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Recommended Citation

Gerald S. Dickinson, *Reviving Liberal Constitutionalism with Originalism in Emergency Powers Doctrine*, 12 Journal of National Security Law & Policy 203 (2022).
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Reviving Liberal Constitutionalism With Originalism in Emergency Powers Doctrine

Jerry Dickinson*

INTRODUCTION

There are three primary theories that have shaped scholars' understanding of Article II's Executive Power Clause. The first is the cross-reference, which points to specific powers under Article II, such as the appointment power.[1] The second is the Royal Residuum theory that interprets Article II as granting wide-ranging powers possessed by the eighteenth-century British Crown-like executive officer.[2] And finally, the third is the Law Execution theory which rests on an interpretation that the "clause grants power to execute the laws and is otherwise an empty vessel until it has legislative instructions to carry out."[3] American emergency

* Associate Professor of Law, University of Pittsburgh School of Law. Thanks to the Georgetown Law Center's JOURNAL OF NATIONAL SECURITY LAW & POLICY for inviting me to participate in the 2020 Symposium on *Presidential Emergency Powers: Legal Framework and Perspectives for Reform.* Special thanks to Joshua Geltzer, Jamil Jaffer, and Mary McCord for a lively panel discussion. © 2021, Jerry Dickinson.

1. *See* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020).
2. *Id.*
3. *Id.*

powers doctrine is historically premised upon the Royal Residuum theory, the notion that Article II's Executive Power Clause constitutes little, if any, limitation on the broad grant of expansive powers to the President. As President Harry S. Truman explained, "[t]he Power of the President should be used in the interest of the people and in order to do that the President must use whatever power the Constitution does not expressly deny him."[4] In *Youngstown Sheet and Tube v. Sawyer*, the government argued that there was an inherent emergency power in the President that distinguished Article I from Article II.[5] This view purportedly derives from the founding generation's understanding of executive power as vesting broad authority that extends further than merely, say, executing the laws. Indeed, Alexander Hamilton insisted that the executive power was not restricted, but instead conferred expansive powers.[6]

This expansive view permits presidential action that is neither authorized nor prohibited by Congress.[7] It also views presidential power in times of emergency as indefeasible even when the executive exercises powers prohibited by Congress.[8] It provides an extraordinary menu of discretionary policies to the Executive in times of crisis. In fact, some former Supreme Court Justices have rejected the view that "[t]he broad executive power granted by Article II . . . cannot . . . be invoked to avert disaster."[9] Even the more moderate version of this theorem still envisions Article II's Executive Power Clause as a non-absolute power that provides the Executive wide-ranging power in times of emergency over national security or foreign affairs, "so long as neither the Constitution nor any specific statute forbids it."[10]

Scholarly, judicial, and political discourses have been dominated by the Royal Residuum view, also known at the Vesting Clause Thesis, to broaden and entrench the Executive's power over foreign affairs and national security, including emergencies.[11] Since the eighteenth century, this expansive interpretation of the executive's inherent powers during times of emergency has influenced decisions by administration after administration over when and how to respond to

4. MARCUS CUNLIFFE, AMERICAN PRESIDENTS AND THE PRESIDENCY 343 (2d ed. 1976) (quoting President Truman).

5. J. MALCOLM SMITH & CORNELIUS P. COTTER, POWERS OF THE PRESIDENT DURING CRISIS 135 (1960).

6. Alexander Hamilton, *Pacificus No. 1*, *in* THE PAPERS OF ALEXANDER HAMILTON 33, 38–40 (H. Syrett eds., 1969).

7. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (defining Zone Two as presidential action). Justice Jackson set forth a tripartite test in his concurring opinion, laying out three zones of Presidential power. Zone One is when Congress gives authority for the President's action. Zone Two is when Congress is silent, also known as the twilight zone. And finally Zone Three is when Congress disapproves Presidential actions.

8. *See id*. at 637–38 (defining Zone Three).

9. *Id*. at 708 (Vinson, J., dissenting).

10. Mortenson, *supra* note 1, at 1272.

11. There are other sources of this expansive executive power that scholars and various administrations have relied upon, including Article II's Commander and Chief Clause, as well as the Take Care Clause; *see, e.g*., Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172–73 (2019).

exigencies and to act with flexibility depending upon the crisis situation. Yet, while the Constitution declares the executive power shall be vested in the President, important basic questions have remained unanswered about "[w]hat is executive power? What is the degree, and what are the limitations? . . . What are its boundaries?"[12] Julian Mortenson's recent scholarship challenges the dominant view of executive power, its degree, and its limitations, arguing that the view "is so entrenched in our constitutional culture, we must uproot it systematically."[13]

Indeed, recent scholarship suggests the executive power is, at its core, merely the power to "carry out projects defined by a prior exercise of the legislative power" and to implement "substantive legal requirements and authorities that were created somewhere else."[14] Few, if any, scholars, however, have drawn a link between the original understanding of the Executive Power Clause and its relationship to emergency powers doctrine under the theory of liberal constitutionalism. This Essay addresses this gap in the scholarship, and offers musings about the doctrinal and political implications of an originalist reading of the Executive Power Clause in relation to crisis government and emergency powers doctrine. If, as Mortenson argues, Article II is to be read as merely the power to execute the laws and nothing more, then we must question whether our long-standing expansive view of emergency powers, as derived from Article II, is also wrong. If so, what are the political and doctrinal implications for a narrowed, originalist understanding of Article II in times of emergency?

This Essay proceeds in three Parts. Part I sets forth the traditional theories of emergency powers. From the absolutist to the relativist to the liberal, these competing theories have established the basic frameworks that attempt to resolve tensions between law and necessity during times of crisis.[15] While the liberal theory dominated discourse and action in the early Republic, the relativist view has become the dominant view of emergency powers.[16] Part II will seek to revive liberal constitutionalism in emergency powers doctrine by focusing on recent scholarship arguing that the Law Execution theory of executive power meant the power "was conceptually an empty vessel until there were laws or instructions that needed executing" by the legislature.[17] Like the relativist theory of emergency powers displacing liberal constitutionalism, the Royal Residuum Theory likewise has long dispatched the Law Execution theory in executive powers interpretation. Yet, a revised originalist interpretation of the Law Execution theory is based in seventeenth and eighteenth-century originalism where the "ordinary meaning of 'executive power' referred unambiguously to a single, discrete, and potent authority" to simply execute the laws created by the legislature. This

12. Myers v. United States, 272 U.S. 52, 229–30 (1926) (Reynolds, J., dissenting) (quoting 4 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 186 (1851)).

13. Mortenson, *supra* note 11, at 1174.

14. *Id*. at 1173–1174.

15. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1386 (1989).

16. *Id*. at 1392

17. Mortenson, *supra* note 11, at 1169.

Essay seeks to supplement an original understanding of the Article II Executive Powers Clause with liberal constitutionalism's theory that is based on a Madisonian-centric conception of government. Part III offers musings on the political and doctrinal implications of a resuscitated vision of liberal constitutionalism and emergency powers under the Law Execution Theory of executive powers.

I. EMERGENCY POWERS THEORY

A. Absolutist

There are three major frameworks for resolving tensions "between law and necessity."[18] The first is the "absolutist" view. This theory discards the idea that the federal government enjoys emergency powers during times of crisis. The absence of any explicit emergency powers within the U.S. Constitution, under this theory, is evidence that the federal government is not vested with such power.[19] Underlying this perspective is an understanding that the absence of such emergency powers in the Constitution implies that a sufficient amount of power already exists within the confines of the Constitution to preserve the existence of the sovereign without the need for the suspension of rights provisions or other extra-constitutional powers.[20]

As the Supreme Court explained in *Home Building & Loan Association v. Blaisdell*, the "Constitution was adopted in a period of grave emergency" and no such provisions of necessity were included.[21] This view "suppresses the tension between law and necessity" in that it denies the necessity for emergency powers in times of crisis.[22] The Court, likewise, in *Ex Parte Milligan* interpreted the Constitution's silence on any emergency or suspension powers as evidence that the framers "left the rest (powers) to remain forever inviolable."[23] Note, however, that the absolutist theory also acknowledges that if there were a necessity to address crisis or emergency, preserving the nation would be secondary to liberty during times of emergency.[24]

B. Relativist

The relativist view, unlike the absolutist view, interprets the Constitution to permit expansive executive powers in extraordinary circumstances.[25] The relativist theory of emergency powers rests, in part, on a rationale that the Constitution implicitly grants the executive the power to act if there is necessity to intervene in

18. Lobel, *supra* note 15, at 1386.
19. *Id.* at 1386–1387.
20. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866); *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425–26 (1934).
21. *Home Bldg. & Loan Ass'n*, 290 U.S. 398, 425–26 (1934).
22. Lobel, *supra* note 15, at 1387.
23. 71 U.S. (4 Wall.) at 121.
24. *Id.*
25. Lobel, *supra* note 15, at 1388.

a crisis, such as the suspension of rights or of the Constitution. The Constitution, under this theory, is a "flexible document that permits the President to take whatever measures are necessary in crisis situations."[26] This is a Hamiltonian view of expansive powers of the federal government in which such powers "ought to exist without limitation" because of the unknown circumstances that may arise.[27] Indeed, such power, according to President Franklin Roosevelt, means that the executive may ignore legislative acts constraining executive powers during times of emergency when "necessary to avert a disaster which would interfere with" certain crises.[28] This is the modern day theorem held by many theorists and is the basis for current frameworks of emergency powers statutes.

