NOTES & COMMENTS

ORIGINALIST SIN: THE FAILURE OF ORIGINALISM TO JUSTIFY THE UNITARY EXECUTIVE THEORY

by
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Originalists justify a "unitary executive" theory of presidential powers using the Constitution's vesting of the executive power in "a President," as opposed to a council or other multi-member setup. In spite of this justification's popularity with originalists, a deeper understanding of prerogative and power, as the Founders understood those key concepts, reveals that the unitary executive theory cannot be justified through either the original intent or the original meaning of our founding document. In the absence of this grounding, the unitary executive theory is underpinned by modern exigencies and therefore loses coherency as an originalist theory.

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"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

Magna Carta (1215), ¶ 39[1]

"Well, when the president does it that means that it is not illegal."

President Richard M. Nixon (May 19, 1977)[2]

"As has been stated by numerous legal scholars, I have the absolute right to PARDON myself."

President Donald J. Trump (June 4, 2018)[3]

I. INTRODUCTION

A prevalent conception in the United States today of the scope of presidential power is that broadly referred to as the "unitary executive." This phrase, and in particular the word "unitary," can be taken to refer to one of two things. It can indicate a belief that the president is the sole repository of the power entrusted to the executive branch by Article II of the U.S. Constitution. It can also, separately, refer to the extent of that power. One analogy, used by Justice Samuel Alito during his confirmation hearings, compares the executive power to a table—some unitary executive theorists want to make the table bigger, while others simply want to make clear that the table belongs to a single person, the President.[4] These are interlocking concepts, since the size of the table, i.e., what is included in the phrase "executive power," has an impact on the relative propriety of assigning that power to a single individual, without much (or sometimes anything) in the way of an institutional check from another branch of government.

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[1] GR. BRIT., THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE TWENTY-FIFTH YEAR OF THE REIGN OF KING GEORGE THE THIRD, INCLUSIVE 7–8 (Owen Ruffhead, ed., 1786). ENGLISH TRANSLATION OF MAGNA CARTA (G.R.C. Davis trans., British Library 2014) (1215), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[2] Television Interview by David Frost with Richard Nixon, President of the United States (May 19, 1977) in Monarch Bay, Cal. (transcript available at https://www.landmarkcases.org/united-states-v-nixon/nixons-views-on-presidential-power).

[3] Donald Trump (@realDonaldTrump), TWITTER (June 4, 2018, 5:25 AM), https://twitter.com/realDonaldTrump/status/1003616210922147841?ref_src=twsrc%5Etfw.

[4] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 351–52 (2006) (statement of Senator Edward M. Kennedy).

In a literal sense, the Constitution's creation of a "unitary executive" is undeniable. The executive power shall be vested in "a President," not a council or other multi-member setup—though such an arrangement was discussed at the time.[5] However, the degree to which the President may act in ways that are contrary to the expressed will of the legislature or the judiciary, or even contrary to the Constitution itself, has been debated since the nation's founding.[6] These debates have been most frequent and urgent during times of national crisis, or when action must be taken so swiftly and decisively that the inherently more deliberative pace of legislative action might be inappropriate.[7]

"[A]rguments for the hard version of the unitary executive are almost always originalist."[8] That is, they rely on an interpretation of the Constitution that looks for either the "original intent" of the Framers or the "original meaning" of the text. This necessarily involves an examination of the acknowledged influences on the Framers. Two of the most prominent such influences were the 18th century British jurist William Blackstone and the 17th century British philosopher John Locke.[9] While both writers' works have been used to justify an expansive version of the unitary executive through an originalist lens, this Paper demonstrates that those justifications are, at best, misguided or, at worst, willful misreadings of these formative texts.

Part II of this Paper traces a brief history of the unitary executive theory, while Part III describes the ways that originalist thinking has been used to justify the unitary executive theory. Part IV examines the aspects of the royal prerogative as described in William Blackstone's *Commentaries on the Laws of England* and their evolution since the Founding Era. Part V performs the same analysis with regard to John Locke's theory of prerogative as outlined in his *Second Treatise of Government*. The Paper concludes by confirming that an originalist Constitutional interpretation incorporating those thinkers' works cannot be used to justify the unitary executive theory.

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[5] It was not a given that the executive would consist of just one person. *See* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 VOL. 1 (Yale Univ. Press, 1966) ("Mr. Wilson moved that the Executive consist of a single person . . . Docr. Franklin observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it . . . .").

[6] *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (discussing the historical and legal background of presidential power and the unitary executive); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015) (dis-cussing the powers and duties of the President at the founding of the Constitution).

[7] *See* Robert Dallek, *Power and the Presidency, From Kennedy to Obama*, SMITHSONIAN MAG. (January 2011), https://www.smithsonianmag.com/history/power-and-the-presidency-from-kennedy-to-obama-75335897/ (discussing the historical evolution and expansion of presidential powers through times of crisis).

[8] Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 329 (2016).

[9] *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Wilfrid Prest & David Lemmings eds., Oxford Univ. Press 2016) (1765). *See also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

II. A BRIEF HISTORY OF THE UNITARY EXECUTIVE

The boldest and simplest formulation of the unitary executive idea was uttered by former President Richard Nixon, who told interviewer David Frost that "[i]f the president does it, that means it is not illegal . . . ."[10] This statement was in response to a question about a scheme known as the Huston Plan that Nixon had approved and that would have used illegal methods to infiltrate anti-war groups and others opposed to Nixon's policies.[11]

It is worth looking beyond this iconic quotation to Nixon's further explication of the idea when questioned regarding the potential constitutional justification for it:

> There's nothing specific that the constitution contemplates. I haven't read every word, every jot and every tittle, but I do know that it has been argued that, as far as a president is concerned, that in wartime, a president does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the constitution, which is essential for the rights we're all talking about.[12]

It bears mentioning that Nixon is using "wartime" to refer to a situation when no formal declaration of war had been passed by Congress. And that the Supreme Court had held, in the so-called *Steel Seizure* case, that a president's authority, even during a period when the nation was involved in an overseas armed conflict, was not limitless.[13] Moreover, Nixon's approval of the Huston Plan was included in the proposed articles of impeachment that were drawn up against him.[14] Despite all this, the idea that the president has a prerogative to act above or outside of the law has taken firm root over the ensuing decades.

During his presidency, Ronald Reagan increased the use of so-called signing statements, by which the executive would append to legislation being signed into law a clarification of how the law would be enforced.[15] Signing statements are not explicitly authorized by the Executive Clause of Article II of the Constitution, and their legality and force have been disputed.[16]

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[10] *'I Have Impeached Myself': Edited Transcript of David Frost's Interview with Richard Nixon Broadcast in May 1977*, GUARDIAN, at 2, (Sept. 7, 2007 5:18 PM) https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1.

[11] *Id.*

[12] *Id.*

[13] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 580 (1952).

[14] H.R. REP. NO. 93-1305, at 3–4 (1974).

[15] Christopher S. Kelly & Brian W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRESIDENTIAL STUD. Q. 248, 248 (2008).

[16] Clement Fatovic, *Blurring the Lines: The Continuities Between Executive Power and Prerogative*, 73 MD. L. REV. 15, 25–26 (2013) ("[T]here is no mention of anything like a power to issue signing statements anywhere in the Constitution."). Perhaps the most controversial such statement was that appended by President George W. Bush to a 2005 defense appropriations bill intended to restrict the use of so-called enhanced interrogation methods. *See, e.g.*, Presidential Statement on Signing the Dep't of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (December 30, 2005) (available at https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/2005121230-8.html).

During the Clinton Administration, the Presidential removal power became a hot topic, most notably during the investigation by Special Prosecutor Kenneth Starr that culminated with accusations that Clinton lied under oath to hide an extra-marital affair and his eventual impeachment.[17]

The next substantial increase in the visibility and acceptability of expansive executive power came following the attacks of 9/11. President George W. Bush, at the urging of Vice President Dick Cheney (a former Nixon White House official) and Cheney's advisor David Addington, acted in extralegal ways while commanding foreign military action, when instituting a domestic surveillance program, and by ordering the use of military commissions to try suspected enemy combatants.[18]

The Supreme Court has weighed in at various points on each of these uses of executive power, but the most in-depth and influential defense of the unitary executive came in Justice Antonin Scalia's dissent from an 8-1 majority in *Morrison v. Olson* (1998),[19] which held the Independent Counsel Act to be constitutional. Scalia mounted a passionate defense of unfettered presidential control over the executive branch, one which relied heavily on the Justice's trademark originalist approach to the Constitution.[20] This originalist tack has become the most common way in which the theory of the unitary executive is defended.

More recently, actions such as President Obama's use of drone strikes in furtherance of the War on Terror, his initiation of military action in Libya,[21] and President Trump's threatened use of the removal power in order to allegedly obstruct justice, have kept debate about the extent of the President's unilateral authority at a steady boil.[22] The Trump Administration's actions and rhetoric concerning tariffs,

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[17] *See generally* Bob Woodward & Peter Baker, *President Hides Private Rage over Starr*, WASH. POST (Mar. 1, 1998), https://www.washingtonpost.com/archive/politics/1998/03/01/behind-calm-air-president-hides-rage-over-starr/8c521ede-99e8-4677-8d96-b7f4fceeb6dd/; Associated Press, *Starr Blasted as 'Totally Out of Control'*, DESERET NEWS (Mar. 2, 1998, 12:00 AM), https://www.deseret.com/1998/3/2/19366614/starr-blasted-as-totally-out-of-control.

[18] *See generally, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2009); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

[19] Morrison v. Olson, 487 U.S. 654, 655–58 (1988).

[20] *Id.* at 697–99 (Scalia, J., dissenting).

[21] *See generally* Mark Mazzetti & David E. Sanger, *Obama Expands Missile Strikes Inside Pakistan*, N.Y. TIMES (Feb. 20, 2009), https://www.nytimes.com/2009/02/21/washington/21policy.html; Josh Rogin, *Obama Declares National Emergency Over Libya*, FOREIGN POL'Y: THE CABLE, (Feb. 25, 2011, 11:01 PM), https://foreignpolicy.com/2011/02/25/obama-declares-national-state-of-emergency-over-libya/; Scott Wilson, *Obama Administration: Libya Action Does Not Require Congressional Approval*, WASH. POST (June 15, 2011), https://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH_story.html.

[22] Neal Katyal, *Yes, Trump Can Fire Mueller. But a Normal President Would Know Not To Try It*, WASH. POST (Jan. 26, 2018, 8:06 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/01/26/yes-trump-can-fire-mueller-but-a-normal-president-would-know-not-to-try-it/?utm_term=.d4957d040b81; David Lauter, *Trump May Not Have the Legal Power to Fire Mueller, the Special Counsel*, L.A. TIMES (June 13, 2017, 8:08 AM),

border security, and judicial independence have made separation-of-powers discussions less purely academic than ever.

III. ORIGINALIST JUSTIFICATIONS FOR THE UNITARY EXECUTIVE THEORY

Justifications for the correctness of the unitary executive theory have largely relied on an originalist interpretation of the Constitution.[23] This isn't surprising, since other forms of constitutional interpretation, such as Living Constitutionalism, make the centralization of executive power in the person of the president even less valid. As government and society have grown exponentially more complex, and the stakes of executive decision-making have become exponentially higher, placing such power in the hands of a single individual has become much more of a risky proposition.

