¹³⁵ on the topic had a thoroughly substantive reason. Indeed, structuring the chief magistracy might have been the hardest design problem in governance.¹³⁶ As Virginia

¹³¹ Statement of James Madison, Virginia Ratification Debates (June 20, 1788), reprinted in 10 DHRC, *supra* note 46, at 1412, 1412 (1993) (emphasis added); *see also id.* (“Every thing incident to it, must have participated of that difficulty.”). Madison made the same point privately. *See* Letter from James Madison to Thomas Jefferson, *supra* note 59, at 98 (“The first of these objects as it respects the Executive, was peculiarly embarrassing.”); *see also* 2 FARRAND’S RECORDS, *supra* note 51, at 118 (George Mason) (“In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared.”).

¹³² 1 FARRAND’S RECORDS, *supra* note 51, at 65.

¹³³ A Citizen of New-York, N.Y. DAILY ADVERTISER, Sept. 27, 1787, reprinted in 19 DHRC, *supra* note 46, at 54, 54 (2003); *see also id.* (listing other politicians “equal to the office of President” should Washington decline). *Cf.* A Letter from Philadelphia, FAIRFIELD GAZETTE, July 25, 1787, reprinted in 13 DHRC, *supra* note 46, at 172, 172-73 (1981) (suggesting that there was a plot to install a monarch, and speculating that “Gen. Washington, though unexceptionable in every respect of his virtues, would probably decline the crown were it offered him . . .”).

¹³⁴ On the relevant day, the secretary’s notes observe that “Article 2d, section 1st” was read for comment. The next recorded comment comes from an irritated Federalist challenging the opponents of the Constitution to object. *See* 4 ELLIOT’S DEBATES, *supra* note 90, at 102 (William Davie) (“Is it not highly improper to pass over in silence any part of this Constitution which has been loudly objected to?”). Silences continued throughout the North Carolina convention’s discussion of Article II. *See, e.g., id.* at 107 (James Iredell) (“The rest of the 1st section read without any observations”); *id.* (“Mr. Chairman, I was in hopes that some other gentleman would have spoken to this clause.”).

¹³⁵ Letter from James Madison to Thomas Jefferson, *supra* note 59, at 98.

¹³⁶ Mortenson, *supra* note 5, at 1207-19.

Governor Edmund Randolph said to the Virginia ratifying convention, “[e]very Gentleman who has . . . considered of the most eligible mode of Republican Government, agrees that the greatest difficulty arises from the Executive, as to the time of his election, mode of his election, quantum of power, &c.”¹³⁷ Echoing the handwringing of parliamentarians a century earlier and an ocean away, Gouverneur Morris explained why:

It is <the> most difficult of all rightly to balance the Executive. Make him too weak: The Legislature will usurp his powers. Make him too strong. He will usurp on the Legislature.¹³⁸

This dynamic forced the Framers to “act[] a very strange part” in structuring the presidency: “We first form a strong man to protect us, and at the same time wish to tie his hands behind him.”¹³⁹ The Antifederalist Melancton Smith borrowed the English treatise *Bracton’s* bridle metaphor to make the point: “Power is a Head strong Horse—requires a Curb and will even then sometimes [break free.¹⁴⁰] Will the Rider then Hamstring To Contrive a Govt. to check it from operating?”¹⁴¹

These were hard questions, to put it mildly. And so the Convention bogged down in what Madison called “tedious and reiterated discussions.”¹⁴² (Smash cut to generations of scholars nodding vigorously.) A series of

¹³⁷ Statement of Edmund Randolph, Virginia Ratification Debates (June 17, 1788), *reprinted in* 10 DHRC, *supra* note 46, at 1338, 1366 (1993). *See generally* Mortenson, *supra* note 5.

¹³⁸ 2 FARRAND’S RECORDS, *supra* note 51, at 105 (Gouverneur Morris). *Cf. Reply to George Mason’s Objections to the Constitution*, N.J.J., Dec. 19 & Dec. 26, 1787, *reprinted in* 3 DHRC, *supra* note 46, at 154, 159 (1978) (“May not every person you appoint, probably, also become venal, wicked, and oppressive? I answer . . . If we must have no government till we can get one that cannot be abused, there is an end of the business at once.”). *See also generally* HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES (1642).

¹³⁹ 2 FARRAND’S RECORDS, *supra* note 51, at 317 (Gouverneur Morris).

¹⁴⁰ Melancton Smith, New York Ratification Debates (June 25, 1788), *reprinted in* 22 DHRC, *supra* note 46, at 1877, 1901 (2008). McKesson did not get down the end of this thought. It seems safe to assume the reference was to the “Curb” sometimes failing.

¹⁴¹ *See id.* (“With respect to the Powers of Govt. they must [be] adequate to the objects or it becomes useless—There must be checks or the Govt. will [be] dangerous—”). James Wilson, a Federalist, made a version of this same point when he noted, “Bad Governts. are of two sorts. 1. that which does too little. 2. that which does too much: that which fails thro’ weakness; and that which destroys thro’ oppression.” 1 FARRAND’S RECORDS, *supra* note 51, at 483 (James Wilson). Something like a sensible middle did drive the discussions: Federalists like Wilson and Morris generally acknowledged that fixing the execution problem risked making the government too strong; Antifederalists and skeptics like Smith and Randolph generally acknowledged that every government required some force and authority and capacity to execute. The calibration was the hard part—and the contested one.

¹⁴² Letter from James Madison to Thomas Jefferson, *supra* note 59, at 98 (“On the question whether it should consist of a single person, or a plurality of co-ordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place.”).

interconnected issues was hotly debated, including the number of people at the head of the executive branch, the process of selecting them, the provisions for removing them, the length of their terms, their eligibility for re-election, and the provision for an executive veto.¹⁴³ However mechanical each question may seem individually, the disagreement they provoked was entirely in line with Morris's sketch of the basic problem: how to promote presidential independence and vigor (and how much) while restraining presidential abuse (and how strictly)?

The vehemence of these debates over presidential independence, however, shouldn't obscure a broad band of warm agreement on at least two equally central questions of presidential design. First, everyone knew that vehement antiroyalism was a singularly potent force in American politics. The King's protection had of course for a time been invoked during the colonists' various confrontations with Parliament,¹⁴⁴ and there appear even to have been some pockets of genuinely revanchist sentiment.¹⁴⁵ But what we now think of as Whig history was easily the dominant rhetorical trope, with all sides of the mainstream debate celebrating "that patriotic spirit which prompted the illustrious English barons to extort Magna Charta from their tyrannical king, John."¹⁴⁶ This bedrock fact of political life sharply constrained the founders' options in designing an American executive.

Both the Framers and the Federalists thus had to account at every stage for "that jealousy of executive power which has shown itself so strongly in all the American governments."¹⁴⁷ We might discount the Antifederalist

¹⁴³ For present purposes, tracking the chronological evolution of the Philadelphia proposals isn't terribly useful. For discussions of how the Presidency evolved over the course of the drafting process, see CLINTON ROSSITER, *1787: THE GRAND CONVENTION 182-256* (1966); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS 168-173* (1967). See also RAKOVE, *supra* note 52, at 244-87 (canvassing Founding-era debates about presidential power); Bradley & Flaherty, *supra* note 22, at 593-95 (describing Convention debates about presidential power).

¹⁴⁴ See generally JACK P. GREENE, *CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011); ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* (2014); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (1995).

¹⁴⁵ See, e.g., Letter from George Washington to John Jay, *supra* note 66, at 208-09 ("I am told that even respectable characters speak of a monarchical form of government without horror.")

¹⁴⁶ Tar & Feathers, 2, *INDEP. GAZETTEER*, Oct. 2, 1787, reprinted in 2 *DHRC*, *supra* note 46, at 152, 153 (1976). For particularly detailed contemporaneous surveys of the relevant English constitutional history, see, for example, *THE FEDERALIST NO. 26* (Alexander Hamilton), reprinted in 15 *DHRC*, *supra* note 46, at 65, 65-69 (1984); A Farmer, I, *BALT. MD. GAZETTE*, Feb. 15, 1788, reprinted in 11 *DHRC*, *supra* note 46, at 306 (2015).

¹⁴⁷ 4 *ELLIOT'S DEBATES*, *supra* note 90, at 115, 120 (William Davie). James Monroe made the same point from across the aisle. See Monroe, *supra* note 70, at 863 ("Against the encroachments of the Executive the fears and apprehensions of the whole continent would be awake, with a watchful jealousy they would observe its movements.").

tendency to bang on about the draft constitution's betrayal of liberty¹⁴⁸—always a surefire way to irritate the Federalists, who saw in such warnings “the same design that nurses tell children many strange stories about raw-head and bloody-bones.”¹⁴⁹ But even proponents of a vigorous executive like James Iredell admitted that “in every [American] country . . . there is a strong prejudice against the executive authority.”¹⁵⁰

To be sure, that didn't necessarily translate into categorical opposition to any non-hereditary magistracy. While James Wilson conceded that “the manners of the United States . . . are [against] a King and are purely republican,”¹⁵¹ for example, he also reminded the Philadelphia delegates not to get carried away: “[a]ll know that a single magistrate is not a King.”¹⁵² But the resistance was to more than just a title. From Randolph observing that “the permanent temper of the people was adverse to the very *semblance* of Monarchy”¹⁵³ to Hamilton conceding “the aversion of the people to

¹⁴⁸ Cornelius, *supra* note 118, at 415 (“[T]he dignified station in which that officer is placed . . . cannot be considered as far below that of an European Monarch . . . with the most dreadful consequences.”); Philadelphensis, *IX*, PHILA. FREEMAN'S J., Feb. 6, 1788, *reprinted in* 16 DHRC, *supra* note 46, at 57, 58 (1986) (“Who can deny but the president general will be a king to all intents and purposes . . .” (emphasis omitted)).

¹⁴⁹ Letter from New York, *supra* note 108, at 383; *see also id.* at 382-83 (“What snake in the grass is there here? . . . Such a whim could never have entered the noddle of any man of sense, unless it were for the purpose of frightening those who have been taught to start at the sound of ‘king.’”). Hamilton was a little over the top in his fury, accusing Antifederalists of inventing a President with a “diadem sparkling on his brow” and “murdering janizaries” and the “unveiled mysteries of a future seraglio” at his command. THE FEDERALIST NO. 67 (Alexander Hamilton), *reprinted in* 16 DHRC, *supra* note 46, at 369, 370 (1986); *see also id.* at 371 (“[C]alculating upon the aversion of the people to monarchy, [the antifederalists] have endeavoured to [mischaracterize] the intended President of the United States; not merely as the embryo but as the full grown progeny of that detested parent.”). For further similar commentary, *see also*, for example, Aristides, *supra* note 87, at 229; Americanus, *supra* note 73, at 200; A Freeholder, VA. INDEP. CHRON., Apr. 9, 1788, *reprinted in* 9 DHRC, *supra* note 46, at 719 (1990); Publicola, *supra* note 68, at 493.

¹⁵⁰ 3 ELLIOT'S DEBATES, *supra* note 90, at 113 (James Iredell); *see also, e.g.*, 1 FARRAND'S RECORDS, *supra* note 51, at 86, 87 (John Dickenson) (noting that he considered “limited Monarchy . . . as *one* of the best Governments in the world,” but conceding that “limited monarchy was out of the question. The spirit of the times—the state of our affairs, forbade the experiment”); Charles Pinckney, Opening Speech in the South Carolina Ratification Debates (May 14, 1788), *reprinted in* 27 DHRC, *supra* note 46, at 324, 333 (2016) (“The citizens of the United States would reprobate, with indignation, the idea of a monarchy.”). Alexander Hamilton's “despair that a Republican Govt. Could be established” in the United States didn't prevent his “sensib[ility] at the same time that it would be unwise to propose one of any other form.” 1 FARRAND'S RECORDS, *supra* note 51, at 288 (Alexander Hamilton); *see also id.* at 288-89 (emphasizing his “private” admiration of the “British Govt”).

¹⁵¹ 1 FARRAND'S RECORDS, *supra* note 51, at 71 (James Wilson).

¹⁵² *Id.* at 96; *see also id.* (“[Wilson] observed that [Randolph's] objections [to a one-person presidency] were levelled not so much agst. the measure itself, as agst. its unpopularity.”).

¹⁵³ 1 FARRAND'S RECORDS, *supra* note 51, at 88 (Edmund Randolph) (emphasis added) (unsuccessfully urging an executive by committee); *see also id.* at 72 (“I Situation of this Country peculiar—II—Taught the people an aversion to Monarchy III All their constitutions opposed to it—IV—Fixed character of the people opposed to it . . .”). For others in this vein, *see, e.g.*, 1

monarchy . . . that detested parent,”¹⁵⁴ this descriptive point was understood across the ideological spectrum.

That brings us to a second point of broad agreement: at least in part because of the power of such antimonarchical politics, everyone understood that any politically viable proposal would have to subject the executive branch to the law of the land. As Blackstone’s enormously influential treatise taught, “one of the principal bulwarks of civil liberty” in Britain was “the limitation of the king’s prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them”¹⁵⁵ Americans liked to imagine that this principle was embedded deep in English history, as in the sketch offered here by “A Farmer”:

Henry Bracton a cotemporary [sic] lawyer and judge, who has left us a compleat and able treatise on the laws of England, is thus clear and express—*Omnes quidem sub rege, ipse autem sub lege*, all are subject to the King, but the King is subject to the law—It will hardly then be imagined, that the supreme law and constitution were the grants and concessions of a Prince, who was thus in theory and practice, subject himself to ordinary acts of legislation.¹⁵⁶

While this point had been forcefully contested by the Stuarts and their intellectual minions, the long aftermath of the Glorious Revolution conclusively resolved the debate in favor of Parliament.¹⁵⁷ So as a political matter, Federalists simply had to reiterate that the Constitution they were

FARRAND’S RECORDS, *supra* note 51, at 432 (Elbridge Gerry) (“[T]he American people have the greatest aversion to monarchy, and the nearer our government approaches to it, the less Chance we have for their approbation.”); *id.* at 101-02 (George Mason) (“He hoped that nothing like a monarchy would ever be attempted in this Country. A hatred to its oppressions had carried the people through the late Revolution.”); BALT. MD. GAZETTE, July 3, 1787, *reprinted in* 13 DHRC, *supra* note 46, at 89, 89 (1988) (criticizing John Adams for supporting “monarchy, or what is the same, ‘a first Magistrate possessed exclusively of the Executive power.’”).

¹⁵⁴ THE FEDERALIST NO. 66 (Alexander Hamilton), *reprinted in* 16 DHRC, *supra* note 46, at 370, 370 (1986).

¹⁵⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *230. A recent and excellent Note sheds important light on the substantial influence that legal writers other than Blackstone exerted on legal education. But its title is best read as an overstatement of the author’s thesis, which is impressively demonstrated. See Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1359 (2018) (arguing that Coke, Hale, and Rolle may have been more significant than Blackstone in the instruction of eighteenth-century law students).

¹⁵⁶ A Farmer, *supra* note 146, at 311 (footnote omitted) (criticizing the draft constitution’s failure to include a bill of rights).

¹⁵⁷ Mortenson, *supra* note 5, at 1210-15, 1223.

selling would put “every department and officer of the federal government . . . subject to the regulation and controul of the laws . . .”¹⁵⁸

But wasn’t subjecting the chief magistrate to “ordinary acts of legislation” incompatible with Federalists’ avowed and enthusiastic embrace of presidential vigor and independence? They didn’t think so. Just as the founders understood the difference between conceptual powers and political entities, they also understood the difference between the statutory framework and the various branches of government which created and interpreted it. The separation of powers was implicated when you forced the President to obey *Congress*, not when you forced him to obey the *laws*. The former was a political entity that existed and acted at a specific point in time. The latter was an abstract framework of rules that had been successfully enacted through a complex process that included presidential approval as a necessary step.

Alexander Hamilton could not have been clearer on the point:

It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government; and whatever may be the forms of the Constitution, unites all power in the same hands.¹⁵⁹

Pause for a moment, if you don’t mind, and read that quote again. As the era’s most vocal advocate for a strong executive magistracy saw it, the considerations bearing on the President’s *political independence* from Congress had nothing to do with the considerations bearing on what *substantive authorities* he should possess.¹⁶⁰ The two questions were wholly separate:

[H]owever inclined we might be to insist upon an unbounded complaisance in the executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the Legislature. The latter may sometimes stand in opposition to the former; and at other times the

¹⁵⁸ A Citizen of New Haven, *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, reprinted in 15 DHRC, *supra* note 46, at 280, 283 (1984); see also *id.* (“[T]herefore the people will have all possible security against oppression.”).

¹⁵⁹ THE FEDERALIST NO. 71 (Alexander Hamilton), reprinted in 16 DHRC, *supra* note 46, at 411, 413 (1986); see also *id.* (emphasizing the “tendency of the legislative authority to absorb every other” (emphasis added)). This was no aside. The excerpt above is perhaps the most important two sentences in perhaps Publius’s most important defense of presidential independence. FEDERALIST NO. 71 was the first in a pair of essays defending two core elements of the Convention’s package deal on presidential independence: the duration of the office and the president’s eligibility for re-election. It was thus a key task to explain why these bulwarks of independence were not at odds with the universally accepted principle that the chief magistrate should be subject to law.

¹⁶⁰ Prudence might have counseled more care about assuming a sharply binary distinction; it’s not hard to imagine how the form of law could be used to effectuate direct control by a political entity. But I have seen no evidence in the Founding debates that this proposition would have been adjusted in response to more careful thought about the ambiguity of that line.

people may be entirely neutral. In either supposition, it is certainly desirable that the executive should be in a situation to dare to act his own opinion with vigor and decision.¹⁶¹

It would be a perfectly natural response here to respond with limit-testing hypotheticals. But don't let that reaction obscure the political centrality of Hamilton's distinction. Even as they forcefully defended the wisdom of an independent and vigorous executive magistrate, Federalists not only didn't, but couldn't, question Bractonian piety. The president was subject to the laws.

There was no question, however, of the President being weak. To the contrary: Federalists leaned hard into their pitch of an Article II president who would be *independent* in the exercise of his constitutional and statutory authorities.¹⁶² The Philadelphia deliberations had certainly created a series of safeguards to precisely that end. By combining selection by the Electoral College with an extended duration in office, the Constitution reduced the likelihood that the President would be a catspaw for legislative factions. By giving him the first move in the appointments process and a presumptively decisive veto power, the Constitution gave the President tools to defend that independence once in office. By permitting impeachment, the Constitution created a limited route for real-time supervision; by requiring a supermajority for conviction, the Constitution reduced the likelihood that impeachment would become a tool of ordinary politics.

For the Federalists, this hydraulic calibration was a triumphant solution to the age-old dilemma of executive authority. And so throughout ratification they trumpeted the Constitution's success in giving the President both "that degree of vigour which will enable the president to execute the laws with *energy and dispatch*," and also "that firm or independent situation which can

¹⁶¹ THE FEDERALIST NO. 71, *supra* note 159, at 413 (Alexander Hamilton).

¹⁶² This point has been made at least since Charles Thach's seminal CREATION OF THE PRESIDENCY. See CHARLES THACH, CREATION OF THE PRESIDENCY 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY (1923). The latest entry in this literature is Eric Nelson's ROYALIST REVOLUTION, which urges the non-parliamentary nature of the government scheme that emerged. See ERIC NELSON, ROYALIST REVOLUTION: MONARCHY AND THE AMERICA FOUNDING (2014). Recall that in the Westminster system, literally anything Parliament enacted was law, including fundamental changes to the constitution. Nelson's immensely learned book rightly argues that *some* of the king's prerogatives were reintroduced by the American constitution. And certainly the revolutionaries' deployment of the "evil counsellors" trope—so familiar to political debate in any monarchical system—conveyed a perhaps-sometimes-even-sincere regard for the British monarchy. *E.g.* 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 391 (Nov. 29, 1775) ("The manner in which the last dutiful petition to his Majesty was received . . . are considered by Congress as further proofs of those malignant councils, that surround the sovereign . . ."). But Nelson's imprecision about legal terminology—and in particular about the constitutional significance of prerogative as a well-defined suite of authorities—leads him to misread evidence of support for executive independence as an embrace of royalism in a politically or legally significant sense.

alone secure the safety of the people, or the just administration of the laws.”¹⁶³ Did this raise its own risks to liberty? You betcha. This was no milquetoast president, and everyone knew it. In the ever-so-delicate words of one French emissary’s report home, it would “perhaps be interesting to examine, if . . . it is prudent . . . to elect an Officer as powerful as the President of the united States will be?”¹⁶⁴ As Federalists enjoyed reminding their opponents, though, “[i]t is a well established principle in rhetorick, that it is not fair to argue against a thing, from the abuse of it.”¹⁶⁵

As the founding era has receded further into memory, the more difficult problem for historians has been to identify the *substantive* scope of presidential power. At least where the constitutional authorities of the office are concerned, the enumeration principle simplifies that question quite a bit. If “[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined,”¹⁶⁶ then it’s hard to get around the fact that Article II doesn’t include many grants of presidential authority. And that brings us back to the Executive Power Clause. Does that mousehole hide an elephant?¹⁶⁷ Did someone slip “the unallocated parts of Royal Prerogative”¹⁶⁸ into the first sentence of Article II? Or does the clause convey only the functional authority to execute law? On either reading, the Executive Power Clause was the *raison d’être* of Article II. Let’s try to figure out which one is right.

III. “THE EXECUTIVE POWER” MEANT THE POWER TO EXECUTE THE LAWS

Americans on all sides of the debates constantly invoked a standard lesson of eighteenth-century political theory: it’s not enough for government to

¹⁶³ Charles Pinckney, Opening Convention Speech of the South Carolina Ratification Debates (May 14, 1788), in 27 DHRC, *supra* note 46, at 324, 329, 333 (2016). For a pair of more canonical examples, see 2 FARRAND’S RECORDS, *supra* note 51, at 56 (James Madison) (“If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised . . . It is essential then . . . [to] give [the President] a free agency with regard to the Legislature.”); JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA xii-xiii (1787) (“[T]he people’s rights and liberties, and the democratical mixture in a constitution, can never be preserved without a strong executive, or, in other words, without separating the executive power from the legislative.”).

¹⁶⁴ Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), in 13 DHRC, *supra* note 46, at 422, 425 (1981) (editors’ translation).

¹⁶⁵ A Native of Virginia, *supra* note 68, at 664; *see also id.* (“Would you say there should be no Physicians because there are unskillful administers of medicine: No Lawyers because some are dishonest: No Courts because Judges are sometimes ignorant; nor government because power may be abused? In short, it is impossible to guard entirely against the abuse of power.”).

¹⁶⁶ THE FEDERALIST NO. 45, *supra* note 104, at 479 (James Madison).

¹⁶⁷ *Cf.* Statement of Sir Edward Coke, 4 Parl. Hist. Eng. (1628) col. 357 (“This is magnum in parvo . . . It is a matter of great weight, and to speak plainly, it will overthrow all our Petition.”).

¹⁶⁸ TRIMBLE, *supra* note 32.

make rules; it must also have the power to enforce them. As this Part will show, the name for that simple but crucial authority was “the executive power.” Many thought possession of the authority implied at least a presumptive power to make appointments. And everyone agreed that the executive power was an empty vessel with a simple executory function: to implement the law as generated by relevant sources of legislative authority.

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

1. Law Is Meaningless Without Execution

The founders understood the Confederation’s ineffectiveness as just the latest example of a recurring difficulty in governance design. For Edmund Randolph, the point was practical: “No government can be stable, which hangs on human inclination alone, unbiassed by the fear of coercion.”¹⁶⁹ For Publius, it was intrinsic to law as such: “It is essential to the idea of a law, that it be attended with a sanction; or, in Other words, a penalty or punishment for disobedience.”¹⁷⁰ Either way, the implications were straightforward: “positive regulations ought to be carried into execution” and “negative restrictions ought not to [be] disregarded or violated.”¹⁷¹

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

¹⁶⁹ Edmund Randolph, Letter of his Excellency Edmund Randolph on the Federal Constitution (Oct. 10, 1787), in 15 DHRC, *supra* note 46, at 117, 124 (1984); *id.* (deriding the Confederation’s “wretched impotency . . . sentenced to witness in unavailing anguish”); *see also, e.g.*, 4 ELLIOT’S DEBATES, *supra* note 90, at 182 (statement of Archibald Maclaine) (“[T]he powers given by this Constitution must be executed. What, shall we ratify a government and then say it shall not operate? This would be the same as not to ratify.”); *id.* at 139 (statement of Richard Spaight) (“When any government is established, it ought to have power to enforce its laws, or else it might as well have no power. What but that is the use of a judiciary? . . . [N]o government can exist without a judiciary to enforce its laws, by distinguishing the disobedient from the rest of the people, and imposing sanctions for securing the execution of the laws.”); *id.* at 153 (statement of Samuel Spencer) (“I am ready to acknowledge that the Congress ought to have the power of executing its laws.”).