C. Liberal Constitutionalism

The theory of liberal constitutionalism, or liberal legalism, is known as the post-World War II default system of constitutional politics.[29] It is based on a written constitution, judicial review, and a commitment to, among other things, democratic elections and the rule of law.[30] This model seeks to encourage democracy and limit governmental power. As Jethro Lieberman explains, "the idea of constitutionalism comprises a cluster of particular jurisprudential and sociological attributes, summed up as 'limited government under a higher law.'"[31] James Madison famously explained, "[y]ou must first enable the government to control the governed; and in the next place oblige it to control itself."[32] In the emergency powers context, liberal constitutionalism seeks to "resolve the tension between law and necessity" by preserving the dichotomy between ordinary and emergency power.[33] The preservation is dependent upon strong controls on the governed, especially the executive.

According to constitutionalism, only the most extraordinary of emergencies permit executive action. Under this theory, the Constitution does not grant the President inherent emergency powers and any such invocation of those powers is unconstitutional. Liberalism, then, makes a distinction between the constitutional order and a separate framework that provides "the executive with the power, but not legal authority, to act in an emergency."[34] The primary example of the activation of such emergency powers under this classical liberal theory is war. For example, the world of law and politics operate between two opposites—war and

26. *Id.*
27. THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
28. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 250–51 (4th ed. 1957).
29. Tom Ginsburg, Aziz Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, 85 U. CHI. L. REV. 239 (2018).
30. *Id.*
31. Jethro K. Lieberman, *Constitutionalism*, *in* 2 THE ENCYCLOPEDIA OF POLITICAL THOUGHT 730, 730 (Michael T. Gibbons ed. 2015) (quoting David Fellman, *Constitutionalism*, in 1 DICTIONARY OF THE HIST. OF IDEAS (P.P. Wiener ed. 1973)).
32. FEDERALIST 51 at 347, 349 (James Madison) (Jacob E. Cooke ed., 1961).
33. Lobel, *supra* note 15, at 1388.
34. *Id.* at 1390.

peace. The Constitution permits the President to repel attacks. But, the power to address a crisis beyond repelling an attack was dependent upon congressional authorization. Otherwise, the exercise of executive powers during times of emergency was unconstitutional without either precondition met. Indeed, as Jules Lobel explains, under a liberal theory, "the executive should be forced to seek specific congressional authorization prior to acting."[35] In situations where an extraordinary emergency makes prior congressional authorization impossible, the President should respond "to such emergencies by openly acting unconstitutionally" and "then immediately seek congressional and public ratification of such action."[36]

D. Emergencies and Executive Authority

One of the most recognized examples of the dichotomy between the emergencys power and executive powers was the Court's *Youngstown Sheet & Tube Company v. Sawyer* decision. There, the majority opinion and multiple concurring and dissenting opinions, taken together, created a basic framework for understanding the executive power during times of emergency. Variations of absolutism, relativism and liberal constitutionalism permeated the opinions. Justice Black's majority opinion was a quintessential conception of liberal constitutionalism. His opinion established a basis where there exists no inherent executive power and the President may only act if there is constitutional or statutory authority. This model acknowledges that the Court does have the power to strike down presidential actions not explicitly authorized under the Constitution or by statute.

Justice Douglas offered a different conception, noting that the Constitution does not permit the President to act when he usurps the power of Congress to spend. Justice Frankfurter, on the other hand, saw Presidential action in the face of congressional omission as clear congressional disapproval. Justice Jackson's "tripartite" framework filled in some of the holes and gaps in both Justice Black's and Frankfurter's opinions. He offered the "twilight zone" where Presidential acts are unconstitutional in the absence of either a congressional grant or denial of authority to act. And in some instances the President has the power to act unless his actions violate a constitutional and statutory provision; that is, unless Congress acts to stop the President after the fact. But there also existsenvisions a world in which the President may exercise his powers and act over matters of national concern unless or until his actions clearly violate constitutional provisions.

The debate over these models played out quite dramatically throughout the opinions of the Justices. Justice Clark explained that Article II "does grant to the President extensive authority in times of grave and imperative national emergency" and "necessary to the very existence to the Constitution itself."[37] Yet Justice Douglas disagreed, noting, "[i]f we sanctioned the present exercise of power by the President, we would be expanding Article II . . . and rewriting it to suit the political

35. *Id*. at 1427.
36. *Id*. at 1428.
37. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring).

conveniences of the present emergency" and acknowledged that Article II vests the executive power in the President, and thus "defines that power with particularity."[38] Justice Douglas's concern was that permitting the steel seizure after declaring a national emergency would require reading Article II "as giving the President not only the power to *execute* the laws but to make some" and that such a determination would "alter the pattern of the Constitution."[39] Justice Vinson's dissent balked at the narrowed scope of executive powers during times of emergency set forth by the majority, instead arguing that if the "broad executive power granted by Article II to the President cannot "be invoked to avert disaster," it essentially renders the President a "messenger-boy" who must first recommend to Congress certain action.[40] But the messenger concern is elevated when crisis strikes, and government must respond with efficiency and speed in order to address a nation under the state of exception.

Underlying the absolutist, relativist, and liberal theories, along with the *Youngstown* Models, is the work of Carl Schmitt, whose scholarship laid a fundamental foundation for understanding the "state of exception"; that is, the state in which government operates and addresses a national crisis or emergency beyond the confines of the law."[41] In his work, Schmitt looks to Roman law as guidance. There, the government was permitted to authorize a temporary dictator to hold powers for a finite period of time, thus creating a state in which there were rules for normal times and rules for states of exception.[42] However, Schmitt departs from liberal constitutionalism. He argues law cannot control politics.[43] This view envisions a world where even during times of crisis, when law supposedly constrains the executive, government always has the discretionary power to impose the state of exception, because the "[s]overeign is he who decides on the [state of] exception."[44] At some point, the law ceases to constrain and inevitably is discarded during times of crisis—the law runs out.[45] This theory of emergency powers argues that such extraordinary powers are wholly unconstrained by law.

This perspective tracks closely to the work of Clinton Rossiter. He argued that during times of crisis, government "must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions."[46] Once activated, government transforms itself into one with more power and the "people

38. *Id*. at 632 (Douglas, J., concurring).

39. *Id*. at 633 (emphasis added).

40. *Id*. at 708 (1952) (Vinson, J., dissenting).

41. CARL SCHMITT, DICTATORSHIP (Michael Hoelzl & Graham Ward trans., 2014) (1922) [hereinafter SCHMITT, DICTATORSHIP]; CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 2005) (1922) [hereinafter SCHMITT, POLITICAL THEOLOGY]. *See generally* CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., 1976) (1932).

42. SCHMITT, DICTATORSHIP, *supra* note 41, at 1-2.

43. SCHMITT, POLITICAL THEOLOGY, *supra* note 41, at 17.

44. *Id*. at 5.

45. GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., Chicago Univ. Press 2005).

46. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 5 (1948). Rossiter discuses expansive statutes conferring "extreme discretionary authority upon the President or his administration" during a crisis. *Id*. at 269.

fewer rights."[47] Rossiter argues war, rebellion, and economic depression authorize the execution of emergency powers.[48] From suppressing insurrection to crushing sovereign enemies to economic hardship, there are certain events that, according to Rossiter, require speedy, and arguably unilateral, intervention by the federal government.[49] The result, if any of these specific crises arise, is a "constitutional dictatorship," a "regime which can act arbitrarily and even dictatorially in the swift adoption of measures designed to save the state and its people from the destructive effects of the particular crisis."[50] In other words, the goal of constitutional dictatorship is to "end the crisis and restore normal times" without changing the "political, social and economic structure" of society and does not continue in a state of emergency for an infinite time period.[51] Under this theory, the constitutional dictator, typically the President, can violate the law, position itself as a legislative body or assume judicial power if necessary.[52]

Giorgio Agamben fuses theories of Schmitt and Rossiter, arguing that we live in times of indefinite emergency, which has effectively normalized crisis government. Agamben notes that public fear and the desire for urgent action has created a default deferential standard for government to address any and all emergencies.[53] This "unbound" view of crisis government is linked to Eric Posner and Adrian Vermeule's theory that the executive is "unbound." Posner and Vermeule argue that the only constraint on crisis government is public opinion. They challenge the traditional model of liberal constitutionalism, or liberal legalism, which supports a framework where "legislatures govern and should govern, subject to constitutional constraints, while the executive and judicial officials carry out the law" to harvest a world where "law does and should constrain the executive."[54] The problem, according to Posner and Vermeule, is that liberal constitutionalism struggles to account for the administrative state, and thus the massive delegation of emergency authorities to the executive has effectively relegated "legislatures and courts to the sidelines," making legal constraints weak during normal times and non-existent in times of emergency.[55] In fact, Posner and Vermeule argue that this is, normatively, the most efficient and expedient way to manage crises, thereby discarding—or rather, displacing—the role of Madisonian government during times of crisis.

This view finds the Madisonian vision of separation of powers uniquely inadequate during an era of extraordinary power centered with the executive branch and administrative state. The traditional constraints on crisis government—separation of powers or law—are relegated to weak positions of utility, meaning that

47. *Id.*
48. *Id.* at 6.
49. *Id.*
50. *Id.* at. 7.
51. *Id.*
52. *Id.* at 9.
53. AGAMBEN, *supra* note 45.
54. ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 3 (2010).
55. *Id.* at 4.

politics and public opinion, instead, are the only constraints on government in times of emergency. During crises, the public demands rapid response from government. This causes legislators and judges to "hand the reins to the executive and hope for the best."[56] Posner and Vermeule argue that the "central fallacy of liberal legalism" is the equation of "a constrained executive with an executive constrained by law."[57] Instead, Posner and Vermeule argue that there exists "de facto political constraints" that have taken the place of "legal constraints on the executive," and instead offer a stronger—tightened—grip on the executive than traditional separation of powers or law-based restraints.[58]

Under an "executive unbound" theory, judicial review, unlike Justice Black's support for the Court's role in reviewing and constraining executive action in *Youngstown*, is incapable of effectively dealing with crises. Courts, therefore, should act deferentially to the executive during times of crisis, largely due to the slow pace and rigidity with which courts approach problems that, for all intents and purposes, needs flexibility during times of emergency.[59] There are information and knowledge gaps that courts simply do not have according to Posner and Vermeule. Legislative bodies also typically take a back seat during times of emergency because of the "lack of information about what is happening" and the "inability to act quickly and with one voice."[60] As a result, legislatures over decades have delegated emergency authority to the executive to avoid "legislating" during the crisis.[61] Indeed, modern-day crisis government effectively transfers the power to declare emergencies to the executive without the legislature ever having a say in how to manage the crisis, when to end the crisis, or why to even address the emergency in the first place.[62] This one-sided approach to crisis government tends to track the predominant conception of the executives' Article II powers being vast and expansive. Indeed, this reality means that during times of emergency, "the executive governs nearly alone, at least so far as law is concerned," and that the "legally constrained executive is now a historical curiosity."[63]

A consequence of this expansive evolution of Presidential power during times of emergency is the interpretation of Article II's Executive Power Clause becoming lost in translation, or modified and altered so significantly over decades, both politically and doctrinally, that the executive power is, arguably, a shadow of its former — original — self. Julian Mortsenson's recent scholarship tracking the early seventeenth- and eighteenth-century understanding of the "executive power" offers a window into an originalist interpretation of the Executive Power

56. Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614 (2009).
57. POSNER & VERMEULE, *supra* note 54, at 5.
58. *Id.*
59. ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE 4–6 (2007).
60. *Id.* at 47.
61. *Id.*
62. *Id.*
63. POSNER & VERMEULE, *supra* note 54, at 4.

Clause, one that may revive the dormant, and arguably displaced, theory of liberal constitutionalism in emergency powers doctrine.

II. THE EXECUTIVE POWER: EXECUTE THE LAW AND NOTHING MORE

A. Theories of the Executive Power Clause

Part II seeks to bridge an originalist understanding of the Executive Power Clause with liberal constitutionalism's emergency powers. According to recent scholarship, the "Executive Power Clause is incapable of giving rise to any substantive foreign affairs authority, much less an indefeasible one."[64] This conclusion is grounded in an originalist and "descriptive historical assertion about the semantic content of a standard eighteenth-century" understanding of the "executive power."[65] There are three primary interpretations of the Executive Power Clause set forth by Mortenson—the Cross-Reference Theory, the Royal Residuum, and the Law Execution Theory. Of these three, the Law Execution Theory, according to Mortenson, most accurately defines and conceptualizes the original meaning of the executive power as "unambiguously limited to law execution."[66] Little, if any, connection in legal scholarship has been made between this newly discovered originalist understanding of the Executive Power Clause and its potential relationship to liberal constitutionalism's conception of emergency powers. The basic idea, that the original understanding of the Clause was that the executive power was nothing more than the power to execute the laws created by Congress, deserves greater exploration for its utility in reviving liberal constitutionalism, which has arguably been displaced by the relativist theory of unfettered, absolute executive powers over national security and foreign affairs.

1. The Cross-Reference Theory

The first theory of the Executive Power Clause is a "thinner" Cross-Reference reading of the power to mean that the President has broad authority, but that it is limited to a "grab bag" of items set forth under Article II.[67] Some Justices, such as Jackson in *Youngstown*, have adopted this "grab bag" view of the Clause, noting that, "I cannot accept the view that [the Executive Power Clause] is a grant in bulk of all conceivable executive powers but regard it as an allocation to the presidential office of the generic powers thereafter stated."[68] As Mortenson explains, the "full contents of that grab bag are set out in the remainder of Article II [and] nothing else goes in the bag."[69] Lawrence Lessig and Cass Sunstein have argued that the executive powers are fixed within Article II express provisions.[70]

64. Mortenson, *supra* note 11, at 1172 n.10.
65. *Id*. at 1188.
66. *Id*.
67. *Id*. at 1172 n.10.
68. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952).
69. Mortenson, *supra* note 11, at 1179.
70. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 49–52 (1994).

Likewise, Robert Reinstein notes that the Executive Power Clause is not a "residual source of plenary presidential powers beyond those enumerated in Article II."[71] The Royal Residuum theory interprets the power quite differently.

2. Royal Residuum

The Royal Residuum thesis of the Executive Power Clause suggests the executive power is a "well-understood bundle of authorities that went well beyond the specific enumerations elsewhere in Article II."[72] Here, the power extends to and includes the "residual foreign affairs powers" not set out in the Constitution.[73] This dominant view was articulated by Theodore Roosevelt, that the "executive power was limited only by specific restrictions [in the Constitution or] imposed by Congress."[74] The result, according to Mortenson, is a President who has been indefeasibly granted "those aspects of kingly authority that have not been reallocated to other actors."[75] It seems that this theory is nestled somewhere within or between *Youngstown*'s Zone Two or Three, both of which suggest the President may act if Congress is silent on or expressly disapproves of the act.[76] But this theory has been met with some limiting interpretations.