The originalism that Scalia and like-minded academics employ in their analyses uses sources contemporary to the framing era to clarify the meaning of the words in the Constitution.[24] This includes examining the precepts of the English common law of the latter half of the 18th century, as well as the writers who had an acknowledged influence on the Framers. Foremost among such authors are William Blackstone and John Locke.[25] While originalists have used such writings, especially Locke's, as justification for a strong executive, a closer analysis of those writings, and an examination of the way they were interpreted by the Framers, reveals that, in fact, an originalist reading of the Constitution does not support the unitary executive theory.

This Paper examines the key writings of both of these theorists and their influence on the Framers' thoughts regarding what they called "executive prerogative." These writings include, naturally, Blackstone's *Commentaries on the Laws of England*, published in 1765,[26] which offers a detailed taxonomy of the *royal* prerogative as it was defined in the mid-18th century; and Locke's *Second Treatise on Government*,

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https://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-may-not-have-the-legal-power-to-1497365324-htmlstory.html.

23 Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 454 (2008) ("Unitarians insist that the text and history of the Constitution support their understanding of the unitary executive.").

24 Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONSTITUTION CTR., https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation (last visited April 14, 2020).

25 CLEMENT FATOVIC, OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER 125 (2009) ("[Blackstone's] influence . . . surpassed that of all other writers in the period after the adoption of the Constitution."); David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543, 574 (2011) ("Locke was arguably the pre-eminent theoretical influence on American political thinkers and the U.S. Constitution's innovative system for the separation of powers."); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 189 (1984).

26 1 BLACKSTONE, *supra* note 9. The first American edition was published in 1771. JOHN H. LANGBEIN, ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 816 (2009).

published in 1689,[27] which proposed the division of power between a legislature and an executive and attempted to describe the border between their powers.[28] In each case, this Paper demonstrates how the particular variety of prerogative described or proposed was either adopted, transformed, or neutered by the Framers into a corresponding authority allotted either to the legislative or executive branch. In the case of powers allotted to the executive branch, the Paper demonstrates whether those powers were intended to be restricted by the legislature, either explicitly or implicitly, preemptively or post-hoc. Ultimately, a methodical unpacking of Blackstone's vision of prerogative power within an institutional framework, and Locke's vision of it outside such a framework, lead to the same conclusion: In no sense did the Framers take either vision as an inspiration for an executive with the ability to ignore or countermand the legislature.[29]

IV. THE EVOLUTION OF THE ROYAL PREROGATIVE

To understand the conceptions of prerogative that Locke and Blackstone were describing or reacting to, it is necessary to trace the evolution of the royal prerogative's boundaries and dimensions. Early notions of royal prerogative were absolute.[30] In the centuries after the Magna Carta first instituted restrictions on the king's authority, the expansion of Parliamentary supremacy came at a glacial pace.

Even in the early 17th century, the most influential opponent of expansive royal prerogative, Sir Edward Coke, still considered the existence of prerogative courts "necessary for the administration of justice,"[31] and described the most notorious of such courts, the Court of Star Chamber, as "the most honourable court (our parliament excepted) that is in the Christian world."[32] Opposition by common law judges to the ecclesiastical Court of High Commission eventually forced the issue of whether "the king's prerogative or the common law [was] the fundamental law of the English constitution[.]"[33] At this stage, the king still held unfettered power to dispense with penal laws at will.[34]

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[27] LOCKE, *supra* note 9.

[28] The third leg of the intellectual tripod supporting the Framers' efforts, of course, was the French philosopher Montesquieu. While he was the most commonly cited thinker during the Founding Era, his contributions centered on the establishment of the judiciary as a third co-equal branch of government, and to some extent on the composition of the executive. "[F]or all the attention and acclaim Montesquieu's account has received, it had remarkably little to say about executive power[,]" and is thus outside the scope of this Paper. Fatovic, *supra* note 16, at 34.

[29] This is not to deny that other inspirations for a unitary executive may have validity, but merely to demonstrate that the most frequently cited such inspirations are without historical basis.

[30] Ralph V. Turner, *King John's Concept of Royal Authority,* 17 HIST. POL. THOUGHT 157, 157 (1996); W.S. Holdsworth, *The Prerogative in the Sixteenth Century*, 21 COLUM. L. REV. 554, 554 (1921).

[31] P. B. Waite, *The Struggle of Prerogative and Common Law in the Reign of James I*, 25 CAN. J. ECON. & POL. SCI. 144, 146 (1959).

[32] EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 65 (London, E. & R. Brooke 1797).

[33] Waite, *supra* note 31, at 147.

[34] Case of Non Obstante (1606) 77 Eng. Rep. 1300, 1300 (KB) ("No act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*").

Despite the noted inconsistencies in his position, Coke put forth a general view that "[t]he king shall be under no other man's authority but that of God *and the law*."[35] This was, at the time, more of a normative prescription than a description of actual practice, and it certainly conflicted with the perspective of James I, who stated in a 1609 speech to Parliament that it was "sedition in subjects to dispute what a king may do in the height of his power."[36] Within a year, Coke, then Chief Justice of the Court of Common Pleas, committed just such ostensible sedition by ruling against the Crown in *The Case of Proclamations*, which held that "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament" and that "the King hath no prerogative, but that which the law of the land allows him."[37] In *Peacham's Case* (1615)[38] and *The Case of Commendams* (1616),[39] Coke, sitting at King's Bench, again defied his monarch's will, acts of judicial independence that resulted in his removal from King's Bench and the Privy Council.

Several years later, during the reign of Charles I, Coke objected strongly to the King's Bench's decision not to allow a writ of habeas corpus brought by five knights who had been imprisoned for refusing to make mandatory loans to the crown.[40] This incident led directly to the ratification of the Petition of Right of 1628, drafted by Coke, which prohibited the imposition of taxes or loans without the consent of Parliament.[41] The Petition, in short, demonstrated the willingness of the upper house of the legislature, heretofore supportive of royal prerogatives, to join with the lower house in placing limits on the king's powers. In this light, Sir Henry Finch wrote that the king "hath a prerogative in all things that are not injurious to the subject" and that "the King's prerogative stretcheth not to the doing of any wrong: for it groweth wholly from the reason of the Common Law . . . ."[42] When Charles I attempted to get around the Petition by, in essence, declaring a national emergency in order to levy taxes for the purpose of building a navy, his action was upheld in the Court of the Exchequer, but the narrowness of the vote (seven to five) fatally tarnished its legitimacy and the House of Lords vacated the judgment.[43]

The next significant transformation of the scope of the royal prerogative came during and after the Glorious Revolution. This was accomplished symbolically by the fact that Parliament was responsible for the ascension of William and Mary to

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35 Case of Prohibitions (1607) 77 Eng. Rep. 1342, 1343 (KB) ("*[Q]uod Rex non debet esse sub homine, sed sub Deo et lege*.") (emphasis added).

36 King James I, Speech Before Parliament: Kings Are Justly Called Gods (March 21, 1609), *in* THE PENGUIN BOOK OF HISTORIC SPEECHES 45 (Brian MacArthur ed., 1996).

37 Case of Proclamations (1610) 77 Eng. Rep. 1352, 1353–54 (KB).

38 The Case of Edward Peacham (1615) 79 Eng. Rep. 711 (KB); *see also* DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578–1616 87–89 (2014).

39 SMITH, *supra* note 38, at 278–81.

40 Darnell's Case (1627) 3 How. St. Tr. 1 (KB).

41 J.A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 HIST. J. 289, 291 (1982).

42 HENRY FINCH, LAW: OR A DISCOURSE THEREOF, IN FOURE BOOKS 84–85 (London, Affignes of John More 1636).

43 Hampden's Case (1637) 3 How. St. Tr. 825 (Exch). For the aftermath of the decision, see D.L. Keir, *The Case of Ship-Money*, 52 L.Q. REV. 546, 546, 570 (1936).

the throne, and statutorily through legislative action including the English Bill of Rights, the Act of Settlement, and the Acts of Union, which respectively put Parliament in charge of lawmaking, royal succession, and even the creation of an entirely new sovereign entity.[44] It was at this point that the royal prerogative began to resemble the truncated thing that was described by Blackstone and that inspired the Framers of the American Constitution; [45] "[t]his hard-won legacy of subjecting the Crown to the rule of law was key to the Founders' self-image as heirs to a revolutionary tradition of liberty . . . ."[46]

V. BLACKSTONE'S TAXONOMY OF THE ROYAL PREROGATIVE

"Perhaps no other work contributed as significantly to the ascendancy of [the doctrine of parliamentary supremacy] in the second half of the eighteenth century" than Blackstone's *Commentaries*.[47] Nonetheless, his conception of royal prerogative can, at first blush, seem quite expansive. One of the key questions regarding it (and Blackstone's entire institutionalist project) is distinguishing the degree to which the *Commentaries* are meant as descriptive as opposed to prescriptive. If they are seen as prescriptive, Blackstone becomes almost absurdly conservative for his time; if descriptive, one can sense him hedging his bets and perhaps attempting to soothe stubborn monarchists' acceptance of Parliamentary supremacy.

The seventh chapter of the first volume of William Blackstone's four-volume work is titled "Of the King's Prerogative," and in it Blackstone provides a granular portrait of the prerogative's contours. Blackstone defines prerogative as "that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity."[48] This exhaustive description of the various forms of the royal prerogative as it existed in English common law of the mid-18th century is the most explicit statement we have of the environment in which the Framers were operating when they contemplated the scope of executive authority in the U.S. Constitution.[49] It served as both a

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[44] English Bill of Rights 1689, 1 W. & M. 2 c. 2 (Eng.) ("suspending of laws . . . by regal authority, without consent of parliament, is illegal."); Act of Settlement 1701, 12 & 13 Will. 3 c. 2 § 3 (Eng.) ("[N]o person who shall hereafter come to the possession of the Crown shall go out of the Dominions of England Scotland and Ireland without the consent of Parliament."); Act for the Union of the Two Kingdoms of England and Scotland, Scot.-Eng., March 6, 1706–1707, 6 Ann. c. 11 § 1 ("[T]he Two Kingdoms of England and Scotland, shall upon the First Day of May next ensuing the Date hereof, and forever after, be United into One Kingdom, by the Name of Great Britain.").

[45] *See* James Wilson, Opening Address to Pennsylvania Ratifying Convention (Nov. 24, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION 801 (1993) ("Sir William Blackstone says [absolute power] resides in the omnipotence of the British Parliament . . . .").

[46] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1200 (2019).

[47] FATOVIC, *supra* note 25, at 124.

[48] BLACKSTONE, *supra* note 9, at 155.

[49] Mortenson, *supra* note 46, at 1220 ("Blackstone's Commentaries . . . defined the mainstream American understanding of English law" even though "Blackstone was behind the times in his presumably willful silence about the Commons' political dominance of the Crown.").

framework and a negative example as James Madison, Alexander Hamilton,[50] and Thomas Jefferson debated the appropriate scope of presidential power in the new nation. This Paper examines each variety of prerogative as Blackstone described it, as the Framers interpreted and modified it, and, when relevant, how it is conventionally viewed today.