¹⁷⁰ THE FEDERALIST NO. 15 (Alexander Hamilton), *reprinted in* 14 DHRC, *supra* note 46, at 324, 328 (1984); *see also id.* (“Government implies the power of making laws.”).

¹⁷¹ 4 ELLIOT’S DEBATES, *supra* note 90, at 156 (William Davie). Note that in the literature on which this discussion drew, the founders distinguished between two theoretically distinct powers of execution. First, the enforcement of negative prohibitions like a ban on piracy. *See, e.g.* Marcus, IV, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, *reprinted in* 16 DHRC, *supra* note 46, at 379, 381 (1986) (“[I]f they could not enforce such acts by the enacting of penalties, those powers would be altogether useless, since a legislative regulation without some sanction would be an absurd thing indeed.”). Second, the implementation of affirmative projects like the construction of postal roads. Letter from the Reverend James Madison to James Madison, *supra* note 101, at 31 (“[A] Govt. so wisely conceived in it’s general Plan . . . must possess Vigour & Energy sufft. to execute the Measures adopted under it.”). *See generally* Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 52-54 (2014).

of its political regulations.”¹⁷² Without the power to enforce, the power to legislate was “nonsensical”;¹⁷³ “idle and nugatory”;¹⁷⁴ “useless”;¹⁷⁵ “ridiculous”;¹⁷⁶ an “inconceivable absurdity”;¹⁷⁷ a “political farce” or “solecism”;¹⁷⁸ “strange indeed;”¹⁷⁹ even “a *felo de se*.”¹⁸⁰ Some founders went so far as to argue that “[l]aws of any kind which fail of execution, are *worse* than none, because they weaken the government, expose it to contempt, destroy the confidence of all men”¹⁸¹

As throughout the literature on which the founders relied, this point was often made through extended metaphors involving bodies or machines.

¹⁷² Samuel Huntington, Speech in the Connecticut Convention (Jan. 9, 1788), *reprinted in* 15 DHRC, *supra* note 46, at 312, 313 (1984).

¹⁷³ Letter from Nathaniel Peaslee Sargeant to Joseph Badger, *supra* note 85, at 567; *see also id.* at 564, 567 (“Can there be such a thing as Government without Power? What is advice, recommendation, or requisition? It is not Government When Laws are made they are nonsensical unless they can be carried into execution; therefore it is necessary somebody should have a Power of determining when they are broken, and to decree ye forfeiture in consequence of such breach.”).

¹⁷⁴ Cato, POUGHKEEPSIE COUNTRY J., Dec. 19, 1787, *reprinted in* 19 DHRC, *supra* note 46, at 438, 440 (Dec. 19 1787); *see also id.* at 439-40 (“If a union is necessary, a government is also necessary for that union; for to make general laws without having power of executing them, would be idle and nugatory [T]he powers necessary to be given to a confederated government, for the purposes of executing the general laws of the union”).

¹⁷⁵ 4 ELLIOT’S DEBATES, *supra* note 90, at 144, 145 (statement of James Iredell); *see also id.* at 145-46 (“[L]aws are useless unless they are executed. At present, Congress have powers which they cannot execute. After making laws which affect the dearest interest of the people, in the constitutional mode, they have no way of enforcing them.”).

¹⁷⁶ A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, *reprinted in* 3 DHRC, *supra* note 46, at 146, 149 (1978); *see also id.* (“It will be readily agreed that it would be highly ridiculous to send representatives . . . to make laws for us, if we did not give power to some person or persons to see them duly executed. The wisdom and prudence is to be shown in the framing laws; the complete execution of them ought to follow of course.” (emphasis omitted)).

¹⁷⁷ Letter from New York, *supra* note 108, at 389 (discussing Calling Forth clause); *see also id.* (“[I]f Congress is invested with power to make laws, the power of executing laws in the most ample and effectual manner ought to be lodged there also. Without this, there would have been an inconceivable absurdity in the Constitution.”).

¹⁷⁸ Edmund Randolph, Speech in the Virginia Ratification Debates (June 4, 1788), *in* 9 DHRC, *supra* note 46, at 915, 934 (1978); *see also id.* (arguing that the Confederation was “a system, that provided no means of enforcing the powers which were nominally given it. Was it not a political farce, to pretend to vest powers, without accompanying them with the means of putting them in execution?”).

¹⁷⁹ Charles Carroll, Draft Speech for Maryland Convention (Jan.–Mar. 1788), *in* 12 DHRC, *supra* note 46, at 832, 839 (2015); *see also id.* (“To have given to Congress an authority & power to make laws, & withheld the means of enforcing them would have been a proceeding strange indeed in men so well acquainted with the defects of the existing system and leave us nothing but the shadow, the mockery of an unreal government”).

¹⁸⁰ 4 ELLIOT’S DEBATES, *supra* note 90, at 158 (statement of William Davie).

¹⁸¹ A Citizen of Philadelphia, *supra* note 107, at 304 (emphasis partly omitted); *see also id.* (“[I]n fine, our union can never be supported without definite and effectual laws which are co-extensive with their occasions, and which are supported by authorities and laws which can give them execution with energy”).

Enforcement authority provided the “ligaments of Government,”¹⁸² the “limbs, or parts” of the institutions they served,¹⁸³ and “[t]he nerves of the whole body politic.”¹⁸⁴ Government is therefore “a nerveless mass, a dead carcase, without the executive power.”¹⁸⁵ Its “powers . . . are mere sound”;¹⁸⁶ its “machine[ry]” can “no more move, than a ship without wind, or a clock without weights.”¹⁸⁷ “[E]mpower[ing] one body of men to enact statutes; and another to forbid their being carried into execution,” Republicus wrote, “resembles a man putting forth his right hand to do some important business and then stretching forth his left hand to prevent it”¹⁸⁸

Their obsessive worry manifested in almost ritualistic reference to “good laws faithfully executed.”¹⁸⁹ Indeed, that phrase became literal ritual when it

¹⁸² Statement of Edmund Pendleton, Virginia Ratification Debates (June 12, 1788), *reprinted in* 10 DHRC, *supra* note 46, at 1184, 1193 (1993) (citing Montesquieu, Locke, Sidney, and Harrington on the balance between excessive severity and excessive lenience in execution).

¹⁸³ Federal Farmer, An Additional Number of Letters to the Republican, Letter XV (May 2, 1788), *in* 20 DHRC, *supra* note 46, at 976, 1043 (2004) (“[E]xecutive officers [such] as clerks, sheriffs, &c . . . are all properly limbs, or parts, of the judicial courts . . .”).

¹⁸⁴ Speech of Simeon Baldwin, *supra* note 68, at 237; *see also id.* (“The nerves of the whole body politic should concenter in the supreme executive; and the great council of the nation, under due restrictions, ought to command the purse and the sword; or in vain will they wield the sceptre of government. To what purpose should a legislative enact laws if nobody is obliged to obey them?”).

¹⁸⁵ 4 ELLIOT’S DEBATES, *supra* note 90, at 58 (William Davie); *see id.* (“Let your representatives be the most vicious demons that ever existed; let them plot against the liberties of America; let them conspire against its happiness,—all their machinations will not avail if not put in execution. By whom are their laws and projects to be executed? By the President.”). *Compare* THE FEDERALIST NO. 38, *supra* note 102, at 358 (James Madison) (declaring that government is “a lifeless mass” without “the means of carrying [its powers] into practice”), *with id.* (“[T]he Confederation is chargeable with the still greater folly of declaring certain powers in the fœderal government to be absolutely necessary, and at the time rendering them absolutely nugatory . . .”).

¹⁸⁶ Statement of James Wilson, Pennsylvania Ratification Debates (Dec. 11, 1787), *in* 2 DHRC, *supra* note 46, at 571, 581 (1976); *see also id.* (“Can we perform a single national act?”).

¹⁸⁷ Oliver Ellsworth, Speech in the Connecticut Convention (Jan. 4, 1788), *in* 15 DHRC, *supra* note 46 at 243, 246 (1984); *see id.* (“Mr. President, have we not seen and felt the necessity of such a coercive power?”); *cf.* Speech of William Pierce (July 4, 1788), *in* 18 DHRC, *supra* note 46, at 249, 253 (1995) (“[T]he old Constitution . . . being placed, as it were, out of the perpendicular, it is like the hanging tower of Pisa; it is kept up and supported only by props, that must one day or other fall.”).

¹⁸⁸ Republicus, KY. GAZETTE, Feb. 16, 1788, *reprinted in* 8 DHRC, *supra* note 46, at 375, 380 (1988); *see id.* (criticizing bicameral structure of legislative process rather than the executive power per se).

¹⁸⁹ PHILA. INDEP. GAZETTEER, June 5, 1787, *reprinted in* 13 DHRC, *supra* note 46, at 126, 126 (1981). American antecedents stretched back at least to the Rhode Island Compact of 1636. R.I. COMPACT (1636), *in* 6 THE FEDERAL AND STATE CONSTITUTIONS 3207-08 (1909) (“It is in the Powre of the Body of Freemen orderly assembled, or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man.”); *see also, e.g.*, Statement of Edmund Randolph, Virginia Ratification Debates (June 6, 1788), *reprinted in* 9 DHRC, *supra* note 46, at 970, 987-88 (1990) (“No extent on earth seems to me too great, provided the laws be wisely made and executed.”); *id.* (“[L]aws . . . made with integrity, and executed with wisdom . . .”); Statement of Edmund Pendleton, Virginia Ratification Debates (June 20, 1788), *reprinted in* 10 DHRC, *supra* note 46, at 1412, 1427 (1993) (“To give execution to proper laws, in a proper manner, is the[] peculiar

came time to toast ratification. Whether accompanied by muskets or cannon, by folded hands or a raised tumbler, the formulation was strikingly consistent: “wise Federal Laws, and may they be well executed” in Maryland¹⁹⁰ and Pennsylvania;¹⁹¹ “[w]isdom to frame laws and spirit to execute them” in South Carolina;¹⁹² and “grace, wisdom and understanding to make and execute such laws . . . to secure . . . the blessings of liberty” in Virginia.¹⁹³ Meaningful execution was the central promise of ratification, and they knew it.

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

Once you know the job that needs doing, the next step is to give it to someone.¹⁹⁴ “Suppose that the three powers, were to be vested in three persons by compact among themselves,” Gouverneur Morris mused, such that “one was to have the power of making—another of executing, and a third of judging, the laws.”¹⁹⁵ His analogy wasn’t subtle. The defining role of the legislature was promulgating law. The defining role of the judiciary was adjudicating law. And the defining role of the President was executing law.

In this framework, it was the Article II presidency that made the new government “complete.” To be sure, a number of other provisions also spoke

province” of the judiciary); Letter from William Vassall to John Lowell (Feb. 26, 1788), *reprinted in* 7 DHRC, *supra* note 46, at 1709, 1709 (2001) (“[W]ithout an Efficient Government no State or Society of Men will be just or happy. By an Efficient government . . . that will make wise & Equitable Laws, And as Horace expresses it, Justos et tenaces propositi Vires be Armed with full compulsive power to Execute said Laws . . .”).

¹⁹⁰ BALT. MD. J., July 11, 1788, *reprinted in* 12 DHRC, *supra* note 46, at 751, 751 (2015); *see also* MD. J., July 1, 1788, *reprinted in* 10 DHRC, *supra* note 46, at 1718, 1719 (1993) (toast to “Wise Federal Laws, and well executed”).

¹⁹¹ *Extract of a letter from Head of Elk*, PA. MERCURY, July 15, 1788, *reprinted in* 12 DHRC, *supra* note 46, at 752, 752 (2015).

¹⁹² CHARLESTON CITY GAZETTE, May 7, 1788, *reprinted in* 27 DHRC, *supra* note 46, at 276, 276 (2016).

¹⁹³ *E.g.*, *The New Litany*, VA. HERALD, Feb. 21, 1788, *reprinted in* 8 DHRC, *supra* note 46, at 399, 400 (1988).

¹⁹⁴ Separation of powers theory advised at least two design principles for any distribution of the powers of government. First, the various entities needed to be meaningfully independent. *E.g.* Statement of Edmund Pendleton, Virginia Ratification Debates (June 5, 1788), *reprinted in* 9 DHRC, *supra* note 46, at 943, 947 (1990) (“Would any Gentleman in this Committee agree,” one Federalist asked in Virginia, “to vest these three powers in one body, Congress? No.—Hence the necessity of a new organization and distribution of those powers.”). Second, each individual entity needed to be structured so that it could most effectively implement its defining power. *E.g.* Speech of Simeon Baldwin, *supra* note 68, at 236 (“It is necessary in a good government, that the *legislature* should be so formed as not to enact laws without due deliberation—that the *judicial* be competent to the administration of justice, and that the *executive* have energy to carry their decisions into execution.”).

¹⁹⁵ 2 FARRAND’S RECORDS, *supra* note 51, at 78-79 (Gouverneur Morris) (responding to criticism of including the judiciary in proposed council of revision). Cato’s use of Vesting Clause terms was similarly unmistakable. Cato, *supra* note 60, at 277 (without certainty in “political compacts . . . you might as well deposit the important powers of legislation and execution in one or a few and permit them to govern according to their disposition and will”).

to the execution problem. But it was fundamentally “the *president*, . . . so much concerned in the execution of the laws,”¹⁹⁶ who transformed the Confederation into a more perfect union. This point was common ground among the competing proposals in Philadelphia: both the New Jersey plan and its Virginia competitor listed “authority to execute” or “power to carry into execution” as the chief magistrate’s first substantive authority.¹⁹⁷ Indeed, the first draft of each plan gave these provisions an almost-goes-without-saying flavor, listing presidential powers “*besides* a general authority to execute the National laws”¹⁹⁸ and “*besides* [a] general authority to execute the federal acts,”¹⁹⁹ respectively.

What emerged from the ensuing negotiations was the President as “the superior officer, who is to see the laws put in execution”:²⁰⁰

[A] properly constituted and independent executive,—a vindex injuriarum—
an avenger of public wrongs; who with the assistance of a third estate, may
enforce the rigor of equal law on those who are otherwise above the fear of
punishment²⁰¹

This was an indispensable charge. As James Iredell put it, the “office of superintending the execution of the laws of the Union” was “of the utmost importance. It is of the greatest consequence to the happiness of the people of America, that the person to whom this great trust is delegated should be worthy of it.”²⁰²

B. *The Constitutional Term for this Power to Execute Laws Was “The Executive Power”*

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

¹⁹⁶ Fabius, *IV*, PA. MERCURY, Apr. 19, 1788, reprinted in 17 DHRC, *supra* note 46, at 180, 181 (1995); see also *id.* (surveying the defining features of each branch).

¹⁹⁷ 1 FARRAND’S RECORDS, *supra* note 51, at 21 (Virginia Plan); *id.* at 244 (New Jersey Plan) (first listing “authority to execute the federal acts”); *cf. id.* at 230 (Amended Virginia Plan) (“power to carry into execution the National Laws”); 2 FARRAND’S RECORDS, *supra* note 51, at 116 (Re-Amended Virginia Plan) (“power to carry into execution the National Laws”).

¹⁹⁸ 1 FARRAND’S RECORDS, *supra* note 51, at 21 (Virginia Plan) (emphasis added).

¹⁹⁹ *Id.* at 244 (New Jersey Plan) (emphasis added).

²⁰⁰ 4 ELLIOT’S DEBATES, *supra* note 90, at 47 (Archibald Maclaine).

²⁰¹ A Farmer, *II*, BALT. MD. GAZETTE, Feb. 29, 1788, reprinted in 11 DHRC, *supra* note 46, at 325, 330 (2015) (emphasis omitted).

²⁰² 4 ELLIOT’S DEBATES, *supra* note 90, at 106 (James Iredell).

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

It really is that simple. The founders variously shorthanded the power therein granted as the “authority [or responsibility] to execute laws”;²⁰³ as “the whole executive government”;²⁰⁴ or as “the whole [or sole] executive authority.”²⁰⁵ But most often they just called it “executive power.”²⁰⁶ Sometimes it seemed like the only thing on which that squabbling generation could agree.

1. The Root and Cognates of the Term

Let’s start with the root of the word. The word “execute” meant to perform; to complete; to carry out; to implement; to bring into being; or simply to do.²⁰⁷ When you executed something, you took some intention that as yet existed only as a plan, and you brought it into reality. Execution thus meant success in creating something new, often with a flavor of subordination

²⁰³ A Countryman, *BALT. MD. GAZETTE*, Dec. 18, 1787, *reprinted in* 11 *DHRC*, *supra* note 46, at 115, 115 (2015); *see also id.* (“Are not the Governors of the different States equally absolute all along? Each of them have had the command of the fleet, the army and militia, and authority to execute laws?”); A NATIVE OF BOSTON: THOUGHTS UPON THE POLITICAL SITUATION OF THE UNITED STATES (1787), *reprinted in* 7 *DHRC*, *supra* note 46, at 1763, 1767 (2001) (advocating a single magistrate with a veto, the appointment power, and “responsib[ility] in the dernier resort for the execution” of law (emphasis omitted)).

²⁰⁴ A Countryman, *V*, *NEW HAVEN GAZETTE*, Dec. 20, 1787, *reprinted in* 15 *DHRC*, *supra* note 46, at 54, 55 (1984) (listing “the whole executive government” as a separate prerogative from the king’s military, veto, prorogation, and financial powers).

²⁰⁵ *Id.* (describing “the whole executive authority” as an alternative formulation); The Impartial Examiner, *IV*, *VA. INDEP. CHRON.*, June 11, 1788, *reprinted in* 10 *DHRC*, *supra* note 46, at 1609, 1610 (1993) (contrasting “the sole executive authority” with the separate prerogative of veto) (emphasis omitted); *see also* 4 *ELLIOT’S DEBATES*, *supra* note 90, at 109 (James Iredell) (“In [Great Britain], the executive authority is vested in a magistrate who holds it by birthright. He has great powers and prerogatives . . .”).

²⁰⁶ *See, e.g.*, *Americanus*, *IV*, *N.Y. DAILY ADVERTISER*, Dec. 5-6, 1787, *reprinted in* 19 *DHRC*, *supra* note 46, at 354, 358 (2003) (contrasting the constitution’s placement of “the Executive power in the hands of a single person” with the King’s suite of “dangerous prerogatives”); The Impartial Examiner, *supra* note 205, at 1609 (contrasting “the supreme executive power” as an alternative formulation); Pierce Butler to Weeden Butler (May 5, 1788), *in* 27 *DHRC*, *supra* note 46, at 268, 269 n.6 (2016) (paralleling *Caroliniensis*; implications unclear for question of authorship vs. influence); *cf.* Marcus, *II*, *NORFOLK & PORTSMOUTH J.*, Feb. 27, 1788, *reprinted in* 16 *DHRC*, *supra* note 46, at 242, 244-45 (1986) (describing the Crown “who has the whole Executive authority” and need not “consult [j]either house as to any exercise of its Executive power,” in a discussion of “the actual present practice of Great-Britain”—where, of course, *other* elements of the royal prerogative *were* regularly subject to legislative review and control); *THE FEDERALIST* NO. 47 (James Madison), *reprinted in* 15 *DHRC*, *supra* note 46, at 498, 500 (1984) (explaining that the English constitution mixes powers because the King—who possesses “the whole executive power”—is thus “the executive magistrate” *and yet also possesses* “the prerogative of making treaties,” the veto, and the power of judicial appointments).

²⁰⁷ *E.g.* SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 732 (6th ed. 1785) (offering a typical range of definitions for “execute”).

to instructions from somewhere else.²⁰⁸ It was also a pretty ordinary word, appearing regularly in circumstances where we would likely use a lower-register formulation today.

The sheer range of objects taken by “execute” in eighteenth-century discourse is striking. But easily its most common²⁰⁹ grammatical object was the enforcement, implementation, and carrying out of “law.” If, as Publius declaimed, “[l]aw is defined to be a rule of action,”²¹⁰ then enforcing that rule was obviously its “execution.” (Just to make extra sure, the busybodies of the Political Club of Danville agreed that it would be best to amend the Constitution by “striking out the word ‘execute’” each time it appeared and replacing it with “enforce obedience to.”²¹¹) This formulation was in constant use, whether the founders were chattering in informal contexts or declaiming in formal ones. They spoke of “executing” the law of the national government, the law of the individual states, the law of particular localities, the law of nations, and the law of political society in the abstract. Their state constitutions are covered in references to the “execution” of law, and often more than that—a constant collocation that both reflected and reinforced the standard tripartite structure for the elements of complete government.²¹²

From here the key point for the Executive Power Clause followed naturally. As shown in previous work, scores of eighteen-century dictionaries offer the following uncontradicted definition of the adjective “executive”:

“having the quality of executing or performing.”²¹³

The sheer unanimity is overwhelming. Consider how easy it would be to specify a metonymic definition of “executive” that could support a substantive residuum, even if only as a secondary meaning. All it would take is adding some variation on “relating to an executive,” “relating to the executive branch

²⁰⁸ E.g., Rough Carver, NY DAILY ADVERTISER, Sept. 4, 1787, reprinted in 19 DHRC, *supra* note 46, at 36, 37 (2003) (“[I]f a great villain orders one, or more, smaller ones, to cut our throats, they are all guilty, as well those who execute, as he who directs”); Letter from Zephaniah Swift to Paul Fearing (Apr. 10, 1788), in 3 DHRC, *supra* note 46, at 599, 600 (1978) (“Their story was that a combination was forming in the western part of the state to dismiss Dyer from the Superior Court and that this depended on me as an instrument to execute the plan.”).

²⁰⁹ At least as reflected in the Documentary History, the Journals of the Continental and Confederation Congress, and the Correspondence of Delegates to the Continental and Confederation Congress.

²¹⁰ THE FEDERALIST NO. 62 (James Madison), reprinted in 16 DHRC, *supra* note 46, at 232, 236 (1986) (criticizing mutability in government policy).

²¹¹ The Political Club of Danville, Kentucky, Debates over the Constitution, (Feb. 23–May 17, 1788), in 8 DHRC, *supra* note 46, at 408, 413 (1988). We can apparently thank Mr. Innes for the initial motion, and Mr. McDowell for its second.

²¹² See *infra* Section III.B.3. (discussing the concept of a “complete” and “perfect” government).

²¹³ JOHNSON, *supra* note 207, at 732; see also generally Mortenson, *supra* note 5 (surveying all Founding era dictionaries that could be identified and located after a comprehensive search).

of government,” or “relating to an executive magistrate.” Indeed, precisely that “relating to” formulation was used regularly—in definitions of *other* words.²¹⁴ But in dictionary definitions of “executive,” it didn’t appear once.

An “executive officer” was thus the one responsible for “execution of the laws,”²¹⁵ for “carry[ing] . . . decrees into execution,”²¹⁶ or simply for “compulsion.”²¹⁷ The “executive part” of government was that which is “requisite for carrying those decrees into execution.”²¹⁸ “Executive business” was implemented by “executive officers” who “have it in charge, faithfully to . . . execute the laws”²¹⁹ and whose reason for being was simply by

²¹⁴ For just a few examples of this standard “relating to [noun]” formula, *see, e.g.* JOHNSON, *supra* note 207, at 74, 124, 710 (defining “Abdominal” as “relating to the abdomen,” “Airy” as “Relating to the air,” and “Epistolary” as “Relating to letters”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 666, 176 (1828) (defining “subjective” as “[r]elating to the subject” and “hominative” as “[p]ertaining to the name which precedes a verb”).

²¹⁵ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 16 (1787); *see also id.* (“One half the evils in a state arise from a lax execution of the laws; and it is impossible that an executive officer can act with vigor and impartiality, when his office depends on the popular voice.”)

²¹⁶ 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 269 (May 7, 1787) (describing a proposal for the organization of the Illinois territory, resolving “that the said Commissioner with the advice and Consent of the major part of the said Magistrates of the district shall appoint executive officers therein respectively to carry their decrees into execution. . . .”); *see also* 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 156 (Mar. 14, 1785) (describing a proposal for the organization of the Kaskaskie territory, resolving “[t]hat the Commissioner, with the advice and consent of the above magistrates, appoint executive Officers in the respective districts to carry their decrees into execution.”).