Although the Constitution is silent regarding any specific emergency powers vested in the President, the Supreme Court has also noted in *Youngstown* that there is no inherent executive power and the President may only act with constitutional or statutory authority. This reading suggests that neither the Commander in Chief Clause nor the Take Care Clause is appropriate constitutional provisions that grant the President such unilateral powers.[77] Nonetheless, the dominant view of expansive Presidential powers inherent beyond the text of the Constitution—the Royal Residuum theory—has captivated modern executive powers theory, even if the majority of the Supreme Court has yet to accept that dominant view.[78] Indeed, this view envisions a monarch-like executive that "establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power."[79]

3. Law Execution

This Essay is focused on a third view that receives less attention than the above-mentioned views—the "Law Execution" theory. This theory of the Executive Power Clause interprets the words to mean the "power to executive the law."[80] President William Taft once explained that the "true view of the Executive functions

71. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 264 (2009).
72. Mortenson, *supra* note 11, at 1181.
73. Zivotofsky *ex rel*. Zivotofsky v. Kerry, 576 U.S. 1, 37–38 (2015) (Thomas, J., concurring).
74. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388–89 (1913).
75. Mortenson, *supra* note 11, at 1183.
76. *Id.*
77. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641–46 (1952) (Jackson, J., concurring).
78. Mortenson, *supra* note 11, at 1183.
79. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001).
80. Mortenson, *supra* note 11, at 1180 n.10.

is . . . that the President can exercise no power which cannot be . . . traced to some specific grant of power or justly implied . . . within such express grant as . . . necessary to its exercise . . . . There is no undefined residuum of power which he can exercise."[81] Likewise, Justice Breyer has explained that the executive power is the "energetic, vigorous, decisive, and speedy execution of the laws."[82] This view in many respects adheres to the notion that the "executive power enables the President to spearhead" the implementation of "an affirmative project of the legislature."[83] As Michael McConnell suggests, the power to execute the law is to carry into "effect policies set by the lawmaker."[84] And, as Justice Burger noted, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[85]

As such, if the "Executive Power Clause is incapable of giving rise to any substantive foreign affairs authority," it is equally the case that the Clause does not give rise to an emergency power unless there is statutory authority. From this view, the "Constitution does not vest in the president a general, independent lawmaking power in foreign affairs."[86] Other scholars have carved out a two-track approach, one that was fixated on separation of powers that "distinguishes between law-making and the implementation of the law in particular instances."[87] Indeed, this was the theory that the Executive Power Clause was merely to "execute plans, instructions, and above all else the laws."[88] However, recent scholarship offers persuasive evidence to suggest that the meaning of the Executive Power Clause was "unambiguously limited to law execution."[89]

B. Originalist Interpretations of the Executive Power

1. English Interpretations

William Blackstone, as early as the 1600s, carved out two distinct classifications of governmental powers between the "legislative" authority of "making . . . the laws" and the "executive" authority as "enforcing the laws" which according to Blackstone derived from the English Constitution's conception of separate political institutions.[90] This was purportedly the "King's Prerogative," which meant that there existed a menu of substantive powers. Mortenson likens these powers to the *Youngstown* Zone Two model of presidential powers in which the

81. Mortenson, *supra* note 11 at 1180 (quoting WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139–40 (1916)).

82. Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

83. Mortenson, *supra* note 11, at 1180.

84. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 42 (2020).

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

86. Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 314 (2006); *see also id.* at 344–59 (broadly discussing the limitations the President faces in foreign affairs lawmaking).

87. WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 5 (1965).

88. Mortenson, *supra* note 11, at 1269.

89. *Id.* at 1188.

90. *See id.* at 1221 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *146).

President acts in the absence of congressional denial or grant of authority.[91] Of course, this doesn't tell us what criteria should be used to determine when the executive has acted impermissibly, but instead leaves that decision to the circumstances of the events that led to the executive's action. But, according to Blackstone, this meant that the Crown could act on its "residual and defeasible authority" when Parliament had neither approved nor disapproved of certain acts by the Crown,[92] but when Parliament exercised its ability to provide "supplementary legislation," then it would displace the Crown's power.[93]

Indeed, the "supreme executive power" defined by Blackstone was the right to enforce the laws; that is, the royal prerogative. Likewise, the founding generation relied upon this same basic framework of legal authorities to the Crown—the Executive—that could be wielded, so long as the Parliament did not override it with countervailing authority.[94] But the royal "prerogative" had a very specific meaning in the English law, one that entailed "all powers, preheminences, and priviledges, which the law giveth to the crowne [sic]."[95] The executive power, according to Mortenson, was only a part of the whole—a "discrete subset"—of the Crown's list of prerogatives, and that power was *only* the power to execute the laws given to the executive by the legislature.[96]

John Locke wrote that there existed the "legislative power" and the executive power, and that the former was the "right to direct how the force of the commonwealth shall be employed," while the latter was the ability to pursue the "execution of the laws that are made, and remain in force."[97] Algernon Sidney, an English politician, explained that the legislature was "exercised in making Laws" and the executive power to implement law.[98] Sir Robert Filmer explained that the "gubernative" had the power to merely put "those laws in execution" that the legislative "power of making laws"[99] and that there "be a power in kings both to judge when the laws are duly executed, and when not. . . ."[100] Jean-Jacques Rousseau was quite clear that, likewise, the "executive power . . . is only the

91. *Id.* at 1223.

92. *Id.*

93. *Id.*

94. *Id.* at 1228.

95. Mortenson, *supra* note 11, at 1229 (quoting 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON bk. 2, ch. 5, § 125, at 90b (Francis Hargrave & Charles Butler eds., London, Luke Hansard & Sons 16th ed. 1809) (1628)).

96. *Id.*at 1230.

97. *Id.* at 1231 (quoting JOHN LOCKE, THE SECOND TREATISE: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION ch. XIV, §§ 143–144, at 164 (Ian Shapiro ed., Yale Univ. Press 2003) [hereinafter LOCKE, SECOND TREATISE]).

98. *Id.* at 1231 (quoting ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT ch. I, § 1, at 4 (London, n. pub. 1698)).

99. *Id.* at 1232 (quoting ROBERT FILMER, THE ANARCHY OF A LIMITED OR MIXED MONARCHY (1648) *reprinted in* PATRIARCHA AND OTHER WRITINGS 131, 136 (Johann P. Sommerville ed., Cambridge Univ. Press 1991)).

100. *Id.* at 1233 n.276 (quoting FILMER, THE FREE-HOLDERS GRAND INQUEST, (1679) *reprinted in* PATRIARCHA AND OTHER WRITINGS at 114 [hereinafter FILMER, THE FREE-HOLDERS GRAND INQUEST]).

instrument for applying the law."[101] This followed a cadre of English scholars who saw the executive power as a separate element of a long list of prerogatives.

James I noted that "so yee may be a good King . . . in establishing and executing, (which is the life of the Law) good Lawes among your people."[102] And John Milton noted that the "King was created to put . . . laws in execution."[103] And James Otis explained that the "supreme legislative" and the "supreme executive" check each other.[104] It was common for the King to be known as the "supreme Magistrate of the Kingdom" who was entrusted with "the whole executive Power of the Law."[105] Beyond the words of English and French scholars and historians, dictionaries also offered guidance. For example, "to execute" was defined as "to put a law, or any thing planned, in practice."[106] Further, amid the founding generation, dictionaries were nearly unanimous in their definitions of the executive power.[107] The act of exercising the executive power was understood to be "the power of . . . enforcing laws," or "executing the laws," or "carrying the laws into execution," or the "power to use" the law to put into effect.[108] Indeed, as Mortenson argues, the "executive was subject to plenary control and instruction by parliamentary legislation . . ." and without this prior instruction, the executive power "is an empty vessel that has nothing to execute."[109]

2. Constitutional Interpretations

From a constitutional standpoint, Mortenson argues that the English interpretations of the executive power suggest that the translation in the American constitutional system is "pretty straightforward . . . [i]t was the implementing power [such as] the authority to deploy the massed force of the state to bring legislated intentions into effect."[110] He likens the concept to something akin to an action of "bringing-into-being" decisions about governmental action "of any sort—which for their part could only be designated by an exercise of legislative power."[111] Mortenson explains:

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101. *Id.* at 1232 (quoting JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT bk. III, ch. 15, at 142 (Maurice Cranston trans., Penguin Books 1968) (1762)).

102. *Id.* at 1233 n.274 (quoting JAMES I, BASILIKON DORON bk. 2 (1616), *reprinted in* THE POLITICAL WORKS OF JAMES I, at 3, 18 (Charles Howard McIlwain ed., 1918)).

103. *Id.* at 1233 n.275 (quoting JOHN MILTON, A DEFENCE OF THE PEOPLE OF ENGLAND (1692) [hereinafter MILTON, DEFENCE OF THE ENGLISH PEOPLE], *reprinted in* 2 THE PROSE WORKS OF JOHN MILTON 5, 106 (Philadelphia, John W. Moore 1847)).

104. *Id.* at 1233 n.278 (quoting JAMES OTIS, THE RIGHTS OF THE COLONIES ASSERTED AND PROVED 71 (London, reprinted for J. Almon 1764)).

105. *Id.* at 1234 (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS ch. 1, § 1, at 2 (London, Eliz. Nutt 1716)).