Blackstone begins by dividing his discussion of prerogative into two parts: those regarding the king's *character*, and those related to royal *authority*.[51] Within each, he identifies specific subcategories.

A. Character

Blackstone defines character-based prerogatives as those meant to emphasize the king's dignity, such that "the mass of mankind" will recognize his "great and transcendent nature" and "pay him that awful respect" necessary to enable him to rule.[52]

1. Sovereignty, or Immunity from Suit or Prosecution

Since the king is "inferior to no man upon earth, dependent on no man, accountable to no man," it follows "that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him."[53] The limitations on this immunity, in a practical sense, were several. As far back as the 13th century, it was said that "the king has a superior, for instance, God. Likewise the Law, through which he has been made king."[54] Even a hundred years before Blackstone, Sir Matthew Hale wrote that "[i]t is regularly true that the king is bound by his own laws."[55]

In the case of civil claims against the crown, subjects could petition the Court of Chancery, and the Lord Chancellor "will administer right as a matter of grace, though not upon compulsion."[56] In what Blackstone calls "cases of ordinary oppression," involving misuse of royal power, those "evil counsellors" and "wicked ministers" whose connivance is necessary to effect the oppression can be "examined and punished" for "assist[ing] the crown in contradiction to the laws of the land."[57] As far as removal from power, the example of James I is used to illustrate

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[50] Most explicitly, Hamilton compared the presidential powers with Blackstone's taxonomy of the royal prerogative in THE FEDERALIST NO. 69 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 268 (2009) ("The result of this comparison was that only one of the powers given to the President was the same as those held by the King—that he could receive foreign ambassadors and public ministers.").

[51] BLACKSTONE, *supra* note 9, at 156.

[52] *Id.* at 156–57.

[53] *Id.* at 157.

[54] HENRY DE BRACTON, THE LAWS AND CUSTOMS OF ENGLAND 269 (Travers Twiss ed., London, Longman & Co. 1878) (c. 1200).

[55] MATTHEW HALE, THE PREROGATIVES OF THE KING 176 (D.E.C. Yale ed., London, Selden Society 1976) (1736).

[56] BLACKSTONE, *supra* note 9, at 158.

[57] *Id.*; *see also* WILLIAM PENN, *England's Great Interest in the Choice of this New Parliament: Dedicated to All Her Free-Holders and Electors*, *in* THE POLITICAL WRITINGS OF WILLIAM PENN 384 (Andrew

the precept that the throne can be vacated only when three conditions are met: "If therefore any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom," it would amount to an abdication.[58]

The Constitution's provision for the impeachment of the president by the House of Representatives and removal from office by conviction in the Senate clearly affords a greater ability to deal with the situation of an executive who acts contrary to the constitutional order. The presence of the impeachment option does seem to preserve, however, the president's immunity from criminal prosecution while in office. Alexander Hamilton in Federalist No. 69 makes it even clearer than Article II does: if impeached and convicted, the president "would *afterwards* be liable to prosecution and punishment in the ordinary course of the law."[59] Still, the issue has never been definitively tested or resolved. Current thinking on the topic is dominated by an opinion written by the White House's Office of Legal Counsel in 1973,[60] and then reaffirmed in 2000,[61] establishing that, as a matter of Justice Department policy, a sitting president cannot be indicted on criminal charges. However, memos arguing the alternative were produced both during the Watergate investigation and the investigation by Special Prosecutor Kenneth Starr into the Clinton Administration.[62]

Supreme Court decisions have indicated that a sitting president may be required to produce documents or other evidence as ordered by a subpoena if the only claim made in opposition was a "generalized interest in confidentiality" (i.e., executive privilege),[63] and that a president is not immune to civil suit while in office, assuming the suit concerns events that occurred prior to her term of office.[64] Both of these decisions were unanimous, but the Court has never been asked to rule on

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R. Murphy ed., Liberty Fund 2001) (1679) ("The Work of this Parliament is . . . [to] bring to Justice, those *Evil Counsellors*, and *Corrupt* . . . *Ministers* of State, that . . . give the King Wrong Measures . . . and Alienate his Affections from his People.").

58 BLACKSTONE, *supra* note 9, at 159.

59 THE FEDERALIST NO. 69, *supra* note 50, at 356.

60 Memorandum from Assistant Att'y Gen. Robert G. Dixon, Jr., Off. of Legal Counsel, to Att'y Gen. Elliot Richardson 3 (Sept. 24, 1973) (available at https://www.documencloud.org/documents/3896903-Legal-Memos-About-Whether-a-Sitting-President.html#document/p1).

61 Memorandum from Assistant Att'y Gen. Randolph D. Moss, Off. of Legal Counsel, to Att'y Gen. Janet Reno 222 (Oct. 16, 2000) (available at https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf).

62 Memorandum from Carl B. Feldbaum, Special Prosecutor, to Leon Jaworski, Special Prosecutor 730 (Feb. 12, 1974) (available at https://www.documentcloud.org/documents/3896903-Legal-Memos-About-Whether-a-Sitting-President.html#document/p65); Memorandum from Professor Ronald D. Rotunda, University of Illinois College of Law, to Kenneth W. Starr, Independent Counsel 4–5 (May 13, 1998) (available at https://assets.documentcloud.org/documents/3899216/Savage-NYT-FOIA-Starr-memo-presidential.pdf).

63 United States v. Nixon, 418 U.S. 683, 685 (1974). This Paper went to print just after the Supreme Court's most recent decisions involving executive immunities. Trump v. Vance, No. 19-635, slip op. (U.S. July 9, 2020); Trump v. Mazars, LLP, No. 19-715, slip op. (U.S. July 9, 2020).

64 Clinton v. Jones, 520 U.S. 681, 719 (1997) (Breyer, J., concurring).

whether a sitting president can be indicted in a criminal prosecution while in office. Still, the existence of a removal mechanism and the susceptibility of the president to some aspects of judicial control indicate that this particular prerogative is considerably narrower than it was at English common law in the Founding Era.

2. Perfection

Blackstone's next category of prerogative consists of those related to the perfection of the monarch's person. "The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong: he can never mean to do an improper thing."[65] The only way to undo any proclamations or grants made by the king was to assert that the king was mistaken or deceived into taking the regrettable action. Any imputation by a member of Parliament that the king might be in error personally could lead to imprisonment.[66] (It was allowable for a House of Parliament collectively to criticize the king's actions or words under the useful legal fiction that those actions derived not from the royal personage but from his Administration.)[67] It has been argued that Blackstone saw the perfection of the king as a bulwark against abuses of his power, since "[i]t is simply inconceivable that someone who already has everything could desire more."[68]

There is no such conception of the executive's perfection within the American Constitutional system. The idea that a member of the legislature could be imprisoned merely for criticizing the president was implicitly disavowed by Article I, Section 6, Clause 1 ("The Senators and Representatives . . . shall . . . be privileged from arrest . . . for any speech or debate in either House."). While the Sedition Act of 1798 did result in the imprisonment, for four months, of a Vermont congressman merely for writing an essay critical of the Adams Administration,[69] the Act was allowed to lapse later that year. There is overwhelming consensus that, if it had ever been tested in the courts, such a law would easily have been found to violate the First Amendment's Freedom of Speech guarantee.[70]

Today, despite some pushback from President Trump,[71] it remains a broadly accepted truism that the president is absolutely open to criticism from members of Congress, other American citizens, and even non-citizens. The process of undoing a presidential declaration or order does not require indulging in the legal fiction that

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65 BLACKSTONE, *supra* note 9, at 159.

66 Members of Parliament John Cooke, in 1685, and William Shippen, in 1717, were sent to the Tower of London for criticizing royalty. 9 JOURNALS OF THE HOUSE OF COMMONS 758, 760 (London, His Majesty's Stationary Office 1802) (1685); 6 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS FROM THE RESTORATION TO THE PRESENT TIME 155–61 (London, Richard Chandler 1742).

67 BLACKSTONE, *supra* note 9, at 160.

68 FATOVIC, *supra* note 25, at 140.

69 ERIC FONER, GIVE ME LIBERTY! AN AMERICAN HISTORY 282–83 (2d ed. 2008).

70 New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."); Watts v. United States, 394 U.S. 705, 710 (1968) (Douglass, J., concurring) ("The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever.").

71 Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html.

the president was merely misled by corrupt or incompetent advisors. It's safe to say that this prerogative, even if it barely survived the Framing, did not live much longer before being consigned to the dustbin of history.

This idea of royal "perfection" also implies the inapplicability of laches to actions taken by or on behalf of the crown. The king can ignore statutes of limitation which bind his subjects in the bringing of actions because "the law intends that the king is always busied for the public good."[72] Similarly, no corruption of blood applies to the monarch: any heir who is convicted of treason or felony has the stain purged upon assumption of the throne, because by definition the king's person cannot be so corrupted.[73] Also, the king can never be a legal minor; despite the tradition of appointing regents for monarchs, an underage monarch possesses the full authority of the crown.[74]

None of these three prerogatives are applicable to the American system. Because legal actions taken by the government are not seen as being taken by the person of the executive, there is no statute of limitations issue. Because the presidency is not an inheritable position, and because the Constitution forbids Bills of Attainder,[75] there is no scenario in which an ostensible executive would be barred from the office by such. And because the Constitution stipulates a minimum age of 35 years for the office of the presidency,[76] issues related to a president's legal minority will not occur.

3. Perpetuity

"A third attribute of the king's majesty is his *perpetuity*."[77] That is to say, while individual monarchs may die, the monarchy, in the abstract, is immortal. There is no interregnum, since the heir immediately becomes the new ruler upon the death of the previous one. Hence the age-old adage: "The king is dead! Long live the king!" which reportedly gained currency as early as the 13th century in England, when Henry II died while his son Edward was away fighting in the Crusades. It was decreed that Edward became the new king immediately, and that his accession was not contingent on his coronation or, even, on his awareness that his father had died.[78]

This custom has its origin in the natural desire for continuity in executive authority, and it has continued to be relevant to the present day. While the idea that the presidency exists as some Platonic eternal form regardless of its current occupant does not comport with constitutional democracy, it is still true that the Framers understandably dictated a mechanism for succession in the case of a president's

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72 BLACKSTONE, *supra* note 9, at 160.

73 *Id.*; *see also* FINCH, *supra* note 42, at 82. This prerogative meant that when Henry VII became king in 1485, the act of attainder passed against him the previous year became null and void, and it was unnecessary for Parliament to formally annul it. FRANCIS BACON, THE HISTORIE OF THE RAIGNE OF KING HENRY THE SEVENTH 13 (London, W. Stansby 1622).

74 BLACKSTONE, *supra* note 9, at 161.

75 U.S. CONST. art. I, § 9, cl. 3.

76 *Id.* art. II, § 1, cl. 5.