²¹⁷ Statement of Robert Livingston, Convention Debates (June 26, 1788), in 22 DHRC, *supra* note 46, at 1921, 1941 (2008) (arguing that a proposal for indirect taxation requires “compulsion” in the case the states refuse, which in turn “supposes that a compleat establishment of executive officers must be constantly maintained . . .”).

²¹⁸ Letter from Nathaniel Peaslee Sargeant to Joseph Badger, *supra* note 85, at 567. Sargeant expounded on the point at some length.

This shows ye necessity of ye Judicial Power—and an executive with ye necessary officers are requisite for carrying those decrees into execution—and without all this ye whole parade of making laws wou’d be idle. That these parts, ye Judicial and executive, shou’d be appointed by congress is necessary in order that ye proceedings may be uniform and to prevent one state from conniving at or disregarding ye laws made for ye benefit of ye whole. If they are to raise money they must have officers to collect it.

Id. 567-68.

²¹⁹ Federal Farmer, *supra* note 183, at 1043. Federal Farmer went on to note that

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

Id.; *see also* RAKOVE, *supra* note 44, at 200 (quoting Robert Morris urging Congress to “pay good executive men to do [its] business . . . , because no man living can attend the daily deliberations of Congress and do executive parts of business at the same time.”).

definition “to carry into the effect the laws of the nation.”²²⁰ And referring to a government entity as the “Execut[ive] . . . power[.]” meant that it was “the Executor . . . of laws.”²²¹

Enter metonymy. Because when the founders used the *noun* form of “executive,” they meant an entity that had the power of execution.²²² No one put it better than Publius: “A feeble executive implies a feeble execution of the government. A feeble executive is but another phrase for a bad execution: And a government ill executed, whatever it may be in theory, must be in practice a bad government.”²²³ So the definition of an “executive” in its nominal form simply meant an “[e]xecutor of the [l]aws,”²²⁴ a “person[] for the execution of the laws,”²²⁵ an “[e]xecutor . . . of laws,”²²⁶ and an officer with “authority to enforce your laws.”²²⁷ An executive was thus necessarily “invested with power to enforce the laws of the union and give energy to the

²²⁰ A Landholder, *V* (Dec. 3, 1787), reprinted in 3 DHRC, *supra* note 46, at 480, 483 (1978); see also *id.* (“It is as necessary there should be courts of law and executive officers, to carry into effect the laws of the nation, as that there be courts and officers to execute the laws made by your state assemblies.”).

²²¹ 2 FARRAND’S RECORDS, *supra* note 51, at 34 (James Madison) (“If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws . . .”).

²²² See, e.g., U.S. CONST., art. IV, § 2 (“[O]n demand of the executive Authority of the State . . .”); ARTICLES OF CONFEDERATION of 1781, art. IV (1777) (“[U]pon demand of the Governor or executive power, of the state . . .”).

²²³ THE FEDERALIST NO. 70 (Alexander Hamilton), reprinted in 16 DHRC, *supra* note 46, at 396, 396 (1986).

²²⁴ 1 FARRAND’S RECORDS, *supra* note 51, at 110 (Pierce Butler) (“Mr. Dickinson could not agree with Gentlemen in blending the national Judicial with the Executive, because the one is the expounder, and the other the Executor of the Laws.”).

²²⁵ Aristides, *supra* note 87, at 236-37. Alexander Contee Hanson, the person behind the pseudonym Aristides, begins by discussing the basic units of government: First, the legislative function: “That the people should either make laws to bind themselves, or elect persons, without whose consent, no laws shall be made, is essential to their freedom.” *Id.* at 236 Next, the executive function: “But universal experience forbids, that they should also immediately choose persons for the execution of the laws”—people who are then described as “an executive.” *Id.*; see also *id.* at 237 (“Against choosing an executive for life the reasons are weighty indeed.”).

²²⁶ 2 FARRAND’S RECORDS, *supra* note 51, at 34 (James Madison) (“If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. . . . In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws . . .”).

²²⁷ John Kean, Comments on the Constitution (c. Apr. 8, 1788), in 27 DHRC, *supra* note 46, at 248, 248 (2016) (noting that “an energetic executive is as necessary to government & the happiness of the governed as liberty—for without authority to enforce your laws, liberty degenerates into savage licentiousness, an extreme as much to be dreaded as tyranny”).

federal government,”²²⁸ and indeed defined by its ability to “execute the laws without restraint.”²²⁹

2. “The Executive Power” Meant “The Power to Execute”

On this background, the meaning of “the executive power” was exactly what you’d expect. If Publius could ask, “[w]hat is a legislative power but a power of making laws?”²³⁰ then what indeed was the executive power but the power of executing them? As previous work has shown, the sources most prized by modern originalists reflect a literally uncontested understanding of this point.²³¹ Eighteenth-century dictionaries, legal treatises, political theory tracts, caselaw, politicians, clergymen, and pamphleteers all agreed that the phrase “executive power” meant something quite simple: “[t]he power of putting in execution.”²³²

Rousseau’s use of a simplistic bodily metaphor was typical:

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 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*.²³³

This understanding held true in dictionary definitions for generic authority without any specific context.²³⁴ It held true in definitions that specified a legal hook or governance role.²³⁵ It held true in definitions that referenced the entire phrase as a singular term of art.²³⁶ And it held true in

²²⁸ WEBSTER, *supra* note 215, at 54 (“The president of the United States is elective, and . . . [a]s the supreme executive, he is invested with power to enforce the laws of the union and give energy to the federal government.”).

²²⁹ Statement of Alexander Hamilton, New York Convention Debates (June 27, 1788), *reprinted in* 22 DHRC, *supra* note 46, at 1921, 1954 (2008) (“What is your state government? Does not your legislature command what money it pleases? Does not your executive execute the laws without restraint? These distinctions between the purse and the sword have no application to the system, but only to its separate branches.”).

²³⁰ THE FEDERALIST NO. 32 (Alexander Hamilton), *reprinted in* 15 DHRC, *supra* note 46, at 216, 220 (1984).

²³¹ Mortenson, *supra* note 5, at 1230-43.

²³² A POCKET DICTIONARY; OR, COMPLETE ENGLISH EXPOSITOR (3d ed. 1765).

²³³ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, bk. III, ch. 1, at 101 (Maurice Cranston trans., Penguin Books 1968) (1762).

²³⁴ Mortenson, *supra* note 5, at 1265-66 nn.391-417 (listing twenty-seven definitions for the adjective “executive” in non-governance contexts).

²³⁵ *Id.* at 1267-68 nn.424-34 and accompanying text (listing eleven definitions for the adjective “executive” in governance contexts).

²³⁶ *Id.* at 1269 nn.435-39 and accompanying text (providing five definitions for the full phrases “executive power” or “the executive power”).

the formulations offered by canonical writers like Blackstone,²³⁷ De Lolme,²³⁸ Filmer,²³⁹ Locke,²⁴⁰ Montesquieu,²⁴¹ and Vattel,²⁴² among many, many others.²⁴³ The evidence for this background understanding is uncontested, and it is overwhelming.

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

- “the power of . . . enforcing laws,”²⁴⁴
- “the power of executing the laws,”²⁴⁵
- “the power of carrying th[e] laws into execution”²⁴⁶

²³⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *142 (defining executive power as “the right . . . of enforcing the laws . . .”).

²³⁸ See JEAN-LOUIS DELOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 81 (1775) (“[T]he administration of Justice.”).

²³⁹ See SIR ROBERT FILMER, THE ANARCHY OF A LIMITED OR MIXED MONARCHY 4 (1648) (“[A] power of putting those laws in execution . . .”).

²⁴⁰ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 90 (1690) (“[S]ee[ing] to the execution of the laws that are made . . .”).

²⁴¹ See CHARLES DE SECONDAT MONTESQUIEU, SPIRIT OF LAWS 165 (Thomas Nugent, trans., G. Bell & Sons 1914) (1748) (describing “the execution of [the] general will” as being determined by “the legislative power”).

²⁴² See M.D. VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, 134 (1820) (“[T]he . . . province to have [the laws] put into execution.”).

²⁴³ Mortenson, *supra* note 5, at 1230-43.

²⁴⁴ Cassius, *Letter I to Richard Henry Lee, Esquire*, VA. INDEP. CHRON., Apr. 2, 1788, reprinted in 9 DHRC, *supra* note 46, at 641, 642-43 (1990) (quoting Blackstone); see also *id.* (“Are the legislative and executive powers in that government ‘separate,’ in which the King, who has the whole of the executive, occupies one entire branch of the legislative?” (emphasis omitted)). Cassius then goes on to quote “your favorite author, Blackstone”: “In all tyrannical governments the supreme magistracy, or the right of *making* and *enforcing* the laws, is vested in one and the same man . . . and whenever these two powers are united together, there can be no public liberty.’ From this it appears, that liberty is *only* endangered, when *the whole* of the power of both making and enforcing laws is vested in one man . . .” *Id.* at 643 (footnote omitted).

²⁴⁵ Statement of Edmund Randolph, Virginia Ratification Debates (June 10, 1788), in 9 DHRC, *supra* note 46, at 1092, 1097 (1990); see also *id.* at 1097-98 (“It cannot be objected to the Federal Executive, that the power is executed by one man. All the enlightened part of mankind agree that the superior dispatch, secrecy, and energy with which one man can act, renders it more politic to vest the power of executing the laws in one man, than in any number of men.”).

²⁴⁶ Pennsylvania Council of Censors (Aug. 11, 1784), in PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, 84 (1825) (“The exercise of power in the greatest articles of it, those of making laws, and carrying those laws into execution, is, by [our constitution] assigned to two great branches. The legislative power is vested in the . . . general assembly, and the executive in a president and council . . . [,] [t]he legislative [and] executive . . . powers of the people being thus . . . delegated to different bodies”)

- the “peculiar duty to see [legislative] act[s] carried into execution,”²⁴⁷
- “that of executing the public resolutions,”²⁴⁸
- “direct[ing] the execution of our laws,”²⁴⁹
- “The execution of ye. Laws,”²⁵⁰
- an “efficient power, to carry . . . article[s] into effect,”²⁵¹ and
- the “power to use . . . the powers nominally vested” in a government.²⁵²

That’s why the Federal Farmer could breeze so quickly by the Executive Power Clause: “reason, and the experience of enlightened nations, seem justly to assign the [Article I] business of making laws to numerous assemblies; and the [Article II] execution of them, principally, to the direction and care of one man.”²⁵³ That’s why a Connecticut ratification delegate could refer so blandly to the clause as a simple, unobjectionable authority: “the power, which is to

²⁴⁷ Godwin v. Lunan, Jeff. 96, 105 (Gen. Ct. Va. 1771) (defining “the executive power of the laws”).

²⁴⁸ Brutus, VA. INDEP. CHRON., May 14, 1788, reprinted in 9 DHRC, *supra* note 46, at 798, 799-800 (1990); *see also id.* (“[T]here is no liberty if the power of judging be not separated from the legislative and executive powers. . . . Miserable indeed would be the case, were the same man or the same body of men . . . to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes and differences of individuals.”).

²⁴⁹ BALT. MD. Gazette, Mar. 4, 1788, reprinted in 11 DHRC, *supra* note 46, at 363, 364 (2015); *see also id.* (denying that the Senate would share “the executive power,” since it cannot “interfere with or direct the execution of our laws”).

²⁵⁰ Letter from William Symmes, Jr. to Peter Osgood, Jr. (Nov. 15, 1787), in 14 DHRC, *supra* note 46, at 107, 114 (1983); *see id.* (“That there must be an executive power independent of ye. Legislative branch, appears to have been generally agreed by ye. fabricators of modern Constitutions. But I believe it has not till now been supposed essential that this power should be vested in a single person Laws requires as much prudence as any other department, & ye. pardoning or refusing to pardon offences is a very delicate matter.”).

²⁵¹ William Cushing, Undelivered Speech (c. Feb. 4, 1788), in 6 DHRC, *supra* note 46, at 1438, 1440 (2000) (along with the judicial power); *see id.* at 1339-1440 (“[T]he Confederation, in appearance imparted many, if not most of the great powers, now inserted in the proposed Constitution; . . . but not *one* efficient power, to carry a single article into effect These governmental [sic] powers, in order to have full & proper effect, *must* . . . consist of the Executive, the Legislative, & judicial. Without these govmt cannot be carried an End.”).

²⁵² Statement of James Madison, Virginia Ratification Debates (June 16, 1788), in 10 DHRC, *supra* note 46, at 1299, 1304 (1993) (“He asked, if powers were given to the General Government, if we must not give it executive power to use it? The vice of the old system was, that Congress could not execute the powers nominally vested in them.”).

²⁵³ Federal Farmer, An Additional Number of Letters to the Republican Letter XIV (May 2, 1788), in 20 DHRC, *supra* note 46, at 976 (2004) (noting that “[b]y art. 2. sect. 1. the executive power shall be vested in a president”). He elsewhere explained the “business of the judicial department” is “properly speaking, judicial in part, in part executive” because courts are charged both “faithfully to decide upon, and [to] execute the laws, in judicial cases” Federal Farmer, *supra* note 183, at 1043.

enforce the[] Laws.”²⁵⁴ And that’s why a Georgia Federalist could describe the requisite authority so simply as “an efficient power to execute . . . laws.”²⁵⁵

This understanding was unmistakable regardless of the precise terminology used, as when Brutus observed that the governments’ “authority to execute” amounted to “the means, to attain the ends, to which they are designed.”²⁵⁶ This resulted, among other things, in the frequent equation of “executive duties” and “administration,”²⁵⁷ as with the Continental Congress defining “the executive powers” as “the powers of administration,”²⁵⁸ or with Centinel observing that among “the great distinctions of power,” “the executive” element was simply “the ordinary administrative.”²⁵⁹ (The standard definition of executive power as the *implementing* authority was actually one reason the drafters decided to give Congress the power to “Declare” rather than to “Make” war. One delegate worried that “make war might be understood to ‘conduct’ it which was an Executive function”²⁶⁰) So Publius was just stating a commonplace when explaining that “[t]he administration of government . . . in its most usual and perhaps in its most

²⁵⁴ William Samuel Johnson, *supra* note 99, at 249.

²⁵⁵ Speech of William Pierce, *supra* note 7, at 253 (“*In all the state governments the three great branches that maintain each other give each separate part of the Union an efficient power to execute its own laws. But, in the Federal Constitution, there is nothing but legislative and recommendatory powers, without even the shadow of authority to support or enforce its decrees.*” (emphasis added) (footnote omitted)).

²⁵⁶ Brutus, VI, N.Y. J., Dec. 27, 1787, *reprinted in* 19 DHRC, *supra* note 46, at 466, 472 (2003) (“[T]he objects of each [government] ought to be pointed out, and . . . each ought to possess ample authority to execute the powers committed to them This being the case, the conclusion follows, that each should be furnished with the means, to attain the ends, to which they are designed.”).

²⁵⁷ *E.g.*, A Citizen of Philadelphia, The Weaknesses of Brutus Exposed (Nov. 8, 1787), *in* 14 DHRC, *supra* note 46, at 63, 68 (1983) (“[T]he execution and administration of [these government powers] will require the greatest wisdom The best constitution possible, even a divine one, badly administered, will make a bad government.” (emphasis omitted)); PHILA. INDEP. GAZETTEER, June 27, 1787, *reprinted in* 13 DHRC, *supra* note 46, at 147, 148 (1981) (“[T]he administration or executive duties of government”); *cf.* Theophilus Parsons, Notes of Massachusetts Ratification Debates (Jan. 15, 1788), *in* 6 DHRC, *supra* note 46, at 1206, 1207 (2000) (noting “executors or administrators” of an estate).

²⁵⁸ Continental Congress, Letter to the Inhabitants of Quebec (Oct. 26, 1774), *reprinted in* 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 104, 110 (“Apply these decisive maxims [of Montesquieu], sanctified by the authority of a name which all Europe reveres, to your own state. You have a Governor, it may be urged, vested with the *executive* powers, or the powers of *administration*”); see also *infra* text accompanying note 337 for more on this letter.

²⁵⁹ Centinel, II, PHILA. FREEMAN’S J., Oct. 24, 1787, *reprinted in* 13 DHRC, *supra* note 46, at 457, 465 (1981) (emphasis omitted) (“The chief improvement in government, in modern times, has been the compleat separation of the great distinctions of power; placing the *legislative* in different hands from those which hold the *executive*; and again severing the *judicial* part from the ordinary *administrative*. When the legislative and executive powers (says Montesquieu) are united in the same person, or in the same body of magistrates, there can be no liberty.” (cleaned up)).

²⁶⁰ 2 FARRAND’S RECORDS, *supra* note 51, at 319 (Rufus King) (internal quotation marks omitted).

precise signification” is “limited to executive details, and falls peculiarly within the province of the executive department.²⁶¹

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

That brings us to one of the era’s most important political tropes: the idea of a “complete” or “perfect” government. This had nothing to do with morality or beauty. Rather, it built on an almost naive concept of government action as a simple three-part sequence of “legislative, judicial, and executive power.”²⁶²

These “three grand immutable principles in good government”²⁶³ were logically intertwined, each indispensable to a coherent whole. Legislative action was the formulation of political intent in the form of operational instructions. Judicial action was the impartial assessment of how legislated instructions should apply to particular circumstances. Executive action was the active implementation of legislated instructions in the real world. Drawing on a rich foundation of political and legal theory,²⁶⁴ the sequence was so familiar that it verged on trite.²⁶⁵ Soap, scrub, rinse. Powder, ball, cartridge. Legislate,

²⁶¹ THE FEDERALIST NO. 72 (Alexander Hamilton), *reprinted in* 16 DHRC, *supra* note 46, at 421, 422 (1986); *see also id.* (noting also that administration “in its largest sense, comprehends all the operations of the body politic, whether legislative, executive or judiciary . . .”).

²⁶² Cato, II, N.Y.J., Oct. 11, 1787, *reprinted in* 19 DHRC, *supra* note 46, at 79, 80 (2003); *cf.* SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE 26 (1735) (“Of every perfect Law there are two Parts: One, whereby it is directed what is to be done or omitted: the other, wherein is declared what Punishment he shall incur, who neglects to do what is commanded, or attempts that which is prohibited.” (emphasis omitted)).

²⁶³ A Bostonian, *A View of the Federal Government of America, Its Defects, and a Proposed Remedy*, BOS. INDEP. CHRON., Aug. 10, 1786, *reprinted in* 13 DHRC, *supra* note 46, at 359, 360 (1981); *see also* An Address of the Convention, for Framing a New Constitution of Government for the State of Massachusetts Bay, No. III (1780), *in* JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 219 (1832) (“The Legislative; the Judicial and Executive Powers naturally exist in every Government: And . . . when the same Man or Body of Men enact, interpret, and execute the Laws, . . . a People are finally borne down with the force of corruption resulting from the Union of those Powers”).

²⁶⁴ *See* Mortenson, *supra* note 5, Parts II–III. For perhaps the quintessential real-world example when the Framers sat down in Philadelphia, consider the 1783 Massachusetts Constitution: “The body politic” requires “an equitable mode of making laws . . . an impartial interpretation, and a faithful execution of them . . .” MASS. CONST. pmb., *reprinted in* 4 DHRC, *supra* note 46, at 440, 440. “[T]he people” therefore “vested” these three powers as “authority, whether legislative, executive, or judicial” in “the several magistrates and officers of government” as “their substitutes and agents.” MASS. CONST. pt. 1, art. V, *reprinted in* 4 DHRC, *supra* note 46, at 440, 442.

²⁶⁵ An exasperated British reviewer’s snark about John Adams’s work on mixed government can serve just as well to in describing the Founder’s discussions of the separation of powers: “We are indeed repeatedly told that no government can exist, but where a balance, consisting of three parts, is preserved. Upon this point, like Lord Chesterfield with the Graces, Dr. Adams dwells for ever.” John Adams, *A Defence of the Constitution of Government of the United States of America*, LONDON MONTHLY REV., May 1787, at 394, 395. Note of course that, as Martin Flaherty has emphasized, the Founding debate engaged two quite different concerns: the separation of powers proper and the Aristotelian-

adjudicate, execute. Once in a great while someone pointed out that the boxes had fuzzy edges,²⁶⁶ and—true to long tradition²⁶⁷—there were varying views on the taxonomic relationship between executive power and judicial power.²⁶⁸ But for the most part the tripartite sequence was catechism.²⁶⁹ It's like what

via-Westminster theory of mixed government. See Flaherty, *supra* note 43, at 1755-1807. As I have shown in previous work, the distinction between those two concerns was well established in the Anglo-American legal and political discourse that undergirded the Founding era. See Mortenson, *supra* note 5, at 1210-42. This Article shows that the Founding debates reflected that fully.

²⁶⁶ True to form, Madison offered the clearest thinking about the hard cases: “Even the boundaries between the Executive, Legislative & Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference.” Letter from James Madison to Thomas Jefferson, *supra* note 59, at 102; see also THE FEDERALIST NO. 37 (James Madison), reprinted in 15 DHRC, *supra* note 46, at 343, 345-48 (1984) (generically discussing line-drawing problems, including in the separation of powers context).

²⁶⁷ For more on the uneven development of distinctions between executive and judicial power, see Mortenson, *supra* note 5, at 1238.

²⁶⁸ For examples that focused on a two-step process of moving from the formulation of intentions to their execution in the real world, see, e.g., Luther Martin, *Genuine Information III*, BALT. MD. GAZETTE, Jan. 4, 1788, reprinted in 11 DHRC, *supra* note 46, at 144, 144 (2015) (discussing a citizen’s “share in the forming of his own government, and in the making and executing its laws”); Philanthrop, *To the People*, AM. MERCURY, Nov. 19, 1787, reprinted in 3 DHRC, *supra* note 46, at 467, 468 (1978) (“Are not the Congress and Senate servants of the people, chosen and instructed by them, because the whole body of the people cannot assemble at one place to make and execute laws?”); *Reply to George Mason’s Objections to the Constitution*, N.J. J., Dec. 19 & 26, 1787, reprinted in 3 DHRC, *supra* note 456, at 154, 156 (1978) (“Was it ever said that the people do not make their own laws or that the government of a republic is not in the people because they make the one, and execute the other, through persons delegated by them?”); Republicus, KY. GAZETTE, Mar. 1, 1788, reprinted in 8 DHRC, *supra* note 46, at 446, 449, 451 (1988) (criticizing “president [who] may exercise the combined authority of legislation, and execution,” and noting that “the people . . . and only they, have a right to determine whether they will make laws, or execute them”); A Watchman, WORCESTER MAG., Feb. 7, 1788, reprinted in 5 DHRC, *supra* note 46, at 879, 881 (1998) (“[T]he governments of Connecticut and Rhodeisland . . . have chose their own officers, and made and executed their own laws . . .”).

²⁶⁹ For just a few examples, see, e.g., Curtius, II, N.Y. DAILY ADVERTISER, Oct. 18, 1787, reprinted in 19 DHRC, *supra* note 46, at 97, 100 (2003) (“What! resign all the three powers, legislative, judicial and executive, in the hands of one body of men?”) NEWPORT HERALD, Oct. 25, 1787, reprinted in 24 DHRC, *supra* note 46, at 40, 40 (2011) (“It is presumed that those States who have heretofore granted powers to Congress for regulating trade cannot disapprove of the New Constitution; for the grant to Congress implied that they were vested with full powers to enact all laws relative thereto, to be adjudged and executed by officers of their appointment . . .” (emphasis omitted) (footnote omitted)). James Wilson’s post-Ratification lectures were magisterial on the point:

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

JAMES WILSON, *Lectures on Law*, in THE WORKS OF THE HONOURABLE JAMES WILSON 394-97 (1791).

one Virginian said about the relationship between George Mason and Patrick Henry: “the former plans, & the latter executes.”²⁷⁰

In this context, no government could be “complete”²⁷¹ or “perfect”²⁷² if it did not include “the powers of Legislation, Judgment and Execution.”²⁷³ If a government didn’t have the power to implement its intentions, then it was “incomplete”²⁷⁴ in the sense that it lacked the final link in a sequential chain of governing.²⁷⁵ Certainly Federalists thought so, with one opening the Connecticut ratification convention by arguing that “[t]he Constitution before us is a complete system of legislative, judicial, and executive power,”²⁷⁶ and another telling the Virginia convention:

²⁷⁰ Letter from James Duncanson to James Maury (June 7 & 13, 1788), in 10 DHRC, *supra* note 46, at 1582, 1583 (1993); *see also id.* at 1583-84 (describing the relationship between George Mason and Patrick Henry in organizing Antifederalists in Virginia).

