

IN SEARCH OF PREROGATIVE

ILAN WURMAN[†]

ABSTRACT

The standard formalist account of Article II's Executive Vesting Clause is that "the executive power" refers to all the powers and authorities possessed by the executive magistrate in Great Britain prior to the Constitution's adoption, subject to the assignment of such powers and authorities to the other departments of the national government. In recent papers, a handful of scholars have challenged this "residual vesting thesis" by amassing evidence that "the executive power" textually referred only to the power to carry law into execution and not to the bundle of other royal prerogatives—for example over foreign affairs and national security—enjoyed by the British monarch. According to the advocates of both accounts, the scope and nature of the executive is dramatically altered depending on which account one adopts.

This Article dissents from both views. "The executive power" was indeed about law execution and was not a residual grant of power; but both the Founding generation and its key guide, Blackstone, likely shared a "thick" understanding of this power. Their writings and statements suggest that "the executive power," even in its narrower law-execution sense, plausibly included the powers to appoint, remove, and direct executive officers and to promulgate regulations as necessary incidents to law execution. Not only is this account consistent with Blackstone and the historical meaning of "the executive power," but it better fits the available data from the Constitutional Convention and early practice than either of the other two accounts. The residual vesting thesis requires us to believe that the Committee of Detail ignored the instructions of the delegates in the Constitutional Convention, to infer

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[†] Associate Professor, Sandra Day O'Connor College of Law, Arizona State University. Thanks to William Baude, Philip Hamburger, John Harrison, Kathryn Kovacs, Michael McConnell, Julian Mortenson, James Pfander, David Upham, Matt Steilen, Peter Strauss, Seth Barrett Tillman, and Lael Weinberger; to Emily Bremer, Linda Jellum, Matt Lawrence, David Rubenstein, Daniel Walters, and the organizers of the George Washington University Regulatory Studies Center workshop; to Christopher Walker and the participants of the AALS legislation/administrative law new voices workshop; and, of course, to my colleagues Laura Coordes, Ben McJunkin, Trevor Reed, Erin Scharff, Josh Sellers, Bijal Shah, and Justin Weinstein-Tull for their usual early intervention.

that the delegates themselves were unaware of the implications of what they had written, and to ignore the fact that not a single opponent of the Constitution during ratification so much as mentioned the possibility of a residual grant. On the other hand, the law-execution thesis, at least a “thin” version of it, may not account for important practices and precedents. The “thick” view of “the executive power” advanced in this Article is the theory of best fit: it is the only one that fits the text, the Framers’ apparent intent, and the historical practice. The upshot of this approach is that the president probably has more power in the domestic sphere than under a thin law-execution account but less in foreign affairs than under the residual vesting thesis.

TABLE OF CONTENTS

Introduction	95
I. The Textual Meaning of “the Executive Power”	107
A. Competing Textual Evidence	108
1. <i>Influential Political Thinkers</i>	108
2. <i>State Constitutions and “Executive Powers”</i>	113
3. <i>Hamilton as Pacificus</i>	118
B. “The Executive Power” in Blackstone	119
II. “The Executive Power” in Convention	122
A. Distributing Prerogative Powers	122
B. Two Key Omissions	125
1. <i>The Power To Erect Corporations</i>	126
2. <i>The Immigration Prerogative</i>	128
C. The Convention’s Instruction, and Ratification	131
D. The Vesting Clauses Reconsidered.....	133
E. Summary	137
III. Domestic Separation of Powers Disputes.....	138
A. Appointments, Removals, Presidential Administration..	138
B. Prosecution	145
C. Proclamation Power.....	153
1. <i>Blackstone</i>	153
2. <i>Administrative Regulations</i>	154
3. <i>Youngstown</i>	155
IV. The Executive and Foreign Affairs	159
A. The Standard Picture	160
B. Revisiting Presidential Powers	163
1. <i>Neutrality and “Setting” Foreign Policy</i>	163
2. <i>Terminating Treaties</i>	166
3. <i>Instructing and Recalling Ambassadors</i>	168

4. <i>Recognition</i>	171
5. <i>Torturing Terrorists</i>	172
6. <i>Executive Agreements</i>	172
Conclusion.....	173

INTRODUCTION

Article I of the United States Constitution creates a national government of limited and enumerated legislative powers; it declares that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”¹ Article II creates the executive branch, but its vesting clause is formulated differently: “The executive Power shall be vested in a President of the United States of America.”² The Article II Vesting Clause does not say only those executive powers “herein granted” shall be vested in the president; rather, it says “the executive power” shall be vested in the president.

This distinct formulation has caused much controversy over the past 230 years because Article II nonetheless contains an enumeration of some kind. The first paragraph of Article II, Section 2 declares the president to be the commander in chief of the armed forces and grants the president the power to demand written opinions from the principal officers of the executive departments and to grant reprieves and pardons.³ The second paragraph of Section 2 gives the president and the Senate certain shared powers, namely to make treaties and appointments, although Congress may place responsibility for the appointment of inferior officers in the president alone, the heads of departments, or the courts.⁴

1. U.S. CONST. art. I, § 1.

2. *Id.* art. II, § 1, cl. 1.

3. The first clause states, in full:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Id. § 2, cl. 1.

4. The second clause states, in full:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and

Article II, Section 3, then seems to involve the president's duties and relationship to Congress. The president must from time to time give Congress information about the state of the union; may convene Congress on extraordinary occasions and may adjourn them in the event the House and Senate disagree about adjournment; and "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."⁵ This paragraph also gives the president the duty to "receive Ambassadors and other public Ministers."⁶

There are at least three ways to read the Executive Vesting Clause in light of this structure. The prevailing view among formalists may be termed the "residual vesting thesis."⁷ According to this view, the vesting clause of Article II, unlike the parallel clause in Article I, vests all executive-type powers in the president, including those traditionally exercised by the British monarch. The subsequent enumeration in Article II—and elsewhere in the Constitution—is then largely a

which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id. § 2, cl. 2.

5. Section 3 contains only one clause:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Id. § 3.

6. *Id.* I am indebted to Professor Michael W. McConnell for the insight about this structure. The first paragraph of Section 2 appears to include powers held by the president alone, which McConnell describes as prerogative power indefeasible by statute. MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* (forthcoming Nov. 2020) (manuscript at 207) (on file with the *Duke Law Journal*). The second paragraph of Section 2 appears to include prerogative powers the president shares with the Senate, *id.* (manuscript at 208), and the first paragraph of Section 3 appears to include power and duties the president has with respect to Congress and Congress's laws, *id.* (manuscript at 210–11). McConnell thinks the clause respecting the commissioning of officers was left over from an earlier draft of the Constitution when Congress and the Senate had most of the appointment power. *Id.* (manuscript at 212).

7. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1185 (2019) [hereinafter Mortenson, *Royal Prerogative*] (explaining that "[a]mong constitutional originalists," this thesis "remains dominant"); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. (forthcoming 2020) (manuscript at 8) [hereinafter Mortenson, *Executive Power Clause*], <https://ssrn.com/abstract=3406350> [<https://perma.cc/5NKB-8953>] (describing this thesis as "easily the dominant historical account among modern commentators"). However, the cross-reference theory may be the predominant view in the academy and the judiciary. See *infra* note 25 and accompanying text.

limitation on the president's ability to exercise specific executive powers, or is perhaps a confirmation of them.⁸ Two proponents of this view, Professors Saikrishna Prakash and Michael Ramsey, explain it in the foreign-affairs context:

[T]he President's executive foreign affairs power is residual, encompassing . . . executive foreign affairs powers not allocated elsewhere by the Constitution's text. The Constitution's allocation of specific foreign affairs powers or roles to Congress or the Senate are properly read as assignments away from the President. Absent these specific allocations, by Article II, Section 1, all traditionally executive foreign affairs powers would be presidential.⁹

Professor Michael W. McConnell, in a forthcoming monograph on executive power, also argues that the Executive Vesting Clause "vests all national powers of an executive nature in the President, except for [the] portion of the executive power that is vested elsewhere (mostly in Congress in Article I, Section 8), and except for the limitations and qualifications on the particular executive powers that are set forth in the text."¹⁰ To name but some of these limitations and qualifications,

8. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 549 (2004) (explaining that the residual vesting thesis "reconciles the text of the Constitution with the breadth of presidential power by stipulating that the Article II Vesting Clause grants the President all powers that are in their nature 'executive,' subject only to the specific exceptions and qualifications set forth in the rest of the Constitution").

9. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001) (emphasis omitted). Justice Thomas, relying on Prakash and Ramsey, adheres to this view. He has written that the president may exercise "unenumerated foreign affairs powers" by virtue of the textual differences between the vesting clauses of Articles I and II. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part). According to Justice Thomas, "By omitting the words 'herein granted' in Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the 'executive Power' of the Federal Government." *Id.*

10. MCCONNELL, *supra* note 6 (manuscript at 185–90). For earlier statements of this view, see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 4 (4th rev. ed. 1957) (raising the question that, "if there is 'executive power' that has been found essential in other systems of government and is not granted the President in the more specific clauses of Article II, how is it to be brought within the four corners of the Constitution except by means of the 'executive power' clause?"); *id.* at 10 ("[T]he blended picture of executive power derivable from the pages of Locke, Montesquieu, and Blackstone is of a broadly discretionary residual power available when other governmental powers fail . . ."); and *id.* at 14 ("[T]he Framers had in mind . . . the 'balanced constitution' of Locke, Montesquieu, and Blackstone, which carried with it the idea of a divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative.'" (emphasis omitted)). Earlier still, Professor Thach argued that

Article I assigns a number of traditionally executive or prerogative powers to Congress, such as the powers to declare war, issue letters of marque, coin money, and regulate fleets and armies.¹¹ On this reading, Article II, Section 2, Paragraph 2 assigns some of this executive power, specifically over treaties and appointments, to the president and the Senate together. And Article II, Section 3 further limits executive power: Historically the king could prorogue Parliament,¹² but the American president may only adjourn Congress in the event of a disagreement between the two houses. Further, the president has a duty to execute Congress's laws *faithfully*, by which the Framers may have meant the president could not suspend the laws or dispense with them on particular occasions.¹³

The second possible reading of the Executive Vesting Clause is what Professor Julian Davis Mortenson calls the "Law Execution" reading.¹⁴ Mortenson maintains that "the executive power" refers only to one specific power: the power to execute the laws. All of the powers that are considered "executive" according to the residual vesting thesis were in fact historically considered to be "prerogative" rather than "executive" powers, and "the executive power" was but one of these

where, by the terms of the Constitution, the national government is vested with control over a certain sphere of action, that portion of the field is the President's which is executive in character. Thus the Constitution makes the national government the sole organ for the conduct of foreign affairs. And yet the powers which are necessary for it to take this duty upon it are not all conferred by the Constitution—the power to recognize new governments or new States, to dismiss foreign ministers, even to conduct general negotiations. Since they are not enumerated, they are the President's as of constitutional right, being of an executive character.

CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 165 (1923).

11. See *infra* notes 100–29 and accompanying text for an account of these powers in the Constitution and in William Blackstone's commentaries.

12. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 180 (Oxford, Clarendon Press 1765) ("[A]s the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to it's existence."). A quick note of grammar: Blackstone and other eighteenth-century writers used the contraction "it's" as possessive. The Oxford English Dictionary has several examples of this usage between 1611 and 1802. 8 OXFORD ENGLISH DICTIONARY 150–51 (2d ed. 1989).

13. Although there is no "smoking gun" evidence, it is commonly assumed that by faithful execution the Framers meant to invoke the prohibitions on the suspending and dispensing powers announced in the Bill of Rights of 1689. MCCONNELL, *supra* note 6 (manuscript at 92–96, 95 n.339) (describing this "consensus" view).

14. Mortenson, *Royal Prerogative*, *supra* note 7, at 1180; Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 6).

prerogatives.¹⁵ This definition of “prerogative” is contrary to McConnell’s definition, which depends on John Locke’s view of “prerogative” as executive discretion to act contrary to law.¹⁶ Here, Mortenson seems to have the upper hand because Blackstone used “prerogative” to refer to power generally and not to the specific power to act without law,¹⁷ and it is Blackstone’s definition of prerogative that appears to have been widely shared in pre- and post-revolutionary America.¹⁸ Mortenson’s view is also consistent with the routine use of the term “prerogatives” in the Constitutional Convention to mean

15. Mortenson argues that the “suite of substantive authorities” that Blackstone described “had a name: ‘The King’s Prerogative.’” Mortenson, *Royal Prerogative*, *supra* note 7, at 1223 (quoting BLACKSTONE, *supra* note 12, at 230). The first of these royal authorities was “the ‘supreme executive power,’ specifically defined as ‘the right of enforcing the laws.’” *Id.* (quoting BLACKSTONE, *supra* note 12, at 142–43, 183). “The royal prerogative, as it was understood in the Founding Era,” Mortenson writes, “comprised a long list of separate and highly particularized legal authorities within a well-understood framework of English constitutional law” with no particular “overarching theoretical coherence.” *Id.* at 1228. “‘The prerogative’ [was] the basket category for royal power and ‘the executive power’ [was] *one specific authority among a great many* in that basket.” *Id.* at 1229. “[E]xecutive power” in the context of state action was “the implementing power: the authority to deploy the massed force of the state to bring legislated intentions into effect, especially the laws and their intended consequences.” *Id.* at 1237.

16. McConnell defines prerogative as “powers the executive could exercise . . . without need for legislative authorization and beyond legislative control.” MCCONNELL, *supra* note 6 (manuscript at 5). Hence, he argues that “[r]esidual executive powers are not prerogative powers: they may be exercised by the President without advance congressional authorization, but they are subordinate to exercises of Congress’s enumerated powers.” *Id.* (manuscript at 203). This definition, as explained, is taken from John Locke, who wrote that because the lawmaking body is “too numerous,” “slow,” and “not always in being, . . . and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick,” there is therefore “a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 393 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). The prerogative power, in other words, “can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes [this power can go] against the direct Letter of the Law, for the publick good.” *Id.* at 395.

17. Blackstone defined the prerogative as “those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.” BLACKSTONE, *supra* note 12, at 232. “The executive power” is precisely such a power which the king alone enjoyed, that power being “vested by our laws in a single person, the king or queen.” *Id.* at 183. Elsewhere, Blackstone described the prerogative as the king’s “authority” or “power,” *id.* at 249, which would again include “the executive power.”

18. Matthew Steilen, *How To Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557 *passim* (2018). Professor Matthew Steilen argues that there are multiple meanings of “prerogative,” and that Locke’s was not widely shared in America. *Id.* at 641. Additionally, each of the main usages of the term in America can be subsumed under the term “power,” including, for example, the king’s prerogative to charter colonies, the colonies’ prerogative (delegated from the king) of self-government, and the like. *Id.* at 585 & n.84.

federal as opposed to state power.¹⁹ If the Founders shared this understanding of “prerogative,” then, as Mortenson argues, the president only has those few prerogative powers expressly granted by the Constitution. “The executive power” is one such power. Others include the president’s power to be commander in chief, to receive ambassadors, to make treaties and appointments with senatorial advice and consent, to grant reprieves and pardons, and to adjourn the houses of Congress or call them into session on extraordinary occasions.

Professors John Harrison and Matthew Steilen agree with Mortenson’s reading of the Executive Vesting Clause. Harrison describes “the executive power” as the legal capacity “to occupy the characteristic positions of executive officials in a legal environment of rules that empower and constrain those officials.”²⁰ “[T]his account of the Article II executive power,” Harrison summarizes, “rejects the possibility that it includes any of the British royal prerogative, except to the extent that the prerogative included the authority to carry out the law and administer the government, subject to any applicable statutes.”²¹ And Steilen, writing a year before Mortenson and Harrison, examined early-American usage of the term “prerogative”

19. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., Yale Univ. Press 1911) [hereinafter FARRAND] (“Mr. Pinkney [sic] . . . urged . . . that if the States were left to act of themselves in any case, it wd. be impossible to defend the national prerogatives, however extensive they might be on paper.”); *id.* at 165 (reporting that James Madison observed during discussions of a negative on state legislation that “[t]his prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States”); *id.* at 317 (recording Madison’s critiques of a plan for “omitting a controul over the States as a general defence of the federal prerogatives”). James Wilson observed that

[t]he natil. Govt. is one & yt. of the states another — Commerce, War, Peace, Treaties, &c are peculiar to the former — certain inferior and local Qualities are the province of the Latter — there is a line of separation; where ever the prerogatives lie[] on the side of the Genl. Govt. we are citizens of the nation or of the US.

Id. at 416; see also *id.* at 447 (noting Madison’s description of taxation as “the highest prerogative of supremacy”).

20. John Harrison, Executive Power 3 (June 3, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3398427> [<https://perma.cc/CXS2-J8MP>].

21. *Id.* at 26. Professor John Harrison suggests that this vision of the executive was based on the “Whig theory of executive power.” *Id.* at 30 (quoting Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 16 (1993)); see also Seth Barrett Tillman, *The Old Whig Theory of the Executive Power*, NEW REFORM CLUB (Jan. 18, 2019, 5:02 AM), <https://reformclub.blogspot.com/2019/01/the-old-whig-theory-of-executive-power.html> [<https://perma.cc/J8NT-4LB9>] (“The Executive Power of Article II is wholly an excrescence of Congress’ [power to make statutes] The Old Whig theory stands in opposition to the Hamiltonian theory of a core or residuum of undefined executive power which exists absent an express grant of Article I, Section 7 authority from Congress.”).

and argues that American writers distinguished that term from “the executive power,” which was the power only to execute law.²²

Third, the “cross-reference” reading maintains that the Executive Vesting Clause simply establishes *who* is to exercise “the executive power,” but the only such powers the president actually has are given in other parts of Article II. Thus, the president, like Congress, has only those powers specifically enumerated. Justice Jackson, in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,²³ adhered to this view.²⁴ Perhaps as a result of Justice Jackson’s adherence, the cross-reference theory is probably still the dominant theory among nonoriginalists.²⁵ For purposes of this Article, however, there are two reasons to put the cross-reference theory aside. First, it is the least plausible of the accounts, at least on originalist grounds. If the clause merely identifies who is to exercise the subsequently granted powers, then the Take Care Clause must be a grant of power to execute the laws. Perhaps so, but it is framed as a duty and not a power.²⁶ Moreover, the parallel clause in Article III must be a grant of substantive power

22. See Steilen, *supra* note 18, at 563, 642. Professors Curtis Bradley and Martin Flaherty noted this possibility in 2004:

It is possible . . . that the phrase “executive Power” confers simply a power to execute the laws. That would help explain, for example, why it is written in the singular rather than the plural. Indeed, to the extent that there are any Founding statements ascribing substantive content to the Article II Vesting Clause, they are all statements equating executive power with the power to execute the laws.

Bradley & Flaherty, *supra* note 8, at 553.

23. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579 (1952).

24. *Id.* 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.”).

25. See Bradley & Flaherty, *supra* note 8, at 554 (“[A] significant issue during the drafting of the Constitution was whether to have a unitary or plural executive. The Article II Vesting Clause may simply make clear *where* the executive power is being vested — in a unitary President — not the scope of that power.”); *id.* at 554 n.29 (“The records of the Constitutional Convention make it clear that the purposes of [the Article II Vesting Clause] were simply to settle the question whether the executive branch should be plural or single and to give the executive a title.” (alteration in original) (quoting Edward S. Corwin, Comment, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 53 (1953))); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47 n.195 (1994) (“[T]he [Article II] Vesting Clause does nothing more than show who . . . is to exercise the executive power, and not *what* that power is.”). This position was even articulated by at least one representative in the great 1789 debate over removal. 1 ANNALS OF CONG. 466 (1789) (Joseph Gales ed., 1834) (statement of Rep. White) (“[T]he Executive powers so vested, are those enumerated in the Constitution.”); see *infra* Part III.A.

26. See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”). Indeed, Blackstone explained that the “principal *duty* of the king is, to govern his people according to law.” BLACKSTONE, *supra* note 12, at 226 (emphasis added).

to judges, otherwise nothing in Article III allows judges to exercise any power.²⁷ Second, if the Take Care Clause is a grant of law-execution power, then in any event the law-execution and cross-reference theories will have similar implications, with the admittedly important exceptions of presidential removal and administrative control.²⁸

Focusing, then, on the two main contenders—the residual vesting and law-execution readings—each has critical shortcomings. The proponents of the residual vesting thesis argue that a plethora of foreign affairs related powers, such as instructing and recalling ambassadors, communicating with foreign governments, setting U.S. foreign policy, entering into executive agreements, and terminating treaties, seem “inexplicable” and may have “no defensible explanation of how they fit into the Constitution’s text” without a residual vesting of executive powers.²⁹ Thus, the law-execution account seems difficult to square with at least some historical practice.³⁰ And putting aside

27. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176 (1992) (arguing that Article III’s Vesting Clause is the “only *explicit* constitutional source of the federal judiciary’s authority to act”).

28. Professor McConnell, for example, argues that “the executive power” is entirely defeasible by statute, and therefore an indefeasible removal power follows from the Take Care Clause but not the Executive Vesting Clause. See MCCONNELL, *supra* note 6 (manuscript at 206). On the reading advanced here, however, “the executive power” is indefeasible. See *infra* Part III. Even so, the scope of the removal power may very well differ based on whether it stems from one or the other clause. The Take Care Clause, for example, may be satisfied by for-cause removal provisions. So long as a subordinate officer is exercising discretion consistently with law, there would be no grounds for removal, and no Take Care violation. But if the removal power comes from the Executive Vesting Clause, then the president may direct *how* a subordinate exercises discretion.