77 BLACKSTONE, *supra* note 9, at 161.

78 MARC MORRIS, A GREAT AND TERRIBLE KING: EDWARD I AND THE FORGING OF BRITAIN 104 (2009).

death while in office. And the passage of the Twenty-Fifth Amendment created an even more detailed scheme for the allotment of authority in cases of presidential disability or incapacity.[79] In all such cases, a successor does not need to have taken the Oath of Office (although it is customary to do so as soon as possible) in order to possess full executive authority.[80]

B. Authority

The second major category of prerogative powers outlined by Blackstone are those relating to the king's authority, and it is these which are most relevant to an inquiry into the validity of the unitary executive theory as it is expressed today. The basic thrust of the royal prerogative in this sense is that "the king is and ought to be absolute . . . unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go and no farther."[81] Blackstone lays down what today we would call a fairly squishy standard: the monarch has absolute authority, except where the constitution has expressly or impliedly limited it. On the face of it, this does not seem too far removed from the idea that Article II grants unfettered "executive power" to the president, with the only exceptions being those outlined in Congress' Article I enumerated powers. But Blackstone goes further, suggesting that Parliament has the ability and even the duty to stand up to a king who is abusing his prerogative powers: "[I]f the consequence of that exertion [of a prerogative] be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account."[82] Blackstone is here explicitly relying on a Lockean conception of prerogative as "consisting . . . in the discretionary power of acting for the public good, where the positive laws are silent . . . ."[83]

These authority-based prerogatives come in two familiar flavors: those which "respect either this nation's intercourse with foreign nations, or its own domestic government . . . ."[84] The former include the sending and receiving of ambassadors, the making of treaties, and the power to declare war and peace. The latter include the royal negative, or veto power, the power to appoint and remove ministers, and the power and duty of executing the laws.

1. Foreign Affairs

In this area, "the king is the delegate or representative of his people."[85] The extent of this unified authority is reflected in a hypothetical from Coke's "Institutes of the Laws of England": If all the subjects of the king of England made war, without the king's assent, against a foreign king who was allied with the king of England, it would not be a violation of the alliance between the kings.[86] This demonstrates

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79 U.S. CONST. amend. XXV, § 1.

80 *Id.*

81 BLACKSTONE, *supra* note 9, at 162.

82 *Id.* at 163.

83 *Id.*; *see also infra* Section VI.

84 BLACKSTONE, *supra* note 9, at 163.

85 *Id.*

86 COKE, *supra* note 32, at 152.

vividly the idea that it is solely the monarch who possesses the voice and legitimate authority of the nation.

a. Ambassadors

Under his powers regarding foreign affairs, the king has "the sole power of sending embassadors to foreign states, and receiving embassadors at home."[87] Ambassadors, then as now, are typically held to be immune from prosecution under the laws of their host country, and susceptible only to being sent home to face their own land's justice after committing a crime.[88] Whether this immunity extends to crimes against natural law such as murder or treason, or merely to positive laws, is debated, but susceptibility to prosecution for the former comports with the notion that natural crimes are universal and punishable under any system of justice. Conversely, with regard to civil suits, ambassadors were declared immune from such actions by the Diplomatic Privileges Act of 1708.[89] So, despite the fact that the legislature needed to confirm the privileges and immunities that ambassadors enjoy, it remains the province of the monarch to name her own representatives and receive those of other nations.

This power remains relatively intact in the American system, with the important caveat that ambassadors to foreign states must be confirmed by a majority of the Senate.[90] The power to receive ambassadors lies entirely with the executive and implicitly includes the power to recognize the legitimacy of foreign governments.[91] The degree to which this power of recognition is shared between the legislature and the executive has remained a point of contention, most recently in a case where the Supreme Court held that Congress could not mandate the inclusion of Israel on the passport of a Jerusalem-born American citizen, because the executive branch had the exclusive power to recognize foreign nations.[92]

b. Treaties

Concomitant with this power is that to make treaties and alliances with foreign powers, which, in Blackstone's description, devolves from the monarch's position as the one in whom the sovereign power of the nation is vested.[93] The only remedy for the abuse of this power is that of impeachment by the Parliament of any ministers who advised or concluded any such treaties or agreements. This was largely an academic issue, though it did occur, most notably after King George I entered into the unpopular Partition Treaty of 1715.[94]

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87 BLACKSTONE, *supra* note 9, at 164.

88 *See* Boos v. Barry, 485 U.S. 312, 323 (1988) ("[P]rotecting foreign emissaries has a long history and a noble purpose.").

89 Diplomatic Privileges Act 1708, 7 Ann. c. 12 (Eng.).

90 U.S. CONST. art. II, § 2, cl. 2.

91 Alexander Hamilton, *Pacificus No. I*, *in* ALEXANDER HAMILTON: WRITINGS 807 (The Library of America 2001) (1793) (The right to receive ambassadors "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 . . . .").

92 Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

93 BLACKSTONE, *supra* note 9, at 166.

94 Jack N. Rakove, *Taking the Prerogative Out of the Presidency: An Originalist Perspective*, 37 PRESIDENTIAL STUD. Q. 85, 88 (2007).

Recognizing the ability to enter into binding international agreements as an all-too-easily abused power, the Framers mandated that a prospective ability to block inappropriate international pacts was vital to maintaining democratic legitimacy.[95] Hence Article II, Section 8's provision that the president may negotiate treaties and nominate ambassadors, but that neither would be valid without the approval of the Senate, with treaties requiring a supermajority of two-thirds. James Madison, writing pseudonymously as "Helvidius" in 1793, argued that the power to make treaties (along with the power to declare war) "can never fall within a proper definition of executive powers."[96] Since treaties are "confessedly to have the force and operation of *laws*, and are to be a rule for the courts in controversies between man and man, as much as any *other laws*," it made sense to him that the legislature should have a hand in the process.[97] Writing in response to Hamilton (as "Pacificus"), Madison made the distinction that "[t]he power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government*, and are accordingly treated as Executive prerogatives by *British commentators*."[98] He then quotes Hamilton (writing as Publius a few short years earlier) back to himself, saying that the treaty-making power "partake[s] *more* of the *legislative* than of the *executive* character . . . ."[99] In the same tract, Hamilton had acknowledged that "[h]owever proper or safe it may" be to commit "the entire power of making treaties" to a hereditary monarch, "it would be utterly unsafe and improper to entrust that power to an elective magistrate."[100] This is because an elected president without the lifetime security of royalty "might sometimes be under temptations to sacrifice his duty to his interest," with an eye toward his post-presidential civilian circumstance.[101] It is notable that the Pacificus-Helvidius Debates took place in the wake of President Washington's Neutrality Proclamation of 1793, which essentially abrogated a portion of the Treaty of Alliance that the U.S. had agreed to with France in 1778.[102] In other words, since a mere four years after the ratification of the Constitution, the issue of the executive's power to withdraw from treaties has been almost continually contested.

Another wrinkle to the treaty-making power has been the rise of so-called "congressional-executive agreements." In short, the language in Article I, Section 10, Clause 3 indicates that treaties are not the only form of international agreement envisioned by the Constitution.[103] This created an opening for agreements,

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[95] John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 760 (2002).

[96] James Madison, *Helvidius No. I*, *in* MADISON: WRITINGS 540 (The Library of America 1999) (1793). Madison's narrow definition of "executive power" jibes with that posited by Mortenson.

[97] *Id.* at 541.

[98] *Id.* at 545.

[99] *Id.* at 546 (quoting THE FEDERALIST NO. 75 (Alexander Hamilton)).

[100] THE FEDERALIST NO. 75, *in* HAMILTON: WRITINGS, *supra* note 91, at 404 (Alexander Hamilton).

[101] *Id.*

[102] Saikrishna B. Prakash & Michael D. Ramsay, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 329 (2001).

[103] *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1286–1305 (2008).

approved by a majority of both houses of Congress and signed by the president, that operate in a very similar vein to treaties. Initially, such agreements came into existence when Congress gave prior authorization to the executive branch to negotiate things like international postal service or commercial relations with Pacific island nations.[104] The use of congressional-executive agreements expanded significantly in the decades following the Civil War, culminating in the McKinley Tariff Act of 1890, which declared that "so often as the President shall be satisfied . . . he shall have the power and it shall be his duty to suspend" the tariffs instituted by the Act.[105] The Constitutionality of the Act was challenged, on the grounds that it delegated to the president "both legislative and treaty-making power," but the Supreme Court upheld it, holding that while Congress could not delegate the power to make laws, it could confer discretion as to their execution.[106]

This only encouraged the increasingly common formation of international trade agreements that were perceived and referred to as treaties, but which did not get the two-thirds stamp of approval from the Senate.[107] The passage of the Reciprocal Trade Agreements Act in 1934 essentially codified this approach, delegating to the executive the ability to enact trade policy with a simple majority in both houses of Congress.[108] There is a fairly straight line from that decision to the current, "fast-track" trade authority put in place in the 1970s,[109] a practice that allows a president to institute tariffs on a vast range of products (steel, for example) from a vast array of countries (China, for example) without any Congressional authorization or input.

The precedent established by *Field v. Clark* in the trade arena eventually was used to justify end-runs around the Treaties Clause in other contexts. Prompted by the failure of the Senate to ratify the Treaty of Versailles after World War I, disenchantment with the Treaty Clause's supermajority rule grew.[110] After World War II, fears were stoked that treaties could be used as an instrument of domestic social control, subjecting American citizens to international justice, especially in the civil rights context.[111] These fears, oddly, seemed to be more keenly felt when the potential domestic impact was the invalidation of racial segregation, as opposed to the economic impact of trade agreements such as GATT and NAFTA.[112]

Despite the pendulum swing away from strict observance of the Treaty Clause and towards the prevalence of congressional-executive agreements, and despite Congress' frequent delegation of the nuts-and-bolts negotiation of international agreements to the executive branch, there has never been a sustained movement towards depositing the entirety of the treaty power in the hands of the president. In

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104 *Id.* at 1289–90.

105 McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567 (1890).

106 Field v. Clark, 143 U.S. 649, 681, 693–94 (1892).

107 Hathaway, *supra* note 103, at 1296 n.167 (citing cases).

108 Reciprocal Tariff Act, 19 U.S.C. § 1351 (2000).

109 Trade Act of 1974, 19 U.S.C. §§ 2191–94 (2000).

110 Hathaway, *supra* note 103, at 1299.

111 *THE BRICKER AMENDMENT: A Cure Worse than the Disease?*, TIME MAG., July 13, 1953, at 20.

