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# Law and the President

Richard Pildes

NYU School of Law, pildesr@exchange.law.nyu.edu

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## BOOK REVIEWS

### LAW AND THE PRESIDENT

THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner and Adrian Vermeule. New York, N.Y.: Oxford University Press. 2010. Pp. 249. \$29.95.

*Reviewed by Richard H. Pildes\**

#### INTRODUCTION

How much does law *in fact* constrain the exercise of presidential power, in both domestic and foreign affairs? How much *should* law constrain presidential power?

It is widely recognized that the expansion of presidential power from the start of the twentieth century onward has been among the central features of American political development. While Andrew Jackson, with his rhetorical creation of the “plebiscitary presidency,” and Abraham Lincoln, with his invocation of presidential war powers during the existential military threat of the Civil War, were among the most powerful and activist of all presidents, the nineteenth-century presidency was essentially a narrowly understood office that presided over a highly decentralized and fragmented political system. What Theodore Roosevelt later began identifying and celebrating as the “Jackson-Lincoln” school of presidential practice remained latent through most of the nineteenth century.<sup>1</sup> As the timing of Roosevelt’s comments signals, it was the Progressive movement, first at the state and then at the national level, that turned to executive power as the institutional vehicle through which to bypass corruption-plagued, paralyzed legislative bodies and status quo-affirming courts, and realize the Progressives’ agenda of an activist government, responsive to average voters, that would ensure health, safety, and economic fairness in a

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\* Sudler Family Professor of Constitutional Law, NYU School of Law and Co-Director, NYU Center on Law and Security. I thank Michael Dorf and Sidney Tarrow, along with faculty and student participants in a Cornell Law School colloquium, for helpful comments. For more than the usual helpfulness in commenting, I would like to thank Dan Meltzer, Trevor Morrison, Adam Cox, Daryl Levinson, Robert Bauer, Kenji Yoshino, Liam Murphy, Dan Ernst, David Schleicher, Dan Hulsebosch, and Sam Issacharoff. For excellent research assistance, I thank Dan Rockoff.

<sup>1</sup> See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2078 (2009) (noting that Theodore Roosevelt drew on the “Jackson-Lincoln” school of presidential practice in “assert[ing] that the American President was free to do anything on behalf of the nation except what the Constitution and the laws explicitly proscribed”).

world transformed by industrialization and concentration of economic power.<sup>2</sup>

A string of Progressive Era presidents and intellectuals revived, enhanced, legitimated, and institutionalized the expansive presidency with which, with ebbs and flows, we have since lived. Woodrow Wilson, in his later years as a scholar before assuming office, urged presidents to view their office as “anything [they have] the sagacity and force to make it.”<sup>3</sup> Herbert Croly, a key architect of the Progressive movement, has been characterized as seeking to realize “Jeffersonian ends through Hamiltonian means.”<sup>4</sup> Indeed, this renaissance of Alexander Hamilton as the original visionary of the energetic President, capable of cutting through factional division and corruption, was characteristic and oft repeated. Calling Hamilton “the most brilliant American statesman who ever lived, possessing the loftiest and keenest intellect of his time,” Roosevelt conjured up Hamilton’s spirit;<sup>5</sup> even Roosevelt’s more conservative successor, William Howard Taft, similarly praised Hamilton as “our greatest constructive statesman.”<sup>6</sup> Meanwhile, Progressives disparaged the Constitution’s system of

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<sup>2</sup> For a good synthesis of Progressive Era attitudes toward the presidency, see generally Andrea Scoseria Katz, *The Progressive Presidency and the Shaping of the Modern Executive* (2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1900936>. As Katz notes, Progressives castigated Congress as an “incurably deficient and inferior organ”: Herbert Croly described “the moral and intellectual cowardice” of Congress, and Walter Lippman described Congress as “a group of blind men in a vast, unknown world.” *Id.* at 7 (quoting RICHARD HOFSTADTER, *THE PROGRESSIVE MOVEMENT* 10 (1963); HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 73 (1915); WALTER LIPPMAN, *PUBLIC OPINION* 165 (NuVision 2007) (1922)) (internal quotation marks omitted).

<sup>3</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (1908). Wilson’s shift in favor of presidential power is particularly noteworthy because in his first major work, the famous *Congressional Government*, he had viewed Congress as the appropriate prime mover in the American system; indeed, he urged a strong role for political parties to check executive independence, precisely so that Congress would be able to “mak[e] its authority complete and convenient.” WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 312 (Boston, Houghton Mifflin Co. 1885). He sought to enable Congress to function more in the form of a parliamentary government, but he saw Congress as the central actor. *See id.* at 52–55. By the time of *Constitutional Government*, he abandoned this view and insisted that only the President could provide the kind of leadership necessary for an effective state. As Professor Sidney Pearson’s introduction to the 2002 edition of *Constitutional Government* put it: “Presidential leadership occupied the most exalted position in Wilson’s hierarchy of political virtues.” Sidney A. Pearson, Jr., *Introduction* to WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* ix, xlvi (Transaction Publishers 2002) (1908).

<sup>4</sup> David K. Nichols, *The Promise of Progressivism: Herbert Croly and the Progressive Rejection of Individual Rights*, PUBLIUS: J. FEDERALISM, Spring 1987, at 27, 28. This characterization refers to Croly’s views as reflected in HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909).