29. Prakash & Ramsey, *supra* note 9, at 243–52.

30. McConnell writes: “If the President were limited to the enumerated powers in Sections 2 and 3,” then “every president from Washington through Obama and Trump would have been exceeding his proper powers, and flagrantly so.” MCCONNELL, *supra* note 6 (manuscript at 186). McConnell argues that Article II “fail[s] to address some powers of immense importance, such as the power to direct foreign policy,” and among these are “entering international agreements, supporting or opposing foreign insurrections, forming or breaking alliances, voting in bodies like the United Nations, recognizing foreign regimes, locating embassies, [and] abrogating treaties.” *Id.* (manuscript at 10–11). “The gap in domestic matters is less glaring but also concerning,” he writes: “The President has express authority to demand the opinions of his officers, but no express authority to give them guidance or commands. That must be an ‘executive’ power, but it is not enumerated.” *Id.* He says later in his monograph that interpreting the other grants of power in Article II as conferring the panoply of foreign affairs functions exercised by the president “would entail such a latitude of construction as to make the limiting language of the Constitution illusory.” *Id.* (manuscript at 189). Other foreign affairs scholars agree that many foreign affairs powers seem extra-constitutional or missing, even if those scholars do not agree with the residual

foreign policy,³¹ the law-execution reading does not account for broader presidential power in the domestic sphere, such as a presidential removal power, which many in the Founding generation seem to have believed was included within “the executive power.”³²

Yet the advocates of the residual vesting thesis ignore at least two inconvenient, and critical, facts. First, understanding the grant of “the executive power” to be a residual grant of prerogative powers requires believing that the Committee of Detail that composed the initial draft of the Constitution ignored the instructions of the Convention, which had voted to give the national executive *only* the authority to execute the laws and to appoint to offices not otherwise provided for.³³ Second, it requires ignoring that not a single opponent of ratification so much as mentioned the possibility of a residual grant, even among those who feared the scope of powers conferred upon the national executive.³⁴ And to these inconvenient facts this Article adds a third and fourth: the Convention’s debate over the power to erect corporations and the delegates’ likely views on immigration suggest none of the delegates themselves perceived that the Executive Vesting Clause would confer a residuum of prerogative powers.³⁵

This Article takes a fresh look at debates over “the executive power” in light of recent scholarship and offers a new account, one that better fits the text, the intent of the Framers, and the historical practice. “*The executive power*” did, indeed, seem to refer only to the power of law execution, but there is a thin version of this executive power and a thicker version. The former consists in only the power to carry into execution Congress’s laws with the precise tools, officers, and prescriptions Congress itself chooses. In contrast, the latter plausibly

vesting thesis. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 13–15 (2d ed. 1996) (arguing that many government foreign affairs powers are “not mentioned” by and are “missing” from the Constitution and noting myriad examples).

31. Indeed, it may be that some exercises of presidential foreign affairs authority simply *are* unconstitutional; it is odd that the proponents of the residual vesting thesis rarely consider that possibility.

32. See *infra* Part III.A.

33. For the drafting history, see *infra* Part II.C. Regarding the Committee of Detail, McConnell writes that although the Convention gave the president “only the powers of law execution and appointment to offices other than judges, soon to be augmented by a qualified veto,” the Committee of Detail “reinstated a vesting clause at least as broad as the original” resolution granting general executive rights and powers. MCCONNELL, *supra* note 6 (manuscript at 56).

34. See MCCONNELL, *supra* note 6 (manuscript at 75).

35. For this novel argument, see *infra* Part II.B.

includes the power to issue regulations and to appoint, remove, and direct executive officers in furtherance of law execution. This Article shows that the thick law-execution understanding of “the executive power” is consistent with Blackstone, with the work of the Constitutional Convention, and with Founding-era debates and other historical practice. Indeed, it is the only available theory that truly seems to fit. It therefore represents the most probable meaning of the Executive Vesting Clause.³⁶

To make the case, Part I surveys the textual evidence already laid out by other scholars. It seeks to show, without reinventing the wheel, that this textual evidence favors the law-execution reading, although it is not entirely unambiguous. It then looks specifically at Blackstone’s use of “the executive power,” given Blackstone’s apparent influence on the constitutional drafters.³⁷

36. Originalists look to text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision. See, e.g., ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 18–20 (2017) (arguing that intent is evidence of textual meaning); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3–4 (2019) (articulating a theory uniting originalism and historical practice); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1298–1301 (2019) (noting a variety of structural arguments made by originalists). Of course, it could be that early practice was simply inconsistent with text, or the text with the intent, and so on. In other words, these interpretive tools do not always have to align for us to know the original meaning of a particular provision. But the more those tools do align, the more likely the interpretation is to be correct.

37. McConnell describes Blackstone’s influence:

A principal conclusion is that the framers self-consciously analyzed each of the prerogative powers of the British monarch as listed in Blackstone’s *Commentaries*, but did not vest all (or even most) of them in the American executive. Instead, some were vested in Congress, some were vested in the President, and some where [sic] denied to the national government altogether.

McCONNELL, *supra* note 6 (manuscript at 12). McConnell further notes that “William Winslow Crosskey of the University of Chicago was the first to note that the enumeration of powers by the Committee of Detail was as much about legislative-executive separation of powers as it was about federalism.” *Id.* (manuscript at 56) (first citing 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 428–29 (1953); then citing GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 21 (1997)). For Blackstone’s general influence, see Mortenson, *Royal Prerogative*, *supra* note 7, at 1220 & n.189 (“But for Americans like James Madison, Blackstone’s treatise was the ‘book which is in every man’s hand’—central to pedagogy, drafting, and litigation alike as the standard restatement of the formal constitutional law of England.” (quoting Debates of the Virginia Convention (June 18, 1788) (statement of James Madison), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1371, 1382 (John P. Kaminski & Gaspare J. Saladino eds., 1993))) and *id.* at 1221 n.189 (“[T]he honied Mansfieldism of Blackstone became the Student’s Hornbook, [and] from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.” (alteration in original) (quoting Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), in THOMAS JEFFERSON: POLITICAL

Part II turns to the structure of the Constitution itself as it emerged from the Constitutional Convention, and to the debates that occurred there and after. Part II.A suggests—as has been suggested before³⁸—that the Framers’ key guide on executive power was likely Blackstone. Almost every single power Blackstone listed as belonging to the British monarch the U.S. Constitution assigns to some department of the national government. Part II.B then argues that the omission of certain prerogative powers—those over the erection of corporations and over immigration—is particularly telling. This Article, for the first time in the scholarship, analyzes these omissions and their implications for the residual vesting thesis. The omissions suggest that the delegates did not understand the Executive Vesting Clause to be a residual grant of power. Part II.C briefly addresses two other known historical points: the Convention’s instruction to the Committee of Detail, and the absence of any evidence for the residual vesting thesis in the Ratification debates. Finally, Part II.D argues that the law-execution account makes the most sense of the variations in the three vesting clauses. Putting these data together, Part II makes a comprehensive argument for the law-execution reading of the Executive Vesting Clause.

Parts III and IV turn to historical practice and post-Ratification separation of powers debates. Part III examines domestic separation of powers debates and argues that a “thick” law-execution reading of the Executive Vesting Clause has significant explanatory power for the debates involving appointments, removals, prosecutorial power, administrative regulations, and seizing steel mills. For example, this Part shows that Blackstone understood the prerogative power to issue proclamations as to the “manner, time, and circumstances of putting [the] laws in execution”³⁹ to be part of “the executive power of the laws.” Once this is understood, the real issue in *Youngstown* was not whether the president had some “emergency” or “inherent” power to seize the steel mills; the debate was rather over whether the president’s action was actually in execution of Congress’s various laws or was an act of new lawmaking. In other words, it was a debate over whether or

WRITINGS 57, 58 (Joyce Appleby & Terence Ball eds., 2004)). *But see* Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1362–63 (2018) (arguing that other thinkers dominated legal education and early American understandings of the common law). The present Article confirms Blackstone’s crucial influence on the overall structure of the Constitution.

38. *See supra* note 37.

39. BLACKSTONE, *supra* note 12, at 261.

not the president was properly exercising a “proclamation” power to help carry into execution the existing laws. Justice Jackson’s famous concurrence was a distraction from the case’s true controversy.

Part IV argues that many foreign affairs powers can also be fruitfully analyzed under this thick understanding of “the executive power,” particularly the powers to declare neutrality, terminate treaties, instruct and recall ambassadors, set foreign policy, recognize foreign governments, and enter into executive agreements. Here, however, although the thick understanding explains some of these presidential powers, others it cannot explain—at least not as *exclusively* presidential powers.⁴⁰ The upshot of all this is that the president probably has more power in the domestic sphere than under a thin law-execution reading, but likely less in foreign affairs than under a residual grant.

If this is right, then the implications of the various theories can be represented as follows, where the leftmost column represents the question of whether the president has that particular power:

40. For example, it is not even clear that the ability to “set” foreign policy is a “power” in the constitutional sense. Anyone can *talk*—whether the president (or anyone else) has the authority to make good on that talk is another matter entirely. See *infra* Part IV.B.4.

	Residual Vesting	Thin Law-Execution	Thick Law-Execution	Cross Reference
Removal	Yes	Congressional discretion	Yes	Only for faithless execution
Prosecutorial Control	Yes	Congressional discretion	Yes	Only for faithless execution
Seizing Steel Mills	No	No	No	No
Neutrality Proclamation	Yes	Yes	Yes	Yes
Treaty Termination	Yes	Congressional discretion	Sometimes	Sometimes
Instructing & Recalling Ambassadors	Yes	Congressional discretion	Yes	Yes
Setting Foreign Policy	Yes	No	No	No
Recognition	Exclusive	Nonexclusive	Nonexclusive	Nonexclusive
Torture	Not without congressional authorization	Not without congressional authorization	Not without congressional authorization	Not without congressional authorization
Binding Executive Agreements	Yes	Congressional delegation	Congressional delegation	Congressional delegation

I. THE TEXTUAL MEANING OF “THE EXECUTIVE POWER”

The textual evidence for the meaning of “the executive power” over which scholars have argued is mixed, although the law-execution reading is the better reading. Part I.A predominantly examines evidence from political thinkers who were influential on the Founders, from state constitutions, and from Alexander Hamilton. Part I.B specifically addresses Blackstone’s view of executive power.

A. *Competing Textual Evidence*

1. *Influential Political Thinkers.* John Locke's *Second Treatise on Government* was deeply influential on the Founding generation.⁴¹ Locke describes an "executive power" in the domestic sphere and a "federative power" in the foreign affairs space. After discussing the legislative power, Locke writes that because the laws "need a perpetual Execution, . . . [it is] necessary there should be a Power always in being, which should see to the Execution of the Laws that are made, and remain in force. And thus the Legislative and Executive Power come often to be separated."⁴² Here, "the executive power" is defined as "the execution of the laws that are made." Locke then writes that there is "another" power involving the relations between members of one political community and those of another; "[t]his therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called Federative, if any one pleases."⁴³

Locke explains that although "[t]hese two Powers, Executive and Federative," are "really distinct in themselves, . . . they are always almost united" in a single person because both require "the force of the Society for their exercise."⁴⁴ Professors Prakash and Ramsey write of Locke's discussion that "[a]lthough the powers were distinct as a theoretical matter, Locke could cite the powers interchangeably, because he had stated that they were inseparable."⁴⁵ Yet Locke is not a sure guide on this score. Some of the specific powers that Locke describes as federative—war and peace and leagues and alliances—were distinctly given to Congress or the Senate in coordination with the president. The Framers rejected Locke's very proposition that these powers are "always almost united" in a single magistrate;

41. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27–30 (enlarged ed. 1992) (describing John Locke's influence on Founding-generation Americans); ALAN GIBSON, *INTERPRETING THE FOUNDING* 13–21 (2006) (describing the prominent twentieth-century interpretation of the Founding "that the core of the Founders' political thought is encapsulated in the Lockean variation of the principles of classical liberalism"); Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1598 (1997) ("There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone.").

42. LOCKE, *supra* note 16, at 382–83.

43. *Id.* at 383 (emphasis omitted).

44. *Id.* at 383–84 (emphasis omitted).

45. Prakash & Ramsey, *supra* note 9, at 268.

decisions to go to war and to enter into treaties require just as much policymaking, if not more policymaking, than they require the application of any force. Hence James Wilson in the Constitutional Convention observed that “the great qualities in the several parts of the Executive are vigor and dispatch,” but “[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.”⁴⁶

Instead of treating Locke’s executive and federative powers as united in a single person, then, the Framers appear to have maintained the distinction and assigned the bundle of federative powers away from the chief magistrate. Or, as Professor Harrison puts it, “The strongest indication that the Constitution does not employ Locke’s typology is that it vests three powers, [the legislative, executive, and judicial,] not four.”⁴⁷ It excludes the federative power.

Montesquieu was also deeply influential on the Framers.⁴⁸ In Montesquieu’s famous treatise, *The Spirit of the Laws*, he calls the federative power a type of “executive” power: “In each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right.”⁴⁹ By the second of these powers the magistrate “makes peace or war, sends or receives embassies, establishes security, and prevents invasions,” and by the third “he punishes crimes or judges disputes between individuals.”⁵⁰

46. FARRAND, *supra* note 19, at 73–74. Professor McConnell suspects that William Pierce, who reported this remark from Wilson, may have misheard Wilson. MCCONNELL, *supra* note 6 (manuscript at 33). That seems unlikely. According to Madison,

Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office. 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 [etc.]. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.

FARRAND, *supra* note 19, at 65–66. McConnell believes that “among others” refers to powers *not* legislative in nature, MCCONNELL, *supra* note 6 (manuscript at 33), but it seems more natural to read it as saying “among other examples of legislative powers, that of war & peace [etc.].” This would be consistent with Pierce’s note.

47. Harrison, *supra* note 20, at 24; *see also* Bradley & Flaherty, *supra* note 8, at 560 (arguing that Locke “distinguishes executive power from foreign relations power”).

48. BAILYN, *supra* note 41, at 27–30; Rakove, *supra* note 41, at 1598.

49. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., 1989) (1748).

50. *Id.* at 156–57.

Montesquieu therefore calls this last power “the power of judging,” and the other “the executive power of the state.”⁵¹

This is evidence in favor of the residual vesting thesis, but just as with Locke, one cannot put too much emphasis on it. It appears that only Thomas Rutherford employed a similar taxonomy, calling Locke’s federative power the “executive power” and Locke’s “executive power” a “power of judging.”⁵² Instead, the Framers clearly separated the execution of the laws from the power to judge, lodging the former in the national executive and the latter in the courts, suggesting that they rejected Montesquieu’s taxonomy. Moreover, Professor Mortenson claims that this passage from Montesquieu was never cited in the Convention or ratification debates.⁵³

Yet, as Mortenson recognizes, the famous Essex Result, by which several Massachusetts towns expressed their disapproval of a proposed state constitution, did use Montesquieu’s taxonomy⁵⁴:

The executive power is sometimes divided into the external executive, and internal executive. The former comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state. The confederation of the United States of America hath lopped off this branch of the executive, and placed it in Congress. We have therefore only to consider the internal executive power, which is employed in the peace, security and protection of the subject and his property, and in the defence of the state. The executive power is to marshal and command her militia and armies for her defence, to enforce the law, and to carry into execution all the orders of the legislative powers.⁵⁵

51. *Id.* at 157.

52. Rutherford casts the judiciary in terms of its underlying executive nature:

The second branch of executive power, which is called external executive power, . . . is the power of acting with the common strength or jo[i]nt force of the society to guard against such injuries, as threaten it from without; to obtain amends for the damages arising from such injuries; or to inflict punishment upon the authors and abettors of them.

2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 54 (Cambridge, J. Bentham 1756). Mortenson writes that Rutherford was the only writer to adopt this idiosyncratic view of the taxonomy of internal and external executive power. Mortenson, *Royal Prerogative*, *supra* note 7, at 1251.

53. Mortenson, *Royal Prerogative*, *supra* note 7, at 1259.

54. *Id.* at 1250 n.347.

55. RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX, WHO WERE DEPUTED TO TAKE INTO CONSIDERATION THE CONSTITUTION AND FORM OF GOVERNMENT, PROPOSED BY THE CONVENTION OF THE STATE OF MASSACHUSETTS-BAY (Newbury-Port, John Mycall 1778), *reprinted in* THE POPULAR SOURCES OF POLITICAL

Even though this document may not have had much impact outside of Massachusetts at the time, and it predated the drafting of the U.S. Constitution by about a decade, it still suggests that Montesquieu was on the bookshelf of educated Americans of the period.

Another influential writer was Jean de Lolme, who published the final edition of his work, *The Constitution of England*, in 1784.⁵⁶ De Lolme writes that when Parliament ceases to exist, “its laws still continue to be in force: the King remains charged with the execution of them, and is supplied with the necessary power for that purpose.”⁵⁷ He then adds that the king was “the representative, and the depositary, of all the power and collective majesty of the Nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.”⁵⁸ In the beginning of the very next chapter, de Lolme states that “[t]he King not only unites in himself all the branches of the Executive power,—he not only disposes, without controul, of the whole military power in the State,—but he is moreover, it seems, Master of the Law itself,” as he can dismiss Parliament.⁵⁹ In this last passage, de Lolme could be describing all of these powers as “branches of the Executive power,” including the power over the military. Or he could be saying that the king unites in himself all branches of “the executive power,” *and also* controls the military and the legislative power of the state. On this reading, the control of the military is distinct from “all the branches of the Executive power.” This reading seems more plausible because “the executive power” would include more than simply military control, suggesting that de Lolme’s reference to military control was not an appositive referencing back to “the executive power,” but rather was mentioned in that passage as an independent power.

The meaning of “the executive power” is therefore not unequivocal. In Locke, the executive and federative powers are

AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 324, 337 (Oscar Handlin & Mary Handlin eds., 1966).

56. See JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 197–98 (1992) (describing how John Adams took “closely copied” notes from de Lolme’s 1784 revisions); BAILYN, *supra* note 41, at 27 (noting de Lolme’s broader influence).

57. J.L. DE LOLME, THE CONSTITUTION OF ENGLAND bk. I, ch. IV, at 71 (London, G. Robinson & J. Murray 4th ed. 1784); see also Mortenson, *Royal Prerogative*, *supra* note 7, at 1231 n.267.

58. DE LOLME, *supra* note 57, at 73.

59. *Id.* at 74.

distinct; in Montesquieu there are distinct “executive” powers to administer law, which he redefines as the power of judging, and to conduct foreign policy; and in de Lolme it is not entirely clear if “the executive power” includes other prerogative powers, or is simply a power to execute law.

Mortenson, however, quite exhaustively goes through other sources, particularly those from the seventeenth century.⁶⁰ In these sources, the term “the executive power,” when used in the singular and not to refer to the institution of the executive, almost always (perhaps always) referred to the power to carry laws into execution. For example, in 1698, political theorist Algernon Sidney wrote, “The Sword of Justice comprehends the legislative and the executive Power: the one is exercised in making Laws, the other in judging Controversies according to such as are made.”⁶¹ Here, although executive and judicial functions are not yet separated, the implication is that the legislative power makes the laws while “the executive power” carries them into execution. James Harrington similarly wrote, “[T]he hand of the magistrate is the executive power of the law, so the head of the magistrate is answerable unto the people that his execution be according unto the law; . . . the hand or sword that executeth the law is in it, and not above it.”⁶² Robert Filmer wrote, “By these words of legislative, nomothetical and architectonical power, in plain English, [is understood] a power of making laws. And by gubernative and executive, a power of putting those laws in execution by judging and punishing offenders.”⁶³

Emer de Vattel, a continental author, wrote, “The executive power naturally belongs to the sovereign,—to every conductor of a people: he is supposed to be invested with it, in its fullest extent, when the fundamental laws do not restrict it. When the laws are established, it is the prince’s province to have them put in execution.”⁶⁴ And then, of course, there is Jean-Jacques Rousseau:

60. See Mortenson, *Royal Prerogative*, *supra* note 7, at 1230–43. For a selection of the sources uncovered by Mortenson, see *infra* notes 61–66 and accompanying text.

61. ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* 295 (London 1698).

62. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* 15 (London 1656), as reprinted in *THE POLITICAL WORKS OF JAMES HARRINGTON* 155, 174 (J.G.A. Pocock ed., Cambridge Univ. Press 1977).

63. ROBERT FILMER, *THE ANARCHY OF A LIMITED OR MIXED MONARCHY* 4 (London 1648), as reprinted in *PATRIARCHA AND OTHER WRITINGS* 131, 136 (Johann P. Sommerville ed., Cambridge Univ. Press 1991).

64. EMER DE VATTEL, *THE LAW OF NATIONS* bk. I, ch. XIII, § 162, at 187 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797).