112 Hathaway, *supra* note 103, at 1305.

addition, certain types of pacts have, at the insistence of the Senate, remained subject to the Article II process, including arms control agreements, military alliances, and human rights agreements.[113] Even the staunchest proponents of the unitary executive would not argue that the president has the authority to act in the absence of legislative action, or in opposition to it, when crafting treaties, joining international organizations, or negotiating economic relationships with foreign powers.

c. Making War and Peace

The most impactful and extreme aspect of the royal prerogative's foreign affairs component was the power to make war and peace. This power, in Blackstone's telling, derives from the fact that "the right of making war, which by nature subsist[s] in every individual, is given up by all persons that enter into society, and is vested in the sovereign power."[114] In other words, private citizens may commit acts of violence against another state, but such violence, without the prior imprimatur of the monarch, cannot constitute warfare. Blackstone allows that "the same check of parliamentary impeachment" of the king's ministers is the only check on the potential abuse of this power.[115]

Notably, the Framers of the Constitution chose not to place decisions regarding declarations of war and peace in the hands of the executive. (Just as notably, it has for all practical purposes largely ended up there.) Article I, Section 8, Clause 11 gives Congress the power to declare war, and the treaty-making power gives the president and Senate the shared authority to make peace. Almost since the republic's birth, though, there has been significant pushback to this conception. A mere four years after the Constitution's ratification, its primary author felt the need to clarify that

> "[t]he right to decide the question whether the duty & interest of the U.S. require war or peace under any given circumstances, and whether their disposition be towards the one or the other seems to be essentially & exclusively involved in the right vested in the Legislature, of declaring war in time of peace; and in the [president] & [Senate] of making peace in time of war."[116]

The same events which prompted that letter also spurred the Pacificus-Helvidius debates, in which Hamilton expounded an expanded notion of presidential power. But even he, writing as Pacificus, noted that "the power of the Legislature to declare war [is an] exception out of the general 'Executive Power' . . . ."[117] Madison's response was that the power to declare war "can never fall within a proper definition of executive powers," since it does not involve the execution of previously existing laws.[118] The extent to which Congress may delegate decisions about the initiation

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[113] JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 32 (2017) (noting that the SALT II treaty, the Comprehensive Nuclear Test Ban Treaty, and the New START treaty were all ratified through the Article II process rather than by majority vote of both houses).

[114] BLACKSTONE, *supra* note 9, at 166.

[115] *Id.*

[116] Letter from James Madison to Thomas Jefferson (June 13, 1793), *in* MADISON: WRITINGS, *supra* note 96, at 534–36.

[117] Hamilton, *Pacificus No. I*, *supra* note 91, at 808.

[118] Madison, *Helvidius No. I*, *supra* note 96, at 540.

of military action to the executive branch has been a source of constant tension in American government ever since.

Congress has not declared war since 1941,[119] but America's military involvement around the globe has been essentially constant over the last several decades. The War Powers Act, passed in the wake of the Vietnam War, sought to restrict the executive's ability to rely on Congressional authorization for the use of military force that was passed in response to a specific event in order to justify an unending deployment of troops.[120] The years following the 9/11 attacks and their attendant Authorization for Use of Military Force have demonstrated the Act's toothlessness in the face of a Congress that does not dare to stand up for its institutional prerogatives.[121]

Never was the idea that the president was personally and unilaterally able to initiate military action even considered during the debates over the Constitution. When submitting its ratification of the Constitution, the New York State Convention proposed an amendment requiring a two-thirds supermajority for a declaration of war.[122] The Plan of Government that Hamilton submitted to the Constitutional Convention, one that included life terms (subject to good behavior) for senators and presidents, gave the Senate the "sole power of declaring war."[123] And even today, in an environment of expansive executive authority, Congress still reserves the right to forestall a president's desires regarding foreign military matters. Most recently, President Obama's strategies with regard to the Syrian civil war and the closing of the Guantanamo Bay prison were stymied.[124]

Like the power to declare war, the power to issue letters of marque and reprisal was also shifted from being a royal prerogative to falling under the sole purview of the legislature.[125] Hamilton and Madison talked about it.[126] Today, of course, such letters are obsolete. The United States did not issue one after 1815, and they were eliminated by the Paris Declaration Respecting Maritime Law, which banned privateering and which the United States, while not a signatory, has vowed to respect.[127] While there has been some fringe discussion about utilizing letters of marque to combat 21st century piracy and terrorism, such methods are most likely of only historical interest.[128]

The same might seem to be true of the royal prerogative to issue letters of safe

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119 We use "war" here to refer to military conflicts with other nations, not the rhetorical device of a "War on Crime," a "War on Drugs," or a "War on Childhood Obesity."

120 War Powers Resolution of 1973, 50 U.S.C. §§ 1541–48 (1976).

121 *See* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001) (broadly delegating war powers to the executive).

122 *Ratification of the Constitution by the State of New York; July 26, 1788*, YALE L. SCH.: AVALON PROJECT (2008), https://avalon.law.yale.edu/18th_century/ratny.asp.

123 Alexander Hamilton, *Plan of Government*, *in* HAMILTON: WRITINGS, *supra* note 91, at 149.

124 CHAFETZ, *supra* note 113, at 37.

125 U.S. CONST. art. I, § 8, cl. 11.

126 THE FEDERALIST NO. 41 (James Madison), *supra* note 50, at 208; THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 50, at 357.

127 Charles H. Stockton, *The Declaration of Paris*, 14 AM. J. INT'L L. 356, 362 (1920).

128 Georgi Boorman, *Is It Time to Bring Back Letters of Marque?*, FEDERALIST (Mar. 25, 2015), https://thefederalist.com/2015/03/25/is-it-time-to-bring-back-letters-of-marque/.

conduct allowing citizens of enemy nations to enter the country and travel unmolested. Blackstone starts from the maxim that "it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient . . . ."[129] The right of merchants to enter England for commercial purposes during peacetime is enshrined in the Magna Carta itself.[130] The procedure of issuing such letters, imprinted with the king's great seal and enrolled at Chancery, is dictated by various statutes.[131]

There is no specific mention of letters of safe conduct in the Constitution, and the closest analogue would be Article I's grant to Congress of the power "[t]o establish an uniform Rule of Naturalization."[132] Congress, then, not the executive, is in charge of determining who can enter the country and what immigration policies should exist. The legislature exercised this authority regularly, instituting a quota system via the Emergency Quota Act of 1921,[133] which eventually came to be seen as discriminatory towards immigrants from non-European countries. The McCarran-Walter Act of 1952 made a significant concession to the executive by allowing that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[134]

While that Act was amended by the 1965 Immigration and Naturalization Act to forbid discrimination "in the issuance of an immigrant visa because of [the person's] race, sex, nationality, place of birth, or place of residence,"[135] deference to executive authority in the immigration context was reinforced by the Supreme Court's recent decision in *Trump v. Hawaii*.[136] However, it remains undisputed that Congress could, if it wished, eliminate the president's power to make unilateral prohibitions on the entry of individuals or classes of individuals into the United States. Control over immigration policies, then, cannot be seen as part of the executive prerogative.

2. Domestic Affairs

Many of the powers included within the royal prerogative as described by Blackstone have been blunted or transferred to the legislative or judicial domains.

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129 BLACKSTONE, *supra* note 9, at 168.

130 MAGNA CARTA, *supra* note 1, ¶ 41 ("All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs.").

131 Abuse of Safe-conducts Under Clause of Vidimus 1436, 15 Hen. 6 c. 3 (Eng.); For the Further Security of the Captors of the Ships of Enemies 1439, 18 Hen. 6 c. 8 (Eng.); Evils Arising From the Non-inrollment of Letters of Safe Conduct 1441, 20 Hen. 6 c. 1 (Eng.).

132 U.S. CONST. art. I, § 8, cl. 4.

133 Emergency Quota Act, Pub. L. No. 67-5, ch. 8, § 2(a), 42 Stat. 5 (1921).

134 8 U.S.C. § 1182(e) (1952).

135 8 U.S.C. §§ 1101, 1151–57, 1181–82, 1201, 1254–55, 1259, 1322, 1351 (Supp. I 1965).

136 Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018).

When the matters at hand lie within the nation's borders, the executive's prerogative is especially circumscribed.[137]

a. The Royal Negative, or Veto

The monarch in 18th century England "ha[d] the prerogative of rejecting such provisions in parliament, as he judges improper to be passed."[138] In addition, "the king is not bound by any act of parliament, unless he be named therein by special and particular words."[139] In addition to that limitation, the king could also be bound by an act of Parliament as long as that act was "expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown . . . ."[140] The royal negative, as it was known, however, fell into disuse following the Glorious Revolution and the ascendancy of Parliament.[141] It was last used in 1707.[142] The fact that Blackstone even includes it as an aspect of the royal prerogative is evidence that his account was intended as a descriptive, even backward-looking take on kingly power. As a structural mechanic, Blackstone seems to have seen the royal prerogative as an escape valve, a vehicle for necessary adaptations without forcing the legislature to enact more permanent and potentially damaging changes.[143]

The Framers recognized that giving the executive the power to veto any legislation without further recourse by the legislature would be tantamount to retaining a monarchical system of government. Early state constitutions typically provided no veto power for their executives.[144] Hamilton's original "Plan of Government" did give the "governor" (as he dubbed the chief executive) an unmodified "negative" upon "all laws about to be passed."[145] By 1788, however, Hamilton had softened his position to say that "[a]n absolute *or qualified* negative" was acknowledged as a "barrier against the encroachments" of the legislature upon the executive.[146] In Federalist No. 69, he specifically contrasts the presidential veto, which can be overturned by a two-thirds vote of both houses, with the "absolute negative" enjoyed by the British crown, the "disuse" of which in recent years had not "affect[ed] the reality of its existence."[147] And in Federalist No. 73, he argues that the qualified, rather than absolute, negative makes more sense because it would be "more readily

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137 BLACKSTONE, *supra* note 9, at 169.

138 *Id.*

139 *Id.*

140 *Id.* (citing The Magdalen College Case (1615) 86 Eng. Rep. 803 (KB)).

141 The term "royal negative" is something of a misnomer. What actually occurred was the withholding of royal assent rather than an active rejection, more in the nature of a "pocket veto" in the U.S. system. BLACKSTONE, *supra* note 9, at 154.

142 *Royal Assent*, BBC NEWS (Oct. 14, 2002, 4:01 PM), http://news.bbc.co.uk/2/hi/programmes/bbc_parliament/2327561.stm.

143 FATOVIC, *supra* note 25, at 134.

144 Rakove, *supra* note 94, at 91.

145 Hamilton, *Plan of Government*, *supra* note 123, at 150.

146 THE FEDERALIST NO. 66, *in* HAMILTON: WRITINGS, *supra* note 91, at 351 (Alexander Hamilton) (emphasis added).

147 THE FEDERALIST NO. 69, *in* HAMILTON: WRITINGS, *supra* note 91, at 367 (Alexander Hamilton).

exercised," since presidents "who might be afraid to defeat a law by [a] single VETO, might not scruple to return it for re-consideration."[148] Hamilton's concern that a president might be overly worried about the appearance of monarchical tendencies, and therefore unwilling to take actions "harsh, and more apt to irritate," is perhaps quaint, but this argument, from the foremost proponent of the strong executive among the Framers, vividly communicates the wisdom of weakening the royal negative.[149] Madison, on the other hand, saw what became the Supremacy Clause as the equivalent to the royal negative, writing that, for the national government, "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary . . . ."[150] He also warned, regarding the presidential veto of legislation passed by Congress, that an absolute negative "might not be exerted with the requisite firmness . . . and it might be perfidiously abused."[151]

Early drafts and debates regarding the Constitution resulted in objections to the proposed allocation of the absolute negative.[152] Once the qualified negative, the veto as we know it today, was inserted, it was seen as an appropriate power for the executive, since he would, the Framers (again, perhaps naively) supposed, "watch over the whole [country] with paternal care and affection."[153] It seems the Framers may have underestimated the frequency with which two-thirds of the members of Congress can agree on anything, especially when relatively equal, sharply divided parties form impenetrable blocs.