106. *Id.* at 1235 n.286 (quoting FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London, printed for J. Wilson & J. Fell 1765)).

107. Mortenson, *supra* note 1, at 1315.

108. *Id.* at 1317.

109. Mortenson, *supra* note 11, at 1235.

110. *Id.* at 1237.

111. *Id.* at 1238.

> The implementation of authoritatively formulated intent was intrinsic to the very concept of the executive function, both grammatically and in principle. By the Founding, the implementatory [sic] essence of executive power was most often expressed in terms of Locke's vision of law as an interlocking tripartite phenomenon: First the law must be legislated, then in at least some cases it must be adjudicated, and then its requirements must be executed. While this trinitarian scheme still dominates our modern understanding of the law-related functions of government, it's worth noting that many joined Blackstone in describing the essential powers of government as two interlocked halves of a whole: the "legislative . . . authority" as "the right . . . of making . . . the laws," and the "executive authority" as "the right . . . of enforcing' them. . . . That's because all formulations were identical on the crucial point: Exercising "the executive power" meant bringing the legislated intentions of society into being.[112]

Indeed, this conception was closely followed by a number of philosophers of the founding generation who took the position that the "executive power is strictly no other than the legislative carried forward . . . and controulable by it [sic],"[113] while others regarded the power "altogether subordinate to the legislative. . . ."[114] Some hoisted the legislative power above the executive power, noting that the "Legislative power . . . is the chief of the two."[115]

III. ORIGINALISM, LIBERAL CONSTITUTIONALISM AND EMERGENCY

Liberal constitutionalism envisions a legal world in which the executive power is closely regulated and constrained by the rule of law. Here, liberal constitutionalists are concerned with the threat of the delegation of powers to the executive, thus compromising the tradition of separation of powers, while at the same time fearful of crises that abruptly "required the executive to take necessary measures without clear legal authorization."[116] Specifically, much of the founding generation's concern was assignment of powers undermining the Madisonian separation of powers framework. Liberal constitutionalists, such as James Madison, argued for a separation of powers-centric approach to government, even in times of crisis. The traditional model of liberal constitutionalism in the realm of emergency powers has been for the legislature to pass laws that delegate to the executive authority to regulate, act, and make policy decisions during crises. In other words, legislatures enact and create the rules, while the executive enforces those rules. Some have argued that this creates a passive parliamentary model, where the

112. *Id.* (quoting 1 BLACKSTONE, *supra* note 90, at *146).

113. GAD HITCHCOCK, AN ELECTION SERMON (1774), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 281, 295 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

114. DAVID HUME, ESSAY VI: OF THE INDEPENDENCY OF PARLIAMENT 44 (1777).

115. PHILIP HUNTON, A TREATISE OF MONARCHY pt. I, ch. IV, § 2, at 26 (London, printed for John Bellamy and Ralph Smith 1643).

116. POSNER & VERMEULE, *supra* note 54, at 8.

legislature stands by during times of emergency, relying upon the expertise and efficiency of the executive to address a crisis. This approach to governance generally and in times of emergency has receded into the background since the twentieth century. The long-standing approach to emergency powers doctrine under liberal constitutionalism was to allow the legislature to enact a statute that served the purpose of a blueprint or a guide to what the executive does during times of emergency.

Much of what liberal constitutionalists have sought to achieve between delegation and emergency is a loose version of the Law Execution theory; that is, the Executive Power Clause is nothing more than the power to execute the laws, as persuasively argued by Mortenson. Here, we see efforts by Congress over decades to balance separation of powers with the power of the executive. These efforts entailed, for example, the creation of "administrative procedures and mechanisms of legislative and judicial oversight that would enforce legal constraints on the executive."[117] But, if Article II powers, from an original understanding, are premised on the power of the executive to execute the laws set forth by the legislature, and nothing more, then these attempts at threading the needle, so to speak, have fallen short of the traditional Madisonian model of separation of powers.

Congress has arguably failed to create emergency laws that require the executive to "carry out projects defined by a prior exercise of the legislative power" and to implement "substantive legal requirements and authorities that were created" by the legislature.[118] Instead, the "projects" and "substantive legal requirements" to be carried out and implemented function more like procedural framework statutes that "attempt to constrain executive action" in times of emergency, instead of defining the projects and substantive legal requirements for the executive to follow.[119] There is a reason why scholars have criticized these approaches to crisis government.

Legislatures have become accustomed to deference to the executive, perhaps because they know they lack the information about the true nature of the security threat to a nation and "lack control over the police and military" and likewise cannot "act quickly and with one voice."[120] The modern American statutory framework for emergency powers effectively strips the legislature from legislating during the emergency.[121] As a result, the current frameworks of emergency powers do not look or operate like the Madisonian government of checks and balances envisioned in the Constitution. As Ginsburg and Versteeg explain, scholars view the modern regime as one that enjoys "massive delegation of power to the executive" and that legislatures and courts play a reactive role, effectively allowing the executive to govern alone during times of crisis.[122] That result is the antithesis of liberal constitutionalism and Madisonian government.

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117. *Id*. at 9.

118. Mortenson, *supra* note 11, at 1172–73.

119. POSNER & VERMEULE, *supra* note 54, at 9.

120. POSNER & VERMEULE, *supra* note 59, at 47.

121. *Id*. at 47.

122. Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, INT'L J. CONST. L. (forthcoming 2021) (manuscript at 2, 8) (available online) (citing ERIC A.

Historically, the problem is that when emergencies such as economic crisis or war arise, the executive ignored Congress or concocted dubious arguments of avoidance. But the reality is that liberal constitutionalism has struggled equally to balance the world of separation of powers, delegation and emergency. As a result, liberal constitutionalism has arguably failed to "reconcile the administrative state with the Madisonian origins of American government," which encourages deliberation and coordination during times of emergency, instead depending upon excessive delegation to the executive.[123] This has been caused by a loose patchwork of statutes and laws that function as procedural, rather than substantive, mechanisms to constrain, *ex post*, the executive during an emergency.[124] However, contrary to Posner and Vermeule, the executive-centered government in the administrative state is not "inevitable" or a foregone conclusion.[125] Further, it is simply not true that "law cannot hope to constrain the modern executive" and liberal constitutionalism "overestimates the need for the separation of powers and even the rule of law."[126]

The problem is that Congress, as a result of its excessive application and practice of the relativist theory of emergency powers, has underestimated the strength of a Madisonian-like Law Execution theory of the Executive Power Clause. A renewed focus on the executive power as understood to be "the power of . . . enforcing laws," or "executing the laws" or "carrying the laws into execution" or the "power to use" the law to put into effect[127] may revive liberal constitutionalism in emergency powers by reorienting the lens through which Congress views its role from one fixated on *constraining* the executive through loose, and arguably ineffective, procedural frameworks, to one focused on *implementing* substantive legal requirements for the executive to "carry out projects" during times of emergency. Indeed, there is room for a revival of liberal constitutionalism to reposition itself as a theory that encourages the legislatures to make laws and govern more directly in times of emergency. There are both political and doctrinal implications for a renewed emphasis on the Law Execution theory of the Executive Power Clause in relation to emergency powers doctrine.

A. Political Implications

Legislatures often impose limitations or grant additional powers to the executive during times of emergency through statute. Throughout the world, many countries have emergency provisions inserted into their Constitutions, while in countries, ordinary legislation provides the vehicle through which crisis governments form during times of emergency. A substantial majority of nations have

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Posner & Adrian Vermeule, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4 (2011)).

123. *Id.*

124. POSNER & VERMEULE, *supra* note 54, at 10.

125. *Id.* at 14.

126. *Id.* at 14–15.

127. Mortenson, *supra* note 11, at 1221.

constitutional provisions that permit a declaration of the emergency state.[128] In many provisions, the government has the power to suspend certain rights for a limited period of time. A majority of Constitutions worldwide mandate the legislature to declare the state of emergency, which is also accompanied by end dates for which the emergency powers expire.[129] These constitutional provisions also ensure that the emergency government is dependent upon and subject to legislative oversight and review.[130] Likewise, many Constitutions set forth the reasons for or limited circumstances in which a declaration of emergency may be activated. As Tom Ginsburg and Mila Versteeg explain, "while constitutional emergency regimes allow the executive to assume additional powers, they rarely authorize a truly unbound executive."[131]

This purportedly maintains legislative collaboration and decision-making during the crisis. In these types of emergency regimes, the legislature designates powers to be granted to the executive and maintains the power to rein in those authorities.[132] Such powers are divided into *ex ante* and *ex post* frameworks. The former permits the executive to exercise certain powers within its discretion during an emergency, thus putting the legislature in the back seat and allowing the executive to drive the decision-making process on how to address the crisis, while the latter permits the legislature to overturn the executive's initial declaration of emergency after a certain period of time.