²⁷¹ George Clinton, Remarks Against Ratifying the Constitution (July 11, 1788), in 22 DHRC, *supra* note 46, at 2142, 2145 (2008) (The proposed system “commences in a complete system of government—divided into Legislative, Executive, and Judicial Branches”); 1 FARRAND’S RECORDS, *supra* note 51, at 284-86 (Alexander Hamilton) (“The great & essential principles necessary for the support of Government . . . [include] Force by which may be understood a coercion of laws or coercion of arms. Congress have not the former except in few cases . . . How then are all these evils to be avoided? only by such a complete sovereignty in the general Government . . .”).

²⁷² Brutus alternated between the two formulations. *See, e.g.*, Brutus, *supra* note 122, at 109 (“[O]ne complete government, possessed of perfect legislative, judicial, and executive powers . . .”); *see also, e.g.*, A.B., HAMPSHIRE GAZETTE, Jan. 2, 1788, reprinted in 5 DHRC, *supra* note 46, at 596, 598 (1998) (“I am ready to concede, that ‘the government proposed . . . has as absolute and perfect powers to make and execute all laws, [’] &c. with respect to every object to which it extends as any other in the world . . .” (quoting Brutus while disagreeing with his conclusions)); POUGHKEEPSIE COUNTRY J., Oct. 3, 1787, reprinted in 19 DHRC, *supra* note 46, at 71, 73 (2003) (“[I]f the only effective and durable bond of union among states, as well as among individuals be a coercive government; . . . and if the perfection of that form consists in the accurate distribution of the legislature, executive and judiciary powers . . . the expediency of adopting the new constitution comes as strongly enforced as any thing which can be offered to the human mind.” (emphasis omitted)).

²⁷³ John De Witt, II, AM. HERALD, Oct. 29, 1787, reprinted in 4 DHRC, *supra* note 46, at 156, 159 (1997) (“[T]he future Congress of the United States shall be armed with the powers of Legislation, Judgment and Execution . . .”).

²⁷⁴ Statement of James Wilson, Pennsylvania Ratification Debates (Dec. 4, 1787), in 2 DHRC, *supra* note 46, at 465, 476 (1976) (“I think it no objection, that it is alleged the government will possess legislative, executive, and judicial powers. Should it have only legislative authority! . . . For what purpose give the power to make laws, unless they are to be executed? . . . Ought the government then to remain any longer incomplete?”).

²⁷⁵ *E.g.*, An Old Planter, VA. INDEP. CHRON., Feb. 20, 1788, reprinted in 8 DHRC, *supra* note 46, at 394, 395 (1988) (“It is clear that wherever we give or delegate a trust to do any one act, we must lodge authority sufficient to insure the execution of that act. When we choose an assembly to make laws and regulate the government of this state, what would an assembly avail, if they had not power to enforce every act necessary for our government?”); Letter from Richard Henry Lee to John Adams, *supra* note 113, at 9 (“The present federal system . . . has been found quite inefficent and ineffectual—The government must be both Legislative and Executive . . .”).

²⁷⁶ Ellsworth, *supra* note 187, at 244-48 (“[T]he proposed Constitution . . . evidently presupposes two things; one is the necessity of a federal government, the other is the inefficiency of

Government must then have its complete powers, or be ineffectual: Legislative to fix rules, impose sanctions, and point out the punishment of the transgressors of these rules,—an Executive to watch over officers and bring them to punishment,—a Judiciary to guard the innocent, and fix the guilty, by a fair trial: Without an Executive, offenders would not be brought to punishment: Without a Judiciary, any man might be taken up, convicted and punished, without a trial. Hence the necessity of having these three branches.²⁷⁷

Antifederalists shared the same vocabulary for the “complete and compulsive operation” of government.²⁷⁸ Indeed, it was Brutus who offered perhaps the most thoroughly worked-out model of governmental perfection,²⁷⁹ and certainly its most repetitive expression. To “give the general [government] complete legislative, executive and judicial powers to every purpose,”²⁸⁰ he thought, would yield something very frightening: “one complete government, possessed of perfect legislative, judicial, and executive powers”²⁸¹ Brutus framed his first letter around precisely this point, drawing a sharp distinction between the functional “powers” of government and the particular subject matter “objects” to which those powers would be applied.²⁸² “It is true this government is limited to certain objects,” he conceded.²⁸³ But *as to those objects*, he continued, the federal government

the old articles of confederation A more energetic system is necessary. The present is merely advisory. It has no coercive power The Constitution before us was designed to supply the defects of the former system”).

²⁷⁷ Pendleton, *supra* note 194, at 947; *see also id.* (contrasting “complete” government in this sense with “consolidated” government in the totally centralized sense feared by Antifederalists).

²⁷⁸ 1 FARRAND’S RECORDS, *supra* note 51, at 34-35 (Gouverneur Morris) (urging the Philadelphia drafting convention to understand their very project as aimed at a new national government with “a complete and compulsive operation”) (responding to a question from one of the Pinckneys whether the Convention was even “authorize[d] [to] discuss[] . . . a System founded on different principles from the federal Constitution.”).

²⁷⁹ For others, see, e.g., Statement of John Smilie, Pennsylvania Ratification Debates (Dec. 4, 1787), *in* 2 DHRC, *supra* note 46, at 465, 468 (1976) (“[A] complete [government], with legislative, executive, and judicial powers.”); Statement of John Smilie, Pennsylvania Ratification Debates (Nov. 28, 1787), *in* 2 DHRC, *supra* note 46, at 382, 408 (1976) (“It contains all the necessary parts of a complete system of government, the executive, legislative, and judicial establishments”); Republicus, *supra* note 188, at 377 (“[E]qual natural right to legislative and executive power in all their different branches, which takes in all the powers that can exist in a state”).

²⁸⁰ Brutus, XII, N.Y. J., Feb. 7, 1788, *reprinted in* 20 DHRC, *supra* note 46, at 756, 759 (2004).

²⁸¹ Brutus, *supra* note 122, at 109-10. Brutus couldn’t get enough of this point. *See also, e.g.*, Brutus, *supra* note 256, at 467 (“What will render this power in Congress effectual and sure in its operation is, that the government will have complete judicial and executive authority to carry all their laws into effect”); Brutus, XI, N.Y. J., Jan 31, 1788, *reprinted in* 15 DHRC, *supra* note 46, at 512, 512 (1984) (“This [proposed] government is a complete system, not only for making, but for executing laws.”).

²⁸² Brutus, *supra* note 122, at 107.

²⁸³ *Id.*

would be “as much one complete government as that of New-York or Massachusetts.”²⁸⁴ Indeed,

It . . . has as absolute and perfect powers to make and execute all laws, to appoint officers, institute courts, declare offences, and annex penalties, with respect to every object to which it extends, as any other in the world.²⁸⁵

The framework explained by Brutus was pervasive. The founders repetitiously distinguished between [1] various subject matter objects of government action, “whether civil or military,” and [2] the tripartite mechanical sequence by which government took functional action on those objects, “whether . . . legislative, executive, or judicial.”²⁸⁶ The conceptual point was simply common currency; the only thing to debate was its implications. And so on one side, Samuel Chase objected to the fact that the “National Government has unlimited power, legislative, executive and judicial, as to every object to which it extends by the Constitution”;²⁸⁷ the Federal Farmer explained that “[t]hese powers, legislative, executive, and judicial, respect internal as well as external objects”;²⁸⁸ and A Farmer fretted about granting the national government “legislative, executive, and judiciary powers on every citizen of the empire.”²⁸⁹ And on the other side, the Federalist “A.B.” agreed that “[t]his government is to possess absolute and

²⁸⁴ *Id.*; *see also id.* (“The [proposed] government then, so far as it extends, is a complete one.”).

²⁸⁵ *Id.* Brutus returned to the formulation in his later letters, albeit in a less central role. Brutus, *supra* note 280, at 759 (warning against giving “the general [government] compleat legislative, executive and judicial powers to every purpose,” and then returning repeatedly to warn of the consequences of allowing that government to “pass[] laws on these subjects, as well as of appointing magistrates with authority to execute them” in various contexts).

²⁸⁶ BOS. GAZETTE, Nov. 19, 1787, *reprinted in* 4 DHRC, *supra* note 46, at 274, 276 (1997) (“[A] charter of delegation, being a clear and full description of the quantity and degree of power and authority, with which the society, vests the persons intrusted with the powers of the society, whether civil or military, legislative, executive or judicial.” (emphasis omitted) (footnote omitted)).

²⁸⁷ Samuel Chase, Objections to the Constitution (Apr. 24-25, 1788), *in* 12 DHRC, *supra* note 46, at 631, 636 (2015). Chase’s next three sentences rehearse the same point in more detail. First: there was no serious subject matter limitation on the business of the federal government: “The powers of the National legislature extend to every case of the least consequence . . .” *Id.* Second, the national government had the legislative power to extend to the formulation of binding policies in each such area: “[I]t may make laws to affect the lives, liberty and property of every citizen in America . . .” *Id.* Third, the national government had the executive power to bring those into being: “[N]or can the Constitution of any State prevent the Execution of any power given to the National legislature.” *Id.*

²⁸⁸ Federal Farmer, *supra* note 48, at 224. Note how the author’s distinction between “internal” and “external” executive power tracks onto every power of government; it is not a special feature of “executive” authority. *See* Mortenson, *supra* note 5, at Section IV.A. (discussing Rutherford, Montesquieu, and Essex Result); *see also* Federal Farmer, *supra* note 48, at 24 (“Let the general government consist of an executive, a judiciary and ballanced legislature, and its powers extend exclusively to all foreign concerns . . . and to a few internal concerns of the community In this case there would be a compleat consolidation, *quoad* certain objects only.”).

²⁸⁹ A Farmer, VII (Part 6), BALT. MD. GAZETTE, Apr. 25, 1788, *reprinted in* 12 DHRC, *supra* note 46, at 535, 536 (2015).

uncontrollable powers, legislative, executive, and judicial with respect to every object to which it extends.”²⁹⁰

A casual reader might get the impression that completeness was just another way or talking about the police power. So let’s be clear: the question of completeness in government had nothing to do with the substantive scope of a government’s regulatory portfolio. To measure a government’s perfection required no knowledge about its power to regulate commerce, make treaties, establish a religion, or invade Canada. *Any* unit of government at *any* level of regional or administrative hierarchy with *any* sorts of subject-matter competences could easily possess all three powers *as to those things where its jurisdiction extended*.²⁹¹ The point of perfection was that “the means of securing the welfare of the community must be coextensive with the objects to which the legislature extends its views.”²⁹²

That’s why Oliver Ellsworth said of Hartford, “This very spot where we now are, is a city. It has complete legislative, judicial and executive powers. It is a complete state in miniature.”²⁹³ And that’s why Brutus was careful to emphasize that even entities with only limited subject-matter competences—like the proposed federal government—were perfectly capable of being “complete” in the relevant sense: “This government is to possess absolute and uncontrollable power, legislative, executive and judicial, with respect to every object to which it extends for The government then, so far as it extends, is a complete one, and not a confederation.”²⁹⁴

²⁹⁰ A.B., *supra* note 272, at 596-97 (somewhat misquoting Brutus to dispute the implications of this description).

²⁹¹ See also, e.g., Pendleton, *supra* note 194, at 947 (embracing the Constitution as creating a “complete” government, and sharply distinguishing that from charges of it also creating a “consolidated” government, defined as “that which should have the sole and exclusive power, Legislative, Executive, and Judicial, without any limitation”). For an example of the kind of criticism prompting Pendleton’s point, see, for example, Federal Farmer, An Additional Number of Letters to the Republican, Letter XVII (May 2, 1788), in 20 DHRC, *supra* note 46, at 976, 1060 (2004) (“To form a consolidated, or one entire government, . . . all things, persons and property, must be subject to the laws of one legislature alone; to one executive, and one judiciary.”).

²⁹² Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 DHRC, *supra* note 46, at 569, 570 (1978). The Connecticut convention delegate was writing here to his Federalist colleague—and future Supreme Court Justice—in Massachusetts. See, e.g., THE FEDERALIST NO. 80 (Alexander Hamilton), reprinted in 18 DHRC, *supra* note 46, at 96, 99 (1995) (implicitly endorsing the proposition that “every government ought to possess the means of executing its own provisions by its own authority” (emphasis omitted)). Cf. THE FEDERALIST NO. 21, *supra* note 103, at 414 (Alexander Hamilton) (focusing on the Confederation’s gap in this respect as the “extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws”).

²⁹³ See Ellsworth, *supra* note 96, at 278 (“Yet it breeds no confusion, it makes no scism. The city has not eat up the state, nor the state the city.”); see also *id.* (“Wherever the army was, in whatever state, there congress had complete legislative, judicial and executive power.”).

²⁹⁴ Brutus, *supra* note 122, at 106-07. For other examples of the distinction, see, for example, PROVIDENCE U.S. CHRON., Aug. 7, 1788, reprinted in 25 DHRC, *supra* note 46, at 383, 384 (2012).

Rather than omnicompetent subject-matter authorization,²⁹⁵ then, the idea of completeness meant the functionally sequential process of (first) bringing an idea or project into being and (then) implementing it in the real world. And that functional relationship now brings us to an authority often viewed as either logically entailed in or functionally necessitated by the executive power: the right to appoint “assistances” for its implementation.

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

Modern Supreme Court doctrine holds that “the power to appoint inferior officers . . . is not in itself an ‘executive’ function in the constitutional sense.”²⁹⁶ A good number of founders would have disagreed. George Mason was in good company in considering “the appointment of publick officers”²⁹⁷ closely linked to the executive power—sometimes as a strict conceptual element of the thing itself, other times more loosely as an indispensable buttress for its meaningful exercise.

This view of appointments as “executive” drew on a longstanding (though not uncontested) strand of Anglo-American legal thought. Certainly the inseparability of execution and appointment was central among Charles I’s objections to conceding a parliamentary role in appointments:

He conceives, He cannot perform the Oath of protecting His people if He abandon this power, and assume others into it. He conceives it such a Flowre of the Crown, as is worth all the rest of the Garland.”²⁹⁸

Charles’s argument may have had special force under English law, which was often said to prohibit the King from personally executing the law.²⁹⁹ But its

²⁹⁵ Contrast, for example, A Freeman’s argument that “[S]uch would be the consequence of a single national constitution, in which all the objects of society and government were so compleatly provided for, as to place the several states in the union on the footing of counties of the empire.” A Freeman, III, PA. GAZETTE, Feb. 6, 1788, reprinted in 16 DHRC, *supra* note 46, at 49, 49 (1986).

²⁹⁶ Morrison v. Olson, 487 U.S. 654, 695 (1988).

²⁹⁷ George Mason, *Objections to the Constitution*, MASS. CENTINEL, Nov. 21, 1787, reprinted in 4 DHRC, *supra* note 46, at 287, 289 (1997); *see also id.* (concluding that this power was “improper” in the Senate).

²⁹⁸ HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 38 (1642); *see also id.* (“He conceives, That if He should passe this, He should retain nothing but the Ceremonious Ensignes of Royalty, or the meer sight of a Crown and Scepter . . . but as to true, and reall power, He should remain, but the outside, the picture, the signe of a King.”). There’s some irony in how much more evocative the parliamentarian’s paraphrase is than the King’s original.

²⁹⁹ EDWARD BAGSHAW, THE RIGHTS OF THE CROWN OF ENGLAND AS IT IS ESTABLISHED BY LAW 105 (1660) (“[H]e neither speaketh, nor acteth, nor judgeth, nor executeth, but by his Writt, by his Laws, by his Judges, and Ministers, and both these sworne to him to judge a right, and to execute justice to his People.”); MATTHEW HALE, THE PREROGATIVES OF THE KING 1-7 (“[H]e

deeper logic was quite generalizable. As Matthew Hale’s pathbreaking treatise observed, “the weight, multiplicity and variety of the occasions and emergencies of a kingdom doth necessarily require assistances.”³⁰⁰ Laying claim to the executive power in any large jurisdiction was thus arguably an exercise in fiction unless you had the authority to appoint “assistances”—implementing agents—to act on your behalf.

This view of the relationship between appointments and execution influenced thinking in the Americas well before the Founding. In a 1771 Virginia dispute about appointments authority, for example, the winning counsel argued that “wherever an act of Parliament or of Assembly erects a new office, without prescribing the particular mode of appointing the officer, it belongs to the King to make the appointment.”³⁰¹ Counsel’s explanation is key: the proposed canon of construction followed necessarily from the King’s executive power. “[P]ossessing the executive power of the laws,” it is the King’s “peculiar duty to see such act carried into execution, which cannot be unless an officer is appointed.”³⁰² That in turned implied that “[i]f then our acts of Assembly, erecting [an office] have not said by whom the nomination shall be, it will follow that the King, who is to see the law executed, must nominate persons for that purpose.”³⁰³

This commonsense view persisted into the Founding era. Some relied on formal arguments that King Charles would have found quite congenial,³⁰⁴ while

neither speaks nor doth anything in the public administration of this realm but what he doth by these or some of these, especially the chancellor.”).

300 HALE, *supra* note 299, at 105; *see also id.* at 107 (describing the king’s “legal council” as “the distributors of the king’s judgment and will according to rule, for he neither speaks nor doth anything in the public administration of this realm but what he doth by these or some of these, especially the chancellor”). As Hale later explained, the king’s appointments power was at least at times *compulsory*—that is to say, he could conscript private individuals into compulsory state service. *Id.* at 269 (“refusing to take” an “office[] that [is] grantable by the king and concern[s] the administration of justice” was “punishable for a contempt”). Obadiah Hulme made a similar point.

The king, who is in the constant exercise, of the executive power, in the state, always did the business of the state; and therefore, it immediately falls within his province, to see any plan, of national utility, put into execution, and to authorize the acting parties by a writing, vesting them with certain powers, for the accomplishment of the business which is to be done.

OBADIAH HULME, AN HISTORICAL ESSAY ON THE ENGLISH CONSTITUTION 182 (1771).

301 Godwin v. Lunan, Jeff. 96, 105 (Gen. Ct. Va. 1771).

302 *Id.*

303 *Id.*

304 *See* 2 FARRAND’S RECORDS, *supra* note 51, at 538 (James Wilson) (“[O]bject[ing] to the mode of appointing, as blending a branch of the Legislature with the Executive.”); *see also* 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (statement of James Madison) (“[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”); *cf. id.* at 538-39 (“Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute.”); 2

others were agnostic on the formal classification³⁰⁵ and focused instead on prudential considerations.³⁰⁶ The limited and parasitic nature of the claim was evident, however, in the fact that this view focused only on the appointment of *executive* officers.³⁰⁷ There was much less angst about the Senate's role in appointing judges—and much more angst about the President's.³⁰⁸

The point wasn't uncontested.³⁰⁹ Indeed, some of the fussier formalists forcefully rejected the claim that the Senate's role in appointments gave it any portion of the executive power. For them, the standard meaning of executive power decisively rebutted that claim: since the Senate "cannot

FARRAND'S RECORDS, *supra* note 51, at 53 (July 19, 1787) (Gouverneur Morris) ("There must be certain great officers of State . . . These he presumes will exercise their functions in subordination to the Executive . . . Without these ministers the Executive can do nothing of consequence.").

³⁰⁵ See, e.g., 2 FARRAND'S RECORDS, *supra* note 51, at 405 (Edmund Randolph) ("[T]he power of appointments was a formidable one both in the Executive & Legislative hands . . .").

³⁰⁶ See, e.g., 2 FARRAND'S RECORDS, *supra* note 51, at 537 (George Mason) (arguing that legislative bodies were "too unwieldy & expensive for appointing officers"); 2 FARRAND'S RECORDS, *supra* note 51, at 81 (Edmund Randolph) (noting the "inconveniencies" with vesting judicial appointments in a multi-member body").

³⁰⁷ Publius explained a pragmatic aspect to the point. In general, "each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others." THE FEDERALIST NO. 51 (Alexander Hamilton), *reprinted in* 16 DHRC, *supra* note 46, at 43, 43 (1986). But "[w]ere this principle rigorously adhered to, . . . [s]ome difficulties . . . would attend the execution of it. Some deviations therefore from the principle must be admitted." *Id.*

³⁰⁸ George Mason, for example, supported presidential appointment of executive branch officers, but opposed any presidential role in the appointment of judges. *Compare* Letter from George Mason to John Lamb (June 9, 1787), *in* 9 DHRC, *supra* note 46, at 818, 822 ("[T]hat the Power of . . . appointing Judges of the Supreme Courts . . . be vested in the president of the United States with the Assistance of the [newly formed Executive] Council . . ."), *with* 2 FARRAND'S RECORDS, *supra* note 51, at 83 (George Mason) ("He considered the appointment [of judges] by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself."). For others expressing similar views, see, e.g., 1 FARRAND'S RECORDS, *supra* note 51, at 120 (James Madison) ("On the other hand, He was not satisfied with referring the appointment [of judges] to the Executive. He rather inclined to give it to the Senatorial branch . . ."). Next to the Framers' comparatively desultory discussion of judicial appointments, their tail chasing about non-judicial appointments was much more charged. *Compare, e.g.,* 1 FARRAND'S RECORDS, *supra* note 51, at 232-33 (James Madison) (discussing appointment of judicial officers), *and* 2 FARRAND'S RECORDS, *supra* note 51, at 41-44 (James Madison) (same), *and id.* at 80-83 (same), *with, e.g.,* 2 FARRAND'S RECORDS, *supra* note 51, at 405-07 (discussing appointment of non-judicial officers), *and id.* at 522-25 (same), *and id.* at 537-40 (same), *and id.* at 627-28 (same).

³⁰⁹ Dissent from the Committee Report, Second Session of the Pennsylvania Council of Censors (Aug. 11, 1784), *in* THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 (1825) 101-102 n.* (Notwithstanding the Pennsylvania Constitution's vesting of executive power in a Council, it was "the right of the assembly . . . either by law to appoint . . . or to empower the executive council to appoint" officials to offices created by statute, because "every power necessary for good government, not placed somewhere by the constitution, is vested in the assembly, as the representatives of the people"). *But see* Committee Report, Second Session of the Pennsylvania Council of Censors (Aug. 11, 1784), *in id.* at 101 ("[T]he appointment of officers is an executive prerogative, and belongs to the council in all cases, if it be not in-express terms vested in the assembly or in the people.").

execute” the laws, it was definitionally impossible for it to be “a part also of the executive.”³¹⁰ One Maryland Federalist made the point at some length:

Much learned and hackneyed declamation has been used against the executive power of the senate, and the making one body of men both an executive and a legislative. Happily the reasoning does not apply.—The objection would be valid, if the senate could alone make laws, and alone execute. This they cannot do, and we may rest assured, that the representatives, having no share in the execution, will never consent to tyrannical laws, to be executed in a tyrannical manner by the president and the senate. What are the executive powers of the senate? None at all. It has nothing at all to do with the execution of the laws it assents to.³¹¹

For his part, Tench Coxe (writing under the pseudonym “An American”) called it an “evident” error to speak of “the executive powers of the senate.”³¹² There’s no mistaking the prescriptivist condescension of his explanation:

The Senate as a body & the Senators as individuals can hold or execute no office whatever. They cannot be Ambassadors Generals, Admirals, Judges, Secretaries of War. or Finance, nor perform any other National duty, but that of Senators, nor can they even nominate a person for any post or employment. In short they can execute no offices themselves, nor can they declare who shall—Their power is merely to declare who shall not. You will pardon me, Sir. for applying the term to so elegant a Scholar as you are. but really to say as you do that the power of declaring who shall not hold an office is to hold it oneself appears to me an absolute Solecism.³¹³

³¹⁰ Charles Carroll, Notes on the Constitution (Feb. 1, 1788), in 12 DHRC, *supra* note 46, at 862, 864 (2015); *see also, e.g.*, A Landholder, *supra* note 220, at 483 (“On examination you will find this objection [to the Senate] unfounded. The supreme executive is vested in a President of the United States . . . In the President, all the executive departments meet, and he will be a channel of communication between those who make and those who execute the laws.”). Other than the President’s legislative veto and the Vice-President’s presiding role in the Senate, Landholder continued, “[i]n no other instance is there even the shadow of blending or influence between the two departments.” *Id.* When discussing the judiciary in the very next section, Landholder went on to discuss the need for “executive officers, to carry into effect the laws of the nation,” so it’s not like the functional point was lost on him. *Id.*

³¹¹ MD. J., July 25, 1788, reprinted in 12 DHRC, *supra* note 46, at 867, 886 (2015). While the author was contemptuous of the formal claim, he was typical among Federalists in taking the functional concerns more seriously. *See id.* (disputing the notion that the Senate’s constitutional designation as a source of “advice” rendered it a “council to the president,” which was in itself a “formidable executive power[.]”).