Historically, the presidential veto was rarely used prior to the Civil War.[154] It became a relatively more frequent occurrence in the latter half of the 19th century and the first half of the 20th century.[155] Today, vetoes are rarely used, for reasons

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148 THE FEDERALIST NO. 73, *in* HAMILTON: WRITINGS, *supra* note 91, at 398 (Alexander Hamilton).

149 *Id.*

150 James Madison to George Washington (Apr. 16, 1787), *in* MADISON: WRITINGS, *supra* note 96, at 81.

151 THE FEDERALIST NO. 51, *in* MADISON: WRITINGS *supra* note 96, at 296 (James Madison); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* THE DEBATE ON THE CONSTITUTION PART ONE 196 (The Library of America 1993) (1787) ("[I]t is evident, I think, that without the royal negative or some equivalent control, the unity of the system would be destroyed.").

152 An Officer of the Late Continental Army, *Reply to Wilson's Speech*, INDEPENDENT GAZETEER, November 6, 1787, *in* THE DEBATE ON THE CONSTITUTION PART ONE 99 (The Library of America 1993) (1787) ("In England the king only, has a *nominal negative* over the proceedings of the legislature, which he has NEVER DARED TO EXERCISE since the days of *King William*, whereas by the new constitution, both the *president general* and the *senate* TWO EXECUTIVE BRANCHES OF GOVERNMENT, have that negative.").

153 James Wilson, James Wilson Replies to Findley (Dec. 1, 1787), *in* DEBATE ON THE CONSTITUTION PART ONE 825 (The Library of America 1993) (1787).

154 *See Presidential Vetoes*, UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES (Jan. 6, 2020), https://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/. These figures include so-called "pocket vetoes," as ostensibly authorized by art. I, § 7 of the Constitution, which cannot be overridden. U.S. CONST. art. I, § 7. However, neither Bush nor Obama issued any pocket vetoes.

155 *Presidential Vetoes*, *supra* note 154.

ranging from the infrequency of Congressional action to the rise in signing statements to the role of the executive branch in shaping prospective legislation.[156] Franklin Delano Roosevelt issued 635 vetoes during his 12-year presidency, while George W. Bush and Barack Obama issued 24 during their combined 16 years.[157] As of this writing, Donald Trump has recently issued his first veto, more than two years into his presidency.[158] Overriding a presidential veto has always been a rare feat, accomplished only once before 1850, only 111 times (7.4% of all overridable vetoes) in the nation's history, and only 8 times since the Reagan presidency.[159] In addition to its rarity, the veto power was restricted in its scope by the Supreme Court's decision in *Clinton v. City of New York* invalidating the Line Item Veto Act, which had allowed a president to veto particular sections of a passed act while allowing the remainder to take effect.[160] Far from being an absolute ability to negate any legislative act, then, the veto power is another instance in which the executive prerogative is sharply curtailed compared to its royal predecessor.

b. Raising Armies

The royal prerogative included "the sole power of raising and regulating fleets and armies."[161] As the commander in chief (or "generalissimo," in Blackstone's parlance) of the military, it seemed logical that a monarch would also have control over the creation and enlistment of the armed forces. This power was relinquished during the Long Parliament that began during the reign of Charles I, but was re-established by statute following the Restoration.[162] This power extended "not only to fleets and armies, but also to forts, and other places of strength," and also included both the ability to prohibit the exportation of arms or ammunition and the right to confine subjects within the realm or recall them from overseas for purposes of defense.[163] This is another area where Blackstone seems behind the times, since the Declaration of Rights issued following the Glorious Revolution included the provision "[t]hat the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against law."[164] In addition, the Mutiny Act of 1689 established a precedent of Parliamentary control over the administration of

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156 *Id.*; *see also* Alan Greenblatt, *5 Reasons Vetoes Have Gone Out of Style*, NAT'L PUB. RADIO (May 9, 2013, 10:17 AM), https://www.npr.org/sections/itsallpolitics/2013/02/22/172698717/five-reasons-vetoes-have-gone-out-of-style; Leah Libresco, *Comparing Obama's Veto Rates to Other Recent Presidents*', FIVETHIRTYEIGHT (Feb. 23, 2015, 4:30 PM), https://fivethirtyeight.com/features/comparing-obamas-veto-rate-to-other-recent-presidents/.

157 *Presidential Vetoes*, *supra* note 154.

158 Eliana Johnson & Kate Galioto, *Trump Issues First Veto of His Presidency*, POLITICO (Mar. 15, 2019, 5:04 PM), https://www.politico.com/story/2019/03/15/trump-veto-national-emergency-1223285.

159 *Presidential Vetoes*, *supra* note 154; *see also Rare, but Hardly Unprecedented: History of Veto Overrides*, FOX NEWS (Sept. 28, 2016), https://www.foxnews.com/politics/rare-but-hardly-unprecedented-history-of-veto-overrides.

160 Clinton v. City of New York, 524 U.S. 417, 421 (1998).

161 BLACKSTONE, *supra* note 9, at 170.

162 The King's Sole Right Over the Militia Act 1661, 13 Car. 2 c. 6 (Eng.).

163 BLACKSTONE, *supra* note 9, at 170–71.

164 English Bill of Rights 1689, 1 W. & M. 2 c. 2 (Eng.).

the military.[165]

Instead of yielding to Blackstone's retrospective approach to this power, the Framers' "real imperative was to preserve the legacy of 1688 and the principle of legislative supremacy."[166] They placed the power to declare war in the hands of the legislature, and they also opted to specifically assign the power to "raise and support Armies," "provide and maintain a Navy," and "call[] forth the Militia" to Congress.[167] These powers, which "the Constitution had carefully & jealously lodged . . . in Congress," could not be abrogated even by the treaty-making power of the president and Senate.[168] In addition, military appropriations are limited to two-year periods, as "a most important check & security agst. the danger of standing armies, & against the prosecution of a war beyond its rational objects."[169] Hamilton, concerned about the vulnerability of the young nation, spoke against these "restraints on the discretion of the Legislature," but stopped short of arguing that the power to raise and maintain garrisons and other standing forces should be vested in the president.[170]

As far as the power to control military appropriations is but a subset of the general power of the purse granted to Congress (and to the House of Representatives in particular to originate), there has rarely been action by the executive to contravene this constitutional requirement. However, a recent challenge to this arrangement has emerged in the form of President Trump's emergency declaration shifting military funds away from their congressionally mandated appropriations in order to finance the construction of a wall along the United States' border with Mexico. The executive prerogative as it relates to emergencies is discussed in Section III, *infra*, but suffice it to say here that this situation seems to fall clearly within the third of Justice Jackson's zones as outlined in the Steel Seizure case; that is, when a president is acting contrary to the expressed will of Congress, he is at the "lowest ebb" of his authority.[171] Whether the Supreme Court as currently constituted upholds that precedent remains to be seen.

c. Appointment and Removal

Blackstone has little to say about the royal power to appoint or remove governmental ministers, most likely because the king's power to enlist and dismiss advisors was one of the few aspects of the unfettered prerogative that remained relatively unchallenged. In the same manner that the monarch may confer "degrees of nobility, of knighthood, and other titles," he also possesses "the prerogative of erecting and disposing of offices."[172]

While the Constitution provides the executive with the "Power, by and with

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165 Rakove, *supra* note 94, at 90.

166 *Id.*

167 U.S. CONST. art. I, § 8, cl. 12, 13, 15.

168 James Madison, Speech in Congress on the Jay Treaty (Mar. 10, 1796), *in* MADISON: WRITINGS, *supra* note 96, at 562–65.

169 *Id.*

170 THE FEDERALIST NO. 25, *in* HAMILTON: WRITINGS, *supra* note 91, at 265–66 (Alexander Hamilton).

171 Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952).

172 BLACKSTONE, *supra* note 9, at 175.

the Advice and Consent of the Senate" to appoint "inferior Officers," it contains no guidance whatsoever regarding the process of removing such officers.[173] In fact, "[t]he first major debate over the meaning of executive power concerned the proper location of the removal power."[174] Such debates have continued almost uninterrupted to the present day. Several Supreme Court decisions have attempted to differentiate which officers may be removed by the president at will and which can only be dismissed with cause,[175] as well as what degree of insulation from presidential fiat remains constitutional.[176]

d. Execution of the Laws

Last but certainly not least, the Vesting Clause of Article II of the Constitution dictates that "[t]he executive power shall be vested in a President."[177] This phrase, the subject of unending interpretation and speculation, derives from the monarch's role in English common law as "the fountain of justice" and "conservator of the peace."[178] The king, though he has the "whole executive power of the laws," cannot practicably exercise such power on his own. Hence the existence of courts, which operate under the crown's authority but which had, by the 18th century, established a level of independence that resembles that envisioned by the Framers for the American judiciary branch.[179] This comports with the view that, in criminal prosecutions, the king is in effect the prosecutor, and thus it would be improper for him to preside over the proceedings as well.[180] The natural evolution of this line of thinking is that "the public liberty . . . cannot subsist long . . . unless the administration of common justice be in some degree separated both from the legislative and also the executive power."[181] In sum, Blackstone, despite his gestures toward England's monarchical past, subscribed to the primacy of the legislature: "True it is. That what they do, no authority upon earth can undo."[182] As much as they were reacting against monarchical rule, the Framers were also operating from an environment where the crown had been essentially neutered by Parliament.

The Take Care clause is an obvious echo of the first provision in the English Bill of Rights, which declared that the suspending and dispensing prerogatives allowing monarchs to ignore in different ways the laws passed by Parliament were

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173 U.S. CONST. art. II, § 2, cl. 2.

174 Fatovic, *supra* note 16, at 45.

175 Humphrey's Ex'r v. United States, 295 U.S. 602, 603 (1935); Myers v. United States, 272 U.S. 52, 53 (1926).

176 Morrison v. Olson, 487 U.S. 654, 732–33 (1988) (Scalia, J., dissenting); Bowsher v. Synar, 478 U.S. 714, 715 (1986).

177 U.S. CONST., art. II, § 1, cl. 1.

178 BLACKSTONE, *supra* note 9, at 171.

179 Act of Settlement 1701, 12 & 13 Will. 3 c. 2 § 3 (Eng.) (judges' terms are for good behavior during current monarch's reign rather than at the pleasure of the crown); Creating Commissions and Salaries of Judges Act 1760, 1 Geo. 3 c. 23 (Eng.) (extending judges' terms beyond that of the current monarch and forbidding reduction of their salaries by the crown); Habeas Corpus Act 1640, 16 Car. c. 10 (Eng.) (abolishing Court of Star Chamber and expanding use of writ of habeas corpus).

180 BLACKSTONE, *supra* note 9, at 172–73.

181 *Id.* at 173.