An originalist conception of the Law Execution theory may alter the way we understand the usefulness and limitations of modern emergency frameworks, such as the National Emergencies Act and the International Emergency Economic Powers Act. The National Emergencies Act, passed in the 1970s, terminated all previous emergencies that had been activated by former Presidents. As a result, Presidents are required to declare a national emergency and follow specific procedures thereafter, while Congress reserved the power to terminate any emergency declaration with a joint resolution, but that which could be thwarted by the Presidential veto power. Likewise, the Act requires that Congress meet and vote on terminating the emergency every six months. While the Act was meant to "temper the potentially dictatorial powers available to the president" and to "ensure that proper safeguards were in place to allow for congressional review when the president declared an emergency," the procedures have been ineffective in giving Congress a more active role in governing and legislating during times of emergency.[133] Instead, the Act proactively delegates the power to declare an emergency to the executive and effectively requires the

128. Christian Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT'L J. CONST. L. 101, 101 (2018).

129. Ginsburg & Versteeg, *supra* note 122, at 30.

130. *Id*. at 30–31.

131. *Id*. at 10.

132. *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 212 (2004).

133. Gerald S. Dickinson, *The National Emergencies Act Was Never Meant for Something Like Trump's Wall*, WASH. POST (Jan. 31, 2019), https://perma.cc/3BMX-Q7UB.

executive to address an emergency however he sees fit. As Frank Church, the co-chair of the special committee on national emergencies explained during testimony to Congress in the 1970s, "Congress should be forewarned that it is inherent in the nature of modern government that the Executive will seek to enlarge its power in small ways and large."[134]

President Trump's border wall national emergency declaration is perhaps a quintessential example of how the executive can play fast and loose with the weak procedural constraints set forth in the Act to abuse and enlarge its power over domestic and foreign affairs, while also altering the power of the congressional purse with the stroke of pen. As Church feared, a President could, if he chose, "invoke the emergency authories . . . *for frivolous or partisan matters*" unrelated to concrete, particularized national security or foreign crisis.[135] There, President Trump, after months of stonewalling by Congress to block billions in funding for Trump's wall along the U.S.-Mexico border, declared a national emergency over illegal immigration across the border as a threat to national security, even though "[i]llegal crossings [were] at the lowest ebb since the Clinton administration."[136]

The declaration effectively activated for the President a variety of statutes that would allow him to unilaterally shift unauthorized congressional monies from one executive department to another in order to build the wall. This circumvention was met with only the weak procedural safeguards available in the Act, for which Congress failed to terminate the emergency after the President exercised his veto power. This was not the first time that the "procedural requirements for reporting and congressional oversight have simply not been followed by either the executive or Congress," as the President has multiple times in the past provided "sparse details of the basis for the purported emergency," while Congress has rarely "considered whether to terminate any of these purported emergencies."[137] Indeed, as Lobel explains, the "procedures Congress has established to review these emergencies are legally unenforceable in the courts [and] [i]t is hard to discern any progress from the post-war era of drastic abuses that Congress wanted to end."[138] Much of this is a result of overreliance on the relativist theory of emergency powers that delegates power to the President, with very little, if any, substantive requirements to carry out such projects. In fact, Congress has never reversed a President's national emergency declaration.[139]

Another political implication for a renewed understanding of the Law Execution Theory of Article II's Executive Power Clause and its political implications is the International Emergency Economic Powers Act. The Act purportedly restrains crisis government in foreign affairs. Like the NEA, the IEEPA is

134. *Id.*
135. *Id.*
136. *Id.*
137. Lobel, *supra* note 15, at 1415–16.
138. *Id.* at 1418.
139. Robert Tsai, *Manufactured Emergencies*, YALE L.J.F. 590, 591 (2020).

procedural, not substantive in nature. It places conditions on the President's power after he has declared a national emergency by requiring some consultation with Congress, including reporting dates and a six-month timeline. However, unlike the NEA, the IEEPA did insert some substantive provisions that provided a basis for which the President could declare a national emergency in the international economic realm. There, the statute defined a national emergency as "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States." If invoked, the President may block financial transactions with individuals, industries or governments that are viewed as a threat. The President also has at his disposal the ability to freeze property and bank accounts.

Further, the statute also imposed a requirement that the President declare a national emergency over such threats when they arise. Some may argue that the IEEPA departs slightly from the NEA in that it addresses an area that the NEA does not: creating standards and criteria for invoking emergency powers. Still, like the NEA, the IEEPA has been undermined, ignored or circumvented by presidential administrations per a relativist approach to expansive executive powers. Most invocations of the statute have been due to non-threatening national emergencies, such as those against South Africa, Libya, Panama and Nicaragua in the 1980s.[140] Indeed, the sweeping powers entrenched in the IEEPA, along with a lack of checks and balances, make the law an avenue for executive abuse. Shortly after the September 11th attacks, President George W. Bush invoked the IEEPA to close Muslim American charities and freeze their assets due to suspicion of connections with terrorists overseas, even though there was very little evidence.

Much of the abuse and misuse of the IEEPA is administrations that ignore the substantive requirement of "unusual and extraordinary threat." And like the NEA, Congress can only rein in the President's power after he declares a national emergency under the IEEPA only by passing a new law that the President then must sign, or if the President fails to sign, getting a supermajority vote to override the veto. Even with the procedural safeguards inserted into the statute, the use of those provisions is dismal. In fact, Congress has never voted to terminate an IEEPA emergency.

These procedural deficiencies and lack of substantive controls by Congress raise questions as to the political implications for emergency powers when viewed from a revived Law Execution Theory of the Executive Powers Clause. Does the current statutory framework of emergency power fit neatly with Mortenson's revised theory of the executive power?

The Law Execution theory suggests that Congress's modern statutory framework is divorced from the Madisonian conception of emergency powers that liberal constitutionalism envisions. If we agree that the original meaning of the executive power was "unambiguously limited to . . . execution"[141] of law set forth

140. Lobel, *supra* note 15, at 1385, 1415.
141. Mortenson, *supra* note 11, at 1188.

by legislative authority and for the executive "to put a law, or any thing planned, in practice,"[142] then it would seem that mere procedural constraints under the NEA, for example, are not in keeping with the historical and original understanding of the Executive Power Clause. In other words, the "executive [is] subject to plenary control and instruction by parliamentary legislation . . ." and without this prior instruction, the executive power "is an empty vessel that has nothing to execute."[143] A "prior instruction" is not, and should not, be simply procedural constraints outlined in loose fashion within a statute. Instead, "prior instruction" should be focused on substantive law that allows the legislature to govern during times of emergency in coordination with the executive. The most recent national emergency as a result of the international pandemic is an example of how legislatures and the executive can, in the Madisonian sense of crisis government, work in coordination and meld together liberal constitutionalism in emergency powers doctrine and the Law Execution theory.[144]

For example, emergency responses to the pandemic by some legislatures across the world entail refusing to "grant certain powers to the executive," while in other instances the interactions between the legislature and the executive have "taken the form of collaboration, such as when the legislatures pass new laws in consultation with the executive."[145] Indeed, one could surmise that the Law Execution Theory of the Executive Power Clause envisions what liberal constitutionalists view as not only checks and balances, but also a relationship between the two branches in times of emergency that "take of the form of cooperation and dialogue" instead of the inherent, expansive, and unilateral approach so entrenched in our current constitutional structure under the relativist theory and the Royal Residuum theory. During times of crisis, such as an international pandemic, there is evidence that legislatures will assert themselves "by enacting new laws" that constrain but also guide, regulate and coordinate with the executive.[146] This is the quinntessential ideal of liberal constitutionalism: legislatures that play the "Madisonian role of limiting the executive to measures adopted by law."[147]

The Law Execution theory — that the executive power is nothing more than the power to execute the laws set forth by Congress — has a variety of other political implications. While a response to an emergency might take longer, such coordinated and deliberate efforts by Congress to enact laws setting forth substantive requirements of the executive, but still retaining control and power during times of emergency, may "produce better reason-giving, forced by the back and forth between the different branches."[148] Likewise, the Law Execution Theory may facilitate, not a unilateral system of the executive unbound, but one in which

142. *See* ALLEN, *supra* note 106.
143. Mortenson, *supra* note 11, at 1235.
144. Ginsburg & Versteeg, *supra* note 122, at 36.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 37.