³¹² Letter from An American to Richard Henry Lee, in 15 DHRC, *supra* note 46, at 173, 175 (1984) (draft).

³¹³ *Id.* at 175-76. Coxe was typical of Federalists in both dismissing Antifederalists’ formalist argument and evaluating more seriously their functionalist criticism of the Senate’s mix of authorities.

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

These objections aside, most Americans who spoke to the point seemed to conclude that the right to appoint “assistances” in execution was necessary on any functional understanding of the power to execute. Certainly this view was prominent among antifederalists. “Hampden” was typical in singling out “the most important and most influential portion of the executive power, viz., the appointment of all officers.”³¹⁴ The list of constitutional skeptics who called appointments “executive”—among them Brutus,³¹⁵ Centinel,³¹⁶ the

³¹⁴ Hampden, PITTSBURGH GAZETTE, Feb. 16, 1788, reprinted in 2 DHRC, *supra* note 46, at 663, 667 (1976); see also *id.* at 664, 667 (criticizing “the highly dangerous combination of the legislative and executive departments,” and noting that “the President only acts as a nominating member” for executive appointments). William Findley, who is thought to be the author of “Hampden,” urged the same point in opposing ratification at the Pennsylvania convention: “Only a part of the executive power is vested in the President. The most influential part is in the Senate, and he only acts as *primus inter pares* of the Senate; only he has the sole right of nomination. The officers of government are the creatures of the Senate The great objection is the blending of executive and legislative power.” Statement of William Findley, Pennsylvania Ratification Debates (Dec. 7, 1787), in 2 DHRC, *supra* note 46, at 512, 512 (1976); see also *id.* at 513 (“President in appointing officers will generally nominate such persons as will be agreeable to the Senate. The legislative and executive departments are mixed in this Constitution.”).

³¹⁵ See Brutus, *supra* note 122, at 313; McHenry, *supra* note 100, at 85 (“[The President’s] power when elected is check’d by the Consent of the Senate to the appointment of Officers, and without endangering Liberty by the junction of the Executive and Legislative in this instance.”); see also, e.g., Brutus, XVI, N.Y. J., Apr. 10, 1788, reprinted in 20 DHRC, *supra* note 46, at 907, 911 (2004) (“It may possibly also, in some special cases, be adviseable to associate the legislature, or a branch of it, with the executive, in the exercise of acts of great national importance But I think it equally evident, that a branch of the legislature should not be invested with the power of appointing officers.”). Melancton Smith, often thought the likeliest author of the Brutus letters, seems to have made the same point at the New York Ratification debates. See Statement of Melancton Smith, New York Ratification Debates (July 4, 1788), in 22 DHRC, *supra* note 46, at 2094, 2097 (2008) (“[T]he legislative & executive should be kept apart . . . it is improper that the Senate . . . should appoint Officers.”); see also *id.* (“Objs. to appt of officers by consent senate—executive power to be *distinct*.”).

³¹⁶ Centinel, I, INDEP. GAZETTEER, Oct. 5, 1787, reprinted in 2 DHRC, *supra* note 46, at 158, 165 (1976) (“The Senate, besides its legislative functions, has a very considerable share in the executive; none of the principal appointments to office can be made without its advice and consent.”); see also, e.g., Centinel, *supra* note 259, at 464 (“The king of England is . . . in possession of the whole executive power, including the unrestrained appointment to offices . . .”).

Federal Farmer,³¹⁷ Richard Henry Lee,³¹⁸ and George Mason³¹⁹—goes on.³²⁰

Many Federalists readily conceded the point as well. Writing as Publius, Madison conceded that “the appointment to offices, particularly executive offices, is in its nature an executive function . . .”³²¹ A number of other

³¹⁷ Federal Farmer, An Additional Number of Letters to the Republican, Letter XIV (May 2, 1788), in 20 DHRC, *supra* note 46, at 976, 1036 (2004) (“It has been thought adviseable by the wisest nations, that the legislature should so far exercise executive and judicial powers as to appoint some officers . . .”). The Federal Farmer’s discussion of the separation of powers spans many letters, and richly rewards close study. Given space limitations, I note here only that the author classifies appointments as “executive” in nature.

³¹⁸ Letter from Richard Henry Lee to Governor Edmund Randolph, PA. PACKET, Dec. 20, 1787, *reprinted in* 14 DHRC, *supra* note 46, at 364, 371 (1983) (“In order to prevent the dangerous blending of the legislative and executive powers, and to secure responsibility, the privy, and not the senate shall be joined with the president in the appointment of all officers, civil and military, under the new constitution . . .”).

³¹⁹ 1 FARRAND’S RECORDS, *supra* note 51, at 101 (George Mason) (“Col. Mason observed that a vote had already passed he found (he was out at the time) for vesting the executive powers in a single person. Among these powers was that of appointing to offices in certain cases.”).

³²⁰ *See, e.g.*, A Federal Republican, *supra* note 60, at 272 (proposing “a sovereign executive council . . . [which would] have the appointment of all officers” since “the senate . . . should have no executive or other powers whatever in that department”); John De Witt, III, AM. HERALD, Nov. 5, 1787, *reprinted in* 4 DHRC, *supra* note 46, at 194, 197 (1997) (“With respect to the Executive, the Senate excepting in [*i.e.*, taking exception to] nomination, have a negative upon the President . . .); *id.* (referencing “their share above mentioned in the Executive department”).

Less unequivocal, but hard to explain on any other theory, were more abstractly expressed Antifederalist claims that the Senate would “execute [the laws] tyrannically”—a concern with no obvious legal hook besides the Appointments Clause. *E.g.*, Cincinnatus, IV, *To James Wilson, Esquire*, N.Y. J., Nov. 22, 1787, *reprinted in* 19 DHRC, *supra* note 46, at 281, 285 (2003) (“[B]y making [the Senate] participant in the executive,” the Framers ignored Montesquieu’s adage: “When the legislative and executive powers are united in the same person . . . the same monarch or senate will make tyrannical laws, that they may execute them tyrannically.” (internal quotation marks and citation omitted)); *cf.* WINCHESTER VA. GAZETTE, Mar. 7, 1788, *reprinted in* 8 DHRC, *supra* note 46, at 469, 470-71 (1988) (“The powers granted to Congress are boundless in some instances of the utmost consequence to the people, particularly . . . their power of legislation blended with that of the execution of their own laws, without controul.”).

³²¹ THE FEDERALIST NO. 47, *supra* note 206, at 502 (James Madison); *see also* THE FEDERALIST NO. 38, *supra* note 102, at 356-57 (James Madison) (“With another class of adversaries to the constitution . . . the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting this executive power in the executive, alone, is the vicious part of the organisation.”).

In fact, at the Convention, Madison had gone so far as to suggest that there might be no need to explicitly grant appointments authority, since it was logically entailed within the vesting of “executive power” simpliciter. Madison proposed amending the Virginia Plan to read: “[T]hat a national Executive be instituted . . . with power to carry into effect, the national laws—to appoint to offices in cases not otherwise provided for; and to execute such other powers, not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national legislature.” 1 FARRAND’S RECORDS, *supra* note 51, at 63 (James Madison). He then observed that he “did not know” that specifying the appointment power was “absolutely necessary,” since it was “perhaps included in the first member of the proposition,” which vested the executive power. *See id.* at 67 (“Mr. Madison did not know that the words [of the third clause] were absolutely necessary, or even the preceding words. to appoint to offices &c. the whole being

supporters of the Constitution—including John Adams,³²² John Brown Cutting,³²³ A Democratic Federalist,³²⁴ John Kean,³²⁵ and James Wilson³²⁶—plainly held the same view.³²⁷ Indeed, Aristedes forthrightly “confess[ed]” that the objections to the Senate had “at first, appeared formidable.”³²⁸ The separation of powers risk was obvious: permitting a legislature to appoint “persons for the execution of the laws” would arguably “be the same thing, in

perhaps included in the first member of the proposition. He did not however see any inconvenience in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions.” (internal quotation marks omitted)).

322 See Letter from John Adams to Thomas Jefferson (Nov. 10, 1787), in 4 DHRC, *supra* note 45, at 212, 212 (1997) (“They have adopted the Idea of the Congress at Albany in 1754 of a President to nominate officers and a Council to Consent: but thank heaven they have adopted a third Branch . . . I think that Senates and assemblies should have nothing to do with executive Power. But still I hope the Constitution will be adopted . . .”).

323 See Letter from John Brown Cutting to William Short (Dec. 13, 1787), in 14 DHRC, *supra* note 46, at 475, 478 (1983) (supporting the Constitution, but noting that his “principal apprehension” [was] “the mingled legislative and executive powers of the senate . . . especially in appointments to office”).

324 A Democratic Federalist argued that:

[t]he executive powers of the Union are separated in a higher degree from the legislative than in any government now existing in the world. As a check upon the President, the Senate may disapprove of the officers he appoints, but no person holding *any office* under the United States can be a member of the federal legislature. How differently are things circumstanced in the two houses in Britain where an officer of any kind, naval, military, civil or ecclesiastical, may hold a seat in either house.

A Democratic Federalist, INDEP. GAZETTEER, Nov. 26, 1787, *reprinted in* 2 DHRC, *supra* note 46, at 294, 298 (1976)

325 See John Kean, Notes on the New Constitution (c. May 1788), in 27 DHRC, *supra* note 46, at 408, 408-09 (2016) (advocating without elaboration “[a] legislature . . . who has no executive or judicial powers,” and later urging in reference to “Defense” that “appointment of officers—ought not be exercised by the Legislature”).

326 See 2 FARRAND’S RECORDS, *supra* note 51, at 530 (James Wilson) (“The different branches should be independent of each other. They are combined and blended in the Senate. The Senate may exercise, the powers of legislation, and Executive and judicial powers. To make treaties legislative, to appoint officers Executive for the Executive has only the nomination.”); *see also* 1 FARRAND’S RECORDS, *supra* note 51, at 66 (James Wilson) (“The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.”).

327 See, e.g., Statement of Thomas McKean, Pennsylvania Ratifying Convention (Dec. 10, 1787), in 2 DHRC, *supra* note 46, at 532, 534, 536 (1976) (“[T]he whole of the executive power is not lodged in the President alone,” but “[a]s to the Senators having a share in the executive power, so far as to the appointment of certain officers, I do not know where this restraint on the President could be more safely lodged.”); *see also id.* at 544 (similar); *id.* at 546 (“There is scarce a king in Europe that has not some check upon him in the appointment of officers.”); 4 ELLIOT’S DEBATES, *supra* note 90, at 121-23 (William Davie) (“In this state, and most of the others, the executive and judicial powers are dependent on the legislature. Has not the legislature of this state the power of appointing the judges? Is it not in their power also to fix their compensation?”).

328 Aristides, *supra* note 87, at 236.

many respects, as if the legislature should execute its own laws.”³²⁹ That’s why George Mason explained that his proposed amendments³³⁰—like those suggested by both James Wilson³³¹ and the Society of Western Gentlemen³³²—would restore each branch to its proper place by getting the Senate *out* of the executive function of appointments³³³ and by bringing the House *into* the legislative function of treaty-making.³³⁴

So while the most strait-laced formalists disagreed, a great many founders did take a more functional view of Law Execution. Such commentators gravitated toward a more loosely disaggregated view of executive power, reflecting the functional reality that executing the law includes not just (i) the power to impose prohibitions on private parties and (ii) the power to carry out the legislature’s affirmative projects, but also at least presumptively (iii) the appointment of different kinds of subordinates to do each kind of execution. This disaggregated understanding occasionally also emerges in scattered references to “executive powers” in the plural form,³³⁵ as in some of

³²⁹ *Id.* Aristides went on to defend the Senate’s role in appointments as a necessary concession to pragmatics over theory:

Let us reflect . . . whether it be proper for any one man (suppose even the saviour of his country to be immortal) to have the appointment of all those important officers I confess, that the number of the senators for this purpose only is excessive. But I can confidently rely on the extraordinary selection to compensate for the excess.

Id. at 237-38.

³³⁰ See Letter from George Mason to John Lamb, *supra* note 308, at 819 (“[T]he Legislative, Executive and Judicial powers of Government should be separate and distinct . . .”).

³³¹ See 2 FARRAND’S RECORDS, *supra* note 51, at 538 (James Wilson) (“Mr. Wilson moved to add, after the word ‘Senate’ [in the Treaty Clause] the words, ‘and House of Representatives’. As treaties he said are to have the operation of laws, they ought to have the sanction of laws also.”). Wilson’s motion was rejected in the face of typical functionalist concerns about secrecy in a large body.

³³² *The Society of Western Gentlemen Revise the Constitution*, VA. INDEP. CHRON., Apr. 30 & May 7, 1788, reprinted in 9 DHRC, *supra* note 46, at 769, 771 (1990) (proposing to strip the President’s veto power and require House approval of all treaties).

³³³ See Letter from George Mason to John Lamb, *supra* note 308, at 818 (“[T]hat the Power of . . . appointing Ambassadors, other public Ministers or Consuls, Judges of the Supreme Courts, and all other Officers of the United States, whose appointments are not otherwise provided for by the Constitution, and which shall be established by Law, be vested in the president of the United States with the Assistance of the [newly formed Executive] Council . . .”).

³³⁴ See *id.* at 822 (“But all Treaties so made or entered into [by the President], shall be subject to the Revision of the Senate and House of Representatives for their Ratification.”).

³³⁵ Early drafts of the Articles of Confederation themselves thus generically referenced interactions by the national entity with “the Officers in the several States who are entrusted with the executive powers of government.” *E.g.* 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 687 (Aug. 20, 1776). For other examples of this usage as the generic reference to state-level executive actors in their mailbox function, see, e.g., 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 414 (Dec. 7, 1775) (“those Officers, in whom the executive powers of government in those colonies may be vested”); *id.* at 431 (“such officers in the several colonies as are entrusted with the executive powers of government”).

the state constitutions.³³⁶ The Continental Congress's famous 1774 "Letter to the Inhabitants of Quebec," for example, argued that the future of liberty in the North depended on its inhabitants' proper understanding of Montesquieu—including his standard gloss on "executive power" as "the power of executing":³³⁷

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.³³⁸

"Your countryman," the Americans warned, would have told the Quebecois that any semblance of liberty in their government was but a "tinsel'd outside."³³⁹ The reason was simple: the British Governor controlled each

³³⁶ As a general matter, state constitutional drafting practice provides no comfort to residuum theorists. A number of state constitutions use the plural phrase "executive powers" in a way that all but requires either the disaggregated Law Execution understanding or the Cross-Reference interpretation. *See generally* FRANCIS NEWTON THORPE, 1 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 572 (1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (compiling early state constitutions that included the phrase "executive powers of government"). Massachusetts's 1780 constitution and New Hampshire's 1784 and 1792 constitutions refer to the "executive part of government" in what is pretty clearly either the Cross-Reference or Law Execution sense. *See* MASS. CONST. of 1780, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1893; N.H. CONST. of 1784, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2457.

A number of state constitutions refer to "executive power" or "executive authority" singular in a way that effectively mirrors Article II of the U.S. Constitution. *See* N.J. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2596; N.Y. CONST. of 1777, *reprinted in id.* at 2624; PA CONST. of 1776, *reprinted in id.* at 3084, 3087-88; PA CONST. of 1790, *reprinted in id.* at 3095; S.C. CONST. of 1778, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3250; VT. CONST. of 1777, *reprinted in id.* at 3737; VT. CONST. of 1786, *reprinted in id.* at 3754.

Two state constitutions do use the plural phrase "executive powers" in a way that could plausibly refer to something like the royal residuum. But in each case the phrase is susceptible to either the Law Execution or Cross-Reference understanding as well. *See* DEL. CONST. of 1776, *supra* (chief magistrate "may exercise all the other executive powers of government"); N.C. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787 (governor "may exercise all the other executive powers of government").

³³⁷ Letter to the Inhabitants of Quebec, *supra* note 258, at 110 ("When the power of making laws, and the power of executing them, are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same Monarch or Senate, should enact tyrannical laws, to execute them in a tyrannical manner . . . [Likewise,] [t]here is no liberty, if the power of judging be not separated from the legislative and executive powers." (emphasis omitted) (quoting Montesquieu)). Congress evidenced not a particular of shame in resorting to outright flattery, using our northern neighbors to "exert[] the natural sagacity of Frenchmen" and consider the authority of that "truly great man," "your countryman." *Id.* at 110-11.

³³⁸ *Id.* (emphasis added and omitted).

³³⁹ *Id.*; *see also id.* ("Your Judges, and your Legislative Council, as it is called, are dependant on your Governor, and he is dependant on the servant of the Crown, in Great-Britain. The legislative, executive and judging powers are all moved by the nods of a Minister.").

authority in the sequential process of creating, adjudicating, and executing legislative instructions. And his control of that complete sequence rendered the government of Quebec “a whited sepulchre, for burying your lives, liberty and property.”³⁴⁰

That brings us to the final characteristic of the executive power. Everyone agreed that it was an empty vessel authorizing only the implementation of instructions issued by a legislative authority.

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

Beyond its definition as “the power to execute,” the signal characteristic of executive power was that it was derivative and subsequent. This Section will explore that derivative quality—which the founders drew directly from the legal and political theory on their bookshelves—by explaining two seemingly paradoxical features. First, the intrinsic *subordination* of executive authority to its legislative principal. Second, the immense latent *power* of executive authority, especially where its holder could influence the exercise of legislative power to convey broad delegations of discretion and authority.

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

As generations of writers had explained, the power to execute was fully subordinate to the power to legislate. This claim had nothing to do with power struggles among political institutions in any particular regime. It was rather a logically entailed feature of the relationship between two intrinsically successive functions of government in the abstract.³⁴¹ The failure to appreciate this distinction has frequently caused confusion for modern audiences. One often-misunderstood line of Federalist 49, for example, describes the branches of federal government as “co-ordinate” with one another.³⁴² A shallow reading of that sentence might seem in tension with the mass of evidence that the founders understood executive power as subordinate to legislative power.³⁴³ But it isn’t. Publius’s statement about the

³⁴⁰ *Id.* (internal quotation marks omitted).

³⁴¹ Mortenson, *supra* note 5, at Section III.C (discussing the dominance of this frame on the eighteenth-century bookshelf).

³⁴² See THE FEDERALIST NO. 49 (James Madison), reprinted in 16 DHRC, *supra* note 46, at 16, 16 (1986). This description is important more because it has become a standard judicial reference in modern caselaw than because it was thought to be particularly common at the Founding. (It wasn’t). *E.g.*, Bailey v. Drexel Furniture, 259 U.S. 20, 37 (1922) (“[T]he acts of a co-ordinate branch of the government . . .”).

³⁴³ See THE FEDERALIST NO. 49, *supra* note 342, at 17 (“The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to

coordinacy of *institutional branches* had nothing to with the subordination of *functional powers*; invoking the former to refute the latter conflates the political entity called “the executive” with the conceptual function of government called “the executive power.”³⁴⁴

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

The Founding records are replete with versions of this observation, itself practically a paraphrase of John Locke,³⁴⁵ David Hume,³⁴⁶ and many other writers on whom the founders relied.³⁴⁷ Start with the famously pro-executive John Adams, who defended the gubernatorial veto as necessary because “the legislative power is naturally and necessarily sovereign and supreme over the

an exclusive or superior right of settling the boundaries between their respective powers . . .”). Less well remembered is Madison’s use of the same phrase during the Virginia debates in service of an argument that sits uncomfortably with a strong departmentalist reading of Publius. See Madison, *supra* note 131, at 1413 (“It may be no misfortune that in organizing any Government, the explication of its authority should be left to any of its co-ordinate branches. There is no example in any country where it is otherwise.”). Madison went on to discuss examples of judicial review of action by the states. *Id.*

³⁴⁴ See THE FEDERALIST NO. 49, *supra* note 342, at 18-19.. This is a version of what I have elsewhere called the metonymy error. See Mortenson, *supra* note 5, at Section IV.A; see also Blake Emerson, The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller 17 (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533508 (“A department is a specialized division of government in which officials exercise their powers. A department is thus different from a power. It is the confined domain and rule-structure in which power operates.”). The Federalist Papers were themselves elsewhere quite clear that obeying the law is different from obeying the legislative branch. Consider also that the entities most often described as “co-ordinate” were the states and the federal government, rather than the departments of the federal government themselves. That characteristic was apparently quite consistent with their shared understanding that the federal government would be supreme (for better or worse) within its field of activity.

³⁴⁵ See LOCKE, *supra* note 240, at 149-50 (“[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 . . .”).

³⁴⁶ Hume made the point repeatedly. DAVID HUME, *Essay VI, in* ESSAYS MORAL, POLITICAL, AND LITERARY 44 (Eugene F. Miller, ed. 1985) (1758) (“The executive power in every government is altogether subordinate to the legislative”); HUME, *Essay XVI, supra*, at 524 (“[T]he legislative power [is] being always superior to the executive . . .”).

³⁴⁷ See Mortenson, *supra* note 5, at Section III.D.

executive.”³⁴⁸ Continue from there to an array of others across the ideological spectrum, all agreeing with A Farmer that “[t]he power of making rules or laws to govern or protect the society is the essence of sovereignty, for by this the executive and judicial powers are directed and controuled, to this every ministerial agent is subservient”³⁴⁹ Centinel was to the same effect: “It will not be controverted that the legislative is the highest delegated power in government, and that all others are subordinate to it.”³⁵⁰ The Old Whig emphasized this observation’s distinguished pedigree: “[I]n the opinion of *Montesquieu*, and of most other writers, ancient as well as modern, the legislature is the sovereign power.”³⁵¹ And A Landholder suggested the negative implication: “a legislative power without a judicial and executive under their own control is in the nature of things a nullity.”³⁵²

This all just followed from the definition of the thing. Executive power was intrinsically an empty vessel, awaiting instructions from an exercise of the legislative power that would give it something to execute. This understanding pervaded the discourse. It grounded Gad Hitchcock’s observation, in a famous Election Day sermon from 1774, that “the executive power is strictly no other than the legislative carried forward, and of course, controllable by it.”³⁵³ It was necessary to Elbridge Gerry’s claim that reading the Articles of Confederation to permit troop requisitions by Congress “must preclude the states from a right of deliberating, and leave them only an executive authority on the subject.”³⁵⁴ It surfaced in Theodorick Bland’s

³⁴⁸ 1 JOHN ADAMS, *Letter LIII*, in 1 DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 362, 363 (3d ed. 1797) (1778) (“[A]nd therefore, . . . The latter must be made an essential branch of the former, even with a negative, or it will not be able to defend itself . . .”).

³⁴⁹ A Farmer, PHILA. FREEMAN’S J., Apr. 16 & 23, 1788, reprinted in 17 DHRC, *supra* note 46, at 133, 134 (1995); see also *id.* (“[T]o this all corporate or privileged bodies are subordinate: this [legislative] power not only regulates the conduct, but disposes of the wealth and commands the force of the nation.”).

³⁵⁰ Centinel, *supra* note 316, at 162.

³⁵¹ An Old Whig, II, PHILA. INDEP. GAZETTEER, Oct. 17, 1787, reprinted in 13 DHRC, *supra* note 46, at 399, 401 (1981).

³⁵² A Landholder, *supra* note 220, at 484. Comments like these have too often been mistaken for being the end of an argument (i.e., contestable assertions of republican ideology) rather than the beginning of one (i.e., an attempt to build from common ground). But that reading is demonstrably wrong—not least because so many Federalists not only recognized but affirmatively relied on the point as a key descriptive element of their arguments.

³⁵³ Gad Hitchcock, Election Sermon (1774) in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805 295 (1983); see also *id.* (“Legislators . . . should know how to give force, and operation to their laws This, indeed, is to be done by means of the executive part . . .”). For more on the context of this annual sermon series, see LINDSAY SWIFT, *THE MASSACHUSETTS ELECTION SERMONS: AN ESSAY IN DESCRIPTIVE BIBLIOGRAPHY* (1897).