182 *Id.* at 107.

henceforth illegal.[183] This principle was reinforced by the Supreme Court when it denied President Andrew Jackson's asserted power to ignore a writ of mandamus.[184]

The Framers certainly agreed with the distinction between the creation of laws and the process of putting them into practice. In 1783, Thomas Jefferson wrote that "[b]y Executive powers, we mean no reference to those powers exercised under our former government by the Crown as of its prerogatives."[185] During the Constitutional Convention, the general consensus was that the executive power was utterly distinct from the royal prerogative.[186] "The framers, it may be said, did not even squint in the direction of presidential prerogative."[187] Only after the drafting did the precise contours of the Vesting Clause become hotly debated, with Hamilton taking the more expansive view that the "executive power" was closer in nature to the royal prerogative.[188] This, however, raises the question of why Article II lists specific powers granted to the president if its opening clause was intended to be self-explicating. It also conflicts with Blackstone's classification of the power to execute laws as merely one subset of the already truncated royal prerogative.[189] Additionally, an examination of state constitutions drafted during the first decades after federal ratification has "demonstrate[d] that the unitary executive model was not the original construction of the vesting of executive power in a chief executive."[190] More recent research has definitively shown that the phrase "executive power," at the time of the Framing, meant nothing more than the power to execute laws validly enacted by the legislature.[191]

Nonetheless, in recent decades "the executive power" has become "the last best hope of Presidents who want to take action without legislative authorization."[192] A consensus from the Supreme Court has not emerged as to what, exactly, the Vesting Clause means.[193] The interpretation that allows presidents the broadest

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183 Reinstein, *supra* note 50, at 280.

184 Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) ("This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution.").

185 Thomas Jefferson, *Jefferson's Draft of a Constitution for Virginia*, *in* 6 THE PAPERS OF THOMAS JEFFERSON 298–99 (Julian P. Boyd ed., Princeton Univ. Press 1952) (1783).

186 FARRAND, *supra* note 5, at 65, 70, 292 (James Wilson "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers[;]" James Madison "agrees with Wilson in his definition of executive powers," which "should be confined and defined[;]" and Alexander Hamilton, the biggest admirer of the British system among the Framers, proposed an executive with a life term, but listed "the execution of all laws passed" as but one of its enumerated powers, not a description of its overall prerogative).

187 David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 PRESIDENTIAL STUD. Q. 376, 382 (2012).

188 Hamilton, *Pacificus No. I*, *supra* note 91, at 805 ("The enumeration [of executive powers in Article II] ought . . . to be considered . . . to specify . . . the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power . . . .").

189 BLACKSTONE, *supra* note 9, at 162.

190 Shane, *supra* note 8, at 335.

191 Mortenson, *supra* note 46, at 1169.

192 *Id.* at 1178.

193 *Cf.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2098 (2015) (Thomas, J., concurring in part and dissenting in part) ("By omitting the words 'herein granted' in Article II, the Constitution indicates

discretion has, unsurprisingly, been embraced by every recent president to some degree or another, especially with regard to national security and foreign affairs.[194] Without a chief executive who makes the politically masochistic decision to forgo at least some of the powers her predecessors have accumulated, it is hard to imagine an easily trodden path back to a more balanced arrangement of powers. And yet, the current arrangement is not, in most significant ways, what the Framers envisioned.

Regarding Blackstone, the preceding should be sufficient to demonstrate that "most of the prerogatives that the King had exercised were vested completely in Congress, prohibited to the President, or altogether omitted from the Constitution."[195] But what about the notion of prerogative that exists independent of the constitutional framework?

VI. LOCKE'S TAXONOMY OF THE EXECUTIVE PREROGATIVE

While Blackstone outlined the structural nature of the royal prerogative, Locke probed the ways that the executive could, or should, function outside of the otherwise ordained structure of government, typically in reaction to urgent or unforeseen circumstances.[196] "The philosopher John Locke's taxonomy of legislative, executive, and federative (i.e. foreign affairs and national security) powers of the government was the Founders' most important referent."[197] Locke's vision of the executive prerogative is laid out in Chapter 14 of his *Second Treatise on Government*, the single most influential document in the drafting of the U.S. Constitution.[198]

Locke's conception of executive prerogative has been hotly debated, with scholars lining up on both sides. His definition of prerogative, plainly stated, is the "[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it . . . ."[199] Since Blackstone was writing much closer temporally to the events of the American Revolution and the Framing of the Constitution, it is important to understand the historical context within which Locke, writing in the late 17th century, was operating. Having witnessed the Interregnum, the exiling of James II, and the Glorious Revolution, but writing before

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that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document."); Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (the executive power consists of "energetic, vigorous, decisive, and speedy execution of the laws"); Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (the Vesting Clause is "an allocation to the presidential office of the generic powers thereafter stated").

194 *See* Memorandum from the Off. of Legal Counsel on Military Interrogation of Alien Unlawful Combatants Held Outside the U.S., to William J. Haynes II, Dep't of Def. Gen. Counsel (Mar. 14, 2003); Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6 (2011); April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 1 (2018).

195 Reinstein, *supra* note 50, at 271.

196 LOCKE, *supra* note 9, at 375 ("[I]t is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick.").

197 Mortenson, *supra* note 46, at 1215.

198 ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 8 (1973) ("[T]he Founding Fathers were more influenced by Locke than by any other political philosopher.").

199 LOCKE, *supra* note 9, at 375.

the issuance of the English Bill of Rights, Locke was clearly reacting to the increasing ability and willingness of Parliament to defy and even dethrone monarchs.[200] It was only this reality that allowed him to imagine a post-monarchical arrangement of governmental powers, with a non-hereditary, circumscribed executive replacing the once absolute power of the crown.

Nonetheless, Locke still realized the importance of a single leader possessing the ability to act with vigor and alacrity, and to speak for the nation with a single voice when necessary. However, this leader's prerogative authority is limited in circumstance and duration. The precise delineation of the prerogative is less than crystal clear in Locke's writing. The only concrete example he provides is the obvious and unilluminating metaphor of "pull[ing] down an innocent Man's House to stop the Fire, when the [one] next to it is burning."[201] And even this is unclear as to whether it is meant to describe a use of the pardon power (to forgive one who takes the action) or the executive prerogative (to order the action).[202]

Locke says that "whoever has the Legislative or Supream Power of any Common-wealth, is bound to govern by establish'd *standing Laws*, promulgated and known to the people, and not by Extemporary Decrees . . . ."[203] This limitation of the executive's power would seem to extend even to military matters, as the "Supream Power" is also bound "to imploy the force of the Community at home, *only in the Execution of such Laws*, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion."[204] This could easily be read to say that, even in the face of imminent enemy invasion, or during a time of war, a president may not act, domestically at the very least, outside what the law allows.

Even though Locke indicated that the "right of resistance" famously granted by him to the citizenry was an effective check on potential abuses of any executive prerogative, there is evidence that he considered it more of a theoretical than practical limitation.[205] Historically, from Locke's perspective in the late 17th century, English citizens had only ever objected to the excessive use of the royal prerogative when it oppressed them, not out of some sense that separation of powers was a principle worth preserving for its own sake.[206]

This recognition of a degree of "public apathy" finds illustration in the reaction to the Act of Indulgence of 1672, in which Charles II exercised his royal prerogative to "grant[] an indulgence to religious Noncomformists and suspend[] the enforcement of penal laws against both Dissenters and Catholics."[207] Of those who benefitted from the Act, few were willing to oppose it on the grounds that the king had no power to suspend the rule of law—most were happy to accept the benefits it

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200 Jenkins, *supra* note 25, at 564.

201 LOCKE, *supra* note 9, at 375.

202 FATOVIC, *supra* note 25, at 54.

203 LOCKE, *supra* note 9, at 353.

204 *Id.*

205 *See* Benjamin A. Kleinerman, *Can the Prince Really Be Tamed? Executive Prerogative, Popular Apathy, and the Constitutional Frame in Locke's Second Treatise*, 101 AM. POL. SCI. REV. 209, 209 (2007).

206 *Id.* at 211–12 ("[E]ach time [Locke's] political anthropology mentions the development of constitutionalism, he describes it as following from kingly abuse.").

207 *Id.* at 216.

provided them.[208] Locke himself "supported the king's power to suspend penalties against nonconformists because the benefits to the public secured by prerogative in this instance outweighed the danger inherent in any augmentation of royal power."[209] This somewhat cynical view of human nature finds an echo in Thomas Jefferson's concern that, as a society grows more and more comfortable and affluent, its citizens will devote themselves to the "sole faculty of making money, and will never think of uniting to effect a due respect for their rights."[210]

A. The Importance of "Virtue"

A lack of absolute faith in the citizenry to act in a principled manner also provides a rationale for Locke's inclusion of "the publick good" in his definition, as well as his warning "[t]hat the Reigns of good Princes have been always most dangerous to the Liberties of their People," because they would allow their successors to "draw the Actions of those good Rulers into Precedent, and make them the Standard of their *Prerogative* . . . for the harm of the people . . . ."[211] This points to a significant difference between the views of Locke and Madison and those of unitary executive proponents today: the former saw a "critical distinction between the person and the office of the executive[.]"[212] Locke "did not believe that all executives were equally entitled to the same degree of deference" and that "[o]nly those executives with reputations for public virtue . . . would enjoy additional leeway to act beyond and even against the strict letter of the law in cases of emergency."[213] In fact, Locke wrote, "Prerogative was always *largest* in the hands of our wisest and best Princes . . . ."[214] This reliance on virtue in the executive can help to explain the seeming incongruity between Locke's insistence on the primacy of the rule of law and his description of a potentially expansive prerogative.[215] "The people's right to overthrow a tyrannical executive constituted the last line of defense against abuses of prerogative . . . but the first line of defense would be the virtue of the executive."[216] In fact, there is, for Locke, not much in between. He "provides no internal mechanism [such as impeachment or judicial oversight] to adjudicate constitutional

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208 RICHARD ASHCRAFT, REVOLUTIONARY POLITICS & LOCKE'S *TWO TREATISES OF GOVERNMENT* 34–35 (1986).

209 FATOVIC, *supra* note 25, at 44; *see also* ASHCRAFT, *supra* note 208, at 111–12.

210 Thomas Jefferson, *Notes on the State of Virginia*, *in* JEFFERSON: WRITINGS 287 (The Library of America 1984) (1785). Such concerns surely find an echo today as even supposedly advanced liberal democracies are slow to rouse themselves against the rise of authoritarianism.

211 LOCKE, *supra* note 9, at 378.

212 FATOVIC, *supra* note 25, at 64.

213 *Id.* at 6.

214 LOCKE, *supra* note 9, at 377.

215 *Compare id.* § 137 of the Second Treatise ("For all the power the government has . . . it ought not to be *arbitrary* and at pleasure . . . ."), *with id.* § 160 (the executive may act ". . . without the prescription of the Law, and sometimes even against it . . . ."). This anomaly can also be understood as Locke's acknowledgement that a ruler may act against specific positive law but in the service of "the *first and fundamental natural Law*, which . . . is the *preservation of Society*". LOCKE, *supra* note 9, at 355–66.