When I walk towards an object, it is necessary first that I should resolve to go that way and secondly that my feet should carry me. . . . 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*.⁶⁵

These statements, and the others that Mortenson uncovers,⁶⁶ are quite persuasive. They suggest that “the executive power” represented “force,” but the legislative power, which represented “will,” had to direct that force.⁶⁷ This is also consistent with some Founding-era statements, such as those of Hamilton writing as Pacificus, describing “the executive power” “as that Power which is charged with the command and application of the Public Force.”⁶⁸ This implies some prior direction from some other authority, with the exception perhaps of repelling invasion.

In summary, most uses of the term “the executive power” were references to law execution. A small handful of eighteenth-century writers, however, such as Montesquieu and the authors of the Essex Result, plausibly included Locke’s federative power within “the executive power.”

2. *State Constitutions and “Executive Powers.”* State constitutions also reveal ambiguity about the meaning of “the executive power.” Professor Harrison relies in particular on the constitutions of Virginia

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

66. Mortenson also argues that the executive power was entirely controllable by the legislative power; this is further evidence that “the executive power” was nothing more than the power to execute law. Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 62–69). For example, “A Farmer” wrote during the ratification debates 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.” A Farmer, *The Fallacies of the Freeman detected by a Farmer*, PHILA. FREEMAN’S J., Apr. 16 & 23, 1788, *reprinted in* 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 133, 134 (John P. Kaminski & Gaspare J. Saladino eds., 1995). And a generation later, Charles Francis Adams wrote, “This legislative power is then the precise measure of the executive power.” CHARLES FRANCIS ADAMS, *AN APPEAL FROM THE NEW TO THE OLD WHIGS* 15 (Bos., Russell, Odiorne & Co. 1835).

67. Professor Philip Hamburger has suggested to me that the tripartite separation of powers goes farther back to the medieval separation among force, will, and judgment. That seems plausible and consistent with the above quotations, and it would be further support for my thesis: there can be no force without will. The residual vesting thesis maintains, on the other hand, that sometimes the executive may exercise force without any indication of congressional will.

68. Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *in* *THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794*, at 8, 11 (Morton J. Frisch ed., 2007) [hereinafter *PACIFICUS*].

and Maryland from 1776 for his claim that the Founding generation likely shared the narrow, Whig conception of “the executive power.”⁶⁹ Both constitutions granted the state governors the “executive powers of government” but only “according to the laws,” and then prohibited the exercise of “any power or prerogative, by virtue of any law, statute or custom of England,” with some enumerated exceptions.⁷⁰ This suggests that even when the Founding generation used the term “executive powers” in the plural, such powers could still only be exercised “according to the laws”; that is, such powers, even if they went beyond law execution, were defeasible and controllable by the legislature.

Some state constitutions used the term “executive powers” in the plural but did not expressly forbid the exercise of prerogative powers. Even in these constitutions, the “executive powers” were to be exercised according to the laws. The Delaware Constitution of 1776 declared that the president of the state had the power to lay embargoes, grant reprieves and pardons, and “may exercise all the other executive powers of government, limited and restrained as by this constitution is mentioned, and according to the laws of the State.”⁷¹ Listing out embargoes and pardons and then declaring that the president “may exercise all the other executive powers of government” suggests that the royal prerogative powers were here described as “executive.” On

69. Harrison, *supra* note 20, at 29–30.

70. Under the Virginia Constitution, the governor

shall, with the advice of a Council of State, 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. But he shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.

VA. CONST. of 1776, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS 3812, 3816–17 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS]. As provided in the corresponding clause of the Maryland Constitution,

the Governor, by and with the advice and consent of the Council, may embody the militia; and, when embodied, shall alone have the direction thereof; and shall also have the direction of all the regular land and sea forces, under the laws of this State . . . ; *and may alone exercise all other the executive powers of government, where the concurrence of the Council is not required, according to the laws of this State*; and grant reprieves or pardons for any crime, except in such cases where the law shall otherwise direct; and may, during the recess of the General Assembly, lay embargoes . . . ; but the Governor *shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England or Great Britain.*

MD. CONST. of 1776, art. XXXIII, *reprinted in* 3 CONSTITUTIONS, *supra*, at 1686, 1696 (emphasis added).

71. DEL. CONST. of 1776, art. 7, *reprinted in* 1 CONSTITUTIONS, *supra* note 70, at 562–63.

the other hand, these other powers could only be exercised “according to the laws of the State.” Georgia’s 1777 constitution is particularly telling, providing that the governor and council shall “exercise the executive powers of government, according to the laws of this State and the constitution thereof, save only in the case of pardons and remission of fines, which he shall in no instance grant.”⁷² Here, too, the various prerogative powers are all considered “executive powers,” but they are all subject to the laws.⁷³ In short, these constitutions seem to have included other traditional prerogative powers within the term “executive powers” (plural). In the absence of further legislation, the chief executive could exercise those powers, but the legislature could always step in. It is not entirely clear whether the governors of these states could exercise only those executive powers specifically enumerated; the point is only that “executive powers” could encompass more than mere law execution, but were subject always to whatever laws the legislature happened to make.

New York’s constitution is recognized as the key state model for the federal Constitution’s chief executive because it was the only state constitution that granted a governor robust executive powers.⁷⁴ New York’s constitution vested “the supreme executive power and authority”—in the singular—in a governor.⁷⁵ The state constitution then granted a series of powers similar to those in the federal Constitution. The governor was to be commander in chief of the militia and admiral of the navy, to have the power to convene the assembly and senate on extraordinary occasions and prorogue them under

72. GA. CONST. of 1777, art. XIX, *reprinted in 2 CONSTITUTIONS*, *supra* note 70, at 777, 781.

73. North Carolina’s 1776 constitution similarly provided that the governor “may exercise all the other executive powers of government, limited and restrained as by this Constitution is mentioned, and according to the laws of the State.” N.C. CONST. of 1776, art. XIX, *reprinted in 5 CONSTITUTIONS*, *supra* note 70, at 2787, 2791–92.

74. See Letter from George Read to John Dickinson (May 21, 1787), in WILLIAM THOMPSON READ, LIFE AND CORRESPONDENCE OF GEORGE READ 443, (Phila., J.B. Lippincott & Co. 1870) (noting that some of the “principal features” of a draft plan for the federal constitution “are taken from the New York system of government”); THE FEDERALIST NO. 67, at 407 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (comparing the national executive to New York’s executive); THE FEDERALIST NO. 69, *supra passim* (Alexander Hamilton) (same). *But see* MCCONNELL, *supra* note 6 (manuscript at 18–19) (challenging the unique relevance of New York’s constitution). Notably, Gouverneur Morris, likely the key drafter on the Committee of Style and Arrangement in the federal Convention, *id.* (manuscript at 188, 207), actively participated in drafting the New York state constitution in 1777 and was a member of the state’s provincial congress that adopted it, *id.* (manuscript at 243).

75. N.Y. CONST. of 1777, art. XVII, *reprinted in 5 CONSTITUTIONS*, *supra* note 70, at 2623, 2632.

specified conditions, and to grant reprieves and pardons.⁷⁶ It then made it his duty:

to inform the legislature . . . of the condition of the State . . . ; to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity; to correspond with the Continental Congress, and other States; to transact all necessary business with the officers of government . . . ; to take care that the laws are faithfully executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature.⁷⁷

After the state constitution was adopted, the provincial congress and executive committees referred to these powers as a whole as “executive powers.” For example, in response to a letter from a committee in Albany, the statewide Council of Safety wrote via its secretary, “I am directed to acquaint you that since the Governor has been qualified, the executive powers of the State are vested in him by the constitution; therefore, that to him alone all applications respecting the militia should be made.”⁷⁸ In response to a letter from George Washington requesting that Governor George Clinton command the militia in four New York counties, the Council stated that as Clinton was now in charge of the militia under the new constitution, it would be unnecessary to make a resolution granting him such power: “On the Governor’s admission to office, all the executive powers of the State are to be surrendered by the Council to him, and of consequence they can neither alter the nature of those powers or place them in any other hands.”⁷⁹ The use of “executive powers” in the plural to refer to the command of the militia suggests a broader use of the term “executive.”⁸⁰

This reading is consistent with the use of the term “executive powers,” in the plural, in other Founding-era writings. If Madison’s

76. *Id.* art. XVIII, at 2632–33.

77. *Id.* art. XIX, at 2633.

78. 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK: 1775-1776-1777, at 1025 (Albany, Thurlow Weed 1842). To the author’s knowledge, this Article is the first to examine the records of the New York provincial congresses and committees for this purpose.

79. *Id.* at 1014–15.

80. To be sure, the militias of the time could be used to help carry law into execution. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 15 (granting Congress power to provide for calling for the militia to “execute the Laws of the Union,” among other things). The use of the term militia in the above context, however, seems clearly to refer to its military function.

notes to the Constitutional Convention are accurate, then Charles Pinckney “was for a vigorous Executive but was afraid the Executive powers of ⟨the existing⟩⁸¹ Congress might extend to peace & war [etc.] which would render the Executive a Monarchy.”⁸² And in any event, these notes show *Madison’s* use of “executive powers” to describe this view, which would also be evidence of the proposition. And John Jay, who would be instrumental in early foreign policy matters, wrote in a 1789 letter that the president “is vested with Powers and Prerogatives of far greater Magnitude and Importance, than any that were confided to the former Presidents of Congress . . . to whom the great executive Powers were not committed; for they were all held and exercised by the Congress itself.”⁸³ These usages suggest not only that “executive powers” encompassed a broad understanding of “executive,” but also that the term was at least sometimes understood to include the executive prerogatives generally.

The best conclusion to draw from these state constitutional provisions and other Founding-era material is that, at the time of the Founding, “executive powers,” in the plural, was sometimes used to describe the entire suite of the traditional royal authorities. This makes some sense because once these other powers are assigned to the executive, they become executive (adjective) by virtue of the executive (noun) possessing them. Thus, “executive powers” could be loosely translated as “the executive’s powers.”⁸⁴ But all of these powers were subject to the laws, suggesting that no indefeasible prerogative power could be exercised by the chief executive except as specifically provided for in the state constitution. Therefore, when the term “the executive power” was used, it is unlikely that it referred to a set of unenumerated prerogative powers uncontrollable by the legislature. Indeed, when the authors of the state constitutions clearly indicated that the “executive powers” included the suite of other prerogatives, they used the plural and, again, indicated that they were subject to law. “*The* executive power,” in the singular, may still have been only the power to carry law into execution. There is no suggestion in the New

81. As explained in FARRAND, *supra* note 19, at xvi–xix, pairs of angle brackets enclose material that Madison added later in life as he prepared his notes of the convention for posthumous publication.

82. *Id.* at 64–65.

83. Letter from John Jay, Sec’y, U.S. Dep’t of State, to Giuseppe Chiappe, Agent of the U.S. at Mogador (Dec. 1, 1789), in 5 THE SELECTED PAPERS OF JOHN JAY 168, 169 (Elizabeth M. Nuxoll ed., 2017).

84. I thank Matthew Steilen for suggesting this nice formulation.

York Constitution or in the similar Pennsylvania Constitution⁸⁵ that the vesting of “the executive power,” in the singular, included all of the royal prerogative powers.⁸⁶

3. *Hamilton as Pacificus*. Alexander Hamilton himself recognized the plausibility of both the residual vesting and law-execution readings of the term “the executive power.” He appealed to both possibilities in his debate with Madison over the Neutrality Proclamation, by which President Washington declared the country’s neutrality vis-à-vis France and England in 1793.⁸⁷ Hamilton’s discussion of “the executive power” is a staple of the executive power literature and the existing debate, and he is often believed to have been the first to articulate the residual reading of the clause.⁸⁸

Hamilton’s first justification for the Neutrality Proclamation was that the president “is charged with the Execution of the Laws, of which Treaties form a part,” and he must therefore interpret existing treaties

85. The 1776 Pennsylvania Constitution provided that “[t]he supreme executive power shall be vested in a president and council,” PA. CONST. of 1776, § 3, *reprinted in* 5 CONSTITUTIONS, *supra* note 70, at 3081, 3084, and in its twentieth section provided that the president and council “shall have power to appoint” officers “agreeable to this frame of government, and the laws that may be made hereafter”; to fill vacancies; “to correspond with other states, and transact business with the officers of government, civil and military; . . . to prepare such business as may appear to them necessary to lay before the general assembly”; to hear impeachments; and to grant pardons, *id.* § 20, at 3087. They were “to take care that the laws be faithfully executed” and “to expedite the execution of such measures as may be resolved upon by the general assembly.” *Id.* § 20, at 3088. They could draw appropriated sums, lay temporary embargoes during the legislative recess, and call together the general assembly. *Id.* “The president shall be commander in chief of the forces of the state . . .” *Id.*

86. The Massachusetts and New Hampshire constitutions did not grant “the executive power” or “executive powers.” They simply declared that there shall be a supreme executive magistrate and listed a variety of authorities. MASS. CONST. of 1780, ch. II, § I, *reprinted in* 3 CONSTITUTIONS, *supra* note 70, at 1888, 1899–1903; N.H. CONST. of 1792, pt. 2, §§ XLI–LIX, *reprinted in* 4 CONSTITUTIONS, *supra* note 70, at 2471, 2481–84. South Carolina’s obliquely provided that “the executive authority be vested in the president and commander-in-chief, limited and restrained as aforesaid.” S.C. CONST. of 1776, art. XXX, *reprinted in* 6 CONSTITUTIONS, *supra* note 70, at 3241, 3247. New Jersey’s provided that the governor “shall have the supreme executive power, be Chancellor of the Colony, and act as captain-general and commander in chief of all the militia, and other military force in this Colony.” N.J. CONST. of 1776, art. VIII, *reprinted in* 5 CONSTITUTIONS, *supra* note 70, at 2594, 2596. Rhode Island and Connecticut continued to be governed by their seventeenth-century charters. *See* 1 CONSTITUTIONS, *supra* note 70, at 529, 536 (recording no governing constitutional replacements or amendments for Connecticut between 1662 and 1818); 6 *id.* at 3211, 3222 (recording no intervening constitutional amendments or replacements for Rhode Island between 1663 and 1842).

87. For more on the Neutrality Proclamation, see *infra* Part IV.B.1.

88. Mortenson, *Royal Prerogative*, *supra* note 7, at 1172; Bradley & Flaherty, *supra* note 8, at 679–84; Prakash & Ramsey, *supra* note 9, at 330, 334–39.

(and determine if they are even in force).⁸⁹ He went on to say that “[t]he President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning.”⁹⁰ As Professor Harrison writes, here Hamilton “realized that some of his readers might take the Whig view” of executive power.⁹¹

Yet Hamilton also offered the alternative, residual view: “The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.”⁹² And he includes the power of declaring war to be one such qualification,⁹³ thereby going beyond the law-execution reading. Hamilton, in other words, provides support for both readings of “the executive power.” This suggests that the residual vesting thesis—supported also by the terminology of Montesquieu and the Essex Result—was certainly a possible reading at the Founding. But Hamilton’s dual analysis also suggests that the residual vesting thesis “was less central to Hamilton’s analysis than proponents of the [t]hesis typically acknowledge.”⁹⁴

B. “The Executive Power” in Blackstone

Again, examining the variety of sources available to the Founding generation suggests some ambiguity in the term “the executive power,” particularly as it was used in the eighteenth century. Even so, the law-execution reading seems to have more support. This Section examines Blackstone’s text—which will be relevant to several parts of the argument to come—and shows that even Blackstone seems to use “the executive power” in both senses in dispute.

In his two chapters on the royal prerogative, Blackstone divides the king’s prerogative powers into three categories: the king’s “royal *character*,” his “royal *authority*,” and his “royal *income*.”⁹⁵ In the

89. PACIFICUS, *supra* note 68, at 11.

90. *Id.* at 16.

91. Harrison, *supra* note 20, at 50.

92. PACIFICUS, *supra* note 68, at 13 (alteration in original).

93. *Id.*

94. Bradley & Flaherty, *supra* note 8, at 682.

95. BLACKSTONE, *supra* note 12, at 233 (“These substantive or direct prerogatives may . . . be divided into three kinds: being such as regard, first, the king’s royal *character*; secondly, his royal *authority*; and, lastly, his royal *income*.”).

second of these two chapters, Blackstone deals entirely with the king's royal revenue.⁹⁶ The first deals with the king's royal character, or "dignity," and the royal authority, or "power."⁹⁷

Blackstone begins with the royal "dignity," under which he includes the king's attributes of sovereignty, sovereign immunity (immunity from suit), and perpetuity.⁹⁸ Then, Blackstone turns to the second part of the king's prerogatives. "We are next to consider those branches of the royal prerogative," Blackstone writes, "which invest . . . our sovereign lord . . . with a number of authorities and powers; in the exertion whereof consists the executive part of government."⁹⁹ Here, Blackstone describes powers that almost all appear somewhere in the Constitution.

These powers deal either with "th[e] nation's intercourse with foreign nations, or it's¹⁰⁰ own domestic government and civil polity."¹⁰¹ The former category includes the powers to send and receive ambassadors; to make treaties, leagues, and alliances; to make war and peace; to issue letters of marque and reprisal; to grant safe conduct in times of conflict; and to admit strangers (foreigners) into the country.¹⁰² The latter, domestic powers include the power to veto legislation; be commander in chief (or "generalissimo"); raise and regulate fleets and armies; and erect forts and similar buildings.¹⁰³ The king is also "the fountain of honour, of office, and of privilege," by which he may, for example, grant titles of nobility.¹⁰⁴ This includes the power to create and dispose of offices and to naturalize aliens and erect corporations.¹⁰⁵ The king is the arbiter of commerce, regulates weights and measures, and may coin money.¹⁰⁶ He is also the head of the Church of England.¹⁰⁷

As Blackstone continues, he seems to use "the executive power" in both senses in dispute. On the one hand, Blackstone gets to law execution as he further discusses the king's prerogatives. He writes that

96. *Id.* at 271.

97. *Id.* at 233–34.

98. *Id.* at 234–42.

99. *Id.* at 242.

100. For a comment regarding the possessive use of "it's," see *supra* note 12.

101. BLACKSTONE, *supra* note 12, at 245.

102. *Id.* at 245–53.

103. *Id.* at 253–57.

104. *Id.* at 261–62.

105. *Id.* at 262–63.

106. *Id.* at 263–68.

107. *Id.* at 269.

the king is “the fountain of justice and general conservator of the peace of the kingdom.”¹⁰⁸ This means the king is “the proper person to prosecute for all public offenses and breaches of the peace,” may grant pardons, and may nominate judges.¹⁰⁹ The king has the power to make proclamations as to “the manner, time, and circumstances of putting [the] laws in execution.”¹¹⁰ Tellingly, Blackstone goes on to write that the king may create judicial tribunals, “for, though the constitution of the kingdom hath entrusted him with the *whole executive power of the laws*, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust,” and so “courts should be erected, to assist him in executing this power.”¹¹¹ Blackstone seems to use the phrase “the executive power of the laws” as the power to execute the laws enacted by the kingdom’s legislative body. Here, “the executive power” is a *subset* of the numerous “authorities and powers” that Blackstone promised to describe.

On the other hand, at the end of this entire discussion, Blackstone writes: “[The preceding chapter] considered at large those branches of the king’s prerogative, which contribute to his royal dignity, and constitute *the executive power* of the government.”¹¹² This seems to suggest that all of the prerogative powers—save for those involving the royal dignity or the royal revenue—constitute “the executive power.” Professor Mortenson claims that the use here may refer to the executive authority—that is, the king himself.¹¹³ This is possible, but the executive authority *also* is responsible for the two other branches of prerogative (the royal dignity and revenue). Thus, “the executive power” here may instead refer to all the “powers and authorities” that Blackstone discusses between his analyses of the royal character and the royal revenue.

Blackstone’s use of “executive power,” in short, is cause for some pause. Although the evidence, put together, does strongly favor the law-execution reading, it is at least possible that by Blackstone’s time the phrase could have also referred to all the royal powers and authorities, save for those involving the royal dignity and revenue.

108. *Id.* at 257.

109. *Id.* at 259.

110. *Id.* at 261.

111. *Id.* at 257 (emphasis added).

112. *Id.* at 271 (emphasis added).

113. Mortenson, *Royal Prerogative*, *supra* note 7, at 1249 n.343.

II. “THE EXECUTIVE POWER” IN CONVENTION

This Part seeks to show that, notwithstanding any ambiguity from the textual sources canvassed in Part I, the proceedings at the Constitutional Convention make the law-execution reading much more plausible than the residual reading. Part II.A confirms Blackstone’s influence on the drafting of the Constitution, which contains almost all of the power and authorities attributed to the king by Blackstone. At the very least, this confirms that defining and assigning the known royal prerogatives to the various branches of government was a central motivation of the Framers, and Blackstone was a leading expositor of those prerogatives. Not only does this confirm the influence of prerogative, but it suggests a reason to discount the residual vesting thesis: if the delegates thought they were already accounting for all of the royal powers, it seems unlikely they would have thought they needed to grant a residuary of executive powers. Part II.B analyzes the few prerogatives mentioned in Blackstone but not mentioned in the U.S. Constitution and argues that these omissions also suggest that it is unlikely the drafters understood themselves to be creating a residual grant of prerogative power. Part II.C details the Convention’s resolutions and the silence of the ratification debates, both of which further support the law-execution reading. Part II.D reexamines the three vesting clauses and proposes that they make the most sense if “the executive power” indeed refers only to law execution. Part II.E summarizes.