³⁵⁴ Motion of Elbridge Gerry (June 2, 1784), in 27 JOURNALS OF THE CONSTITUTIONAL CONGRESS, *supra* note 69, at 518; see also Motion of Elbridge Gerry (May, 26, 1784), *id.* at 433 (depicting an earlier version of this same motion).

argument that there was a profound distinction between “levy[ing]’ an impost” and “collect[ing]’ an impost,” because “the first word imported a legislative idea, & the latter an executive only.”³⁵⁵ It was reflected in references to debt payment as “a simple executive operation”³⁵⁶ and contrasts between “trifling executive Business” and “Objects of the greatest Magnitude.”³⁵⁷ And it was emphasized in the Board of Treasury’s denials of compensation claims grounded in equity rather than the statutory framework. “As the Executive Officers of Congress,” they explained, they had no independent policy prerogative.³⁵⁸ The Board’s only authority—even in the face of demands from the likes of Pennsylvania³⁵⁹ and Virginia³⁶⁰—was to implement the letter of legislative instruction as written.

For eighteenth-century Americans, the executive power’s subordinate role in a principal-agent relationship was “naturally and necessarily” true³⁶¹—simply inherent in the very “nature of things.”³⁶² Indeed, the empty vessel nature of executive power made it a useful metaphor for enumerated constitutionalism itself: “[A]s the constitution comes immediately from the people; so ought the laws to flow immediately from the constitution; it should like a circle circumscribe all legislative power as the legislat[i]ve ought to

³⁵⁵ Motion by Theodorick Bland (Mar. 27, 1783), in 25 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 945; *see also id.* at 945-46 (“[A]nd consequently the latter might be less obnoxious to the States.”). The other congressional delegates were unpersuaded by the claim that levying and collecting should be read as distinct phases of a process as opposed to synonyms in a more pragmatic sense. But no one challenged the principle behind Bland’s proposed sales pitch; just the way Bland was applying it to the semantics of their particular case.

³⁵⁶ Report of the Office of Finance (Aug. 5, 1782), in 22 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 46, at 435 (“Already Congress have adopted a plan for liquidating all past accounts, and if the States shall make the necessary grants of Revenue, what remains will be a simple executive operation which will presently be explained.”).

³⁵⁷ Letter from James M. Varnum to William Greene (Apr. 2, 1781), in 17 LETTERS OF THE DELEGATES, *supra* note 75, at 115, 117 (“Our Time is consumed in trifling executive Business, while Objects of the greatest Magnitude are postponed . . .”).

³⁵⁸ Report of the Board of Treasury (July 3, 1786), in 30 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 386 (noting that “[i]t is not for this Board to enter into the Merits of [a] Claim” that contradicts an “Explicit[.]” statute). Recall also Adam Smith’s observation that if “the leading men of America . . . feel, or imagine, that if their assemblies . . . should be so far degraded as to become . . . executive officers of parliament, the greater part of their own importance would be at an end.” 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 452 (A. Strahan & T. Cadell, eds., 6th ed. 1791) (1776).

³⁵⁹ *See* Report of the Board of Treasury, *supra* note 358, at 386 (explaining that “[a]s the Executive Officers of Congress,” it was “not for this Board to enter into the Merits of [a] Claim” that would require reassessment of a statute).

³⁶⁰ *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 327 (July 11, 1787) (“It is with regret that the Board observe that a strict adherence on their part, to their duty as Executive Officers, should expose the United States to the risque of not receiving from the State of Virginia that support towards the Expences of the Current Year . . .”).

³⁶¹ *See* ADAMS, *supra* note 348, and accompanying text.

³⁶² *See* A Landholder, *supra* note 352, and accompanying text.

circumscribe the executive”³⁶³ Celebrating South Carolina’s ratification, another Federalist amplified the point: “The legislative powers are resolveable into this principle, that the sober second thoughts and dispassionate voice of the people, shall be the law of the land. The executive department amounts to no more than that the man of the people shall carry into effect the will of the people.”³⁶⁴

This “no more than” was common ground across ideological lines. For each committed republican telling the drafting convention that “the Executive magistracy [w]as nothing more than an institution for carrying the will of the Legislature into effect,”³⁶⁵ you can find a strong advocate for the constitutional Presidency telling a ratifying convention that “[e]xecutive officers . . . have no manner of authority, any of them, beyond what is, by *positive* grant and commission, delegated to them.”³⁶⁶ The Remarker put the point sharply: “[t]he executive . . . hath its own [inherent] limits,” since “[t]o make laws is an unlimited authority; but to execute them when made, is limited to their existence.”³⁶⁷ And A Federal Republican used notably identical language in defending the President’s veto:

It hath been made an objection to this constitution, that the legislative and executive are not kept perfectly distinct and separate. This, I think, is not valid. The executive should have a check on the legislative for this simple reason—that the executive hath its own limits—but the legislative independent of it, would have none at all. To make laws is unconfined and indefinite, but to execute them when made, is limited by their existence.³⁶⁸

³⁶³ Republicus, *supra* note 188, at 378; *see id.* (“[A]nd both take their form from tAhe people as the great centre of all . . .”).

³⁶⁴ Speech of David Ramsay, CHARLESTON COLUMBIAN HERALD, June 5, 1788, *reprinted in* 27 DHRC, *supra* note 46, at 432, 433; *see also id.* at 432 (“I congratulate you my fellow-citizens on the ratification of the new constitution. This event, replete with advantages, promises to repay us for the toils, dangers and waste of the late revolution.”).

³⁶⁵ 1 FARRAND’S RECORDS, *supra* note 51, at 65 (Roger Sherman). Note that Sherman started in the same place as his ideological opponent John Adams, but came to very different conclusions about the *institutional* implications that should follow. *Id.* at 68 (arguing “for the appointment by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed”); *id.* at 64 (similar). It’s a wonderful example of how the debaters used identical descriptive terminology and an identical conceptual toolkit even when making otherwise contradictory normative arguments.

³⁶⁶ McKean, *supra* note 327, at 542.

³⁶⁷ Remarker, INDEP. CHRON., Dec. 27, 1787, *reprinted in* 5 DHRC, *supra* note 46, at 527, 530 (2016); *see also id.* (“The executive should always have a negative upon the legislative, for this simple reason, that the former hath its own limits, but the latter, independent of it, would have none at all. To make laws is an unlimited authority; but to execute them when made, is limited to their existence.”).

³⁶⁸ A Federal Republican, *supra* note 60, at 255. Note that this description of the *conceptual* nature of executive power came from an Antifederalist who nonetheless viewed that the constitutional President as a threatening figure. *See id.* at 272 (“The executive, as vested in the

Even Federalists could thus conclude in private that “[a]s to the executive powers . . . there is nothing of any great importance in [the President’s] power *solely*”³⁶⁹ or in public that “the cases, in which he can exercise an *exclusive power*, are too *insignificant* to be productive of *dangerous* consequences.”³⁷⁰

So when Charles Francis Adams commented decades later that “[the] legislative power is then the precise measure of the executive power,”³⁷¹ he was just channeling the true legacy of the Founding. Standing alone, the executive power was a thin authority that did no more than authorize the implementation of instructions from some other source. That’s why the founders returned so often to the idea of a “correspondent,” “consequent,” or “commensurate” relationship between legislative and executive power. Certainly George Washington’s letter transmitting the draft Constitution to the Confederation Congress began by emphasizing the necessary “corresponden[ce]” between legislated intention and the executive power of implementation:

The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union³⁷²

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

Washington’s idea of an intrinsic “correspondence” between specific legislative authorities and the ensuing executive power of implementation

president is too pointedly supreme. The fears of the people will and ought easily to be agitated by such an extent of power in a single man”).

³⁶⁹ Letter from Samuel Holden Parsons to William Cushing, *supra* note 292, at 571-72 (“As to the executive powers, some appear to apprehend danger; but . . . I think no man of considerable discernment can have fears from this quarter unless he has also very weak nerves.”). Note that this description was of the President’s various powers standing alone. As the next section will discuss, the founders understood very well that when executive authority was used to implement legislative instructions that were sufficiently broad and discretionary, it could be very powerful indeed.

³⁷⁰ *Americanus, II*, VA. INDEP. CHRON., Dec. 19, 1787, reprinted in 8 DHRC, *supra* note 46, at 244, 245 (1988) (offering the President’s executive power as an example of just such an “exclusive power,” emphasizing “[the] *unity* of the executive authority” and that “the *executive power*” was not “lodged in the hands of *many persons*”).

³⁷¹ CHARLES FRANCIS ADAMS, AN APPEAL FROM THE NEW TO THE OLD WHIGS IN CONSEQUENCE OF THE SENATE’S COURSE, & PARTICULARLY OF MR. WEBSTER’S SPEECH UPON THE EXECUTIVE PATRONAGE BILL 15 (1835).

³⁷² Letter from George Washington to the President of Congress (Sept. 17, 1787), in 19 DHRC, *supra* note 46, at 526, 526 (2003).

recurred throughout the debates.³⁷³ For James Wilson, the word was “commensurate”: as he told the Pennsylvania ratifying convention, “the executive powers of government ought to be commensurate with the government itself, and . . . a government which cannot act in every part is so far defective.”³⁷⁴ For Valerius Agricola, the relationship was better described as “consequent,” with the first “right[] of sovereignty” defined as the standard trio: “*Legislation*, and the consequent *executive* and *Judicial* rights.”³⁷⁵ But everyone agreed on the underlying structure. Executive power was subsequent, subordinate, and dependent on instructions from a prior exercise of its legislative counterpart.

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

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

³⁷³ See, e.g., A Freeholder, NEWPORT HERALD, Feb. 25, 1790, reprinted in 26 DHRC, *supra* note 46, at 731, 732 (2013) (“The Constitution is calculated for a confederacy of States. It vests in Congress the power, of making war, peace, and treaties; over concerns of a foreign and general nature, of regulating commerce, providing for the support of government, and establishing correspondent judicial and executive authorities . . .”); Solon, junior, PROVIDENCE U.S. CHRON., Feb. 25, 1790, reprinted in 26 DHRC, *supra* note 46, at 737, 737-38 (quoting Washington’s letter transmitting the draft Constitution to the states).

³⁷⁴ Statement of James Wilson, Pennsylvania Ratification Debates (Dec. 11, 1787), in 2 DHRC, *supra* note 46, at 550, 559 (1976). In its entirety, Wilson stated:

Let us examine these objections; if this government does not possess internal as well as external power, and that power for internal as well as external purposes, I apprehend, that all that has hitherto been done must go for nothing . . . I presume, sir, that the executive powers of government ought to be commensurate with the government itself, and that a government which cannot act in every part is so far defective.

Id. at 557, 559.

³⁷⁵ P. Valerius Agricola, *An Essay on the Constitution Recommended by the Federal Convention to the United States*, ALBANY GAZETTE, Nov. 8, 1787, reprinted in 19 DHRC, *supra* note 46, at 186, 188-89 (2003) (emphasis in original). Agricola went on to set out various subject matter competences to which these three great powers of formulating intentions, assessing applications, and implementing results could be applied. *Id.* (listing the subject matters of “making war and peace,” “raising money,” “making commercial regulations,” and “promoting . . . the wealth and happiness of [the] community”).

Consider by analogy the diverse range of instructions that the Continental Congress imposed on General George Washington in his role as commander-in-chief.³⁷⁶ On one hand, he was subject to unbelievably particularized instructions from his national principal, sometimes half-drowning in a flood of orders ranging from the distribution of flour barrels,³⁷⁷ to the transportation of refugees from Charleston to ports of their choice,³⁷⁸ to the suspension of court-martial sentences until Congress could review the trial records.³⁷⁹ On the other hand, Congress regularly delegated substantive rulemaking authority of startlingly open-ended dimensions. Consider the order “direct[ing]” General Washington “to carry . . . into the most effectual execution” Congress’s desire to end the circulation of “dangerous and criminal . . . correspondence” from England “contain[ing] ideas insidiously calculated to divide and delude the good people of these states.”³⁸⁰ The statute contained nothing more than a goal—to suppress English propaganda—and

³⁷⁶ As the pathbreaking work of David Barron and Marty Lederman have shown, Americans adopted the British understanding of commander-in-chief as “a purely military post under the command of political superiors” rather than a font of independent substantive authority. David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb, Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 772 (2008); see also generally *id.* at 772-86 (surveying eighteenth-century practice in England, under the Continental Congress, and in the separate states).

³⁷⁷ See 12 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 902-03 (Sept. 11, 1778) (informing General Washington that “Congress have given orders for the purchase of 20,000 barrels of flour”).

³⁷⁸ The issue was recorded as follows:

Therefore, Resolved, That General Washington take order for procuring from the British General the necessary passports, and the proper means of re-conveying back to the State of South Carolina, by water carriage at the expence of the King of Great Britain, the persons, families and baggage of those of the inhabitants of the said State who are entitled to the benefit of the capitulation of Charles Town and who have been sent from that State to other distant parts of these States by order of the Commanding Officer of the British Troops in Charles Town

²² JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 330-32 (June 14, 1782).

³⁷⁹ See 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 509-10 (Aug. 15, 1783) (“Resolved . . . that the execution of the sentences against the several offenders who have been ~~tried for~~ convicted of mutiny by the general court-martial now sitting at Philadelphia, be suspended, until ~~the further order of Congress~~ ten days after a full report of all the proceedings of the said court-martial respecting the mutiny, shall have been laid before Congress . . .”).

³⁸⁰ 11 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 616 (June 17, 1778). In full, the Congress stated:

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

Id.

an open-ended full-powers authorization to pursue the goal by any means necessary.

The increasing prevalence of such open-ended instructions was surely due in part to Washington's increasing prestige. And that point is generalizable: the more influence an executive has over the legislative process, the more empowering and less constraining his instructions are likely to be. So as a practical matter, the congressional "instructions" issued to General Washington often consisted of legislative ratification of some proposal for which he had himself sought approval,³⁸¹ or a forward-looking authorization for the great man to investigate some problem and take action if he saw fit.³⁸² As Madison explained, this exact dynamic might yield tyrannical power for the President precisely as an executive—unless Congress's legislative authority were limited:

One consequence must be, to enlarge the sphere of discretion allotted to the Executive Magistrate. Even within the legislative limits properly defined by the Constitution, the difficulty of accommodating legal regulations to a country so great in extent and so various in its circumstances has been much felt, and has lead 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

³⁸¹ *E.g.*, 14 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 1004 (Aug. 27, 1779) ("Resolved, That the plan prepared by General Washington for conducting the western expedition, is in the opinion of Congress wise and judicious; that the measures he has taken for the execution of it are proper and prudent; and that Congress are perfectly satisfied with the General's conduct relative to the same."); *cf.* 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 630 (Aug. 11, 1777) ("Congress took into consideration the letter from General Washington, respecting the river defence necessary to be adopted for the protection of Philadelphia. *Ordered*, That . . . the Board of War . . . be directed to carry the General's plan of defence into execution with all possible despatch.").

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

³⁸² *See, e.g.*, 15 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 1108 (Sept. 26, 1779) (providing "that General Washington be authorized and directed to concert and execute such plans of co-operation with the Minister of France, or the Count, as he may think proper"). Yet another Congressional declaration stated:

[W]hether a reduction of the stationary teams cannot be made consistently with the good of the service, or whether ox-teams cannot, in the present seat of war, be substituted in a great measure for horse-teams; and if General Washington shall be of opinion that both or either of these measures are advisable, that the quarter master general take measures for carrying the same into execution . . .

12 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 906 (Sept. 12, 1778).

diminished, and the difficulty of providing uniform and particular regulations for all be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature, so as to suit them to the diversity of particular situations.³⁸³

That's at least in part why the Continental Congress would sometimes pair such open-ended instructions with short-cycle sunset provisions.³⁸⁴

The latent possibility of such immense delegated authority thus posed a recurring question for legislators: how much discretion to embed in any particular instruction. Some contemporaries certainly argued that “laws *should* be so formed as to leave little or nothing to the discretion of those by whom they are executed.”³⁸⁵ Where a statute was written that way, any executive authority parasitic on its instructions was indeed close to the caricature of an automaton or messenger boy. But lots of statutes rejected this advice, instead delegating broad authority for discretionary execution by its recipient.³⁸⁶ And the consequence of such decisions was well understood. Thus the Board of Treasury urged the Continental Congress *not* to extend the same discretionary authority to its state commissioners for settling accounts with states that those commissioners had for settling accounts with individuals:

That altho' the powers vested by Congress in the said Commissioners for settling Accounts with Individuals are as extensive as a regard to the Public Security can possibly admit of . . . it would be inconsistent with those principles of equality which ought to Govern in the settlement of the Accounts of the Individual States with the United States to vest the Commissioners with those extensive powers, in settling the accounts of the State, which they have a right to Exercise in the case of Individuals . . .³⁸⁷

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

An analogous problem arose when interpreting existing statutes: how much discretion should ambiguous legislative instructions be read to convey?

³⁸³ JAMES MADISON, *Report on the Virginia Resolves*, in 6 THE WRITINGS OF JAMES MADISON 358 (Daillard Hunt, ed. 1906) (1799).

³⁸⁴ See, e.g., 20 JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 69, at 556 (May 28, 1781) (“And be it further resolved that the powers herein granted to the Commander in Chief continue for the space of six months, unless sooner revoked by Congress, and that he be fully empowered and directed to execute the same . . . by all ways and means that to him shall appear conducive thereto or the necessity of the case may require.”).

³⁸⁵ Report of the Office of Finance, *supra* note 356, at 442 (emphasis added) (treating revenue laws as a special case of this general principle).

³⁸⁶ For a more detailed discussion, see Mortenson & Bagley, *supra* note 77, at Section III.A.

³⁸⁷ 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 536-37 (July 14, 1785).

The Continental Congress often used the formulation “take order,” for example, when issuing instructions to executive agents—as with a resolution instructing that “the Superintendent of Finance take order for furnishing [discharged soldiers] two months pay.”³⁸⁸ But was the formulation a discretionary authorization or a mandatory command? When the point was pressed, the delegates had a hard time agreeing. John Rutledge moved to resolve that “when a matter was referred to any of the [national executive] departments *to take order*, it was the sense & meaning of Congress that the same should be carried into execution.”³⁸⁹ The secretary’s notes suggest that, after some discussion, it “seemed to be the general sense of the house that a reference to take order implied a discretionary power.”³⁹⁰ James Madison’s account is more detailed:

On this motion some argued that such reference amounted to an absolute injunction, others insisted that it gave authority, but did not absolutely exclude discretion in the Executive Departments. The explanation which was finally acquiesced in as most rational & conformable to practice was that it not only gave authority, but expressed the sense of Congress that the measure ought to be executed: leaving it so far however in the discretion of the Executive Department, as that in case it differed in opinion from Congress it might suspend execution & state the objections to Congress that their final direction might be given.³⁹¹

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

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

³⁸⁸ 27 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 521 (June 2, 1784).

³⁸⁹ 23 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 848-49 (Nov. 12, 1782); *see also id.* at 722-23 (similar).

³⁹⁰ *Id.* at 722; *see also id.* (“But it was argued by Mr Madison that if the thing was not done the officer should report the reasons that prevented.”). Madison’s failure to quote his own intervention here is consistent with my sense that his notes are unlikely to have overstated his role at the Constitutional Convention.

³⁹¹ *Id.* at 848. In the end, the motion was withdrawn, “the mover alledging that as he only aimed at rendering an uncertain point clear, & this had been brought about by a satisfactory explanation, he did not wish for any Resolution on the subject.” *Id.* at 849.

* * *

That in turn brings us back to perhaps the most important impetus for the Constitution in the first place. We saw above how people on all sides of the ratification debates recognized that the Confederation Congress wasn't cutting it. And we saw how all sides agreed that its worst problem was the lack of an effective mechanism to effectuate its intentions. That's why national governance was so fundamentally transformed by vesting executive power in a single President.³⁹² That's why it was sometimes suggested that the new constitution didn't change the "ends" or "objects" of the national government so much as it changed the mechanisms available to execute them.³⁹³ And that's why Publius said that "the executive power" was not only "restrained within a narrower compass" than its legislative counterpart, but also "more simple in its nature."³⁹⁴ When the essence of a function is to implement instructions, it's just not that hard to explain.

IV. "THE EXECUTIVE POWER" WAS NOT ANOTHER WORD FOR ROYAL PREROGATIVE

At this point the affirmative case for the meaning of "executive power" is complete. What remains is to explore its implications for the larger structure of Article II, and to more squarely address the principal competing theory in its own right. In broad strokes, this Part will proceed as follows. Section IV.A will sketch the radical implausibility of the residuum claim as a matter of Founding-era politics, political theory, and legal terminology. Section IV.B will show that, when engaging the question directly, the founders rejected

³⁹² This wasn't the only way that execution was transformed; also important were the new Congress's legislative competences, from Commerce to Necessary & Proper authorities. The idea of legislative execution was especially important to Gouverneur Morris, who emphasized that each of the three powers could be framed with relatively more or less compulsive aspect to its implementation: "The foederal gov. has no such compelling capacities, whether considered in their legislative, judicial or Executive qualities." 1 FARRAND'S RECORDS, *supra* note 51, at 43 (Gouverneur Morris).

³⁹³ William Cushing made such a suggesting, arguing

[T]he Confederation, *in appearance* imparted many, if not most of the great powers, now inserted in the proposed Constitution . . . but not *one* efficient power, to carry a single article into effect . . . These governmental powers, in order to have full & proper effect, *must, in the nature of things, consist* of the Executive, the Legislative, & judicial. Without these govmt cannot be carried an End.

Cushing, *supra* note 251, at 1439-40. *See also* Jonathan Gienapp, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 54-56 (2018) ("[The Continental] Congress's inability to exercise its power was less an issue of legal authority (it enjoyed the power) than a matter of practical legitimacy (the states simply did not allow it and Congress lacked the resources to coerce them)").

³⁹⁴ THE FEDERALIST NO. 48 (James Madison), *reprinted in* 16 DHRC, *supra* note 46, at 3, 5 (1986).

even the possibility of residual executive authority as absurd. Section IV.C will explore residuum theory's "dog that didn't bark" problem, emphasizing the sheer number of instances where at least *someone* would have referred to the possibility of a Vesting Clause residuum if such a thing were even plausibly in play.

A. *The Royal Residuum is Facially Implausible*

The first thing to say about the royal residuum is that it is wildly implausible on any serious account of the era's politics. To be sure, the incompetence and excesses of state legislatures had created a vocal constituency for a structurally independent executive branch and a presidential veto. While not everyone agreed, there's no denying the appeal of state constitutions with strong executives like those of New York and Massachusetts.³⁹⁵ But here are two more things that are every bit as undeniable: the virulently anti-monarchical cast of American politics, and the radical semantic unsuitability of "executive" as an umbrella term for royal power.

1. It's Politically Implausible

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

[T]he writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation, calculating upon the aversion of the people to monarchy, they have endeavoured to inlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo but as the full grown progeny of that detested parent. To establish the pretended affinity they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate . . . have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a King

³⁹⁵ See, e.g., WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 254-73 (1973); WOOD, *supra* note 54, at 430-38 (describing states' apprehension of the popular nature of the Revolutionary constitutions and the tension between "the inherited dread of magisterial despotism and a fear of popular disorder" in states' constitutional reform efforts). *But see* MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 15 (1997) (suggesting that other historians attribute too much significance to "the Massachusetts Moment").

of Great-Britain. He has been shown to us with the diadem sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses; giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been almost taught to tremble at the terrific visages of murdering janizaries; and to blush at the unveiled mysteries of a future seraglio.³⁹⁶

Hamilton set out to rout such comparisons with a relentlessly systematic demolition of this “gross pretence of a similitude between a King of Great-Britain and a magistrate of the character marked out for that of the President of the United States.”³⁹⁷ Such Federalist mockery, of course, only evinced the Federalists’ political concern about this line of attack: “The enemies of the new form of government endeavour to persuade others, what I can scarcely think they believe themselves; that the President of the United States is only another name for King, and that we shall be subject to all the evils of a monarchical government.”³⁹⁸

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

We have seen that the late honorable Convention, in designating the nature of the chief executive office of the United States, *have deprived it of all the dangerous appendages of royalty*, and provided for *the frequent expiration of its limited powers*—As our President bears *no resemblance to a King*, so we shall see the Senate have *no similitude to nobles*.³⁹⁹

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

³⁹⁶ THE FEDERALIST NO. 67, *supra* note 149, at 370 (Alexander Hamilton).

³⁹⁷ *Id.*

³⁹⁸ Publicola, *supra* note 68, at 496.

³⁹⁹ An American Citizen II, *On the Federal Government*, PHILA. INDEP. GAZETTEER, Sept. 28, 1787, *reprinted in* 13 DHRC, *supra* note 46, at 264, 264 (1981).