Congress prepared law that, when executed by the executive, had "multiple branches of government … involved in formulating the response."[149] This, according to Ginsburg and Versteeg, "might demonstrate a consensus among institutions with their own distinct bases of legitimacy."[150] Legislative involvement in the execution of the law, or at least coordination, may help "identify blind spots in governmental decision-making, as well as to force careful consideration to ensure that errors are not simply repeated because of inertia."[151] It seems that, under a more narrow understanding of the Law Execution Theory, the Executive Power Clause in times of emergency could be interpreted and applied in a manner that encourages a response to emergencies "through the involvement of multiple branches of government, with an executive that is bound to interact with other branches of government, which would be in keeping with traditional notions of liberal constitutionalism."[152] And the value of legislatures having "distinct advantages as arenas for policy debate" should not be lost in translation here.[153]

In fact, one could argue that this "interbranch dialogue" is in fact the essence of what the original understanding of the Executive Power Clause was meant to achieve.[154] In other words, the traditional sense of the executive power is not, as Posner and Vermeule suggest, one in which the executive is not *unbound* but instead *bound* by and to the legislature's prior actions, setting forth substantive requirements and projects that must be carried out, not necessarily alone, but in collaboration with, the legislature.

Indeed, the NEA, for example, is devoid of substantive legal requirements, criterias, and other concrete tasks that govern how the executive is to address emergencies, instead handing the President carte blanche to do as he pleases, with easy escape hatches built into the procedural safeguards. The Law Execution theory and its original understanding, as persuasively argued by Mortenson, suggests that modern emergency statutes are hollow and weak examples of the kind of crisis government that liberal constitutionalism envisions, one that is truly a sharing and coordination of powers between the executive and legislative branches. Indeed, there is room for normative policy proposals when revisiting liberal constitutionalism with the scalpel of the original understanding of the Executive Power Clause in hand.

As Ginsburg and Versteeg explain, some countries "require the legislature to declare the emergency that activates the legislation" during times of emergency.[155] This rather simple tweak in process seems to conform more neatly with the Law Execution theory of executive powers, because it entrusts the decision to

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Christine Bateup, *The Dialogic Promise - Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1137 (2006).
155. Ginsburg & Versteeg, *supra* note 122, at 11.

determine whether an emergency exists within the legislature. This might translate into legislatures accompanying the authority to declare an emergency with substantive legal requirements that the executive must follow in order to keep the emergency in force. As Locke explained, the legislative power was the "right to direct how the force of the commonwealth shall be employed" while the executive power was the ability to pursue the "execution of the laws that are made, and remain in force."[156] This *ex ante* and *ex post* framework may permit the legislature to enjoy involvement in the emergency and "allow tailoring to the specific needs of the crisis at hand."[157] But a longstanding focus on legislative responses to expansive executive powers during times of emergency seemed to have been accepted from scholars and jurists for decades. Edwin Corwin once explained, in discussing *Youngstown*, "[t]he best escape from presidential autocracy in the age we inhabit is not, in short, judicial review, which can supply only a vacuum, but timely legislation."[158] Yet, reimagining liberal constitutionalism in a world where the Law Execution Theory of executive power is predominant may shift jurists and scholars back to emphasizing the role of courts.

B. Doctrinal Implications

There are two primary versions of the predominant view of the Royal Residuum Theory of the Executive Power Clause that color the Court's doctrinal landscape. The first is that the President enjoys defeasible powers that authorize him to exercise his powers anytime he believes necessary, "so long as neither the Constitution nor any specific statute forbids it."[159] Doctrinally, this approach fits into Justice Jackson's third model of his tripartite test.[160] The more aggressive approach is that Article II grants indefeasible powers that effectively allow the President to do anything he believes necessary for the preservation of the nation during times of emergency short of violating the Constitution.

The U.S. Constitution does not have a state of emergency or crisis government provision that permits either Congress or the executive branch to declare a national emergency, but it does reserve some powers to the military and Congress in special circumstances. For example, under Article I, the Congress can suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[161] Further, Congress may exercise the powers of martial law and may "provide for the calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[162] Nonetheless, the "Constitution does not

156. *See* Mortenson, *supra* note 11, at 1231 (quoting LOCKE, SECOND TREATISE, at 164).
157. Ginsburg & Versteeg, *supra* note 122, at 11.
158. CORWIN, *supra* note 28, at 157.
159. Mortenson, *supra* note 1, at 1269, 1272.
160. *Youngstown*, 343 U.S. at 637–638 (Jackson, J., concurring) (defining Zone Three as presidential action invalid if prohibited by congressional act or Constitution).
161. U.S. CONST. art. 1, § 9, cl. 2 (U.S.).
162. U.S. CONST. art. I, § 8, cl. 15.

expressly grant any such [emergency] power to the President."[163] Still, the Court has, for decades, helped alter its own power to review executive actions. In *Curtiss-Wright*, the Court noted that the executive has "plenary and exclusive power" over foreign affairs. The Court went further in *Korematsu v. United States*, explaining that the Court should not reject or question the military's claims of necessity.[164] As Trevor Morrison explains, the "question of judicial review does not arise" in executive exercises of power because of a nearly assumed deference to the executive in matters implicating foreign affairs or national security.[165]

A few of the Supreme Court's Royal Residuum theorists support an expansive interpretation of the Executive Power Clause, but incorrectly understood the original meaning. Justice Clarence Thomas, in *Zivotofsky v. Kerry*, explained:

> Founding-era evidence reveals that the 'executive Power' included the foreign affairs powers of a sovereign State . . . . William Blackstone, for example, described the executive power in England as including foreign affairs powers . . . . This view of executive power was widespread at the time of the framing of the Constitution . . . . Given this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the "executive Power" vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution.[166]

As Mortenson has pointed out, this broad and expansive view of the Executive Power Clause under the Royal Residuum Theory incorrectly states the historical record, yet Thomas's view is widely shared and held across a variety of Presidential administrations, as well as a few other members of the Court.

The Court in *Trump v. International Refugee Assistance Project* weighed similar expansive arguments from the government.[167] There, the federal government argued that the "'exclusion of aliens is a fundamental act of sovereignty' that is both an aspect of the 'legislative power' and also 'is inherent in the executive power to control the foreign affairs of the nation.'"[168] The late-Justice Antonin Scalia likewise explained that the Executive Power Clause "does not mean some of the executive power, but all of the executive power."[169] He elaborated by noting that, "[i]t is not for us to determine . . . how much of the purely executive

163. CHRIS EDELSON & LOUIS FISHER, EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR 7 (2013).

164. Korematsu v. United States, 323 U.S. 214, 218–19 (1944).

165. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196–97 (2006).

166. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 35–37 (2015) (Thomas, J., concurring).

167. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

168. Brief for the Petitioner at 4, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (No. 16-1436), 2017 WL 3475820 (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950)).

169. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (citing U.S. CONST. art. II, § 1, cl. 1).

powers of government must be within the full control of the President."[170] The Court in *Trump v. Hawaii* effectively, "brushed aside any effort to limit the emergency-based rationales to situations where Congress would have a hard time reacting quickly."[171] Indeed, there is a link between the dissenting opinions in *Youngstown*, expressing approval for expansive executive powers that are nothing short of constitutional violations, according Royal Residuum theorists such as Scalia and Thomas.

The Court in recent decades has taken a hands-off approach to judicial review of executive actions over foreign affairs and national security. The Court's position also seems to suggest that its deference also extends to emergency and crises, as the Court will "rarely, if ever, scrutinize a President's motives or the evidence underlying a crisis claim."[172] This is a departure from Justice Black's ruling in *Youngstown*, which envisioned a role for the judiciary, although limited, in checking the power of the executive during times of emergency. Much of this aversion is due to a perception that the Court lacks the competence over national security issues to insert itself into such decisions. In *Trump v. Hawaii*, the Court explained that "when it comes to collecting evidence and drawing inferences on questions of national security," we lack the competence and knowledge to second-guess the executive.[173] Likewise, in *Jesner v. Arab Bank, PLC*, the Court explained, "Foreign policy and national security decisions are delicate, complex, and involve large elements of prophecy" in which the judiciary does not have aptitude.[174] Indeed, the name of the game for the Roberts Court, in particular, has been to evaluate facts brought forth that substantiate the Executive's decision as being entitled to deference.[175] This judicial acquiescence results in Presidents asserting their emergency power and "nearly always prevail[ing]."[176] Indeed, the problem in today's hyperpolarized politics is the specter of manufactured emergencies by populist executives. The Trump border wall national emergency is arguably an example of a manufactured emergency to reach a populist policy goal without regard to Presidential prudence, judicial oversight or congressional restraint.