A. *Distributing Prerogative Powers*

A comparison of Blackstone’s chapter on the king’s powers and authorities and the U.S. Constitution leaves little doubt that Blackstone influenced the form the Constitution took. Almost every single prerogative discussed is specifically assigned somewhere in the Constitution¹¹⁴: to send ambassadors (president and Senate),¹¹⁵ to receive ambassadors (president),¹¹⁶ to make treaties, leagues, and alliances (president and Senate),¹¹⁷ to make war and peace (Congress

114. Compare *supra* notes 101–07 and accompanying text, with *infra* notes 115–29 and accompanying text.

115. U.S. CONST. art. II, § 2, cl. 2 (“[A]nd he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . .”).

116. *Id.* art. II, § 3 (“[H]e shall receive Ambassadors and other public Ministers . . .”).

117. *Id.* art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

has the power to declare war, the president to wage it);¹¹⁸ to issue letters of marque and reprisal (Congress);¹¹⁹ to veto legislation (president subject to override);¹²⁰ to be commander in chief (president);¹²¹ to raise and regulate fleets and armies (Congress);¹²² to erect forts and similar buildings (Congress);¹²³ to grant titles of nobility (specifically forbidden);¹²⁴ to naturalize aliens (Congress);¹²⁵ to create offices (Congress);¹²⁶ to regulate commerce and weights and measures, and to

118. *Id.* art. I, § 8, cls. 1, 11 (“The Congress shall have Power . . . To declare War”); *id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”).

119. *Id.* art. I, § 8, cls. 1, 11 (“The Congress shall have Power . . . To . . . grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”).

120. The veto power and its override are delineated as follows:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Id. art. I, § 7, cl. 3.

121. *Id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”).

122. *Id.* art. I, § 8, cls. 1, 12–14 (“The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; [and] To make Rules for the Government and Regulation of the land and naval Forces”).

123. *Id.* art. I, § 8, cls. 1, 17 (“The Congress shall have Power . . . to exercise [exclusive] Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”).

124. *Id.* art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States”).

125. *Id.* art. I, § 8, cls. 1, 4 (“The Congress shall have Power . . . To establish a uniform Rule of Naturalization”).

126. *Id.* art. II, § 2, cl. 2 (noting that offices are “established by Law”); *see also id.* art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”).

coin money (Congress);¹²⁷ to institute judicial tribunals (Congress);¹²⁸ and to nominate and appoint judges (president and Senate).¹²⁹

If the Framers assigned all or nearly all of the known prerogative powers, it is not clear why any of them would have thought it necessary to create a residual grant of powers. The most serious objection to this observation is that many foreign affairs powers are nonetheless missing. Yet Blackstone himself wrote that the king had all of the foreign affairs powers but then numbered among the king's relevant prerogatives—he called them the “principal” prerogatives relating to foreign intercourse¹³⁰—only those that also happened to find their way into the Constitution.

More still, the delegates in the Constitutional Convention likely did not think these powers were missing. As the delegates were debating the Committee of Detail draft, which gave the Senate the power over treaties and ambassadorial appointments,¹³¹ Charles Pinckney observed that “the Senate is to have the power of making treaties & managing our foreign affairs.”¹³² He later opposed giving the House a say in the decision to “make war,” stating that “[t]he Senate would be the best depository” of this power, “being more acquainted with foreign affairs, and most capable of proper resolutions.”¹³³ Earlier in the proceedings, James Wilson described the powers over foreign commerce and war and peace to be the principal foreign affairs powers: “Every nation attends to its foreign intercourse — to support its commerce — to prevent foreign contempt and to make war and peace. Our senate will be possessed of these powers, and therefore ought to be dignified and permanent.”¹³⁴ These two delegates seemed to believe

127. *Id.* art. I, § 8, cls. 1, 3, 5 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . .”).

128. *Id.* art. I, § 8, cls. 1, 9 (“Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court . . .”).

129. *Id.* art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . .”).

130. BLACKSTONE, *supra* note 12, at 253.

131. 2 FARRAND, *supra* note 19, at 183 (“The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court.”).

132. *Id.* at 235.

133. *Id.* at 318.

134. FARRAND, *supra* note 19, at 432–33 (reporting Yates's notes). Madison recorded more of Wilson's explanation:

that power over ambassadorial appointments, treaty making, war and peace, and foreign commerce conveyed all the relevant foreign affairs powers.

In fact, it appears that the power to make treaties may have included the power to “treat” with foreign nations generally. The Committee on Postponed Matters, for example, considered the following resolution: “The Senate shall have power to treat with foreign nations, but no Treaty shall be binding on the United States which is not ratified by a Law.”¹³⁵ At least in this formulation, the power to make treaties was included within the power to “treat.” Samuel Johnson’s 1755 dictionary defined “to treat” as “1. To discourse; to make discussions . . . 2. To practice negotiation . . . 3. To come to terms of accommodation . . . 4. To make gratuitous entertainments.”¹³⁶ To treat therefore would include a general power of “managing foreign affairs.” Of course, the ultimate power conferred in the Constitution was to make treaties; but this requires the nation to treat with other nations—that is, to engage in negotiations and general discourse. The power to treat generally might thus be implicit in the power to make treaties. Part IV revisits this issue in more detail, but for now it suffices to say that by assigning and distributing the “principal”¹³⁷ foreign affairs prerogatives mentioned by Blackstone, it appears the delegates thought they were sufficiently conferring all of the relevant foreign affairs powers, eliminating the need for a residual grant of power.

B. Two Key Omissions

There are, to be sure, still a few differences between Blackstone’s list of prerogatives and those in the U.S. Constitution. The Constitution does not make the president the head of any church. There was no established church at the national level of the American constitutional regime, and so such a power would have been unnecessary (not to mention improper). There is no specific power in the U.S. Constitution

Every nation may be regarded in two relations 1 to its own citizens. 2 to foreign nations. It is therefore not only liable to anarchy & tyranny within but has wars to avoid & treaties to obtain from abroad. The Senate will probably be the depository of the powers concerning the latter objects. It ought therefore to be made respectable in the eyes of foreign nations.

Id. at 425–26.

135. 2 *id.* at 382–83.

136. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2092 (London, W. Strahan 1755).

137. See *supra* note 130 and accompanying text.

over passports, but arguably regulating passports is necessary and proper to carry into effect the naturalization power or the foreign commerce power.¹³⁸ The two key powers from Blackstone that seem to be missing in the Constitution are the power to erect corporations and the power over immigration (the power to admit strangers). This Section explores the Framers' likely views on these powers and concludes that those views are inconsistent with a residual grant of power.

1. *The Power To Erect Corporations.* As described above,¹³⁹ Blackstone included the power to erect corporations as a prerogative power. Because “the king has also the prerogative of conferring privileges upon private persons,” he has “the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic capacity, which they were utterly incapable of in their natural.”¹⁴⁰ This power is nowhere found in the Constitution, and the omission of it may help resolve the meaning of the grant of “the executive power.”

The debate in the Convention over a power of incorporation was short. It occurred on September 14,¹⁴¹ when the Constitution was nearly in its final form.¹⁴² Benjamin Franklin moved to add a power in Article I, Section 8 to allow Congress to “provide for cutting canals.”¹⁴³ Madison then “suggested an enlargement of the motion into a power ‘to grant charters of incorporation where the interest of the U.S. might

138. As Justice Scalia explained,

The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power “carries with it all those incidental powers which are necessary to its complete and effectual execution.”

Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II), 576 U.S. 1, 69 (2015) (Scalia, J., dissenting) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 429 (1821)). The majority in *Zivotofsky II* held that such a power belongs to the president by virtue of the Receptions Clause, *see id.* at 10–13 (majority opinion), but that clause is framed as a duty (and quite a narrow one) and not a power. For an argument that the passport power may be necessary and proper to the foreign commerce power, see MCCONNELL, *supra* note 6 (manuscript at 227–28).

139. *See supra* note 105 and accompanying text.

140. BLACKSTONE, *supra* note 12, at 263.

141. 2 FARRAND, *supra* note 19, at 612–20.

142. The final draft of the Constitution was adopted only three days later, on September 17. *Id.* at 641–49.

143. *See id.* at 615.

require & the legislative provisions of individual States may be incompetent,” with the primary objective being “to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for.”¹⁴⁴

Rufus King objected, arguing that “[t]he States will be prejudiced and divided into parties by it—In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.”¹⁴⁵ James Wilson responded that providing for banks would probably not “excite the prejudices & parties apprehended,” and that providing for mercantile monopolies was already implied by the power to regulate trade (perhaps in combination with the Necessary and Proper Clause).¹⁴⁶ George Mason, however, supported “limiting the power [of incorporation] to the single case of Canals” because “[h]e was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson.”¹⁴⁷

The motion was so modified to be limited only to the power to incorporate companies for the cutting of canals and was rejected by a vote of 8–3.¹⁴⁸ Madison’s notes then state, “The other part fell of course, as including the power rejected.”¹⁴⁹ In other words, the general power of incorporation was rejected because it would have included the rejected power to incorporate companies for the purpose of cutting canals and making other internal improvements.

Although this episode lends itself to more than one possible inference, the most plausible is that the delegates intended to deny the national government a power to grant charters of incorporation.

144. *Id.*

145. *Id.* at 616.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* Of course, recent scholarship shows that Madison appears to have revised his notes of the Convention later in his life. MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 179 (2015) (“In the fall of 1789, Madison turned back to the Notes. . . . As he composed the Notes after August 21, he may have recast his comments and speeches. Madison also revised the Notes, adding and detailing procedural details.”); *see supra* note 81. But in this case, there is no reason to doubt the sequence of events or the general concerns of the delegates. Professor Bilder does not question this episode in her book when discussing how it was later relied upon by Thomas Jefferson in the debate over incorporating a bank. BILDER, *supra*, at 206–07. Additionally, James McHenry’s notes of the same day confirm that there were two motions—one for cutting canals and the other a general incorporation power—and that the incorporation power was rejected. 2 FARRAND, *supra* note 19, at 620.

Wilson, to be sure, suggested that some power to incorporate may be implied by other legislative powers, and so it could be that a power to erect corporations was rejected as unnecessary. But Wilson did not offer his suggestion as a reason to reject the proposal; he was arguing in favor of it, and so it is reasonable to assume that the delegates who voted to reject the proposal did so because they did not want the national government to have any power to erect corporations at all. And yet, to none of these delegates did it occur that such a power might exist by virtue of Article II's Vesting Clause.

This intent is at least suggestive of how the delegates understood the meaning of "the executive power." Notwithstanding their vote, if the residual vesting thesis is correct, then such a power to erect corporations was not merely implied, it was expressly granted by the Executive Vesting Clause—and not a single delegate who wanted to deny this power, whether or not they in fact constituted the majority, sounded the alarm. Even Wilson had to infer such a power by implication from specific grants of legislative power; it did not occur to him, either, that such a power might belong to the executive.

2. *The Immigration Prerogative.* There was no debate in the Convention over the power to admit foreigners. Blackstone described such a power as a royal prerogative, but it appears nowhere in the constitutional text. The exact location of the federal immigration power is unclear and remains contested among originalist scholars.¹⁵⁰ The clause about the Atlantic slave trade suggests that the delegates believed the states would retain primary control over immigration, but that Congress might override their decisions.¹⁵¹ The foreign commerce

150. See, e.g., Ilya Somin, *Does the Constitution Give the Federal Government Power over Immigration?*, CATO UNBOUND (Sept. 12, 2018), <https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration> [https://perma.cc/K9SE-KN98] (arguing there is no federal power over immigration); Christopher R. Green, Tribes, Nations, States: Our Three Commerce Powers 26–27 (unpublished manuscript) (on file with the *Duke Law Journal*) (arguing that the immigration power follows from Congress's power to regulate commerce "with" foreign nations).

151. The clause temporarily limited Congress's ability to interfere with State discretion:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

U.S. CONST. art. I, § 9, cl. 1; see also MCCONNELL, *supra* note 6 (manuscript at 181) ("The wording of the Slave Trade Clause . . . strongly suggests that the states were thought to have primary authority over immigration, but that Congress has power to preempt state law and create a federal legal regime.").

power may have permitted controlling the importation of slaves—and the transporting of individuals¹⁵²—but it hardly follows that Congress can control generally who has a right to come to *reside* in the United States for purposes other than trade.¹⁵³ There may also be creative ways to exercise the immigration power. For example, presumably the states could cede a strip of territory along all United States borders to the federal government, which could then control who crosses these borders through its plenary power over the territories.¹⁵⁴

Not only did the delegates therefore assume Congress or the states would have the power over immigration, but they likely understood that the immigration prerogative had fallen into disuse. As Professor McConnell explains, “The last time a monarch had exercised the prerogative to expel a class of foreigners was in 1575, under Elizabeth, and according to most historians, [t]his branch of the prerogative . . . ha[d] been allowed to fall into desuetude, and may be regarded as no longer existing.”¹⁵⁵ In 1792, the British government investigated whether the monarch had authority to exclude thousands of refugees from revolutionary France without parliamentary approval; the conclusion was that the king had no power to exclude “alien friends”—that is, foreigners from friendly countries.¹⁵⁶ Congress apparently took this same position during the debates over the Alien Acts in 1798. “No one,” according to McConnell, “even suggested that [President] Adams had inherent presidential authority to deport aliens from countries not at war with the United States. This suggests that the

152. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 215–16 (1824) (holding that the transportation of people is “commerce”).

153. In his interesting new paper, Professor Christopher Green argues quite persuasively that the Framers understood commerce “with foreign nations” to encompass any commercial interactions between American citizens and subjects of foreign states, wherever that commerce occurs, and that this would include a power to control all foreigners present in the United States. Green, *supra* note 150, at 6, 26–27. Green’s evidence is persuasive, and perhaps the power to regulate every commercial interaction implies the ability to exclude and expel aliens, but the case is not foolproof and in any event Congress’s power was controverted early on in the debate over the Alien Enemies Act. *See infra* note 158.

154. *See* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”). I first heard of this possibility at an originalism works-in-progress conference hosted by the University of San Diego.

155. MCCONNELL, *supra* note 6 (manuscript at 180) (alterations in original) (quoting H.S.Q. HENRIQUES, *THE LAW OF ALIENS AND NATURALIZATION* 11 (1906)).

156. *Id.*

founders did not share Blackstone's more capacious interpretation of executive authority on this point."¹⁵⁷

Putting these points together indicates the constitutional drafters likely understood the royal immigration prerogative to be obsolete, and they seem to have assumed Congress would have the power over immigration. But on both points, there was ambiguity. As to the first, the drafters' key guide on executive power, Blackstone, described the power over aliens as a royal prerogative. As to the second, they did not expressly grant to Congress the power to exclude alien friends,¹⁵⁸ if they intended to grant such a power to the national government at all. Yet if the Executive Vesting Clause is a residual grant of prerogative powers, then it would be easy for future presidents to argue they had a plenary immigration power. Indeed, in 1950, the Supreme Court held that "[t]he exclusion of aliens is a fundamental act of sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power."¹⁵⁹

It seems highly unlikely both that the delegates would have intended to leave this possibility open and that they would have been unaware of such a possibility if they had granted a residuum of royal power to the executive. The Declaration of Independence had complained that the king "has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither."¹⁶⁰ And they do not appear to have simply forgotten about this issue at the Convention; in opposition to a motion to

157. *Id.*

158. Unless Professor Green is correct. *See* Green, *supra* note 150, at 26–27. Even if he is correct that the power over commerce with foreign nations allows Congress to control every local commercial interaction by aliens, the prerogative power, as described in Blackstone, was much more explicit. *See supra* notes 102, 105 and accompanying text. Indeed, the lack of clarity in the Constitution led very quickly to the federal immigration power being controverted in 1798. *See, e.g.,* Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798), res. 4, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 131, 132 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Resolved, That alien friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the United States . . .").

159. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citations omitted); *see also* MCCONNELL, *supra* note 6 (manuscript at 181) ("The modern Supreme Court, without explanation, has assumed that the implied federal power over immigration is not only plenary but virtually exclusive of the states.").

160. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

increase the residency requirement for a U.S. Senator to fourteen years, for example, Oliver Ellsworth objected that he “was opposed to the motion as discouraging meritorious aliens from emigrating to this Country.”¹⁶¹ It is unlikely that they would have left such a power to the president and that they would have been blind to this possibility under a residual grant of power. Far more plausibly, the grant of “the executive power” did not include a residuum of prerogative power at all.

C. *The Convention’s Instruction, and Ratification*

The above arguments make a compelling case against a residual grant of power, particularly when combined with several general aspects of the Convention’s proceedings. The Virginia Plan would have granted a national executive “general authority to execute the National laws” as well as “the Executive rights vested in Congress by the Confederation.”¹⁶² In the June 1 debate over this provision, several delegates worried it would grant too much power to the national executive. James Wilson, for example, said that he “did not consider the prerogatives of the British Monarch as a proper guide in defining the Executive powers” because some of them “were of a Legislative nature,” such as “that of war & peace [etc.] The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.”¹⁶³ According to Rufus King’s notes, Wilson also argued that “Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed.”¹⁶⁴

Madison defined “executive” power similarly, saying it was the “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 of a legislative or judicial nature “as may from time to time be delegated by the national Legislature.”¹⁶⁵ The last clause on delegated power was struck as being included within the power to carry into effect the national laws, and the motion then carried.¹⁶⁶

161. 2 FARRAND, *supra* note 19, at 235.

162. 1 *id.* at 21; *id.* at 62–63.

163. *Id.* at 65–66.

164. *Id.* at 70.

165. *Id.* at 67.

166. *Id.*

On the one hand, Professor Harrison concludes from all this that the delegates intended to retain only the power to execute the laws (and appoint officers not otherwise provided for) and to reject a general grant of other “executive rights” in the president.¹⁶⁷ Both Wilson’s and Madison’s statements also support the proposition that “executive” power was thought to be only the power to execute law and to appoint necessary assistants. This view is also consistent with Madison’s strategy to decide on the executive’s powers before “determining how far they might be safely entrusted to a single officer.”¹⁶⁸ The ultimate adoption of a unitary, as opposed to plural, executive with only power to execute the laws and limited other prerogatives is consistent with the Convention’s instruction and the discussion among the delegates.¹⁶⁹

The residual vesting thesis, on the other hand, implies that the Committee of Detail ignored the Convention’s instruction from June 1 and the spirit of the debate that occurred. That is exactly what McConnell, for one, claims. According to him, the Convention decided to vest in the president only the powers of “law execution, appointment of offices other than judges, and a qualified veto.”¹⁷⁰ “Undeterred,” McConnell writes, “the Committee of Detail reinstated a vesting clause at least as broad as the original Resolution Seven. It stated, ‘The Executive Power of the United States shall be vested in a single person.’ So much for preparing a draft ‘conformable’ to the Convention’s decisions.”¹⁷¹

More still, not a single opponent of the Constitution over the course of Ratification, including those who spoke about executive power, so much as mentioned the possibility of a residual grant of power. McConnell again recognizes the point, describes this silence as a “significant dog that did not bark,” and recognizes that the “Anti-Federalists did not apparently perceive the possibility that the Vesting

167. Harrison, *supra* note 20, at 37. Yates’ concise and otherwise unhelpful notes of the day list only “[a] general authority to execute the laws” and “[t]o appoint all officers not otherwise provided for” as executive powers “[a]greed to.” FARRAND, *supra* note 19, at 70.

168. FARRAND, *supra* note 19, at 67.

169. The delegates agreed to a unitary executive on July 17. 2 *id.* at 22.

170. Michael W. McConnell, *James Wilson’s Contributions to the Construction of Article II*, 17 *Geo. J.L. & Pub. Pol’y* 23, 40 (2019).

171. *Id.* (footnote omitted) (quoting 2 FARRAND, *supra* note 19, at 185).

Clause of Article II might convey unenumerated powers to the President.”¹⁷²

Consider the sheer amount of inconvenient facts that the proponents of a residual grant of power must ignore. To maintain the residual vesting thesis, they must believe that the Committee of Detail ignored the Convention’s instruction; that none of the delegates realized the possibility that a power to erect corporations, as a prerogative power, would be vested in the president despite their explicit vote to deny the national government that power; that none was aware of the risk that a president might someday claim a prerogative power over immigration; and that the silence of the Anti-Federalists was an oversight instead of a clear indication that few at the time understood “the executive power” to include a residual grant of prerogatives.¹⁷³ A reading of “the executive power” to mean only the power to execute the laws is consistent with the Convention’s instructions, with the delegates’ other votes, and with the Anti-Federalists’ deafening silence.

D. *The Vesting Clauses Reconsidered*

The Constitution’s three vesting clauses make the most sense if “the executive power” refers only to the power to execute law. *The* legislative power, *the* executive power, and *the* judicial power each refers to a single function: the power to make laws, the power to

172. MCCONNELL, *supra* note 6 (manuscript at 75). Mortenson’s extensive research also has not come up with any barking dogs:

Others have observed the failure of royal residuum theorists to identify even one positive assertion of the claim during drafting or ratification. 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.

Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 90) (footnote omitted). Mortenson also points out the total silence in the North Carolina ratifying convention when they discussed “the executive power” clause; no one seemed to be at all bothered by it. *Id.* (manuscript at 93). The concerns were all about the other powers granted to the president. *Id.*

173. To be sure, perhaps the Anti-Federalists did not sound the alarm because most of the prerogatives had already been assigned away from the president or otherwise limited. That seems rather unlikely, however, given the uncertainty surrounding the power to erect corporations and the immigration prerogative, two important historic prerogative powers that would have been familiar to the Anti-Federalists. If the Anti-Federalists had believed that the Executive Vesting Clause included a residuum of prerogative powers, surely at least one of them would have realized the risk that these two prerogatives might be thought to belong to the president.

execute those laws, and the power to adjudicate disputes—at least those affecting life, liberty, or property¹⁷⁴—according to those laws.

This taxonomy is the only one that accounts for the variations in the vesting clauses. Under the standard accounts, there is always something odd about the different formulations. Article I vests *all* legislative powers (plural) herein granted, and then has an enumeration of power; Article II vests “the executive power,” with a subsequent enumeration of additional powers; and Article III vests “the judicial power” with an enumeration of the jurisdiction to which that judicial power extends, but not an enumeration of judicial powers. Under the residual vesting thesis, “the executive power” is a grant of multiple, executive-type powers, yet “the judicial power” seems to be a single function. The disconnect between Articles I and III is even greater. If the enumeration of jurisdiction in Article III is analogous to the enumeration in Article I, then it would have been more natural to provide that “all judicial powers herein granted” are vested in the courts, or conversely that “the legislative power shall be vested in Congress,” with a subsequent enumeration of the subject matters to which the legislative power “shall extend.”

The simplest and most likely answer is that “the judicial power” is a single function, “the executive power” is a single function, and “the legislative power” is a single function. Describing the function does not, however, indicate *when* that function may be performed. Hence, Article III enumerates the jurisdiction of the federal courts. “The executive power” is similarly limited to executing whatever laws Congress has enacted, and therefore is limited by the enumeration of power in Article I, Section 8. Unlike the judiciary, which has only the judicial power, and unlike the executive, which has only “the executive power” and a few other specifically enumerated powers traditionally associated with the executive authority, the Convention arguably assigned Congress much more than just “the legislative power.”

174. The “core” or “exclusive” judicial power—the power that only judges could exercise—was the adjudication of disputes that led to such deprivations of private rights. Public rights cases, in contrast, could be adjudicated either by the courts or one of the other two branches of government. See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (distinguishing between matters which are “the subject of a suit at the common law, or in equity, or admiralty,” which must be exercised by courts, and those “involving public rights,” which are amenable to judicial resolution “but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper”); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1515–16, 1516 n.9 (2020) (noting historical exceptions to the power of the judiciary to adjudicate disputes).

Congress, that is to say, does a lot more than just make laws. In fact, it received most of the historic prerogative powers, like declaring war. Yet “declaring war” is not making law—it does not prescribe a rule of civil conduct. Neither is borrowing or coining money, or issuing letters of marque, for that matter. Thus, the drafters had to give some indication that Congress was getting significantly more power than simply “the legislative power.”¹⁷⁵ To be sure, Congress can often exercise these powers by making laws—that is, by making general rules that prescribe the conduct of private individuals or executive officials. But Congress can also exercise such powers by joint resolution.¹⁷⁶ It can in this way issue a declaration of war or a letter of marque, neither of which can be described as a “law.”

The Vesting Clause of Article I was a natural way for the drafters to indicate this expansion: “All legislative powers herein granted shall be” vested in Congress. Not just “the legislative power,” and not “only such legislative powers as are herein granted,” which would have been a more natural formulation to signal a limitation and enumeration of power. The Article I Vesting Clause, in other words, might indicate a defined and limited scope of legislative powers; but it appears to have also been a signal that the Constitution was *expanding* the powers of the legislative branch beyond a baseline grant of “the” legislative power.

To be sure, this analysis depends on a perhaps too narrow definition of “the legislative power” as the power to create rules of civil conduct.¹⁷⁷ “The legislative power” could be understood more broadly

175. This is not to suggest that these powers could not have been considered legislative even when they belonged to the executive. After all, the executive historically had some legislative power, namely the veto. Recall also that Wilson argued in Convention that the powers of war and peace were “legislative.” FARRAND, *supra* note 19, at 65–66. Congress could also make laws with respect to any of these prerogatives, for example by authorizing the executive to issue letters of marque or to borrow money. The point is only that it is not obvious that these prerogatives required the making of laws or that they were in their nature legislative; they all went under the label “prerogative” and historically belonged to the king. It therefore makes some sense that the delegates, when assigning these powers to the legislature, would emphasize the point by vesting *all* legislative powers in Congress.

176. U.S. CONST. art. I, § 7, cl. 3.

177. See, e.g., THE FEDERALIST NO. 75, *supra* note 74, at 450 (Alexander Hamilton) (defining the legislative power as the power “to prescribe rules for the regulation of the society”); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310–17 (2003) (canvassing similar statements from Locke, Montesquieu, Blackstone, and Founding-era sources to support a definition of legislative power similar to that of Hamilton).

as the power to create and change legal relations.¹⁷⁸ A declaration of war and a letter of marque fall squarely within this broader definition. For example, a letter of marque changes the rules of civil conduct by authorizing the private capturing of enemy merchant vessels. Although this may be right, it was nevertheless disputed at the Convention whether certain prerogative powers were more legislative or executive in nature.¹⁷⁹ Specifically designating these prerogatives as legislative “powers” was a good way to signal a position on the question.

Treating each of the three major powers as a single function is not only logical, it appears to be the way Gouverneur Morris, the head of the Committee of Style, and who might have even worked on the constitutional draft mostly alone,¹⁸⁰ used the terms. In support of a Council of Revision, and responding to objections about blending powers, Morris (according to Madison) described “the three powers” as “the power of making[,] . . . of executing, and . . . of judging, the laws.”¹⁸¹ This taxonomy also has support in other Founding-era sources when the three powers were discussed together. For example, Montesquieu wrote, “All would be lost if the same man or the same body of principal men . . . exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”¹⁸² In an encomium to the inhabitants of Quebec and the separation of powers, the delegates to the Continental Congress in 1774 wrote of the Quebecois that their governor was “vested with the *executive* powers, or the powers of *administration*,” in the governor and council was “lodged the power of *making laws*,” and their judges were “to *decide* every cause affecting your lives, liberty or property.”¹⁸³

In conclusion, it seems likely that the Constitution deploys each power in the sense of its single function: the power to make law, execute law, and adjudicate disputes—at least those affecting life,

178. I am grateful to Professor Harrison for pointing out this possibility to me.

179. See *supra* note 46 (describing statements from James Wilson).

180. THACH, JR., *supra* note 10, at 138.

181. 2 FARRAND, *supra* note 19, at 79.

182. MONTESQUIEU, *supra* note 49, at 157.

183. Letter from the Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS 104, 110 (1904). I am indebted to Professor Mortenson for this reference. See Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 66–67).

liberty, and property—under the law. That is how Founding-era sources used the terms.¹⁸⁴

E. Summary

Part I demonstrated that the textual meaning of “the executive power” is ambiguous but tends to support the law-execution reading. Part II offered a more comprehensive argument that the residual vesting thesis is implausible based on the proceedings of the Constitutional Convention, the delegates’ likely views, and the silence of the Anti-Federalists. A law-execution reading of “the executive power” better fits these data—as well as the variations in the Constitution’s three vesting clauses.

Yet, a “thin” law-execution account of “the executive power” is possibly inconsistent with historical practice and Founding-era debates in both the domestic sphere and foreign affairs. If “the executive power” means only the power to carry into execution preexisting law and is entirely defeasible, then Congress can legislate on how the laws are to be executed in all possible detail. Congress could specify what officers shall prosecute offenses and enforce the laws, on what conditions they may be removed, and what the president’s role is with respect to these other officers. A thin law-execution reading of “the executive power,” in combination with the president’s foreign affairs-related powers, may also be insufficient to explain the president’s power to instruct and recall ambassadors, as well as other presidential foreign affairs powers.

Parts III and IV look to historical practice to put forward a new, “thick” law-execution account of “the executive power” vested in the president. This power is the power to execute law, but it includes within it certain incidental, derivative, or component powers that more easily explain much of the historical practice.

184. Professor Mortenson agrees with this assessment of the evidence: “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.” Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 42); *see also id.* (manuscript at 48) (“Eighteenth-century dictionaries, legal treatises, political theory tracts, caselaw, politicians, clergymen, and pamphleteers all agreed that the phrase ‘executive power’ meant something quite simple: ‘the power of putting in execution.’” (quoting *Executive Power*, A POCKET DICTIONARY (London, J. Newbery 3d ed. 1765))).

III. DOMESTIC SEPARATION OF POWERS DISPUTES

This Part examines a number of domestic separation of powers practices and debates from the Founding era onward to show they are consistent with a thick understanding of “the executive power” to execute law. Part III.A starts with appointments and removals, revisiting the famous “Decision of 1789” to show that a presidential removal power can be consistent with the law-execution reading of “the executive power.” Part III.B assesses presidential control over prosecution. Part III.C then examines the prerogative proclamation power and its implications for administrative regulations and the *Steel Seizure Case*. The real issue in that case was not whether the president had some “emergency” or “inherent” power to seize the steel mills; it was whether the president was properly exercising a “proclamation” power to help carry into execution existing laws or was engaging in new lawmaking. Justice Jackson’s famous concurrence was a distraction from the case’s true controversy. The upshot of this Part is that the president may have more indefeasible power in the *domestic* sphere as part of “the executive power” than proponents of the “thin” law-execution or cross-reference readings have claimed.

A. *Appointments, Removals, and Presidential Administration*

It is best not to reinvent the wheel. Professor Mortenson himself agrees that “the executive power,” on the thin understanding of law execution, included the power to have “assistances.” “George Mason was in good company,” writes Mortenson, “in considering ‘the appointment of publick officers’ 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.”¹⁸⁵ “This view of appointments as ‘executive’” even under the narrower reading “drew on a longstanding (though not uncontested) strand of Anglo-American legal thought.”¹⁸⁶ Mortenson draws on sources from pre-revolutionary America:

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

185. *Id.* (manuscript at 58) (footnote omitted) (quoting George Mason, *George Mason’s Objections to the Constitution*, MASS. CENTINEL, Nov. 21, 1787, reprinted in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 287, 289 (John P. Kaminski & Gaspare J. Saladino eds., 1986)).

186. *Id.*

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.” Counsel’s explanation is key: the proposed canon of construction followed necessarily from the King’s executive power. “[P]ossessing the executive power of the laws,” it is the King’s “peculiar duty to see such act carried into execution, which cannot be unless an officer is appointed.” That in turn[] 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.”¹⁸⁷

James Wilson adhered to this view in the Constitutional Convention, arguing that “[g]ood laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute.”¹⁸⁸ Mortenson concludes that although there were some objectors, “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.”¹⁸⁹ Thus, Mortenson argues that when the term “executive powers” was used in the plural, it could have referred also to the component power to appoint officers for the purpose of assisting in law execution.¹⁹⁰

Although Mortenson does not discuss Blackstone in this regard, Blackstone’s chapter on the king’s powers and authorities is consistent with this view. Blackstone wrote that the king has “the right of erecting courts of judicature” because although “the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust,” and thus it was “necessary, that courts should be erected, to assist him in executing this power.”¹⁹¹ Although Blackstone did not fully disentangle the executive and judicial powers here, he understood that the chief executive could

187. *Id.* at 59 (second alteration added) (quoting *Godwin v. Lunan*, Jeff. Va. Rep. 96, 105 (Gen. Ct. Va. 1771), reprinted in 1 VIRGINIA REPORTS, JEFFERSON—33 GRATTAN 52, 56–57 (1903)).

188. 2 FARRAND, *supra* note 19, at 538–39.

189. Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 62).

190. *Id.* (manuscript at 66). Of course, as explained above, many state constitutions used the plural “executive powers” to describe other executive prerogatives, such as the pardon power. *See supra* Part I.A.2.

191. BLACKSTONE, *supra* note 12, at 257.

not “personally carry into execution” “the executive power of the laws” and thus required other officers to “assist” in “executing this power.”

Even so, some appointment power can be assigned away from the chief executive, as counsel in the 1771 case from Virginia noted.¹⁹² Madison and Wilson generalized the point in the Constitutional Convention, arguing that the “extent of the Executive authority” was the “power to carry into effect[] the national laws” and “to appoint to offices in cases not otherwise provided for.”¹⁹³ Ultimately, the Constitution requires senatorial advice and consent for all principal officers, and leaves it up to Congress to decide whether other officers should be appointed by that mode or by the president alone, the heads of departments, or the courts of law.¹⁹⁴ Thus, the Constitution distributes some of this “executive power” to carry law into execution to both the Senate and Congress.¹⁹⁵ Indeed, the president is left with no unilateral appointment power at all unless Congress chooses to redelegate that power for the appointment of inferior officers.

The famous debate in the First Congress over the power to remove executive officers may now be put in a new light. The Constitution, as just noted, assigns part of the appointment power away from the president, but it does not say anything at all about removal. When the delegates were establishing the first departments of the national government, the question arose whether the departments’ principal officers had to be removed by the president with the advice and consent of the Senate; whether the Constitution vested that power in the president alone; or whether Congress in its discretion could

192. See *supra* note 187 and accompanying text.

193. See FARRAND, *supra* note 19, at 67 (reporting Wilson’s second of Madison’s proposal); *id.* at 70 (noting Wilson’s independent argument that “Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed”).

194. U.S. CONST. art. II, § 2, cl. 2.

195. This raises some interesting questions about whether Congress may circumscribe whom the president may appoint to certain positions or whether that power remains in the president. My initial thought is that the greater power to vest the power of appointment in the president alone, the heads of departments, or the courts of law includes a lesser power to specify the types of individuals who may be appointed—for example, those “learned in the law.” See 28 U.S.C. § 505 (2018) (establishing the requirement for the solicitor general). This would not, however, apply to officers appointed by and with advice and consent (such as the solicitor general), and so the requirement of § 505 may be unconstitutional. The Senate could of course insist on any qualifications that it wanted. It is important to note that whatever the answer to this question is—whatever “appointment power” is left to the president—that power would be the same under the residual vesting thesis as it would be under the reading of “the executive power” presented here.

delegate that power to the president alone.¹⁹⁶ Madison first argued that “the executive power” was vested in the president, but that the Constitution had assigned some of that power to the Senate:

The Constitution affirms, that the Executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The Constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers Have we a right to extend this exception? I believe not.¹⁹⁷

Madison thus argued that all of “the executive power” not assigned away from the president belonged to the president. The question according to Madison, then, was: “Is the power of displacing, an Executive power? . . . [I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”¹⁹⁸ “[I]f any thing in its nature is executive,” Madison added later on, “it must be that power which is employed in superintending and seeing that the laws are faithfully executed.”¹⁹⁹

Representative Fisher Ames agreed with Madison. “The Constitution places all Executive power in the hands of the President,” exhorted Ames, “and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others.”²⁰⁰ Because the president cannot possibly handle all the minutiae of administration, he “must therefore have assistants.”²⁰¹ “But in order that he may be responsible to his country,” Ames concluded, “he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.”²⁰² “The executive power” thus

196. 1 ANNALS OF CONG. 381, 484 (1789) (Joseph Gales ed., 1834). Also, some representatives argued that impeachment was the only mode of removing officers—an argument that was not seriously advanced because, as Madison pointed out, impeachment is a method by which Congress can remove officers. It says nothing of the president’s power. *Id.* at 374–75.

197. *Id.* at 461, 463. As Madison said subsequently, “[T]he Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly.” *Id.* at 496.

198. *Id.* at 463.

199. *Id.* at 500.

200. *Id.* at 474.

201. *Id.*

202. *Id.*

includes, according to Ames, a power for the president to remove his assistants.

Madison's and Ames's arguments are consistent with the law-execution view of "the executive power." There is no indication in the debates that anyone in Congress understood them to be referring to the entire suite of royal authorities when they said "the executive power."²⁰³ The discussion is entirely in the context of "appointing, overseeing, and controlling those who execute the laws."²⁰⁴ Their arguments are evidence that the Founding generation shared a "thick" view of "the executive power," with which a presidential power to remove principal executive officers is consistent; a residual grant of executive powers is simply not necessary for the argument.²⁰⁵

203. As Professors Bradley and Flaherty note,

Instead of seeing the Vesting Clause as conveying a package of foreign affairs powers, the House members who invoked the Clause may have simply believed that the Clause gave the President a general power to execute the laws, and that removal of subordinate executive officers was included within such a power.

Bradley & Flaherty, *supra* note 8, at 661.

204. See *supra* note 198 and accompanying text.

205. In a recent paper, Professor Daniel Birk argues on historical grounds that removal is not part of "the executive power" because the king did not in fact have an inherent removal power. Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 5), <https://ssrn.com/abstract=3428737> [<https://perma.cc/Q6YD-2MKX>]. For a number of reasons, however, Professor Birk's evidence does not contradict the account presented here.

First, many of Professor Birk's examples of non-removable principal officers are lifelong, hereditary officeholders from as early as the fourteenth century and running through the seventeenth century, when offices were considered to be personal property and where the granting of such tenures was entirely up to the king. See *id.* (manuscript at 21–25). But it is not at all clear that much of this survived into the late eighteenth century, and there is no reason to believe such examples provide any insight into the meaning of a constitution rooted in popular sovereignty. It is not particularly revealing that James I appointed Francis Bacon as his attorney general for life. *Contra id.* (manuscript at 22–23) (holding out Bacon's tenure as "reveal[ing] an executive apparatus far removed in many respects from the assumptions of unity often projected onto it by modern scholars"). Moreover, Blackstone certainly argued that principal officers were entirely under the control of the king. See BLACKSTONE, *supra* note 12, at 327 ("[H]is majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like[, are not] . . . in that capacity in any considerable degree the objects of our laws . . ."). Nor does it matter that in these early centuries Parliament tried to regulate tenure to ameliorate the situation of hereditary and lifetime tenures. *Contra Birk, supra* (manuscript at 34–36) (emphasizing "Parliament's longstanding desire to keep the king's officers accountable"). Indeed, in the eighteenth century, most of Parliament's relevant statutes converted life-tenured offices into offices removable at will. See *id.* (manuscript at 35).

Second, many of the paper's examples involve officers exercising judicial, ministerial, or municipal functions. See *id.* (manuscript at 25–28). But arguably none of these functions is, strictly speaking, part of "the executive power" to execute law. See BLACKSTONE, *supra* note 12, at 336 (noting that coroners are not removable at the pleasure of the king and that they exercise "either judicial or ministerial; but principally judicial" power); *id.* at 328 (explaining that municipal

One implication of this argument is that even if “the executive power” is not a reference to the bundle of royal prerogatives, the scope of the president’s power to remove and direct administrative officials depends on whether one adopts Professor Mortenson’s thin law-

officials relate to “mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises,” and therefore do not appear to exercise the national executive power); *see also* Act of Settlement, 12 & 13 W. 3 c. 2 (granting lifetime tenure to judges in Britain).