2. It's Doctrinally Implausible

The residuum's sheer political implausibility is compounded by its doctrinal impossibility in a robustly transatlantic legal culture.⁴⁰⁰ For one thing, the idea that “the executive power” was an umbrella term for all of the king's powers runs into a brick wall when you consider that the royal prerogative also included a veto⁴⁰¹—which without exception of which I am aware was classified as legislative.⁴⁰² More fundamentally, the founders followed Blackstone (and the rest of English law) in expressly *distinguishing* executive power from the other branches of royal authority, whether in foreign affairs, national security, finance, commerce, or church government. Residuum theory requires us to believe that that this standard term of art for one subset of the royal prerogative suddenly became the catchall for naming the full motley array. Far from suggesting a sudden abandonment of black letter terminology, however, the evidence all points to a rather dull carrying forward of the standard framework.

There's just no getting past the array of writers who expressly distinguished between “legislation and the consequent executive and judicial rights” on one hand and foreign affairs powers like “[t]he rights of making

⁴⁰⁰ See, e.g., MARY SARAH BILDER, *COLONIAL LEGAL CULTURE AND THE EMPIRE* (2008); DANIEL HULSEBOSCH, *CONSTITUTING EMPIRE* (2005).

⁴⁰¹ That the crown's negative had basically fallen into disuse domestically left it no less a black letter component of royal prerogative. Certainly the Founding generation had recent experience with crown representatives vetoing the legislative projects of the colonial legislatures. “The king of England has an *unconditional* negative,” wrote one Federalist, “and has often exercised it in his former colonies.” Plain Truth, *Reply to An Officer of the Late Continental Army*, INDEP. GAZETTEER, Nov. 10, 1787, reprinted in 2 DHRC, *supra* note 46, at 216, 220 (1976); see also Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1113-16 (2011) (discussing Thomas Jefferson's 1774 “*A Summary View of the Rights of British America*,” in which Jefferson “insists that the King ought to withhold royal assent to bills passed by Parliament that would infringe on the colonies' rights of self-governance”).

⁴⁰² For just a few examples, see, e.g., 1 FARRAND'S RECORDS, *supra* note 51, at 139 (James Madison); John Leland, *Objections to the Constitution* (Feb. 28, 1788), in 8 DHRC, *supra* note 46, at 425, 425 (1988); Instructions to Daniel Adams (Dec. 31, 1787), in 5 DHRC, *supra* note 46, at 1055, 1055 (1998). Some discussions of the veto expressly contrasted “the supreme *executive* power” or “the sole *executive* authority” and the royal negative—which was “a branch of legislative jurisdiction.” See The Impartial Examiner, *supra* note 205, at 1609-10; see also 1 FARRAND'S RECORDS, *supra* note 51, at 140 (James Wilson) (describing the President's “revisionary duty” as “extraneous” from his “[e]xecutive duties”).

The choice to create a presidential veto—the veto as such occasioned remarkably little resistance at the convention, though it was more controversial during ratification—was just another example of why it is far more accurate to speak of the Constitution's distribution of powers rather than its separation of them. See 1 FARRAND'S RECORDS, *supra* note 51, at 94 (June 4, 1787) (adopting the qualified negative); see also JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 612 (C.C. Little & J. Brown, eds., 2d ed. 1851) (1833) (“In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws.”).

war and peace, consequently of raising troops, establishing navies, arsenals, &c” on the other.⁴⁰³ Caroliniensis was typical in reminding South Carolinians that “[n]ot only all executive power is lodged in” the King, but *also* twelve *more* specifically enumerated “powers and prerogatives . . . together with many others, with which any person may make himself more particularly acquainted by reading the learned and accurate judge Blackstone on the subject.”⁴⁰⁴ The point is equally unmistakable in Publius’s implication that the Executive Power Clause didn’t even bear mention:

[While] the executive authority, with few exceptions, is to be vested in a single magistrate[,] . . . [t]his will scarcely . . . be considered as a point upon which any comparison can be grounded; for if in this particular there be a resemblance to the King of Great-Britain, there is not less a resemblance to the Grand Signior, to the Khan of Tartary, to the man of the seven mountains, or to the Governor of New-York.⁴⁰⁵

Because executive power was just the basic enforcement authority possessed by any chief magistrate, in other words, you could only assess the Antifederalists’ royal comparisons by comparing the *other* presidential powers to the *other* elements of crown prerogative. And so Hamilton pivoted to a drumbeat of contrasts between the other elements of Crown prerogative and

403 P. Valerius Agricola, *supra* note 375, at 189 (emphasis omitted). For a mere sampling of other examples, see, e.g., THE FEDERALIST NO. 75 (Alexander Hamilton), *reprinted in* 16 DHRC, *supra* note 46, at 481, 482 (distinguishing between “the power of making treaties” and “the class of executive authorities”); Caroliniensis, CHARLESTON CITY GAZETTE, Apr. 1 & 2, 1788, *reprinted in* 27 DHRC, *supra* note 46, at 235, 236 (2016) (distinguishing between the English King’s possession of “all executive power” and his separate possession of foreign affairs authorities); Cincinnatus, *V: To James Wilson, Esquire*, N.Y. J., Nov. 29, 1787, *reprinted in* 19 DHRC, *supra* note 46, at 319, 324 (2003) (“[S]overeignty consists in three things—the legislative, executive, and negotiating powers . . .”); Luther Martin, *Address No. III*, MD. J., Mar. 28, 1788, *reprinted in* 12 DHRC, *supra* note 46, at 456, 458 (2015) (“the general government [possesses] extensive and unlimited powers . . . in the executive legislature and judicial departments, together with the powers over the militia, and the liberty of establishing a standing army . . .”); Draft Essay in Defense of the Constitution, *in* 23 DHRC, *supra* note 46, at 2536, 2538 (2009) (“The United Netherlands were also of distinct republicks possessing however a common council a common treasury & a common military establishment & a common executive . . .”). Fabius made a similar point when he argued:

Is there more danger to our liberty, from such a president as we are to have, than to that of Britons, from an hereditary monarch . . . in the exercise of the whole executive power; in the command of the militia, fleets, and armies, . . . who can at his will, make war, peace, and treaties irrevocably binding the nation; and who can grant pardons or titles of nobility, as it pleases him?

Fabius, *IX*, PA. MERCURY, May 1, 1788, *reprinted in* 17 DHRC, *supra* note 46, at 261, 262 (1995).

404 Caroliniensis, *supra* note 403, at 235; *see also* THE FEDERALIST NO. 69 (Alexander Hamilton), *reprinted in* 16 DHRC, *supra* note 46, at 387, 387 (1986).

405 THE FEDERALIST NO. 69, *supra* note 404, at 387 (Alexander Hamilton).

the other authorities enumerated in Article II.⁴⁰⁶ Residuum theory, which constantly cites such federative competences as being contained within “executive power,” simply can’t make sense of these constant distinctions.⁴⁰⁷

B. *The Royal Residuum Was Expressly Rejected*

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

1. They Knew Exactly What a Residuum Structure Looked Like

The founders were thoroughly familiar with residuum structure as a doctrinal tool. The common law was understood as residual in precisely this sense,⁴⁰⁸ and the concept was well-established as a structuring device for other kinds of legal authority as well. The 1774 case of *Campbell v. Hall*, well known to the colonists, expressly deployed the notion of a defeasible residuum to explain royal power in foreign affairs.⁴⁰⁹ *McCulloch v. Maryland* drew on this framework in imagining a government structure where “the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power,”⁴¹⁰ and *Gibbons v. Ogden* engaged the appellants’ claim that “full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.”⁴¹¹ While the question of defeasibility might vary from system to system, the

⁴⁰⁶ See *id.* at 387-94. For the full list of contrasts, see *infra*, note 436.

⁴⁰⁷ Cf. Letter from Marine Committee to William Aylett (Mar. 26, 1779), in 12 LETTERS OF DELEGATES, *supra* note 75 (quoting a separate letter written to James Maxwell and Paul Loyall) (contrasting “the executive part of [] [military] business” and the non-executive part).

⁴⁰⁸ See Mortenson, *supra* note 5, at 1221 (“Like the common law more generally, the [King’s] 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.”).

⁴⁰⁹ See *Campbell v. Hall* (1774) 98 Eng. Rep. 1045, 1048, 1 Cowp. 204, 210 (“[I]f the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles . . .”). On the contemporary salience of *Campbell*, see JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 158 (1986) (noting “the discussion [*Campbell*] generated during the months leading up to the American Revolution”).

⁴¹⁰ 17 U.S. (4 Wheat.) 316, 410 (1819).

⁴¹¹ 22 U.S. (9 Wheat.) 1, 198 (1824).

underlying conceptual structure was an off-the-shelf move: residual authority was that component of an original grant which remained after adjustment by some superior source of legal authority.

The structural concept of a legal residuum was thus regularly invoked in a wide range of discussions and by all sides of the Founding debates. They used a variety of words for the idea, from “residuum”⁴¹² and “residue”⁴¹³ in the most general sense to “prerogative” when talking specifically about executive magistrates.⁴¹⁴ They deployed the concept to describe the fundamental allocation of authority in state and federal government when discussing the need for a bill of rights.⁴¹⁵ And they deployed it again when discussing the British system’s distinctive approach to the residual authorities of an executive magistrate.

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

In England, in all disputes between the King and people, recurrence is had to the enumerated rights of the people to determine. Are the rights in dispute secured—Are they included in Magna Charta, Bill of Rights . . . ? If not, they are, generally speaking, within the King’s prerogative. In disputes between Congress and the people, the reverse of the proposition holds. Is the disputed right enumerated? If not, Congress cannot meddle with it. Which is the most

⁴¹² See, e.g., 4 ELLIOT’S DEBATES, *supra* note 90, at 138 (statement of Samuel Spencer) (discussing “those unalienable rights, which are called by some respectable writers the residuum of human rights”); Federal Farmer: An Additional Number of Letters to the Republican, Letter XIII (May 2, 1788), in 20 DHRC, *supra* note 46, at 976, 1033 (2004) (specifying certain appointments provisions, noting “we shall then want to lodge some where a residuum of power, a power to appoint all other necessary officers The fittest receptacle for this residuary power is . . . the first executive magistrate, advised and directed by an executive council . . .”).

⁴¹³ See, e.g., An Annapolitan, ANNAPOLIS MD. GAZETTE, Jan. 31, 1788, *reprinted in* 11 DHRC, *supra* note 46, at 218, 220 (2015) (“One of these branches possesses a great share of the executive authority, the residue of which is committed to a single man.”). For more on the sense in which the Senate had executive power, see *infra*, Section IV.B.

⁴¹⁴ See THE FEDERALIST NO. 26, *supra* note 146, at 66 (Alexander Hamilton) (“In England for a long time after the Norman conquest the authority of the monarch was almost unlimited. Inroads were gradually made upon the prerogative, in favour of liberty, first by the Barons and afterwards by the people, ‘till the greatest part of its most formidable pretensions became extinct.”).

⁴¹⁵ See 4 ELLIOT’S DEBATES, *supra* note 90, at 138 (statement of Samuel Spencer) (“There has been a comparison made of our situation with Great Britain. We have no crown, or prerogative of a king, like the British constitution.”); Statement of Thomas Hartley, Pennsylvania Ratification Debates (Nov. 30, 1787), in 2 DHRC, *supra* note 46, at 425, 430 (1976) (“[W]hatever portion of those natural rights we did not transfer to the government was still reserved and retained by the people; for, if no power was delegated to the government, no right was resigned by the people”); A Citizen of New-York (John Jay), *supra* note 73, at 933 (“In days and countries where Monarchs and their subjects were frequently disputing about prerogative and privileges, the latter often found it necessary . . . [to] oblige the former to admit by solemn acts, called bills of rights, that certain enumerated rights belonged to the people, and were not comprehended in the royal prerogative.”).

safe? The people of America know what they have relinquished, for certain purposes. They also know that they retain every thing else, and have a right to resume what they have given up, if it be perverted from its intended object. The King's prerogative is general, with certain exceptions. The people are therefore less secure than we are.⁴¹⁶

When Patrick Henry rose the following week to dispute Nicholas's conclusion, he began by agreeing that crown power was residual: "Every possible right which is not reserved to the people by some express provision or compact, is within the King's prerogative." According to Henry, however, the American context rendered this consideration irrelevant.⁴¹⁷ Nicholas returned to the point shortly thereafter, again invoking the residual structure of English royal authority as a contrast to American governance structure: "It is easier to enumerate the exceptions to [the King's] prerogative, than to mention all the cases to which it extends."⁴¹⁸

This agreement at opposite ends of the ideological spectrum exemplifies what earlier work has already shown. Eighteenth-century English indeed had a specific word for any catchall residual authority held by a magistrate. And that word was "prerogative,"⁴¹⁹ used perhaps most frequently in reference to the English king's residual authorities in the realms of foreign and military affairs.⁴²⁰

⁴¹⁶ Statement of George Nicholas, Virginia Ratification Debates (June 10, 1788), in 9 DHRC, *supra* note 6 at 1092, 1135-36 (1990).

⁴¹⁷ Statement of Patrick Henry, Virginia Ratification Debates (June 16, 1788), in 10 DHRC, *supra* note 46, at 1299, 1333 (1993) ("[I]f implication be allowed, you are ousted of those rights. If the people do not think it necessary to reserve them, they will be supposed to be given up.").

⁴¹⁸ Statement of George Nicholas, Virginia Ratification Debates (June 16, 1788), in 10 DHRC, *supra* note 46, at 1299, 1333 (1993).

⁴¹⁹ See, e.g., Congress's Proclamation to Colonies (Feb. 13, 1776), in 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 135 ("The Share of Power, which the King derives from the People, or, in other Words, the Prerogative of the Crown, is well known and precisely ascertained . . ."); 5 ELLIOT'S DEBATES, *supra* note 90, at 287 (statement of Gouverneur Morris) ("[T]he great prerogatives of the [German] emperor, as head of the empire . . ."); Americanus, VII, N.Y. DAILY ADVERTISER, Jan. 21, 1788, reprinted in 20 DHRC, *supra* note 46, at 629, 630 (2004) (noting "the ideas we have imbibed from our English ancestors" include an understanding of "[t]he extensive prerogatives and regal state, which the Supreme Executive in England have always possessed"); see also generally, Mortenson, *supra* note 5.

⁴²⁰ For a few examples from documents not cited elsewhere in this Article, see generally Congress's Response to the King's Proclamation (Aug. 20, 1782), reprinted in 23 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 471, 510 (stating that it is "the prerogative of the crown to manage the affairs of peace"); Statement of George Nicholas, Virginia Ratification Debates (June 18, 1788), in 10 DHRC, *supra* note 46, at 1387, 1388 (1993) (noting the "King's prerogative to make treaties, leagues, and alliances"); Westchester Farmer, *To the Citizens of America*, N.Y. DAILY ADVERTISER, June 8, 1787, reprinted in 13 DHRC, *supra* note 46, at 128, 129 (1981) ("The powers of the supreme executive council should be well defined, and be perfectly enabled to maintain its independence and vigor. It should possess the prerogative of making peace and war, of sending and receiving all ambassadors, of making treaties, leagues and alliances with foreign states and

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

On this background, the founders' repeated denial of any royal residuum is unmistakable. The residuum concept was standard operating procedure. The terms "executive prerogative"⁴²¹ and "prerogatives of the president"⁴²² were readily available—as was the move of building new structures from existing governance templates.⁴²³ But the founders roundly rejected the whole apparatus when it came to presidential power, precisely because of American "jealousy of this danger" from "a monarch . . . [with] prerogatives very considerable."⁴²⁴ Indeed, this rejection was a pillar of Federalist responses to the likes of Patrick Henry roaring that "there is to be a great and mighty President, with very extensive powers; the powers of a King";⁴²⁵ and Luther Martin prophesying that the President will "when he pleases . . . become a king in *name*, as well as in substance."⁴²⁶ Over and over again, Federalists responded to such loose emotive comparisons by dragging their opponents back to the plain text of the Constitution, the well-known doctrinal structure of English constitutionalism, and the patent difference between the two.

It would be hard to make the point more clearly than "A Native of Virginia" did in criticizing the Glorious Revolution for undershooting its mark. It was true, he acknowledged, that William of Orange had dropped any

princes . . ."); 3 FARRAND'S RECORDS, *supra* note 51, at 522 (James Madison) ("[T]he Royal prerogatives of war & peace, treaties coinage . . .").

⁴²¹ See, e.g., 4 ELLIOT'S DEBATES, *supra* note 90, at 553 (James Madison Report) ("[I]t is in this latitude, as a supplement to the deficiency of the laws, that the degree of executive prerogative materially consists.").

⁴²² This phrase was used more casually, but it was available as well. See, e.g., *Americanus*, *supra* note 370, at 247 (noting "the province of the *president*, and . . . the exercise of *his prerogatives*"); Cato, *IV*, N.Y. J., Nov. 8, 1787, *reprinted in* 19 DHRC, *supra* note 46, at 195, 197-98 (2003) (describing "the direct prerogatives of the president").

⁴²³ See, e.g., Andrew Cecchinato, William Blackstone as Interpreter of the European Legal Tradition 68 (2019) (unpublished manuscript). ("[E]ven within those doctrines that accompanied and sustained the rise of nation-states, the paradigm of sovereign power could not be understood if not by attributing to kings those same prerogatives that had been traditionally attributed to the emperor himself.").

⁴²⁴ Marcus, *supra* note 171, at 384; see also *id.* (noting that "a constant jealousy" toward executive authority "is both natural and proper"). A similar point was made by *Americanus*. See *Americanus*, *supra* note 419, at 630 ("The [King's] extensive prerogatives and regal state . . . have ever been, and with reason too, the object of terror to the friends of liberty. All their efforts have been directed to . . . circumscribe and limit these dangerous powers within proper bounds.").

⁴²⁵ Statement of Patrick Henry, *supra* note 111, at 961; see also, e.g., Statement of Patrick Henry, Virginia Ratification Debates (June 18, 1788), *in* 10 DHRC, *supra* note 46, at 1371, 1384 (1993) ("Gentlemen say, that the King of Great-Britain has the same right of making treaties that our President has here. I will have no objection to this, if you make your President a King."); Statement of Edmund Randolph, Virginia Ratification Debates (June 7, 1788), *in* 9 DHRC, *supra* note 46, at 1006, 1018 (1990) (describing antifederalist claim that "the President can . . . establish himself a monarch").

⁴²⁶ Martin, *supra* note 268, at 496.

pretense “to a divine right of governing,” had “acknowledged his [authority] to flow from the people,” and had even “entered into a compact with them, which recognized that just and salutary principle.”⁴²⁷ The problem was that all these changes left the *legal* substance of Crown prerogative in place:

Had the English at this time limited the regal power in definite terms, instead of satisfying themselves with a Bill of Rights, there would have been an end of prerogative; but they from habit were contented with a Bill of Rights, leaving the prerogative still inaccurately defined, *to claim by implication, the exercise of all the powers not denied it by that declaration.*⁴²⁸

Could there be a better definition of residuum theory than “[a] prerogative . . . to claim by implication, the exercise of all the powers not denied” elsewhere in a constitutional document? And “A Native of Virginia” didn’t stop there. The draft Constitution, he said, had confronted and resolved this problem, precisely by *rejecting* that structure and so finally finishing the project of their ideological forebears. Under the Constitution: “The powers of the President are not kingly, any more than the ensigns of his office. He has no guards, no regalia, none of those royal trappings which would set him apart from the rest of his fellow citizens.”⁴²⁹

No more than the President had purple robes and a sparkling diadem, in other words, could he “claim by implication” the right to any powers not expressly enumerated.⁴³⁰ That was because the Constitution did what the English had failed to do: “limit[] the [magistrate’s] power in definite terms” and make “an end of prerogative.”

Federalist polemicists were relentless on this point in refuting claims that a unitary executive magistracy would be an elective monarchy in all but name.⁴³¹ The President would possess the executive power, they emphasized—and properly so. But he would have nothing like the default suite of magisterial authorities known to British law as prerogative: “the doctrine of prerogative and other peculiar properties of the royal character”

⁴²⁷ A Native of Virginia, *supra* note 68, at 660.

⁴²⁸ *Id.* (emphasis added).

⁴²⁹ *Id.* at 679.

⁴³⁰ *Id.* at 655 (discussing structural reasons to omit a bill of rights and presidential term limits).

⁴³¹ A typical argument along such lines was published in a local newspaper:

Mr. Adams . . . seems to bring us back again to the English government; as he . . . is particularly fond of a strong Executive. Surely the air of Europe has not infected our Plenipotentiary? This language is by no means consistent with republicanism, and there are other passages in this writer which point direct to monarchy, or what is the same, a first Magistrate possessed exclusively of the Executive power.

BALT. GAZETTE, July 3, 1787, *reprinted in* 13 DHRC, *supra* note 46, at 89, 89 (1981) (emphasis omitted) (internal quotation marks omitted).

were simply “incompatible with the view of these states when they are settling the *form of a republican government*.”⁴³² Instead, “[t]he Constitution plainly, openly, and without disguise tells us the titles, offices, powers, and privileges of [the President, Senators, and Representatives] and the purposes of their appointment. What snake in the grass is there here?”⁴³³

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

It must excite ridicule and contempt in every man when he considers on one side, the dreadful catalogue of unnecessary, but dangerous, prerogatives, which, in the British Government, is vested in the Crown; and, on the other side, takes a view of the powers with which this Constitution has clothed the President.⁴³⁴

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

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

You institute a comparison between a King of England, and a President, and because you find that some of the powers necessarily vested in this President,

⁴³² The Impartial Examiner, *supra* note 205, at 1610.

⁴³³ Letter from New York, *supra* note 108, at 382; *see also id.* (“What reason have we therefore to be jealous that the Constitution, under the disguise of such humble appellations, aims at the dignity and powers of the King, Lords, and Commons of the British Parliament?”).

⁴³⁴ Americanus, *supra* note 370, at 288.

and some of the prerogatives of that King are alike, you place them on a footing, and talk of a President possessing the powers of a Monarch.⁴³⁵

This pivot from mockery to a rote itemization of black letter prerogative doctrine was standard.⁴³⁶ And the incredulous conclusion was inevitable: “[L]et me pause and seriously ask you sir,” one Federalist wrote to his friend, “to compare this tremendous catalogue of powers, privileges and prerogatives, with those of our foederal President”⁴³⁷ The bare comparison—between

⁴³⁵ *Id.* at 288-89 (internal quotation marks omitted).

⁴³⁶ The Blackstonian detail from Publius was typical of the genre:

[T]here is no pretence for the parallel which has been attempted between him and the King of Great-Britain. But to render the contrast, in this respect, still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer groupe.

The President of the United States would be an officer elected by the people for *four* years. The King of Great-Britain is a perpetual and *hereditary* prince.

The one would be amenable to personal punishment and disgrace: The person of the other is sacred and inviolable.

The one would have a *qualified* negative upon the acts of the legislative body: The other has an *absolute* negative.

The one would have a right to command the military and naval forces of the nation: The other in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority.

The one would have a concurrent power with a branch of the Legislature in the formation of treaties: The other is the *sole possessor* of the power of making treaties.

The one would have a like concurrent authority in appointing to offices: The other is the sole author of all appointments.

The one can infer no privileges whatever: The other can make denizens of aliens, noblemen of commoners, can erect corporations with all the rights incident to corporate bodies.

The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorise or prohibit the circulation of foreign coin.

The one has no particle of spiritual jurisdiction: The other is the supreme head and Governor of the national church!—

What answer shall we give to those who would persuade us that things so unlike resemble each other?—The same that ought to be given to those who tell us, that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

THE FEDERALIST NO. 69, *supra* note 404, at 392 (Alexander Hamilton).

⁴³⁷ Letter from John Brown Cutting to William Short, *supra* note 323, at 478 (detailed itemization of prerogative contrasted to presidential power); *see also, e.g.*, Fabius, *supra* note 403,

England’s “hereditary Monarch, with all the appendages of royalty, and immense powers” and “the feeble power of the President,” armed only “with a small revenue and with limited powers, sufficient only for his own support”—spoke for itself.⁴³⁸

Indeed, once charges of kingship were dissected to their component parts, the modal response was bafflement. Prerogative structure just wasn’t how a government of limited and defined powers *worked*. It was precisely because the President’s powers were “so clearly defined,” wrote Caroliniensis, that they could “never can be dangerous.”⁴³⁹ Article II left no room for implication: What you see is what you get.