216 FATOVIC, *supra* note 25, at 41.

disputes."[217]

B. Locke and the Framers

Proponents of a broad executive power often argue that Locke's prerogative derives from natural law rather than positive law. After all, it would be a logical absurdity to include the power to ignore the Constitution within the Constitution itself, and the Framers (Hamilton in particular) envisioned an executive who could legitimately, if illegally, take whatever action was necessary to protect the nation's security. It is an obvious but relevant truism that the drafting of an American Constitution was only possible because of a revolution that would not have been possible if, as Jefferson wrote, "we had bound our hands by manacles of the law."[218] Essentially, this view holds that even without relying on an expansive interpretation of the Vesting Clause, the president has the right to act unilaterally in times of crisis. This can be seen as stemming from the Lockean recognition of the inevitable contingencies of history. "Executive prerogative is a political response to that flux in the world that runs against the fixity of law."[219] The "flexibility and suppleness of Locke's constitutionalism" differentiated him from many of his republican contemporaries.[220]

This is probably the more widespread view of the Lockean executive prerogative, one that informed the "doctrine of proportionate means" outlined by Hamilton in Federalist No. 23.[221] Hamilton saw the need for an energetic executive who could use whatever means necessary to protect the rights and security of citizens.[222] Hamilton's idea of executive power, at least in the post-ratification period, was expansive and implicit. For him, the powers granted by Article II are plenary, and the wording of the Oath of Office implies the ability to take whatever actions are necessary to "preserve, protect, and defend the Constitution of the United States."[223] He also warns that placing limits on executive authority that will inevitably be ignored in desperate times will only diminish respect for the rule of law.[224]

In the Constitution, the executive prerogative, to whatever extent it exists, is lodged in Article II, and in particular in the Vesting Clause, the Take Care Clause,

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217 *Id.* at 69.

218 Letter from Thomas Jefferson to Dr. James Brown (Oct. 27, 1808), *in* 11 WORKS OF THOMAS JEFFERSON 53 (Paul Leicester Ford ed., Knickerbocker Press 1905) (1808).

219 Larry Arnhart, *"The God-Like Prince": John Locke, Executive Prerogative, and the American Presidency*, 9 PRESIDENTIAL STUD. Q. 121, 125 (1979).

220 FATOVIC, *supra* note 25 at 57.

221 Leonard R. Sorensen, The Federalist Papers *on the Constitutionality of Executive Prerogative*, 19 PRESIDENTIAL STUD. Q. 267, 274 (1989) ("Publius' doctrine of proportionate means culminates in executive prerogative.").

222 THE FEDERALIST NO. 23, *in* HAMILTON: WRITINGS, *supra* note 91, at 253–57 (Alexander Hamilton) ("The *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.").

223 U.S. CONST. art. II, § 1, cl. 8.

224 THE FEDERALIST NO. 25, *in* HAMILTON: WRITINGS, *supra* note 91, at 268 (Alexander Hamilton) ("[F]ettering the government with restrictions, that cannot be observed . . . impairs that sacred reverence . . . towards the constitution of a country, and forms a precedent for other breaches.").

and/or the Oath of Office. Federalist Nos. 31 and 41 indicate that the executive prerogative is granted by one or more of these passages,[225] but more recent scholarship suggests, especially with regard to the Vesting Clause, that the phrase "executive power" referred at the time of the framing only to the power to literally execute laws passed by Congress and not to any other foreign or domestic power beyond those otherwise enumerated in Article II.[226] This debate, as we have seen, goes at least as far back as the Pacificus-Helvidius debates of 1793 between Hamilton and Madison.[227] It is less surprising that two leading voices in the drafting of the Constitution would have such divergent views, and that the Constitution itself is so maddeningly vague on the topic, once one realizes that the disputes between federal and state control of national security matters were much more urgent at the time.[228]

The tension between these two views is reflected in the contrast between the Jeffersonian and Hamiltonian ideas of prerogative.[229] Hamilton felt that the text of the Constitution authorized the executive to act in ways that went against the wishes of the legislature at times, and that such actions, when taken, were inherently legal.[230] Jefferson "felt that, when necessary, the executive can and should act outside the bounds of law, but the burden is on him to disprove criminality before the people."[231] This was reflected in his decision to unilaterally approve the Louisiana Purchase, a decision that was highly controversial and seen by some as hypocritical, but that was ultimately validated by Congressional action and by Jefferson's reelection.[232]

Since then, in the most prominent cases where the Supreme Court has weighed in on claims of expansive executive prerogative in times of national crisis or Congressional inaction, the Court has come down squarely on the side of placing limits on such authority. The principle was explicitly stated in the Court's most foundational text, *Marbury v. Madison*: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[233]

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225 THE FEDERALIST NO. 31, *in* HAMILTON: WRITINGS, *supra* note 91, at 297–300 (Alexander Hamilton); THE FEDERALIST NO. 41, *in* HAMILTON: WRITINGS, *supra* note 91, *passim* (Alexander Hamilton).

226 Mortenson, *supra* note 46, at 1619.

227 *See supra* note 102 and accompanying text.

228 Rakove, *supra* note 94, at 87 ("Federalism considerations, in other words, trumped separation of powers.").

229 Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 48 AM. J. POL. SCI. 429, 429 (2004); Zachary Moore, *The Constitution and Executive Prerogative*, 5 DARTMOUTH L.J. 134, 134 (2007).

230 Fatovic, *supra* note 229, at 430.

231 Moore, *supra* note 229, at 136.

232 *Id.* at 137.

233 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Chief Justice Marshall was writing about the legislative branch, but the reasoning is equally applicable to the government as a whole.

C. Retroactive Ratification

But, of course, emergencies do happen. Should an executive sit idly by when extralegal or illegal action is the only way to prevent catastrophic harm to the nation? Of course not. The response to such situations throughout history has been to rely, as Jefferson did, on retroactive ratification, or post hoc legislative indemnification, of the actions taken. If the president believes that illegal action is necessary, she should take it and then offer up herself for judgment before the legislature.[234] While it may be an exaggeration to say "[t]hat this doctrine was accepted by every single one of our early statesmen,"[235] there isn't any evidence of an alternative methodology and there are numerous instances of retroactive ratification in American history.[236] There is support in Locke's original text, as well: "Prerogative can be nothing, but the Peoples permitting their Rulers" to act without or against the law "for the Publick Good, *and their acquiescing in it when so done*."[237] This strongly implies that without eventual acquiescence in some form, the action taken is not properly termed as part of the prerogative.

The practice was given credence, in dicta at least, by the Supreme Court in the 1824 case *The Apollon*.[238] Abraham Lincoln's extralegal actions during the Civil War were later litigated before the Supreme Court: his suspension of the writ of habeas corpus and his use of military tribunals were both held to be unconstitutional, while the naval blockade of the Confederacy he ordered was upheld.[239] President Truman's order to seize the nation's steel mills in order to head off a labor stoppage during the Korean War was held to be unconstitutional.[240] The government's attempts to deny due process and habeas corpus to American citizens deemed to be

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234 Adler, *supra* note 187, at 379.

235 Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 324–29 (1952).

236 In addition to the famous incidents listed *infra*, Wilmerding describes a 1793 controversy involving Hamilton, as Treasury Secretary, and an 1807 use of unappropriated funds by President Jefferson, both of whom took for granted the appropriateness of legislative indemnification, even when the extra-legal action was not taken in response to a genuine national emergency. *Id.*; Fatovic, *supra* note 16, at 49–50.

237 LOCKE, *supra* note 9, at 377 (emphasis added).

238 The Apollon, 22 U.S. (9 Wheat.) 362, 367 (1824) ("It may be fit and proper for the government . . . to act on a sudden emergency . . . by summary measures, which are not found in the text of the laws. . . . [I]f the responsibility is taken . . . the Legislature will doubtless apply a proper indemnity.").

239 *See Ex parte* Merryman, 17 F. Cas. 144, 152 (1861) ("[I]f the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 3 (1866) ("Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power."); The Prize Cases, 67 U.S. (2 Black) 635, 636 (1863) ("The proclamation of blockade by the President is of itself conclusive evidence that a state of war existed, which demanded and authorized recourse to such a measure.").

240 Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 580 (1952).

"enemy combatants" were rebuked.[241] President George W. Bush's use of military commissions to try detainees at the Guantanamo Bay facility was held unconstitutional and a violation of the Geneva Conventions.[242]

One problem with leaving the determination of post hoc approval or disapproval or prerogative actions in the hands of the Court is that such determinations create precedent, and the legitimacy of the use of executive prerogative is by its nature idiosyncratic and extremely fact-dependent.[243] Anything that not only certifies an individual executive action contrary to the law, but also institutionalizes that action as justified in other circumstances runs the risk of subverting the entire constitutional order.[244] Ideally, retroactive indemnification should come from the legislature (as a one-off, not a statutory seal of approval) or the electorate. Of course, this leads back to the problems inherent in a comfortable, apathetic society that only objects to prerogative actions when its members are personally harmed or discomfited by them. Popular sovereignty demands active civic engagement from its citizens; without it, no structural safeguards can protect them from the abuses of an evil prince.

VII. CONCLUSION

Recent administrations' reliance on expansive executive prerogative to initiate military action in Libya and to enact stringent restrictions on the entry of foreign nationals into the United States, neither of which was forbidden by the courts, indicate that the drumbeat of support for the unitary executive theory may be having an effect on the judiciary's willingness to place limits on executive action. Both the executive branch and an increasingly acquiescent judicial branch ground their reliance on this theory in an originalist reading of the Constitution, and especially on a Hamiltonian interpretation of Lockean prerogative.

As this Paper has hopefully demonstrated, however, that interpretation did not dominate during the Founding Era and has not controlled throughout the nation's history.[245] Its emergence in recent decades is an effort to legitimize a view of American government that runs contrary to both the intention and the textual meaning of the Constitution. This is not to say that a unitary executive could not potentially be justified by a different approach, one that recognizes the ways in which, even though the Constitution has not changed, the country and the world have. But it is

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241 Hamdi v. Rumsfeld, 542 U.S 507, 509 (2004).

242 Hamdan v. Rumsfeld, 548 U.S. 557, 559–63 (2006).

243 Fatovic, *supra* note 229, at 439–40.

244 For example, the indefinite detention of non-citizens is now the law of the land in the wake of Nielsen v. Preap, 139 S. Ct. 954, 958–59 (2019). See also the repeated extensions of the vast majority of provisions in the USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

245 Adler, *supra* note 187, at 383 ("The framers, it is pellucidly clear, granted to the president *less, not more*, power than that enjoyed by the king of England."); SCHLESINGER, *supra* note 198, at 9 ("The idea of prerogative was *not* part of presidential power as defined in the Constitution."); Rakove, *supra* note 94, at 96 ("[I]t was Madison who was far more faithful to the original meaning, intention, and understanding of the Constitution, and Hamilton who was engaged in a brazen act of interpretive *innovatio*.").

undeniable that "a persuasive settlement of the unitary executive debate requires a nonoriginalist exercise in constitutional construction."[246]

[246] Shane, *supra* note 8, at 330; *see also* Rakove, *supra* note 94, at 99 ("[R]ecognizing the inherent advantages of executive power is not the same thing as proving that the idea of inherent executive power was part of the original constitutional understanding.").