Finally, there are a small handful of statutes that do create “commissioners” of various sorts, some of which contain for-cause removal provisions. *See* Birk, *supra* (manuscript at 32–34). However, these independent commissions appear to be exercising not executive power, but rather Parliament’s historic inquisitorial power. *See, e.g.*, 2 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 69 (William Cobbett ed., London, R. Bagshaw 1807) (noting that in 1626 the House of Commons asserted that it was “the antient, constant, and undoubted right and usage of parliaments, to question and complain of all persons, of what degree soever, found grievous to the common-wealth, in abusing the power and trust committed to them by their sovereign”); 21 PARLIAMENTARY HISTORY OF ENGLAND 434–36 (William Cobbett ed., London, T.C. Hansard 1814) (explaining that in a 1780 debate the Lord Chancellor stated that the matter of members of parliament receiving public contracts is subject to the “inquisitorial” power of Parliament). The statutes Professor Birk cites seem to fall within this power. They were enacted “[f]or better examining and auditing the publick accounts of this kingdom,” 25 Geo. 3 c. 52; “to examine, take, and state the publick accounts of the kingdom; and to report what balances are in the hands of accountants, . . . and what defects there are in the present mode of receiving, collecting, issuing, and accounting for publick money,” 20 Geo. 3 c. 54;

to enquire into the fees, gratuities, perquisites, and emoluments, which are, or have been lately, received in the several publick offices therein mentioned; to examine into any abuses which may exist in the same; and to report such observations as shall occur to them, for the better conducting and managing the business transacted in the said offices,

5 Geo. 3 c. 19; “to enquire into the losses and services of all such persons who have suffered in their rights, properties, and professions, during the late unhappy dissensions in *America*,” 26 Geo. 3 c. 68; “to enquire into the losses of all such persons who have suffered in their properties, in consequence of the cession of the province of *East Florida* to the king of *Spain*,” 26 Geo. 3 c. 75; and “to enquire into the state and condition of the woods, forests, and land revenues, belonging to the crown,” 26 Geo. 3 c. 87. Indeed, it is unclear these commissions did anything but make recommendations, although the last of these commissioners were permitted to sell public lands. *Id.* And the commissioners were appointed by the legislature, not by the executive. *See, e.g., id.*

In another paper, Professors Jane Manners and Lev Menand argue that offices with tenures for a term of years were historically understood not to permit removal until the term expired. Jane Manners & Lev Menand, *Presidential Removal: Defining Inefficiency, Neglect of Duty, and Malfeasance in Office*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 27–42), <https://ssrn.com/abstract=3520377> [<https://perma.cc/9ARG-FMMZ>]. I agree with their statutory analysis, but it does not answer the constitutional question of whether such fixed terms without removal would be permissible for federal executive officers. Indeed, Manners and Menand explicitly avoid an in-depth analysis of the Executive Vesting Clause. *Id.* (manuscript at 18). Moreover, their own evidence suggests that a fixed term with no removal would have been understood to be unconstitutional: for the first one hundred years, Congress almost always added to statutory provisions providing for fixed terms the proviso, “unless sooner removed by the president.” *See id.* (manuscript at 35). The most natural implication is that Congress believed it had to do so as a constitutional matter.

execution reading, the cross-reference reading, or the thick reading presented here. Under the thin account, according to which “the executive power” is an entirely empty vessel, arguably Congress may freely limit the president’s removal and directory power.²⁰⁶ Under one version of the cross-reference theory, the Take Care Clause implies the necessary power for overseeing faithful execution. In this view, Congress’s power is limited somewhat, but it can at least establish for-cause removal provisions. As a result, Congress can insulate subordinate officers from presidential direction so long as those officers are faithfully exercising any discretion within the bounds of the law.²⁰⁷

In contrast, under the “thick” reading of “the executive power” presented here, the power to remove is part and parcel of the executive power itself. This means, first, that any discretion left within the bounds of the law is the president’s discretion. The president may therefore direct subordinate officers in the exercise of their discretion, even if a contrary decision by the subordinate would otherwise have been a faithful execution. And it means, second, that Congress cannot limit the presidential removal power, contrary to Professor McConnell’s view. According to McConnell, “the executive power” is entirely defeasible to the extent Congress has an enumerated power. And as part of the necessary and proper power to establish offices and assistants, Congress does have an enumerated power to condition the removal of executive officers. McConnell therefore argues instead for an indefeasible but more limited removal power on the basis of the Take Care Clause. He argues, along with Madison, that this clause implies that the president must have that species of power, namely removal, to ensure the faithful execution of the laws.²⁰⁸

Under the account presented here, the content of the laws that the executive carries into execution are, of course, determined entirely by

206. Although Professor Mortenson has yet to articulate his views on the removal power, based on his paper and my discussions with him, my characterization is consistent with his account. See Mortenson, *Royal Prerogative*, *supra* note 7, at 1269 (“[The Founding generation] would have understood the [executive] power as an empty vessel whose authority in any particular case depended entirely on the substantive decisions of the entity (sometimes the same one that held the power to execute) which possessed the *legislative* power to direct executive action.”).

207. See, e.g., Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2112 (2019) (“Our history supports readings of Article II . . . that limit Presidents to exercise their power in good faith So understood, Article II may thus place some limits on the pardon and removal authority.”).

208. MCCONNELL, *supra* note 6 (manuscript at 201–05) (“[T]he residual executive powers under the Vesting Clause are defeasible, not prerogative, powers.”).

some preexisting authority. The president cannot execute anything that is not already a law. But “*the* executive power” to carry these laws into execution, and all that this executive power entails—appointments, removals, and, as we shall see presently, proclamations (executive orders)—is vested in the president. Congress cannot reduce this power because Congress and the Senate have only such powers over the component parts of “the executive power” as the Constitution itself distributes to them. Thus, these institutions have part of the appointment power but no other parts of “the executive power.”

B. Prosecution

The power to prosecute is not specifically mentioned in the Constitution, and yet the executive has conducted prosecutions from the beginning of the Republic. The controversy over this power today involves whether Congress can create prosecutorial offices independent of the president. In 1978, Congress enacted the Ethics in Government Act, giving a special court the power to appoint, at the recommendation of the attorney general, an “independent counsel” to investigate high-level government misconduct.²⁰⁹ This independent counsel had the “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.”²¹⁰ In other words, the counsel was a prosecutor, and was to be “independent” of the president—the president could not remove the counsel, and the attorney general could only remove her for good cause.²¹¹

In *Morrison v. Olson*,²¹² the Supreme Court upheld the constitutionality of the independent counsel in a 7–1 decision.²¹³ Justice Scalia penned a lone dissent, famously writing: “Article II, § 1, cl. 1, of the Constitution provides: ‘The executive Power shall be vested in a President of the United States.’ . . . [T]his does not mean *some of* the executive power, but *all of* the executive power.”²¹⁴ Justice Scalia was surely—or at least mostly—right: the clause does vest all of “the

209. Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 601–602, 92 Stat. 1824, 1867–74 (codified as amended at 28 U.S.C. §§ 49, 591–598 (2018)).

210. 28 U.S.C. § 594(a).

211. *Morrison v. Olson*, 487 U.S. 654, 660–63 (1988).

212. *Morrison v. Olson*, 487 U.S. 654 (1988).

213. *Id.* at 658, 696–97.

214. *Id.* at 705 (Scalia, J., dissenting).

executive power” in the president, subject to the more specific appointment power exception. The question, however, is what constitutes this “executive power.” It may not include a residuum of prerogative powers—in fact, there is no evidence that Justice Scalia ever adopted such a reading of the clause²¹⁵—but it might very well include the power to oversee all federal prosecutions.

Indeed, the power over prosecution appears in Blackstone’s discussion of “the executive power of the laws.” Under a new roman numeral, Blackstone explained that “[a]nother capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom.”²¹⁶ Under this heading, Blackstone described the king’s power to erect courts to assist in exercising “the whole executive power of the laws.”²¹⁷ Blackstone then mentions criminal prosecutions. “In criminal proceedings, or prosecutions for offences,” it would be absurd for the king “personally” to sit in judgment because he is also the “prosecutor.”²¹⁸ Because the public “has delegated all it’s power and rights, *with regard to the execution of the laws*, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him,” and the king “is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law.”²¹⁹ This discussion suggests an explanation for why the executive has historically conducted prosecutions. It is not because prosecution is an unenumerated “executive” or “prerogative” power vested by virtue of a residual grant of power. It is because prosecution is part of “*the executive power*” to execute law.

Thus, under the law-execution conception of “the executive power,” Congress may still be unable to divest the president of the

215. Justice Thomas adopted the residual vesting thesis in the *Zivotofsky II* passport case (more on that case in Part IV.B.6), but Justice Scalia did not. In responding to Justice Thomas’s argument, Justice Scalia wrote:

The combination of (a) the concurrence’s assertion of broad, unenumerated “residual powers” in the President; (b) its parsimonious interpretation of Congress’s enumerated powers; and (c) its even more parsimonious interpretation of Congress’s authority to enact laws “necessary and proper for carrying into Execution” the President’s executive powers; produces (d) a presidency more reminiscent of George III than George Washington.

Zivotofsky ex rel. Zivotofsky v. Kerry (*Zivotofsky II*), 576 U.S. 1, 84 (2015) (Scalia, J., dissenting) (citations omitted).

216. BLACKSTONE, *supra* note 12, at 257.

217. *Id.*

218. *Id.* at 258 (emphasis omitted).

219. *Id.* at 258–59 (emphasis added).

prosecutorial power. Some scholars have claimed that “prosecution” was never an executive function, at least not one that had to be done by the president, and so Congress can limit the president’s control over prosecution. But these arguments are unpersuasive.

In a prominent article, Professors Lawrence Lessig and Cass Sunstein argue that prosecution was considered “administrative,” as opposed to “executive,” and that the Framers therefore did not intend a unitary executive with control over prosecution.²²⁰ Lessig and Sunstein’s arguments, however, miss critical historical evidence. They first argue that federal district attorneys (now U.S. attorneys) did not report to any central authority.²²¹ Yet even they recognize that presidents directed or countermanded these officers at least some of the time.²²² But more importantly, the district attorneys did report to a central authority. Professors Lessig and Sunstein claim they did not because there was nothing like the Department of Justice in the early years of the Republic. “Until 1861,” they write, “these district attorneys did not report to the Attorney General, and were not in any clear way answerable to him,” and until 1820 the district attorneys reported to “no one.”²²³

It turns out this assertion is likely incorrect. There was no Department of Justice, but the district attorneys did report directly to the secretary of state. The evidence for this is that when the chief clerk of the Department of State resigned in 1792, he left an account of the Department’s filing system, noting that “[t]he *Consular returns* are at the bottom of said desk right hand side; and so are the *Letters from the Attornies of districts*, which are tied together.”²²⁴ Thus, as historian

220. See Lessig & Sunstein, *supra* note 25, at 6 & n.14, 14–22.

221. *Id.* at 16–17, 76.

222. For example, they concede that “Jefferson at least exercised the directory power when he ordered district attorneys to cease prosecution under the Alien and Sedition Acts.” *Id.* at 18 n.75. And, as Professors Steven Calabresi and Saikrishna Prakash have pointed out, George Washington “‘instructed’ the attorney for the Pennsylvania district to *nol-pros* an indictment against the two individuals who had been accused of rioting,” and further directed the district attorneys to collect information regarding all infractions of the Neutrality Proclamation that came within their purview. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 659 (1994) (quoting 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 455 n.35 (John C. Fitzpatrick ed., 1939)).

223. Lessig & Sunstein, *supra* note 25, at 16.

224. LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 503 (1948).

Leonard White concluded, “The federal marshals and attorneys received their instructions from the Department of State.”²²⁵

It may seem odd for the State Department to be involved in such matters, but it makes sense in light of the First Congress’s decision not to create a “home department.” Instead of the additional expense, the representatives thought it would be easy enough to assign the duties of a would-be home department to the already-existing executive departments. The home department would have had a principal officer, one of whose duties would have been “to see to the execution of the laws of the Union.”²²⁶ The officer would “do and attend to all such matters and things as he may be directed to do by the President.”²²⁷ The motion to create such a department was defeated when several members objected that the secretary of foreign affairs—later the secretary of state—could attend to most of the duties proposed for the home secretary.²²⁸

This is consistent with other historical evidence. White has observed that cases involving ships, such as prizes, privateers, and foreign vessels, were of “considerable importance” and “often came to the attention of the Secretary of State.”²²⁹ Cases involving the embargo of 1794 and the Nonintercourse Act of 1798 also “were such as to require direction from the State Department.”²³⁰ Secretary of State Timothy Pickering actively instructed the district attorneys to prosecute cases under the Sedition Act of 1798.²³¹ In another example, Pickering had to order the attorney in New York to release a British captain that had been arrested.²³²

225. *Id.* at 133. Of course, the presence of the correspondence alone does not establish the extent of the supervision; some interactions between the secretary of state and the federal attorneys appear to have been in the nature of requests. *See id.* at 408. Nevertheless, there was centralized supervision; and, as explained presently, on many occasions the president and secretary of state did in fact instruct the attorneys specifically.

226. 1 ANNALS OF CONG. 666 (1789) (Joseph Gales ed., 1834).

227. *Id.*

228. *Id.* at 667–68 (statements of Reps. Huntington and Sedgwick); *id.* at 669 (stating that the motion to establish “an Executive Department” was lost by “a considerable majority”). Interestingly, a few members argued that the duty of law execution was the judiciary’s. *Id.* at 667 (statements of Reps. Benson and White). This seems clearly contrary to the Constitution’s injunction that the president shall take care that the laws be faithfully executed.

229. WHITE, *supra* note 224, at 407.

230. *Id.*

231. *Id.* at 407–08.

232. *Id.* at 485.

To be sure, White wrote, “[a]part from cases of exceptional importance and difficulty,” these attorneys “operated largely on their own responsibility.”²³³ That is, no doubt, because channels of communication were much slower in the 1790s, requiring this degree of independence. Yet when necessary the attorneys were centrally controlled by the executive branch. Although there is no clear evidence of any district attorney being removed, there is no indication that they could not be removed at will.

Lessig and Sunstein next argue that the comptroller of the treasury was responsible for prosecuting revenue suits, and the comptroller’s decisions to prosecute were “relatively independent” and “outside the direct control of the President.”²³⁴ One of the two sources on which they rely, however, states only that the comptroller’s “decisions against claimants would be ‘final and conclusive.’”²³⁵ The question of conclusiveness had to do with whether the decisions of the comptroller would be subject to judicial review, and not whether the comptroller would be subject to the president’s directory and removal authority.²³⁶ The other source indicates only that the Comptroller would make reports to Congress.²³⁷ Moreover, nothing in the statute withheld from the president the power to direct, control, or remove the comptroller.²³⁸

Finally, Lessig and Sunstein argue that “federal officers were not the only ones who conducted federal prosecutions.”²³⁹ State officials, they write, “also conducted federal prosecutions, and these officers were clearly not subject to control by the President.”²⁴⁰ The only

233. *Id.* at 408.

234. Lessig & Sunstein, *supra* note 25, at 17–18 (quoting DARRELL HEVENOR SMITH, *THE GENERAL ACCOUNTING OFFICE: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 22 (1927)).

235. Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 74 (1983) (quoting Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442).

236. Whether an executive branch agency or official could act conclusively—or whether her acts would be judicially reviewable—had to do with the rights–privileges distinction in the nineteenth century. As Professor Caleb Nelson has written, “the public/private distinction had considerable resolving power; it formed the basis for a framework that was used throughout the nineteenth century to separate matters that required ‘judicial’ involvement from matters that the political branches could conclusively adjudicate on their own.” Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 564 (2007). Courts routinely determined whether agency determinations were “conclusive” as opposed to being subject to judicial review. *Id.* at 577–82 (citing numerous cases).

237. SMITH, *supra* note 234, at 22.

238. Calabresi & Prakash, *supra* note 222, at 653.

239. Lessig & Sunstein, *supra* note 25, at 18.

240. *Id.* at 18–19.

statutory example cited by the authors for this proposition, however, is a single section of a single act respecting enemy aliens.²⁴¹ This section merely granted jurisdiction to state courts to hear federal claims against such aliens by authorizing the “several courts of the United States, and of each state, having criminal jurisdiction,” as well as “the several judges and justices of the courts of the United States,” “upon complaint” against any such enemy alien, “to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice.”²⁴² The act went on to authorize the courts “after a full examination and hearing on such complaint, and sufficient cause therefor appearing,” to order the removal of the enemy alien from the United States.²⁴³

There does not appear to be anything in this statute authorizing state officials to prosecute such federal actions in the state courts, although of course that does not disprove that they did so. Still, this particular statute does not establish a lack of presidential control, either. It merely authorized state courts to hear such actions, which is consistent with the Constitutional Convention’s famous “Madisonian Compromise,” by which Congress would have the choice not to create inferior federal courts and instead to rely on state courts to hear federal cases.²⁴⁴ Although this provision of the statute was not written with the utmost clarity, the margin description supports this interpretation: “All courts of criminal jurisdiction—and also the judges of the courts of the U. States may receive and hear complaints against alien enemies, and make an order thereon.”²⁴⁵

241. *Id.* at 19 n.76 (citing Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577, 577).

242. § 2, 1 Stat. at 577.

243. § 2, 1 Stat. at 577–78.

244. This compromise, described in Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975), is enshrined in the text of Article III, which provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1 (emphasis added).

245. § 2, 1 Stat. at 577. The secondary sources on which Lessig and Sunstein rely also point to this kind of evidence. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303 (1989) (“Congress vested jurisdiction in state courts over actions seeking penalties and forfeitures, granted concurrent jurisdiction to state courts over some criminal actions, and assigned state officials auxiliary law enforcement tasks.”); THOMAS SERGEANT, *CONSTITUTIONAL LAW* 269–70 (Phila., Abraham Small 1822) (noting instances of concurrent state and federal court jurisdiction). That, again, is perfectly consistent with the Madisonian Compromise and does not bear on the question of the president’s Article II powers. As for the auxiliary tasks—including arresting fugitive slaves and deserting seamen—

In a recent article arguing that prosecution was not necessarily “executive,” Professor Peter Shane suggests that prosecution was likely considered to be neither executive nor administrative but rather a “judicial” function.²⁴⁶ Yet Shane’s evidence is also subject to contrary interpretations. Shane states that the ratifiers in 1789 “would not have experienced . . . a widespread commitment to concentrated executive power.”²⁴⁷ Yet as Professor Mortenson demonstrates, the central thrust of the complaints against the Articles of Confederation was precisely that there was a complete lack of centralized execution—the confederation government had to rely upon the unreliable states for the execution of federal law.²⁴⁸ Shane also relies on state legislative appointments of states’ attorneys or attorneys general, or the vesting of the power to so appoint in courts,²⁴⁹ indeed, to this day Congress has vested in courts the power to appoint U.S. attorneys under certain conditions.²⁵⁰ But of course, as Mortenson himself recognizes and as explained above, “the executive power” was understood to be the power to carry the law into execution and to appoint assistants to do so where their appointments *had not already been provided for by law*.²⁵¹

these “cannot be characterized as prosecution,” although “they were certainly related to criminal law enforcement.” Krent, *supra*, at 305. To be sure, there is some evidence that the Founders expected Congress to have the power to commandeer state executive officers to enforce federal law. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1111 (2013) (“[F]ederal power to commandeer state officers was generally accepted at the Founding . . .”); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1960, 1990–2007 (1993) (“Though the Founding Generation did not wish to permit coercion of states in their sovereign, *legislative* capacities, many individuals envisioned federal commandeering of state executive officers.”). But even had they done so, it hardly follows that *federal* officials enforcing federal laws would not be removable by the president, in the same sense that state courts exercising general jurisdiction to hear federal cases need not have judges with the same salary and tenure protection as federal judges.

246. Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 251–62 (2019).

247. *Id.* at 252.

248. Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 14–27).

249. Shane, *supra* note 246, at 253, 256.

250. 28 U.S.C. § 546(d) (2018) (permitting a district court to appoint a U.S. attorney for its district upon expiry of a prior appointment by the attorney general).

251. Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 52, 58–62); see *supra* notes 163–65, 193 and accompanying text. It is also worth noting that relying on the fact of judicial appointments of attorneys general is anachronistic. The federal attorney general, for example, did not have control over prosecution until the late nineteenth century because the attorney general was simply the government’s lawyer, who represented the government in court. But the State Department did supervise prosecution. See *supra* notes 224–33 and accompanying text. The attorney general in the eighteenth century was a different kind of officer than in nineteenth century. This also explains why Professor Shane’s reliance on the lack of centralized law enforcement control may be misplaced. See Shane, *supra* note 246, at 255–57. Again, there was centralized control—just in the State Department.

And the Constitution explicitly contemplates “Courts of Law” appointing inferior officers at Congress’s discretion.²⁵²

Perhaps more to the point, the Framers’ key source on executive power—Blackstone²⁵³—expressly disagrees with Shane’s proposition that prosecution was a judicial power. As noted above, Blackstone argued that the king could not “personally [sit] in judgment” precisely because he was the “prosecutor,” and he was prosecutor because the public “has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate.”²⁵⁴ One reason the king did not personally exercise the judicial power was because he exercised “the *executive* power” as the prosecutor in chief.

In conclusion,²⁵⁵ Blackstone and Founding-era sources suggest that the power to prosecute offenses—and to appoint, instruct, and

252. U.S. CONST. art. II, § 2, cl. 2.

253. See *supra* note 37 and Part II.A.

254. BLACKSTONE, *supra* note 12, at 258–59 (emphasis omitted).

255. In addition to state officers purportedly exercising federal executive power, Lessig and Sunstein also pointed to *qui tam* actions by which a private individual could bring an action to enforce federal law. Lessig & Sunstein, *supra* note 25, at 20. Calabresi and Prakash observe, however, that the British king historically had the power to pardon defendants in *qui tam* actions preemptively and thus that the executive still retained ultimate authority when private parties prosecuted the law. Calabresi & Prakash, *supra* note 222, at 660–61. Shane also notes that prosecution was largely private. Shane, *supra* note 246, at 256–57. Regardless, *qui tam* actions are at most a vestigial component of the common law (and even of Roman criminal law) dating from a time long before kings exercised centralized authority and even longer before the development of separation of powers doctrine. Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 385–86. As for private criminal prosecutions, a practice which existed in some American states in the nineteenth century, it appears that these were conducted in coordination with public prosecutorial officials. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 45–49 (1995).

Other attempts to prove that prosecution was not executive similarly fall short. As I have written before, see Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 408 n.217 (2017), Harold Krent has written an entire article critiquing the idea that criminal law enforcement is a core executive power, see Krent, *supra* note 245 *passim*. His critique, however, is unsatisfactory. To give only a few examples, Krent first argues that Congress has wide power to structure executive enforcement of the law. But his evidence is quite odd. He notes that “the Constitution assigns Congress the fundamental task of defining the content of criminal laws.” *Id.* at 282. But that is the legislative power and thus beside the point. He next suggests Congress has “authority to decide how the criminal laws are to be enforced” because it “may specify what penalties are to be assessed for various criminal violations, what law enforcement agencies have jurisdiction over particular criminal investigations, and what procedures the executive branch must follow in investigating crimes.” *Id.* at 283 (footnotes omitted). But deciding what the penalties for crimes shall be is also legislative. And it is well accepted that Congress may create inferior offices and departments to aid the president in execution of the laws—that says nothing of the president’s directive control over such inferior officers. He thirdly points to Congress’s power of appropriation as “a potent weapon with which to influence the Executive’s criminal law enforcement authority.” *Id.* at 284. Yet again that seems irrelevant. That Congress has the power

remove subordinate officers engaged in such prosecutions—is likely part of “the executive power” of the laws, even under the narrower understanding of the term.