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

is a mere Executive officer; his general authority very narrowly limited by the Constitution of the State; with *no undefined or disputable prerogatives*; without power to effect one shilling of the public money, but as he is authorised under the Constitution, or by a particular law; having no colour to represent the sovereignty of the State, so as to bind it in any manner to its prejudice, unless specially authorised thereto.⁴⁴⁰

If you keep the eighteenth-century doctrinal framework firmly in mind, the Court’s point here can’t be missed. “Executive” authority is by its nature grounded in “*special[]* authoris[at]ions” rather than general implications of “undefined . . . prerogatives.”⁴⁴¹ *Chisholm* may have been talking about a state executive, but its vocabulary was thoroughly generic. Certainly there is no way to reconcile it with a view of “executive” authority as a hidey hole for residual prerogative.

at 262 (describing the difference between a “hereditary monarch” and “such a president as we are to have”)

⁴³⁸ Statement of George Nicholas, Virginia Ratification Debates (June 4, 1788), in 9 DHRC, *supra* note 46, at 915, 926, 928 (1990) (detailing an itemization of prerogative contrasted to presidential power).

⁴³⁹ Caroliniensis, *supra* note 403, at 238 (contrasting the “supreme executive authority” that was “vested” in the President with *other* Crown prerogatives like the veto and the treaty power).

⁴⁴⁰ 2 U.S. (2 Dall.) 419, 446 (1793) (emphasis added); *see also* *Calder v. Bull*, 3 U.S. 386, 398 (1798) (“If . . . a government . . . were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.”).

⁴⁴¹ A Native of Virginia, *supra* note 68.

C. *A Play Park of Silent Dogs*

Others have observed the failure of royal residuum theorists to identify even one positive assertion of the claim during drafting or ratification.⁴⁴² I've managed no better on their behalf. Despite reviewing tens of thousands of pages of commentary from hundreds of writers and speakers—and going to an abundance of caution to flag all instances that even vaguely tickled my antennae for a second and third review with as generous a mindset as could be mustered—I have been unable to find a single statement that the Executive Power Clause contained a substantive residuum.⁴⁴³

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

⁴⁴² See Bradley & Flaherty, *supra* note 22, at 551 (“[T]he historical sources that are most relevant to the Founding, such as the records of the Federal Convention, the Federalist Papers, and the state ratification debates, contain almost nothing that supports the Vesting Clause Thesis, and much that contradicts it.”).

⁴⁴³ One of the most notable things worth flagging should speak to what I've meant to serve as the interpretive generosity of review. In the course of Alexander White's general defense of the proposed constitution, he launched into a meandering digression into Roman constitutional structure. First noting that “[t]he legislative power was vested in the assemblies of the people,” he then observed that “[w]here the executive power was vested, and how distributed, I will give you in language better than mine,” and proceeded to quote verbatim Polybius's description of the Roman consuls and senators. That description made clear that each had powers that were part of the Law Execution understanding of executive power: “the administration of all public affairs” as well as the appointments power. It also made clear that each officer had other powers as well, including some that were part of crown prerogative (declaring war) and some that were not (power of the purse). See Alexander White, WINCHESTER VA. GAZETTE, Feb. 22, 1788, reprinted in 8 DHRC, *supra* note 46, at 401, 406 (1988). White's discussion is no different in substance from Blackstone's survey of similar authorities in England. And it's hard to see how his introductory line about “the executive power” could be an umbrella category for everything described in the Polybius excerpt, since the list includes several uncontestedly *non-executive* authorities like spending power. But it's the closest thing I've found to something that could be read as even ambiguous on the point at issue, so I cite it here.

In the first category of treatise-style surveys of presidential power fall the antifederalist Cato⁴⁴⁴ and the federalists Americanus,⁴⁴⁵ Cassius,⁴⁴⁶ James Iredell,⁴⁴⁷ and Publius.⁴⁴⁸ Cassius's comment was pithiest: "Section one, of article second, provides, that the executive power shall be vested in a president of the United States. The necessity of such a provision must appear reasonable to any one; any further remarks, therefore, on this head, will be needless."⁴⁴⁹

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

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

It is ordained, as a necessary expedient in the fœderal government, that a president of the United States (who is to hold the supreme executive power)

⁴⁴⁴ See generally Cato, *supra* note 422.

⁴⁴⁵ See generally Americanus, *supra* note 370.

⁴⁴⁶ See generally Cassius, VI, MASS. GAZETTE, Dec. 18, 1787, reprinted in 5 DHRC, *supra* note 46, at 479 (1998).

⁴⁴⁷ See generally 4 ELLIOT'S DEBATES, *supra* note 90, at 106-08 (James Iredell).

⁴⁴⁸ See generally THE FEDERALIST NO. 70, *supra* note 223 (Alexander Hamilton); THE FEDERALIST NO. 73 (Alexander Hamilton), reprinted in 16 DHRC, *supra* note 46, at 447 (1986); THE FEDERALIST NO. 74 (Alexander Hamilton), reprinted in *id.* at 478; THE FEDERALIST NO. 75, *supra* note 403 (Alexander Hamilton); THE FEDERALIST NO. 76 (Alexander Hamilton), reprinted in 17 DHRC, *supra* note 46, at 4 (1995); see also The Federalist No. 77 (Alexander Hamilton), reprinted in *id.* at 9 ("We have now completed a survey of the structure and powers of the executive department . . .").

⁴⁴⁹ Cassius, *supra* note 446, at 482.

should also concur in passing every law [T]he British monarch being founded on maxims extremely different from those, which prevail in the American States, the writer hereof is inclined to hope that he will not be thought singular, if he conceives an impropriety in assimilating the component parts of the American government to those of the British: and as the reasons, which to the founders of the British constitution were motives superior to all others to induce them thus to give the executive a controul over the legislative, are so far from existing in this country, that every principle of that kind is generally, if not universally, exploded; so it should appear that the same public spirit, which pervades the nation, would proclaim the doctrine of prerogative and other peculiar properties of the royal character, as incompatible with the view of these states when they are settling the form of a republican government.⁴⁵⁰

It's basically impossible to take residuum theory seriously when reading the torrent of words devoted to charges like this without coming across a single reference to the Executive Power Clause as granting any kind of substantive authority, let alone a residual royal prerogative.⁴⁵¹

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

What is the cause of this silence and gloomy jealousy in gentlemen of the opposition? This department has been universally objected to by them. The

⁴⁵⁰ The Impartial Examiner, *supra* note 205, at 1609-10 (emphasis omitted). This passage comes just after the Impartial Examiner has explained why the royal negative is not just consistent with, but required by, English constitutional theory:

In monarchy, where the established maxim is, that the king should be respected as a great and transcendent personage, who knows no equal—who in his royal political capacity can commit no wrong—to whom no evil can be ascribed—in whom exists the height of perfection—who is supreme above all, and accountable to no earthly being, it is consistent with such a maxim, that the prince should form a constituent branch of the legislature This secures to him the intended superiority in the constitution, and gives him the ascendant in government; else his sovereignty would become a shadow.

Id.

⁴⁵¹ For others not previously cited who criticized the President as a king without saying a word about the Vesting Clause, see generally Luther Martin, *Genuine Information I*, BALT. MD. GAZETTE, Dec. 28, 1787, *reprinted in* 11 DHRC, *supra* note 46, at 126 (2015); Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788, *reprinted in id.* at 177; Luther Martin, *Genuine Information IX*, BALT. MD. GAZETTE, Jan. 29, 1788, *reprinted in id.* at 212; Tamony, VA. INDEP. CHRON., Jan. 9, 1788, *reprinted in* 8 DHRC, *supra* note 46, at 286 (1988); GAZETTE OF THE ST. OF GA., Mar. 20, 1788, *reprinted in* 16 DHRC, *supra* note 46, at 442 (1986).

most virulent invectives, the most opprobrious epithets, and the most indecent scurrility, have been used and applied against this part of the Constitution. It has been represented as incompatible with any degree of freedom. Why, therefore, do not gentlemen offer their objections now, that we may examine their force, if they have any? The clause meets my entire approbation. I only rise to show the principle on which it was formed. The principle is, the separation of the executive from the legislative—a principle which pervades all free governments.⁴⁵²

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

The lack of reference to residuum theory at the Virginia convention may be even more striking, because the antifederalists in Virginia were simultaneously among the most talented lawyers and the most paranoid republicans of their generation. Their florid fantasies of despotism were enough to drive the earnest James Madison to distraction.⁴⁵³ And yet, even though the crown prerogative was the subject of extended discussion in the Virginia convention,⁴⁵⁴ the antifederalists' frantic efforts to puff up the Constitution into the foetus of monarchy failed to gesture *even once* at the Executive Power Clause as a source of authority even worth comment, let alone concern. Over two full days spent discussing Section 1 of Article II, the only thing they discussed was its mechanism for electing the President.⁴⁵⁵ The Executive Power Clause itself was never even mentioned. It wasn't until they got to the article's *second* section—the part with clauses complicated or controversial enough to be worth actual discussion—that they started talking

⁴⁵² 4 ELLIOT'S DEBATES, *supra* note 90, at 103 (William Davie); *see also id.* at 102 ("Is it not highly improper to pass over in silence any part of this Constitution which has been loudly objected to?").

⁴⁵³ These ranged from the idea that the future District of Columbia was designed as a refuge for traitors to the claim that Congress's power to "govern[]" the militia was meant to smuggle in permanent martial rule for the entire male citizenry. "We must," Madison finally said, "keep within the compass of human probability." Statement of James Madison, Virginia Ratification Debates (June 14, 1788), in 10 DHRC, *supra* note 46, at 1258, 1295 (1993). For more background on the last fear, see Bernadette Myler, *Originalism and a Forgotten Conflict over Martial Law*, 113 NW. U. L. REV. 1335, 1340-43 (2019).

⁴⁵⁴ *See* Statement of Patrick Henry, *supra* note 417, at 1328-29 ("[I]n Great-Britain . . . every possible right which is not reserved to the people by some express provision or compact, is within the King's prerogative."); *see also* Statement of George Nicholas, *supra* note 418, at 1333 ("It is easier to enumerate the exceptions to his prerogative, than to mention all the cases to which it extends.").

⁴⁵⁵ *See generally* Virginia Ratification Debates (June 18, 1788), in 10 DHRC, *supra* note 46, at 1371 (1993); Virginia Ratification Debates (June 17, 1788), in *id.* at 1388.

about the powers of the office. And then they leapt directly into the fray, with Mason expressing “alarm[]” at “the magnitude of the powers of the President” from his authority as Commander-in-Chief to his power to pardon,⁴⁵⁶ and the other delegates off to the races from there.

The point of all this isn’t that the evidentiary record is spotty. To the contrary, it’s voluminous, and there was no lack of motivation to raise the issue if it existed. And yet residuum theory doesn’t appear once in their discussions—across an enormous array of instances where only a ninny would have failed to raise it if the idea were vaguely plausible, let alone the obvious implication of a well-known phrase.

* * *

Consider too the following coda. It’s a mistake to fetishize the sequence of recorded discussion at the drafting Convention, a project that too often devolves into the archival equivalent of haruspicy. But note how one of the most puzzled-over exchanges in the Philadelphia records reveals itself as perfectly sensible if you just take the standard eighteenth-century framework seriously.

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

that a National Executive be instituted; to be chosen by the National Legislature . . . ; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.⁴⁵⁷

The plural formulation tracked longstanding references by the Continental Congress to “the executive powers, or the powers of administration.” The term “executive rights,” however, was so unusual as to be a little weird; indeed, the phrase appears nowhere else in the materials I have canvassed.⁴⁵⁸ Unless Madison’s subsequent explanation was a bad faith effort to cover up a failed attempt to smuggle in the royal prerogative,⁴⁵⁹ either the Virginia drafters either hadn’t done a careful word-by-word parsing of this language, or they

⁴⁵⁶ See Statement of George Mason, Virginia Ratification Debates (June 18, 1788), in 10 DHRC, *supra* note 46, at 1371, 1378 (1993).

⁴⁵⁷ 1 FARRAND’S RECORDS, *supra* note 51, at 21.

⁴⁵⁸ I have been unable to find the phrase anywhere else in the Philadelphia records, and it does not seem to appear in the Documentary History, the Letters of the Delegates, or the Journals of the Continental Congress. As ratified, of course, the Constitution used “the executive power” as a standard term of art—and as the ensuing discussion shows, this was no accident.

⁴⁵⁹ As subterfuges go, this one would be passing strange from the man who five years later would write Helvidius No. 1. See Helvidius No. 1 (Aug 24, 1793), reprinted in 15 PAPERS OF ALEXANDER HAMILTON 33-34 (Harold C. Syrett ed., 1969) (“[T]he two powers to declare war and make treaties . . . can never fall within a proper definition of executive powers.”).

simply meant the reference to “Executive rights” as a reference to the disaggregated components of law execution.⁴⁶⁰

The oddness of the formulation certainly struck Charles Pinckney. Channeling the standard monarchical paranoia of his era, he rose to warn that unless they were careful to define their terms, the Virginia Plan’s unusual formulation might open a loophole for the new chief magistrate to claim a broad suite of implied powers analogous to the actual royal prerogative and thus “render the Executive a Monarchy.”⁴⁶¹ Pinckney appears to have worried, in other words, that a bare reference to “Executive *rights*” might be susceptible to exactly the metonymic reading that modern-day residuum theorists seek to impose on (the very different wording of) the Executive Power Clause.

Each of the next three speakers hastened to assure Pinckney that there was no plausible scenario under which the Convention would or even could adopt the residual prerogative that was the essence of such monarchy. They all knew such a proposal would render any draft dead on arrival. John Rutledge began, declaring that while “he was for vesting the Executive power in a single person,” he “was *not* for giving him the power of war and peace,” and urging his fellow delegates to chime in on the point.⁴⁶² Roger Sherman followed up with doctrinaire republicanism, asserting that “he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”⁴⁶³ And then James Wilson—famously a forceful advocate for a strong executive—signed on to Rutledge’s point in full, expressing it in the traditional Blackstone framework:

He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and

⁴⁶⁰ Letter to the Inhabitants of Quebec, *supra* note 258, at 110. For more on the disaggregated view of the coercive power, the implementation power, and the appointment power as component parts of law execution, see *supra* Section III.C. Note that the Virginia state constitution used the plural phrase “executive powers” in a way that cannot be understood as a reference to the royal residuum. See 1776 Virginia Const., 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, vol. 7, p. 3816-3817 (“[H]e shall . . . exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England”).

⁴⁶¹ 1 FARRAND’S RECORDS, *supra* note 50, at 64-65 (Charles Pinckney) (“Mr. Pinkney was for a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”).

⁴⁶² *Id.* at 65 (John Rutledge) (emphasis added)

⁴⁶³ *Id.* at 65 (Roger Sherman).

appointing officers, not <appertaining to and> appointed by the Legislature.⁴⁶⁴

Wilson thus saw “only” two “strictly Executive” powers among those contained in royal prerogative: “executing the laws” and “appointing officers.” The other elements of royal prerogative were “*legislative*”—explicitly including “that of war & peace &c.”⁴⁶⁵ Certainly any particular political system might decide to allocate this legislative control over foreign and military affairs to the same political institution that held executive power. But like the other elements of royal prerogative, neither foreign affairs nor military authority was among the “executive powers, or the powers of administration”⁴⁶⁶—much less of *the* executive power that was eventually vested by the actual text of the Constitution.

After a brief squabble about whether the executive should be a single person, James Madison—an influential member of the Virginia delegation that had written the proposal under discussion—herded them back to Pinckney’s concern. Echoing Wilson’s observation that “executive powers *ex vi termini*, do not include the Rights of war & peace &c,”⁴⁶⁷ Madison responded to “General Pinckney[’s fear of] improper powers” by offering a clarifying amendment to more precisely specify the substance of what the Virginia delegation had intended to propose.⁴⁶⁸ As he explained, “certain powers were *in their nature* Executive,” and “a *definition* of their extent would assist the judgment in how far they might be safely entrusted to a single officer.”⁴⁶⁹

Don’t miss the point: Madison’s amendment was proposed, understood, and adopted, *not* as a narrowing revision, but as a more specific “definition” of which powers were “in their nature” executive in the sense that the Virginia Plan’s drafters had always intended to convey. As adopted, Madison’s amendment listed exactly two powers that were, per his introduction, “in

⁴⁶⁴ *Id.* at 65-66 (James Wilson). King’s notes are to the same effect: “Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed.” *Id.* at 70 (James Wilson). And Pierce’s notes suggests that Wilson explicitly included the power of “[m]aking peace and war” in the “*legislative* powers” of the king. *Id.* at 73-74 (James Wilson) (emphasis added).

⁴⁶⁵ *Id.* at 65-67 (emphasis added).

⁴⁶⁶ Letter to the Inhabitants of Quebec, *supra* note 258, at 110.

⁴⁶⁷ 1 FARRAND’S RECORDS, *supra* note 51, at 70 (James Madison). Madison’s notes of his own speech do not reflect this explicit claim.

⁴⁶⁸ Madison’s meeting notes confirm this claim. His summary of the Virginia Plan proposal replaced “executive rights” with the more standard phrase: “that a national Executive . . . possess *the executive powers* of Congress.” *Id.* at 62-63 (James Madison) (emphasis added). Just like his subsequent clarifying amendment, Madison’s abbreviated description of the Virginia Plan treated as irrelevant its nowadays-much-obsessed-over distinction between “Executive rights” and the “general authority to execute the National laws.”

⁴⁶⁹ *Id.* at 66-67 (James Madison) (emphasis added).

their nature Executive.”⁴⁷⁰ And those powers were (of course) the same ones Wilson had just finished saying were the “only” ones “strictly Executive” in nature: the power to execute the laws, and the power to make at least some appointments.⁴⁷¹ The clarifying revision was quickly adopted without dissent.

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

CONCLUSION

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

It might well be asked how anyone has concluded otherwise. At least where academic residuum theorists are concerned, the answer comes down to a few pervasive errors. First, and easily the most important, is what earlier work has described as the Metonymy Error: misunderstanding the metonymic logic of using the noun “executive” to name a political entity that possesses *both* “the executive power” and *also* many others.⁴⁷² A second and related error involves taking prescriptive claims that the executive *branch*

⁴⁷⁰ *Id.* at 67 (James Madison).

⁴⁷¹ *Id.* at 66 (James Wilson); *see id.* at 67 (recording the amendment as stating “with power to carry into effect. the national laws. [and] to appoint to offices in cases not otherwise provided for”).

The full colloquy is even better. Madison’s first draft of the amendment included a third category of presidential authority: “and to execute such other powers <‘not Legislative nor Judiciary in their nature’> as may from time to time be delegated by the national Legislature.” *Id.* at 66 (James Madison). Pinckney spoke up immediately to “amend the amendment by striking out the last [category].” *Id.* (Charles Pinckney). His earlier concerns apparently fully allayed by Wilson’s reminder of the doctrinal point, he viewed it as “unnecessary, the object [already] being included in the power to carry into effect the national laws.” *Id.* (Charles Pinckney) (internal quotation marks omitted). He wasn’t interested, in other words, in distinguishing between the negatively prohibitory and affirmatively implementary aspects of law execution; for him they were features of the same authority.

⁴⁷² *See* Mortenson, *supra* note 5, at 1245-49. (explaining this problem in detail).

should have various powers, and using them as evidence for the descriptive proposition that the executive *power* already includes them.⁴⁷³ The third error is a failure to realize that the founders' occasional references to "executive powers" plural were typically grounded in the disaggregated understanding of Law Execution described in Section III.B.⁴⁷⁴ The fourth error looks to Founding-era claims that both the Continental Congress⁴⁷⁵ and the constitutional Senate⁴⁷⁶ had executive power, which residuum theorists suggest can only be explained as a description of these bodies' foreign affairs competences.

In light of the arguments and evidence presented above, the gist of the first three errors should be obvious. The fourth category, which takes more time to address, is addressed at some length in forthcoming work that begins to map the implications of the Law Execution thesis for contemporary doctrine.⁴⁷⁷ But a brief summary seems advisable, if only for those who are aware of the objections and would like to hear something about them here.

In short, and without exception of which I am aware, every single description of the Continental Congress and the constitutional Senate as "executive" either unmistakably relied on or was fully consistent with the standard Law Execution understanding of executive authority. The Continental Congress was said to have executive power because it had the power to execute laws, both by coercing compliance with prohibitions⁴⁷⁸ and by implementing affirmative legislative projects.⁴⁷⁹ Comparable claims about

⁴⁷³ See, e.g., Prakash & Ramsey, *supra* note 32, at 267 ("Where did the [foreign affairs] power rest? With whoever wielded the executive power. Although the two powers were distinct in Locke's treatment . . . the two powers, he said, are always almost united." (footnote omitted) (internal quotations omitted)).

⁴⁷⁴ See, e.g., *id.* at 299 (quoting John Jay's reference to "the 'great executive powers' that were formerly held by Congress.>").

⁴⁷⁵ E.g., McConnell, *supra* note 3, at 191 ("The 'Executive rights' of the Confederation Congress went far beyond law execution—indeed, the Congress did not have the power of law execution. Law execution was performed by the states."). As frequently discussed during the ratification debates, the Continental Congress did have the power of law execution; it just did a terrible job of implementing it. See Mortenson & Bagley, *supra* note 77, at 433-44, 63-64 & n.225 (describing congressional experimentation with various modes of execution).

⁴⁷⁶ E.g., PRAKASH, *supra* note 25, at 118-19 (2015) ("The Senate would serve as an executive council on treaties and diplomatic appointments [But] the Senate's executive powers over foreign affairs raised hackles" among Anti-Federalists, and "Federalists generally agreed that treaty-making was an executive power.").

⁴⁷⁷ Mortenson & Bagley, *supra* note 77, at 38-60.

⁴⁷⁸ See, e.g., 1 FARRAND'S RECORDS, *supra* note 51, at 447 (statement of James Madison) (noting the power to "operate immediately on . . . persons & properties" already "is the case in some degree as the articles of confederation stand; the same will be the case in <a far greater degree> under the plan proposed to be substituted").

⁴⁷⁹ See, e.g., 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 69, at 785 (Oct. 8, 1777) ("[T]he committee appointed to carry into execution the resolution of Congress, ordering a medal to be struck and presented to General Washington.").

the Senate relied on varying combinations of three theories, each plainly grounded in the same Law Execution understanding. First, some founders thought that the Senate's role in appointments was conceptually executive.⁴⁸⁰ Second, some thought the Vice President's voting role forced a member of the executive branch into the constituent membership of the legislature.⁴⁸¹ Third, some shared a forthrightly functional concern that regular interactions between the two bodies—including but not limited to what they described as the executive activity of appointments and the legislative activity of treaty-making—would produce a dangerous entanglement likely to yield functionally unified control over the full sequence of complete government.⁴⁸² Not one of these theories lends the slightest support to residuum theory.

And so we end where we started. For once, the original understanding of constitutional text is both clear and simple. When Article II vested “the executive power,” it conveyed the authority to execute the laws. This power was an empty vessel that authorized only those actions previously specified by the laws of the land. Sometimes statutory terms delegated far-reaching policy discretion; other times statutes would specify in minute detail the precise and limited action that was authorized. Either way, the conceptual gist of executive action was *implementation of instructions and authority that came from elsewhere*. Make no mistake: the presidency thus created was a massively powerful institution. Just not one with a free-floating foreign affairs power, a residual national security authority, or indeed any other power not specifically listed in the Constitution. To the contrary, the President thus created was “guided by law,” “fetter'd by system,” and “manacled both by man and measures.”⁴⁸³ Is he still?

⁴⁸⁰ See *supra* Section III.C (discussing the view that the executive power entailed the right to appoint “assistances”).

⁴⁸¹ See, e.g., Cincinnatus, *supra* note 320, at 283 (noting “the union of the executive with the legislative functions” and emphasizing “[t]he union established between them and the vice president, who is made one of the corps”). Cincinnatus also argued that the separation of powers was separately violated by the Senate's roles in appointments and impeachment. *Id.*

⁴⁸² E.g., Statement of George Mason, *supra* note 456, at 1376 (“[T]he Constitution has married the President and Senate—has made them man and wife. I believe the consequence that generally results from marriage, will happen here. They will be continually supporting and aiding each other: They will always consider their interests as united The Executive and Legislative powers thus connected, will destroy all balances”); Cato, *VI*, N.Y. J., Dec. 13, 1787, reprinted in 19 DHRC, *supra* note 46, at 416, 419 (2003) (“They are so intimately connected, that their interests will be one and the same”).

⁴⁸³ Letter from John Brown Cutting to William Short, *supra* note 323, at 478.

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