What was unclear at that time, is today unequivocal as a result of Mortenson's research: American emergency powers doctrine is most accurately grounded in history and doctrine under the Law Execution Theory in light of the Court's *Youngstown* ruling. There, the Court leaned on judicial review to rein in executive power in *Youngstown*. Justice Jackson referred to the federal government's briefs to elaborate on the expansive argument regarding the seizure of the steel

170. *See also id*. at 709.

171. Tsai, *supra* note 139, at 600.

172. *Id*. at 599.

173. Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2018)).

174. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1414 (2018) (Gorsuch, J., concurring) (quoting Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948) (Jackson, J.)).

175. Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010).

176. Tsai, *supra* note 139, at 593.

mills. There, the federal government argued that the power of seizure in the Executive Power Clause "constitutes a grant of all the executive powers of which the Government is capable."[177] Justice Jackson gave this argument short shrift, responding, "[i]f that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."[178] Yet, as discussed above, Justice Black's majority ruling in *Youngstown* is perhaps doctrinally the best example of the Law Execution Theory influencing the Court's emergency powers doctrine.

Black's ruling fits neatly, when viewed in retrospect from a liberal constitutionalism angle, with a revived Law Execution Theory. There, Black explained, "if the President had authority to issue the order he did, it must be found in some provisions of the Constitution," and the Constitution is neither "silent nor equivocal about who shall make the laws which the President is to execute."[179] If the President wanted the power "to issue the order [seizing steel mills]" then that power "must stem either from an Act of Congress or from the Constitution itself."[180] He expounded upon, implicitly, elements of the Law Execution Theory, noting that the "President's order [seizing steel mills] does not direct that a congressional policy be executed in a manner prescribed by Congress" and the "Constitution did not subject this law-making power of Congress to presidential . . . supervision or control."[181] He concluded his landmark decision, stating "The Founders of this Nation entrusted the law making power to the Congress alone in both good times and bad times."[182] Harold Koh has argued that the *Youngstown* decision is one that urges consensus between Congress and the executive over substantive foreign policy ends, but that there is a place for the judiciary to become more involved in these matters.[183]

This raises questions as to the legitimacy of judicial review in cases where the executive exercises its powers beyond that narrow interpretation of the Executive Power Clause under the Law Execution Theory. In other words, in a world where liberal constitutionalism flourishes under the Law Execution Theory, what role does the judiciary play? Should the judiciary exercise a more aggressive role in reining in expansive executive exercises of power that subvert the narrow conception of execution of laws?

Historical doctrine suggests that the Court is certainly capable of imposing a stronger presence in times of emergency. In *Ex parte Milligan*, the Court explained that the government cannot use pretext to exercise martial law and that such actions had to be in service of a real threat.[184] The Court stated that the

177. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).
178. *Id.* at 640–641.
179. *Id.* at 587 (Jackson, J., concurring).
180. *Id.* at 585.
181. *Id.* at 588.
182. *Id.* at 589.
183. Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1282–85, 1309 (1988).
184. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121, 127 (1866).

"necessity must be actual and present" and the invasion must be real."[185] In *Ex parte Merryman*, Chief Justice Taney ruled President Lincoln's unilateral suspension of habeas unconstitutional, because Lincoln failed to offer evidence of a true exigency.[186] In *Youngstown*, Justice Black's, Justice Jackson's, and Justice Frankfurter's opinions supported the Court retaining some power over judicial review. Jackson noted, "I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress."[187] Likewise, Frankfurter noted that "with the utmost unwillingness, with every desire to avoid judicial inquiry . . . I cannot escape consideration of the legality" of the President's actions, and the judiciary, at times, may "have to intervene in determining where authority lies as between the democratic forces in our scheme of government" but to be "wary and humble" in doing so.[188]

What the Law Execution Theory tells us is that judicial oversight of emergencies could be revived alongside liberal constitutionalism. This includes strict and vigorous review of statutory or constitutional procedural requirements during times of crisis. The executive must "execute the laws," and thus, courts must evaluate whether constitutional and statutory requirements are met. As Samuel Issacharoff and Richard Pildes explain, "[w]hen courts have upheld the government's actions, they have done so only after a judgment that Congress, as well as the executive, has endorsed the action."[189] This is nothing new. The Court in *Youngstown* insisted upon the executive following legislative authorization.[190] But as mentioned above, the Court and the executive have lost their way over the decades since.

There are substantive arguments for expanded judicial oversight of executive actions during times of crisis. The Law Execution Theory suggests that, without prior legislative approval, the executive cannot act. Thus, where the executive invokes royal residuum powers in contravention of the original understanding of the Executive Power Clause, and where that action infringes on civil liberties or fundamental rights, then courts could actively step in. This is a key ingredient to liberal constitutionalism: that the courts retain some power of review.

CONCLUSION

Political and doctrinal emergency powers discourses have been dominated by the Royal Residuum theory that views Article II's Executive Power Clause as an

185. *Id.* at 127.
186. *Ex parte* Merryman, 17 F. Cas. 144 (C.D. Md. 1861).
187. *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring).
188. *Id.* at 596–97 (Frankfurter, J., concurring).
189. Samuel Issacharoff & Richard Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1, 2 (2004).
190. *Youngstown*, 343 U.S. at 637 (1952) (Jackson, J., concurring).

expansive, unfettered power over foreign affairs and national security.[191] Yet, many questions have remained unanswered for decades as to "[w]hat is executive power? What is the degree, and what are the limitations? . . . What are its boundaries?"[192] Julian David Mortenson's recent scholarship provides an historical and originality basis to argue that the view "must uproot it systematically."[193] This Article chipped away at the dominant view by focusing its efforts on rethinking how the expansive view of the Executive Power Clause has, perhaps incorrectly, been applied to Presidential emergency powers doctrine.

Indeed, it is quite clear that the executive power was simply the power to "carry out projects defined by a prior exercise of the legislative power" and to implement "substantive legal requirements and authorities that were created somewhere else."[194] The political implications are worthy of consideration. Legislative involvement in the execution of the law, per the Law Execution theory, helps "identify blind spots in governmental decision-making, as well as to force careful consideration to ensure that errors are not simply repeated because of inertia."[195] The Executive Power Clause in times of emergency, under the theory, may better support liberal constitutionalism's conception of "the involvement of multiple branches of government, with an executive that is bound to interact with other branches of government."[196] Coordinated efforts by Congress to enact laws setting forth substantive requirements of the executive may, under a Law Execution theory, "produce better reason-giving, forced by the [back] and forth between the different branches," in keeping with the tenors of liberal constitutionalism.[197] This may facilitate "multiple branches of government . . . [getting] involved in formulating the response."[198]

Further, the doctrinal implications for invoking a renewed Law Execution theory as part of liberal constitutionalism are equally worthy of consideration. Based on Mortenson's research, it seems that American emergency powers doctrine is most accurately grounded in history and doctrine under the Law Execution Theory and that judicial oversight of emergencies could be revived alongside liberal constitutionalism. Indeed, the executive is to "execute the laws," and thus, courts could be viewed as institutions that evaluate whether constitutional and statutory requirements, imposed by the legislative branch, are met during times of emergency.

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191. There are other sources of this expansive executive power that scholars and various administrations have relied upon, including Article II's Commander and Chief Clause, as well as the Take Care Clause.

192. Myers v. United States, 272 U.S. 52, 229–30 (1926) (Reynolds, J., dissenting) (quoting from 4 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 186 (1851)).

193. Mortenson, *supra* note 11, at 1174.

194. *Id.*

195. *Id.*

196. *Id.*

197. Ginsburg & Versteeg, *supra* note 122, at 37.

198. *Id.*

This Article sought to revive liberal constitutionalism in emergency powers doctrine by arguing that the Law Execution theory of executive power meant the power "was conceptually an empty vessel until there were laws or instructions that needed executing" by the legislature, and this theory provides a basis for a more narrowed and constrained executive during times of emergency.[199] A revised interpretation of the Law Execution theory that references the executive power as "unambiguously to a single, discrete, and potent authority" may alter the way scholars understand and appreciate a Madisonian-centric conception of government, while perhaps influencing how legislators govern and manage affairs during times of emergency in coordination with, not delegation to, the executive.

199. Mortenson, *supra* note 11, at 1169.

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