C. Proclamation Power

The power to issue “proclamations” is another prerogative listed in Blackstone that has sometimes been described as “missing” from the Constitution.²⁵⁶ Yet this prerogative was also likely understood to be part of “the executive power” to carry law into execution. Understanding “the executive power” to include this proclamation power has significant implications both for modern administrative regulations and also for what is perhaps the most famous separation of powers dispute of all time—President Truman’s seizure of the steel mills.

1. *Blackstone*. Under the same roman numeral heading under which Blackstone described the king’s power to erect courts and prosecute crimes, Blackstone also described the power to issue proclamations. “From the same original, of the king’s being the fountain of justice, we may also deduce the prerogative of issuing proclamations These proclamations have then a binding force, when . . . they are grounded upon and enforce the laws of the realm.”²⁵⁷ Lawmaking is the work of the legislative branch, “yet the manner, time, and circumstances of *putting those laws in execution* must frequently be left to the discretion of the executive magistrate.”²⁵⁸ Therefore, the king’s “proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce *the execution of such laws* as are already in being, in such manner as the king shall judge necessary.”²⁵⁹ Blackstone then added that the infamous Statute of Proclamations, by which it was enacted “that the king’s proclamations should have the force of acts of parliament[,] . . . was calculated to introduce the most despotic tyranny.”²⁶⁰

of the purse and can influence the executive through use of that power says nothing at all about what is or is not executive power.

256. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 276–77 (2009).

257. BLACKSTONE, *supra* note 12, at 260–61.

258. *Id.* at 261 (emphasis added).

259. *Id.* (emphasis added).

260. *Id.*

Once again, then, Blackstone's *Commentaries* reflect a thick version of "the executive power" whereby the president has the power to issue regulations and proclamations to help carry into execution the national laws. The proclamation prerogative is *deduced* from, and therefore included within, the greater prerogative to execute law. This has implications for administrative regulations and for the *Steel Seizure Case*, addressed below. It also suggests a previously unexplored argument in favor of the power to direct subordinate executive officers. James Madison and Fisher Ames assumed the directory power was part of "the executive power"; but Blackstone implied such a power too. For if the king's proclamations were binding on the subjects, then surely they were also binding on a subset of those subjects, namely subordinate executive officers. If anyone had to abide by the king's proclamations—"executive orders," as they would be known today—it was those subjects serving as officers in his government.²⁶¹

2. *Administrative Regulations.* Blackstone's proclamation power may help clarify the role of modern administrative regulations under the Constitution. I have argued elsewhere that the president has a "specification power," akin to Blackstone's proclamation power, to make regulations to help fill gaps in statutes.²⁶² This power is justified

261. Professor Peter Strauss argues that historically "the President could assure the faithful execution of the laws only through removal of one who failed to follow his directions, rather than substitution of his own decision." See Peter L. Strauss, Foreword, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705–06 (2007). Thus the president is an "overseer" and not a "decider." Whatever the merits of that argument, the present argument, which does not depend on the president's ability to execute the law personally, is not to the contrary. But see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 716–17 (arguing that the president must be able to execute the law personally). At a minimum, the president can instruct and direct officers and, if they disobey, remove them.

What of the Opinions in Writing Clause? To be sure, that clause, purporting to authorize the president to seek the opinions in writing of the principal officers of the "executive" departments, U.S. CONST. art. II, § 2, cl. 1, may be superfluous under my reading of "the executive power," see, e.g., Lessig & Sunstein, *supra* note 25, at 32–38 ("No doubt, standing alone in the face of clear evidence that the framers were adopting the strong unitary conception, this clause would be a slender reed, and a redundancy."). But there is at least an explanation for why the clause was included in the Constitution: it was a *rejection* of last-minute proposals to reintroduce a council of state and to allow the president to seek the opinions of the Chief Justice and the officers of Congress. See 2 FARRAND, *supra* note 19, at 335, 342–44, 367. With such a simple explanation at hand, the redundancy of the clause is far too thin a reed on which to rely to refute all the other evidence of the meaning of "the executive power."

262. Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 695 (2020) [hereinafter Wurman, *The Specification Power*] ("This is the power to fill in the details where the statute is clear but does not specify the course of action."). Because that piece details the specification power more fully, this Article does not discuss it in depth.

not only under a residual reading of the Executive Vesting Clause but also under the thick law-execution reading proposed here. Even if “the executive power” refers only to the power to carry law into execution, that power nevertheless includes as a necessary incident the derivative power to make regulations and proclamations—at least to the extent that such regulations do not “contradict the old laws, or tend to establish new ones.” Such a power, Blackstone wrote, can be “deduced” from the king’s executive power of the laws.²⁶³

The question of defeasibility arises here, too. Just as with the power to carry laws into execution generally, the proclamation power is strictly subject to Congress’s laws; it can only be exercised in furtherance of those laws. And Congress can always obviate the need for a particular proclamation or regulation by legislating with more specificity. And perhaps Congress can empower subordinate executive officers only to execute the law in a certain way—for example, by engaging in adjudications and not rulemakings.²⁶⁴ But what Congress *cannot* do is prohibit the president of the United States from issuing proclamations—namely, executive orders—as part of the president’s efforts to carry Congress’s law into execution. That power is part of “the executive power,” not defeasible by statute.

3. Youngstown. The proclamation power casts the *Steel Seizure Case* in a new light. The debate was not over whether the president had “emergency” or “inherent” executive power to seize steel mills. The question was instead whether the president properly exercised the proclamation power to help carry existing national laws into execution or whether he slipped into new lawmaking. The debate, to take the words of Blackstone, was over whether President Truman’s executive order “enforce[d] the execution of such laws as are already in being,” or instead “contradict[ed] the old laws, or tend[ed] to establish new ones.”²⁶⁵ Properly understood, that is the exact debate that went on between the majority and dissent.

263. See *supra* note 257 and accompanying text.

264. This is standard administrative law doctrine: agencies have only those powers delegated by Congress, and they cannot issue rulemakings without authorization. See, e.g., *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973) (“The extent of [an agency’s] powers can be decided only by considering the powers Congress specifically granted it . . .”).

265. BLACKSTONE, *supra* note 12, at 261.

The facts are familiar. The nation's steelworkers were about to go on strike, but President Truman was prosecuting the Korean War.²⁶⁶ For that, he needed steel.²⁶⁷ Truman therefore ordered his commerce secretary to seize and operate the steel mills.²⁶⁸ There was no statute prohibiting the president's actions; however, Congress had explicitly provided for seizures in different circumstances, and had even considered and rejected providing such a power in the kind of circumstances at hand.²⁶⁹ The opinion is celebrated for Justice Jackson's concurrence, in which he elaborated a tripartite framework for thinking about separation of powers concerns. In the first category, the president is merely executing Congress's laws, and so presidential power is at its zenith.²⁷⁰ In the second category, Congress has been silent on the matter; here "there is a zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain," and "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."²⁷¹ In the third category, Congress has expressly forbidden an action, and the president's power depends on the president's "constitutional powers minus any constitutional powers of Congress over the matter."²⁷² Jackson concluded that the Truman administration was effectively operating in the third category.²⁷³

The best analysis, however, comes from the exchange between the majority and the dissent. Justice Black's majority opinion argued that there are only two sources of presidential power: either a congressional

266. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 668, 672 (1952) (Vinson, C.J., dissenting).

267. *See, e.g., id.* at 670.

268. *Id.* at 582–84 (majority opinion).

269. As the *Youngstown* majority explained,

There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (§ 201(b) of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Id. at 585–86 (footnote omitted). Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes.

270. *Id.* at 635–37 (Jackson, J., concurring).

271. *Id.* at 637.

272. *Id.* at 637–38.

273. *Id.* at 640.

statute—such that the president is merely executing the law—or an independent constitutional provision.²⁷⁴ Justice Black agreed with Justice Jackson that there was no statute authorizing the president's actions.²⁷⁵ The majority then discounted the commander-in-chief power because the United States itself was not a “theater of war.”²⁷⁶ All that was left was “the executive power.” Justice Black explained, “Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”²⁷⁷ By seizing the steel mills, the president was not purporting to execute the laws, but rather to make a new law.²⁷⁸

The dissenters, led by Chief Justice Vinson, did not argue that the president had “emergency power,” or some residual “executive” power of which seizing the steel mills was a part. Rather, they argued that to carry all of Congress's laws into execution required seizing the steel mills until Congress could act. They observed that the Senate had ratified various defense treaties (including the U.N. Charter and NATO), and Congress had enacted defense and anti-inflationary legislation, including legislation granting the president power “to stabilize prices and wages and to provide for settlement of labor disputes arising in the defense program.”²⁷⁹ “The President has the duty to execute the foregoing legislative programs,” the dissenters concluded, and “[t]heir successful execution depends upon continued production of steel and stabilized prices for steel.”²⁸⁰ Vinson then surveyed dozens of examples through U.S. history of presidents exercising a kind of proclamation power to help carry law into execution in the absence of more specific directions from Congress.²⁸¹

274. *See id.* at 585 (majority opinion).

275. *Id.* at 585–86.

276. *Id.* at 587.

277. *Id.*

278. *Id.* at 588 (“The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.”).

279. *Id.* at 667–69, 671–72 (Vinson, C.J., dissenting).

280. *Id.* at 672.

281. *Id.* at 683–700. For example, President John Adams had issued an arrest warrant pursuant to an extradition treaty, although Congress had not enacted legislation enforcing that treaty. *Id.* at 684. John Marshall, then a member of the U.S. House of Representatives, argued that “[t]he treaty, which is a law, enjoins the performance of a particular object” and that the president may “perform the object, although the particular mode of using the means has not been

Put another way, Congress sometimes leaves out details necessary for implementing a law. Indeed, that is why the president must have a power to “specify” administratively certain details of implementation, so that the statute as a whole can be executed.²⁸² This power that the executive had frequently exercised, in other words, was nothing other than the proclamation power described by Blackstone as the power over “the manner, time, and circumstances of putting . . . laws in execution.”²⁸³

The question boiled down to a lower-order dispute: whether President Truman’s seizure of the steel mills was merely a “detail” of implementation specifying the “manner, time, and circumstances of putting” Congress’s legislative programs “in execution” in the absence of more specific direction from Congress. Chief Justice Vinson said yes; Justice Black said Truman was engaged in new lawmaking. Formulated thus, *Youngstown* is probably a harder case than is typically believed. Surely there was something to the dissent’s point that if steel production stopped, a whole set of congressional objectives would be compromised. On the other hand, the president can only execute the laws—and prosecute wars—with the tools, officers, and armies that Congress provides. Congress, after all, is given the power to raise fleets and armies, and to appropriate and provide for them.²⁸⁴ Seizing the steel mills seems like precisely an attempt to raise and provide for the army and navy, as Truman’s own executive order suggested.²⁸⁵ That seems like new lawmaking.

Whatever the lower-order result, the debate in *Youngstown* between the majority and the dissent is consistent with a thick understanding of “the executive power” and does not require adopting a residual account of the Executive Vesting Clause. Moreover, it reveals that Justice Jackson’s concurrence was largely a distraction from the case’s true controversy.

The above analyses suggest that many domestic separation of powers practices and disputes—appointments, removals, presidential direction, and *Youngstown*—can be better understood on a thick

prescribed”; Congress could of course prescribe the mode of execution, but until it did so, “it seems the duty of the Executive department to execute the contract by any means it possesses.” *Id.* (quoting 10 ANNALS OF CONG. 613–14 (1800)).

282. See Wurman, *The Specification Power*, *supra* note 262, at 712–13; *supra* Part III.C.2.

283. BLACKSTONE, *supra* note 12, at 261.

284. U.S. CONST. art. I, § 8, cls. 12–13.

285. *Steel Seizure Case*, 343 U.S. at 673–75 (Vinson, C.J., dissenting) (quoting Exec. Order 10340, 17 Fed. Reg. 3139 (1952)).

conception of “the executive power” to carry law into execution. The upshot is that, at least in the domestic sphere, the president probably has more power than under a thin law-execution reading of Article II’s Vesting Clause. Although here, too, the president may sometimes have less power than the residual theorists claim.²⁸⁶

IV. THE EXECUTIVE AND FOREIGN AFFAIRS

The account of “the executive power” proposed here is also consistent with a wide variety of presidential foreign affairs powers and activities, although it cannot justify everything presidents have done in this field. Still, a thick law-execution reading of “the executive power” explains better than any other available theory the validity of the Neutrality Proclamation, on what conditions the president may terminate treaties, the ability to instruct and recall ambassadors, and what presidential power there might be to recognize foreign governments. Although Professor Mortenson claims that the ability to torture terrorists marks a key difference between a law-execution and a residual vesting thesis of the Executive Vesting Clause,²⁸⁷ an indefeasible executive prerogative to torture terrorists is unsupported on *any* account of the clause—whether it is the thin law-execution version, the thick law-execution version, or the residual version. Under any of these readings, the executive might be able to torture terrorists as part of the commander-in-chief power if Congress has not legislated on the matter. Even that is questionable. Certainly there is no power under any of the accounts to torture in spite of what Congress has legislated.²⁸⁸

Part IV.A briefly describes the five other available theories of presidential foreign affairs powers, including the residual vesting thesis and Mortenson’s thin law-execution theory. Part IV.B then analyzes the presidential powers and precedents described above to show how a thick understanding of “the executive power” to execute the law better explains most of these powers and precedents, although it

286. For example, this Article casts some doubt on *In re Neagle*, 135 U.S. 1 (1890), in which the Supreme Court held that the president had inherent power to assign a federal marshal to protect the life of Supreme Court Justice Stephen Field. *Id.* at 67. Perhaps a narrow “protective” power can be justified on the thick reading of the executive power proposed here, though I am somewhat skeptical. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (arguing for a narrow but inherent power of the president “to protect and defend the personnel, property, and instrumentalities of the United States from harm”).

287. Mortenson, *Executive Power Clause*, *supra* note 7 (manuscript at 3–4).

288. See *infra* Part IV.B.5.

cannot explain all assertions of presidential power (nor should it have to). Ultimately, the thick law-execution reading is the theory of best fit across the Constitution's text, structure, intent, and historical practice. Further, some modern presidential practices and Supreme Court opinions in this area are probably unconstitutional or mistaken.

A. *The Standard Picture*

Professors Prakash and Ramsey, writing in 2001, describe three schools in the foreign affairs scholarship that can be labeled as “atextual.”²⁸⁹ These three schools respectively maintain that the president has primacy in foreign affairs, that Congress has primacy in foreign affairs, or that there is an indeterminate allocation of foreign affairs power in the Constitution.²⁹⁰ What these schools have in common, Prakash and Ramsey write, are that they have all “given up on the Constitution.”²⁹¹

The Supreme Court gave voice to the presidential primacy school in the famous *Curtiss-Wright*²⁹² case, where the Court upheld a congressional delegation of power to the president to determine whether certain international arms sales should be prohibited.²⁹³ The Court noted “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”²⁹⁴ More recently, the modern Supreme Court gave voice to presidential primacy when it concluded that Congress, which otherwise legislates over passports, could not require that the country “Israel” be listed as the nation of birth at the request of someone born in Jerusalem.²⁹⁵ On the topic of which foreign nations to recognize, the Court held, “the Nation must ‘speak . . . with one voice’”—the President’s.²⁹⁶ The Court’s pronouncement in this case suggests that functional concerns—the nation *must* speak with one voice—take precedence over the constitutional text.

289. See Prakash & Ramsey, *supra* note 9, at 238 (“[T]hese camps have not articulated a complete or convincing theory, nor one soundly based on the Constitution’s text.”).

290. *Id.* at 238–43.

291. *Id.* at 233.

292. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

293. *Id.* at 331–33.

294. *Id.* at 320.

295. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 576 U.S. 1, 8–9, 31–32 (2015).

296. *Id.* at 14 (alteration in original) (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003)).

The congressional primacy school correctly recognizes that Congress gets many foreign affairs powers. “[V]irtually every substantive constitutional power touching on foreign affairs is vested in Congress,” Professor John Hart Ely wrote, and therefore “[t]he Constitution gives the president no general right to make foreign policy.”²⁹⁷ Yet the Constitution gives some foreign affairs power to Congress and some to the president; the Constitution does not vest a “general” foreign affairs power in explicit terms in *either* branch.²⁹⁸

Thus, Professor Edward Corwin argued that the federal government is vested with “unallocated” foreign affairs powers, leaving it up to Congress and the president “to struggle for the privilege of directing American foreign policy.”²⁹⁹ And Professor Louis Henkin described the Constitution as a “laconic document” on foreign affairs, arguing that “[a]ttempts to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution have not been widely accepted.”³⁰⁰

Prakash and Ramsey reject these three atextual views and root most presidential powers in a residual grant of executive and prerogative powers in the Executive Vesting Clause. “By the first sentence of Article II, ‘the executive Power shall be vested’ in the President. Executive power, as commonly understood in the eighteenth century, included foreign affairs powers.”³⁰¹ This foreign affairs power “is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution’s text.”³⁰² As Parts I and II argued, however, a residual vesting clause is implausible in light of the textual evidence, the proceedings of the Constitutional Convention, and the silence of the ratification debates.

Mortenson’s recent account is also textual: “*the* executive power” is the power to carry laws into execution. Mortenson’s account, however, might not be able to account for a variety of presidential

297. Prakash & Ramsey, *supra* note 9, at 240 (alterations in original) (quoting JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 149 (1996)).

298. *Id.* at 245.

299. CORWIN, *supra* note 10, at 171–72 (arguing that foreign affairs powers are inherent in sovereignty, and that the president, Senate, and Congress vie for “the decisive and final voice in determining the course of the American nation”); *see also* Prakash & Ramsey, *supra* note 9, at 242.

300. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 13–15 (2d ed. 1996); *see also* Prakash & Ramsey, *supra* note 9, at 242.

301. Prakash & Ramsey, *supra* note 9, at 252–53 (footnote omitted) (quoting U.S. CONST. art. II, § 1).

302. *Id.* at 253 (emphasis omitted).

foreign affairs powers. “There is no question,” he writes, “that the Constitution’s terms are abstract and incomplete in most respects, and nowhere more so than the allocation of foreign affairs powers.”³⁰³ Although he has yet to flesh out these arguments, he currently believes that the Necessary and Proper Clause gives Congress the power to fill in any foreign affairs gaps.³⁰⁴ Yet the Necessary and Proper Clause might not serve particularly well as a residual grant of foreign affairs powers because Congress can only carry into execution its own powers or those of the president, which leads us back to identifying which of the two departments has the relevant powers.

Nonetheless, there is a plausible argument that the Necessary and Proper Clause could do the required work. Authorizing the president to enter into executive agreements or to terminate treaties, for example, could be convenient and useful to any number of congressional and presidential powers. But even so, the clause was historically understood only as a grant of implied powers and did not include “great substantive and independent power[s].”³⁰⁵ And the missing foreign affairs powers, like terminating treaties and entering into executive agreements, are arguably great, substantive, and independent powers. Additionally, even if the clause could do the required work, the historical record is potentially inconsistent: the congressional authorizations that would be required under the Necessary and Proper Clause for the exercise of certain presidential foreign affairs powers might be lacking.³⁰⁶

303. Mortenson, *Royal Prerogative*, *supra* note 7, at 1190.

304. *Id.* at 1270 n.440.

305. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) (stating that the incorporation of a bank “is not, like the power of making war, or levying taxes, or of regulating commerce, a *great substantive and independent power*, which cannot be implied as incidental to other powers, or used as a means of executing them” (emphasis added)); *The Bank Bill*, GAZETTE U.S. (Phila.), Feb. 23, 1791, reprinted in 13 THE PAPERS OF JAMES MADISON 372, 378–79 (Charles F. Hobson & Robert A. Rutland eds., 1981) (reporting Madison’s speech to Congress, in which he opposed the incorporation of a national bank under the Necessary and Proper Clause as an exercise of a “particularly . . . great and important power,” and noted that incorporating a bank “was in its nature a distinct, an independent and substantive prerogative”); cf. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 60–62, 83, 117–19 (2010) (arguing that similar antecedent clauses had been grants of implied and incidental, and not great and important, powers).

306. Congress does typically grant authority to the president to create executive agreements, see Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 144–45 (2009), but as far as I am aware it has not authorized unilateral treaty terminations.

None of the accounts, in other words, fits all the data. The three atextual views largely ignore the constitutional text altogether. The residual vesting thesis is not plausible in light of the text and structure, the proceedings at the Constitutional Convention, and Ratification. Mortenson's thin law-execution reading relies heavily on the Necessary and Proper Clause, which may be unable to do all of the required work.

The thick law-execution account of "the executive power" has the most explanatory power. Without relying on a residual grant of power or the Necessary and Proper Clause, it can explain important presidential powers and episodes, including the Neutrality Proclamation, terminating certain treaties, and instructing and recalling ambassadors. But it also suggests that certain *recently* claimed presidential powers—the powers to set foreign policy, exclusively to recognize foreign governments, to torture terrorists, to enter into executive agreements, and to terminate any treaty unilaterally—are likely unsupported. Under the thick law-execution account, the president probably has fewer foreign affairs powers than some proponents of the residual vesting thesis suggest. As compared to the thin law-execution account, the president's foreign affairs powers are similar, although the power to instruct and recall ambassadors, which depends on the president's appointment and removal authority, are more robust under the thick than the thin account.

B. Revisiting Presidential Powers

1. *Neutrality and "Setting" Foreign Policy.* The Neutrality Proclamation is the most important of the early foreign policy precedents. Britain and France were at war, and the question was whether the United States was obligated to enter the war on the side of France, with whom the United States had been allied since the Revolutionary War.³⁰⁷ The only problem was that the monarch with whom the relevant treaty was signed had just been executed during the French Revolution, and so there had been a radical change in government.³⁰⁸ And the alliance was a defensive one only, and arguably France had begun the conflict with Britain.³⁰⁹ Under the circumstances, what were the United States' obligations?

307. Prakash & Ramsey, *supra* note 9, at 332.

308. R.J. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 105 n.185 (1974) ("Hamilton argued that the treaty was void because of the radical change in the government of France since its ratification . . .").

309. RON CHERNOW, *ALEXANDER HAMILTON* 442 (2004).

President Washington issued a proclamation of neutrality.³¹⁰ Prakash and Ramsey argue that in so doing, “Washington confirmed that as part of the executive power over foreign affairs, the President unilaterally could announce the foreign policy of the United States.”³¹¹ This power to “set foreign policy,” they claim, is a “key foreign affairs power[] that . . . cannot be encompassed by an ordinary reading of the specific provisions of the Constitution.”³¹²

Yet Washington’s action is explicable under the thick understanding of “the executive power” to carry into execution the national laws, which include treaties.³¹³ As part of this executive power to execute treaties, Washington could exercise the very proclamation power described by Blackstone: he could establish “the manner, time, and circumstances of putting those laws in execution” by “proclamations” that “only enforce[d] the execution of such laws as are already in being.”³¹⁴

That is exactly how Hamilton initially defended the proclamation in his debate with Madison. Writing as Pacificus, Hamilton wrote that the legislative department “is charged neither with *making* nor *interpreting* Treaties” nor “with enforcing the execution and observance of these obligations and those duties” involving treaties and foreign powers.³¹⁵ Although the judiciary “is indeed charged with the interpretation of treaties[,] . . . it exercises this function only in the litigated cases; that is where contending parties bring before it a specific controversy.”³¹⁶ Turning to the executive, he continued, “It must then of necessity belong to the Executive Department to exercise the function in Question,” as

[i]t appears to be connected with that department in various capacities, as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases

310. George Washington, Neutrality Proclamation (Apr. 22, 1793), *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472, 472–73 (Philander D. Chase ed., 2005).

311. Prakash & Ramsey, *supra* note 9, at 297.

312. *Id.* at 258.

313. The “supreme Law of the Land” includes the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States.” U.S. CONST. art. VI, cl. 2.

314. BLACKSTONE, *supra* note 12, at 261.

315. PACIFICUS, *supra* note 68, at 11.

316. *Id.*

between Government and Government—as that Power, which is charged with the Execution of the Laws, of which Treaties form a part—as that Power which is charged with the command and application of the Public Force.³¹⁷

Or, as he wrote toward the end of the essay, “The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning.”³¹⁸

Hamilton thus argued that the chief executive is the “interpreter of the National Treaties” in cases not judicial in nature, and “is charged with the Execution of the Laws, of which Treaties form a part.”³¹⁹ Washington, in other words, was merely exercising “the executive power” of the laws, which includes a proclamation power, as applied to treaties. It is true that Hamilton went on to make the case for a kind of residual grant of executive powers, and assumed that foreign affairs related powers were “executive” in this sense.³²⁰ Yet this second argument was unnecessary. The neutrality proclamation can easily be explained under the thick version of “the executive power.”

What to make of the claim that the neutrality proclamation is an example of President Washington “setting” the foreign policy of the United States and the claim of many scholars that presidents routinely set foreign policy?³²¹ Where does the president get such a power?

The question seems largely beside the point. Even Prakash and Ramsey recognize that when presidents “set” foreign policy, their “policy” is nonbinding.³²² The Monroe Doctrine is a classic example. President Monroe declared it to be the policy of the United States to oppose any European intervention in the Americas.³²³ Yet the very fact that this doctrine was nonbinding suggests that it was not an exercise

317. *Id.*

318. *Id.* at 16.

319. *Id.* at 11.

320. *See supra* Part I.A.3.

321. *See, e.g.*, GERHARD CASPER, SEPARATING POWER 45, 63 (1997); Prakash & Ramsey, *supra* note 9, at 237, 327; Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 212–15 (1998); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1988 (2009) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)).

322. Prakash & Ramsey, *supra* note 9, at 262–63, 263 n.122.

323. Seventh Annual Message to Congress (Dec. 2, 1823) (James Monroe), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 207, 209, 218 (James D. Richardson ed., Washington, Gov’t Pub. Off. 1896). For a summary by the state department historian, see VINCENT, *supra* note 308, at 107–13.

of any *constitutional* power. After all, President Monroe could not unilaterally *enforce* such a doctrine. He could not declare war on his own if a European nation ignored his threats. He could not repeal existing commercial regulations or impose new ones without new congressional laws. In other words, the president may declare a view of foreign policy, but whether the president has the constitutional powers to make good on that view is an entirely separate matter.

This suggests that Congress could declare foreign policy for its purposes, too. Anyone can *speak*. The House passed a resolution in support of the French Constitution of 1792 and the French adoption of a new flag four years later.³²⁴ U.S. Senator Tom Cotton, in 2015, addressed a letter to the Iranian government explaining his view of the relevant relations between Iran and the United States.³²⁵ None of these instances seems to be an exercise of constitutional power. Whether any of these actors—the president, the House of Representatives, or a single U.S. Senator—has any power to make good on what they say is a matter of constitutional power.

2. *Terminating Treaties.* The Neutrality Proclamation also sheds light on another issue of presidential power—the ability to terminate treaties. Prakash and Ramsey argue that under the U.S. Constitution, “the question is which branch has the power to make the requisite determinations and to direct the delivery of the appropriate notice” to terminate a treaty.³²⁶ Although this question has greatly troubled foreign affairs scholarship, they write, the residual vesting thesis “yields a clear answer. Terminating a treaty in accordance with its express terms or with international law is a power not mentioned directly in the Constitution, but was obviously part of the traditional executive’s foreign affairs power.”³²⁷

324. The episodes are described in DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 175–76, 175 n.17 (1997). To be sure, Washington asked that both resolutions be delivered through him. *Id.* But it is hardly clear that this was constitutionally necessary. Jefferson argued that the House “had a right, independently of legislation, to express sentiments on other subjects,” though they should communicate to foreign powers through the president. *Id.* (quoting *The Anas* (recording Jefferson’s notes from March 12, 1792), in 9 *THE WRITINGS OF THOMAS JEFFERSON* 87, 111 (H.A. Washington ed., Washington, Taylor & Maury 1854)).

325. Press Release, Tom Cotton, Sen. from Arkansas, Cotton and 46 Fellow Senators to Send Open Letter to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), https://www.cotton.senate.gov/?p=press_release&id=120 [https://perma.cc/S66Q-BZ7G].

326. Prakash & Ramsey, *supra* note 9, at 265.

327. *Id.*

Once again, though, a thick understanding of “the executive power” better explains the legal framework. Washington’s neutrality proclamation effectively declared the previous treaty of alliance with France terminated because of the radically different French government then existing. Obviously, if conditions have occurred that require the termination of a treaty or a finding that the treaty has already been terminated by the other sovereign, then the president cannot execute that treaty as though it were still in force and at the same time be “faithfully” executing the law. To execute the treaties, the president has to decide whether they are still in force. A residual vesting of all royal prerogative powers is not necessary to obtain this result.

To be sure, this discussion does not answer the question of how to terminate treaties that do not specify conditions by which they may be considered terminated. Prakash and Ramsey do not have an answer to that problem. They recognize a tension between the argument that the power to terminate “plainly” belonged to the monarch and the fact that treaties are the supreme law of the land.³²⁸ A thick understanding of “the executive power” resolves at least a part of this tension. The president must faithfully execute a treaty that is still in force. In so doing, the president may determine if the treaty is no longer in force but may not decide whether it *should not be* in force. Other grants of power in the Constitution better account for treaty termination when the treaty does not specify the conditions of termination. For example, if a treaty is not self-executing, then it seems up to Congress (with the president’s signature) to repeal implementing legislation.³²⁹

If, however, the treaty is both self-executing and omits the conditions by which it can be declared terminated, then it seems that just as any other law has to be repealed, the treaty would have to be repealed by the same authority that made it—at a minimum the Senate and the president together, or Congress as a whole and the president. This appears to have been the early practice and understanding.³³⁰

328. *Id.* at 265 n.135. Thus, they conclude that “[i]t is not clear what effect the combination of the Supremacy Clause of Article VI and the Take Care Clause of Article II, Section 2 would have on this analysis,” and they leave the problem for another day. *Id.*

329. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995) (describing the difference between self-executing and non-self-executing treaties).

330. See J. Terry Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. LEGIS. 46, 48–55 (1978) (arguing that the historical tradition of shared responsibility for abrogation of treaties has eroded).

Prakash and Ramsey claim the power to terminate treaties “was obviously part of the traditional executive’s foreign affairs power,”³³¹ but their support for this claim is not clear. Insofar as the British monarch had such a power, that could be because the monarch had the power to make the treaties and, as explained, it was understood that the power to make a treaty included the power to terminate it. Of course, whether or not the early understanding was a *correct* understanding of the constitutional text is somewhat beside the point, which is that wherever this termination power came from, it is not clear that anyone thought it derived from “the executive power.”

At a minimum, the thick understanding of “the executive power” provides clear answers some of the time. The president may determine that the conditions leading to termination have been met as part of “the executive power” to interpret and carry into execution those treaties that specify such conditions. For a non-self-executing treaty without such conditions, it seems left to Congress and the president, through the enactment of legislation, to decide whether or not to implement the treaty. And although this Article cannot give a definitive answer to self-executing treaties without conditions of termination, it at least appears that members of the Founding generation understood the power to terminate a treaty to be included within the power to make it. Whether or not this historical understanding is ultimately correct as a matter of the Constitution’s text, certainly no one appears to have thought that the right to terminate was part of “the executive power.”

3. *Instructing and Recalling Ambassadors.* Instructing and recalling ambassadors are two other presidential powers that Prakash and Ramsey claim are inexplicable on the basis of the constitutional text absent the residual vesting thesis.³³² The only remotely applicable textual grant, they argue, is the power to appoint (by and with advice and consent of the Senate) ambassadors; but this “surely cannot convey to the President alone the power to recall them.”³³³ Ambassadors are not analogous to other executive officers unless one thinks that the president must carry into execution the power over foreign affairs. This, they argue, assumes the very point that is to be demonstrated.³³⁴

331. Prakash & Ramsey, *supra* note 9, at 265.

332. *Id.* at 244.

333. *Id.*

334. *Id.* at 244–45.

But that is a very cramped view of the textual grants of presidential power. The answer seems more straightforward: the president has the power to *make* treaties and present them to the Senate for advice and consent. The Constitution itself, in other words, tasks the president with a particular trust—the trust of negotiating and securing treaties. The “executive power of the laws” that belongs to the president extends to the power to execute this trust. Just as with the removal of domestic executive officers, the president cannot possibly hope to execute this trust alone and must therefore rely on assistants. The president may therefore appoint, direct, and remove them as part of this executive power, subject to any constitutional provisions assigning such powers away. The only provision to do so gives the Senate a role in confirming appointments.

To be sure, ambassadors do more than just negotiate treaties on behalf of the president. They also gather information incident to such negotiations and help to ensure the foreign power properly executes the treaty. These tasks, too, are part of “the executive power” to carry into execution existing treaties or to carry into execution the constitutional trust to make treaties. Ambassadors also maintain friendly relations; but that could also be considered as part of “the executive power” to ensure existing treaties are honored. Even if ambassadors do other things that cannot be explained as part of the power to make treaties or carry existing treaties into execution, surely they exercise enough of the president’s “executive power of the laws” that they are subject to recall and instruction.

Indeed, as explained above, the delegates in the Constitutional Convention certainly did not think a general foreign affairs power—presumably including the power to recall and instruct ambassadors—was missing. Charles Pinckney observed that “the Senate is to have the power of making treaties & *managing our foreign affairs*,” although the Senate at that point had little more than the treaty and appointment powers.³³⁵ And the power to make treaties may have included the power to “treat” with foreign nations generally.³³⁶ Blackstone, moreover, argued that the king was the depository of the nation’s foreign affairs powers, but he only listed the prerogatives that also found their way into the U.S. Constitution.³³⁷

335. 2 FARRAND, *supra* note 19, at 183–84, 235 (emphasis added).

336. *See supra* notes 135–36 and accompanying text.

337. *See supra* Parts I.B, II.A.

There are other arguments to which one can resort without a residual grant of foreign affairs powers. As Hamilton wrote in his *Pacificus* essays, if it was up to Congress to declare war, was it not up to the president to “execute” the existing conditions of peace, until war could be declared?³³⁸ Although surely not decisive, it is notable that the key debates over the removal power in 1789 revolved around the secretary of the Department of Foreign Affairs.³³⁹ Presumably this secretary had little to do with the “execution” of domestic laws.³⁴⁰ The secretary was to be responsible for ambassadors and their duties.³⁴¹ Yet the First Congress obviously saw no distinction between this principal officer and the principal officers of the other executive departments.

There is, however, one important document involving managing ambassadors, and managing foreign affairs generally, that may be taken as evidence of the residual vesting thesis. In 1790, Thomas Jefferson wrote an opinion for President Washington addressing whether the Senate could negative the grade of the ambassador that the president recommends along with the appointment. Jefferson answered in the negative, writing that the Constitution “has declared that ‘the Executive powers shall be vested in the President,’ submitting only special articles of it to a negative by the Senate,” and that “[t]he transaction of business with foreign nations is Executive altogether” and therefore “belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate.”³⁴²

At first blush, this letter does seem to support the residual vesting reading of the clause; and if Jefferson and Hamilton are in rare agreement, that would make this reading all the more persuasive. It is possible, however, to read Jefferson’s letter consistently with Madison’s view in the removal debates of 1789. True, Jefferson says that the transaction of business with foreign nations is “Executive,” and

338. *PACIFICUS*, *supra* note 68, at 13 (“If the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared.”).

339. See 1 *ANNALS OF CONG.* 455 (1789) (Joseph Gales ed., 1834); *supra* Part III.A.

340. Though, as explained, this officer did eventually become responsible for some duties that would have been assigned to a home office had such an office been established, including overseeing district attorneys. See *supra* note 225 and accompanying text.

341. The statute required the secretary to execute such duties delegated by the president “relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs.” Act of July 27, 1789, 1 Stat. 28, 29.

342. Thomas Jefferson, Opinion on Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 4 *THE FOUNDERS’ CONSTITUTION*, *supra* note 158, at 109–10.

the subsequent reference to exceptions seems to suggest that Jefferson views foreign affairs within the grant of power in the Executive Vesting Clause. But note that Jefferson actually misquotes the clause, writing that it vests “the Executive powers,” in the plural, in the president. Of course, that is not what the clause actually does.

Recall also, yet again, that the Convention likely understood that the Senate would have the management of foreign affairs when the Senate had the treaty and appointment powers. It could be, then, that the president has the management of foreign affairs because of these two powers, not because of the Executive Vesting Clause. Indeed, Jefferson’s whole letter is addressing the scope of the Senate’s *appointment* power—he is addressing whether the Senate’s appointment power allows them to negative the *grade* of the ambassador or simply to negative the nominee. As previously explained, the appointment power is part of “the executive power,” because the president cannot execute the law—and cannot conduct foreign affairs—alone. In short, Jefferson’s letter is *some* evidence in favor of the residual vesting thesis, but the matter is not entirely clear.

4. *Recognition.* The president’s power to recognize foreign governments has been a matter of constitutional litigation in recent years.³⁴³ What constitutional actor has the power to recognize foreign governments hardly depends on a residual grant of “the executive power.” The president has the duty to receive ambassadors, and as Hamilton wrote, this right “includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to (be) recognised or not.”³⁴⁴ Thus, there is an explicit textual hook for the president’s recognition power on some occasions—at least when foreign ambassadors present their credentials. That hardly means Congress has no power to recognize foreign governments. Congress can establish offices, including ambassadorships; it can choose which such offices to establish and in what countries. And Congress can regulate foreign trade and thereby implicitly recognize a foreign government.

The dispute over recognition in modern times has been more specifically over whether that power is *exclusively* presidential; in

343. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 576 U.S. 1, 12–14 (2015).

344. *PACIFICUS*, *supra* note 68, at 14.

Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II),³⁴⁵ the Supreme Court said yes, but relied on functional considerations.³⁴⁶ It had to rely on such considerations because the Court's conclusion is indefensible on any account of the text. Even an infeasible grant of residual power to the president does not include any prerogative powers granted to Congress. On any account of the text, it is hard to see how the recognition power is exclusive.

5. *Torturing Terrorists.* The same short analysis solves the riddle of "torturing terrorists." Even under an infeasible residual grant of power, the president only has such powers not granted to Congress. Yet, as Professor McConnell explains, Congress has the prerogative power to make rules and regulations for the armed forces.³⁴⁷ It is clearly within Congress's power, in other words, to prohibit torture. The only situation in which the president might be able to authorize torture is if Congress has not legislated on the matter, and the torture occurred in an actual field of battle while the president was acting as commander in chief. But even if the president could authorize torture under such circumstances, that result would not depend on any residual grant of prerogative power; it would depend on one's interpretation of the commander-in-chief power.

6. *Executive Agreements.* In addition to calling into question claims of a unilateral presidential power to terminate treaties, the thick law-execution account calls into question the validity of executive agreements: those non-treaty agreements entered into between the president and the head of a foreign nation. If entering into "executive agreements" without Senate ratification is an executive (prerogative) foreign affairs power, then it would certainly belong to the president

345. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 576 U.S. 1 (2015).

346. According to the Court,

Recognition is a topic on which the Nation must "speak . . . with one voice." That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.

Id. at 14–15 (alterations in original) (citations omitted) (first quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003); then quoting THE FEDERALIST NO. 70, *supra* note 74, at 423–24 (Alexander Hamilton)).

347. MCCONNELL, *supra* note 6 (manuscript at 225).

under a residual grant of power; there is no other constitutional text on point. But must the theory of “the executive power” square with the existence of executive agreements? It seems much more plausible that at least some of these agreements—innovations of the late nineteenth century, and even then they were mostly aberrations until the mid-twentieth century³⁴⁸—are unconstitutional. We should not worry about making a theory of “the executive power,” as it was understood in the late eighteenth century, fit with novel practices of the late nineteenth.

In any event, some binding executive agreements might be constitutionally justified as permissible delegations of legislative authority from Congress to the executive.³⁴⁹ And non-binding executive agreements can be considered in the same terms as “setting” foreign policy—any president may speak. Whether there is any constitutional power to back it up is then entirely a matter of independent constitutional power or statutory authorizations from Congress. Regardless, the Supreme Court’s reasoning in the *Curtiss-Wright* case to the effect that the powers of “external sovereignty” must exist somewhere³⁵⁰—and therefore, for example, perhaps a power to make executive agreements need not depend on specific affirmative grants of power in the Constitution—is dubious.

CONCLUSION

This Article has suggested an interpretation of “the executive power” that fits constitutional text, structure, intent, and historical practice better than any competing theory. It is the only theory that fits the variety of textual evidence for the proposition that “the executive power” was the power to execute law, that fits the instruction of the delegates in the Constitutional Convention and the silence of opponents during ratification, that makes sense in light of the delegates’ likely views on the power to erect corporations and over immigration, that makes the three vesting clauses cohere, and that fits most prior practice in the domestic front and in foreign affairs.

It is sometimes said today that an originalist interpretation of the Constitution would lead to a president who is “above the law.”³⁵¹ But

348. See Hathaway, *supra* note 306, at 144–45.

349. As Professor Oona Hathaway has detailed, most executive agreements are in fact made pursuant to congressional delegations of authority. *Id.* at 144–46.

350. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317–18 (1936).

351. See, e.g., Mortenson, *Royal Prerogative*, *supra* note 7, at 1175 (suggesting the consequences of the residual vesting thesis and asking, “Surely the President isn’t above the

under the interpretation presented here, the president is by no means above the law. To be sure, under this account, the president has more indefeasible power on the domestic front than on a thin law-execution account of “the executive power.” And in foreign affairs, many presidential powers can in fact be explained by the thick law-execution reading of “the executive power,” although not all of them. But the executive that emerges from this analysis is largely subservient to Congress on matters both foreign and domestic, albeit with ample powers to carry Congress’s laws into effect, as the executive sees fit, within the confines established by those laws.

law?”); see also David E. Graham, *The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable*, 48 WASHBURN L.J. 325, 326 n.2 (2009) (“The ‘Commander-Above-the-Law’ is a term sometimes used to depict the current Administration’s interpretation and implementation of the unitary executive concept.” (citing JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* 89–91 (2007))).