<sup>5</sup> RON CHERNOW, *ALEXANDER HAMILTON* 4 (2004) (quoting STEPHEN F. KNOTT, *ALEXANDER HAMILTON AND THE PERSISTENCE OF MYTH* 87 (2002)) (internal quotation marks omitted). Chernow’s account is the greatest modern biography of Hamilton.

<sup>6</sup> *Id.* (quoting KNOTT, *supra* note 5, at 259) (internal quotation marks omitted). As the only man to have served as both President and Chief Justice of the United States, Taft had a complex theory and practice of presidential power. While his famous 1916 book, *Our Chief Magistrate and His Powers*, sought to present a more limited conception of presidential powers than Theodore Roosevelt’s, in practice Taft was closer to Roosevelt, with Taft’s main concern being Roose-

checks and balances as a blueprint for government “divided against itself,” a government “deliberately and effectively weakened,”<sup>7</sup> that could be forged into an instrument of effective power only through the dominating, energetic leadership of a commanding President.

Thus, long before the New Deal, those seeking an activist national government had envisioned a powerful presidency as the vehicle through which their aims could (and had to) be realized.<sup>8</sup> In the aftermath of World War II, Congress’s power was further discredited in foreign affairs and military matters by its abject failure in the 1930s to come to terms with the threat that the rise of Nazi Germany posed — a failure that continued to limit Congress’s credibility in these areas for thirty or so years after the war.<sup>9</sup> And as is well known, the ensuing rise of the Cold War, the national security state, and the constant specter of instant nuclear annihilation further enhanced the legitimacy (and reality) of ever-expanding presidential power.

Only in the 1970s did this general thrust in the direction of enhanced presidential power confront more complex terrain.<sup>10</sup> In the aftermath of the presidentally led Vietnam War, increased U.S. participation in wars of choice rather than of necessity, and President Nixon’s domestic abuses of the office, liberals (in particular) developed anxiety and ambivalence about the powers of the presidency. The work of many of the great liberal constitutional scholars for whom the Vietnam War was a formative experience reflected this newfound concern;<sup>11</sup> in the mid-1970s, Congress enacted a series of statutes designed to cabin presidential power.

Yet this transformation of perspective about the proper bounds of presidential power was countered by the rise of a transformative conservative

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velt’s alleged failure to ground his own conception of presidential powers more clearly in the Constitution. See DONALD F. ANDERSON, WILLIAM HOWARD TAFT 291–95 (1968).

<sup>7</sup> CROLY, *supra* note 2, at 40.

<sup>8</sup> Writing in 1941, when presidential power was fully ascendant in the wake of the New Deal, Professor Edward Corwin argued that the expansive modern presidency was:

the product of the following factors: (1) social acceptance of the idea that government should be active and reformist, rather than simply protective of the established order of things; (2) the breakdown of the principle of dual federalism in the field of Congress’ legislative powers; (3) the breakdown of the principle of the separation of powers as defining the relation of President and Congress in lawmaking; (4) the breakdown of the Monroe Doctrine and the enlarged role of the United States in the international field.

Edward S. Corwin, *Some Aspects of the Presidency*, 218 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 131 (1941).

<sup>9</sup> See, e.g., ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 99 (1973) (“No one for a long time after [the Neutrality Acts of the 1930s] would trust Congress with basic foreign policy. Congress did not even trust itself.”).

<sup>10</sup> See, e.g., Robert S. Hirschfield, *Expert Views*, in THE POWER OF THE PRESIDENCY 276, 277 (Robert S. Hirschfield ed., 3d ed. 1982) (concluding that “the dominant pattern of professional thought about the Presidency in the period from Franklin Roosevelt to the Vietnam war and the Watergate affair” viewed the President’s expanding power as a positive development).

<sup>11</sup> For two prominent examples, see BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 4–5 (2010); JOHN HART ELY, WAR AND RESPONSIBILITY iv (1993).

movement, cresting initially in President Reagan's 1980 election, which had as its aim a dramatic undoing of the New Deal consensus that had reigned since the 1940s.<sup>12</sup> And like all modern insurgent national movements, the new Republican majority viewed presidential power as the means through which its ambitions would be most effectively and immediately realized.<sup>13</sup> Conservatives, the one source of efforts to urge limitations on presidential power throughout the twentieth century, now became the leading proponents of the energetic, forceful presidency that had been transforming American government throughout the century. Thus, as Democratic presidents of the 1990s and 2000s became more ambivalent about presidential power than their predecessors, Republican presidents seized the scepter of expansive presidential power. And with their greater control of the presidency since the 1980s, Republicans had greater opportunity to implement their vision — a vision that included renewed emphasis on the “unitary executive branch” theory of government administration<sup>14</sup> as well as more aggressive assertions of autonomous Article II powers, which Congress purportedly could not restrict, than in the past.<sup>15</sup> In addition, as presidents of both parties found the path to legislative partnership blocked by the rise of hyperpolarized political parties, particularly during divided government, presidents found new tools to set policy unilaterally, without congressional endorsement.<sup>16</sup> Thus, presidential power expanded through liberal hands for most of the century, and just as liberals began to have second thoughts, conservatives propelled the expanding presidency further.<sup>17</sup>

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<sup>12</sup> See SEAN WILENTZ, THE AGE OF REAGAN 127–28 (2008).

<sup>13</sup> See, e.g., CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 44 (2007) (“But the new generation of conservative activists, who had no first-hand memory of those [earlier conservative fights against the Progressive- and New Deal-era presidencies], began to associate unchecked presidential authority with their desire for lower taxes, a more aggressive stance against Communism, and domestic policies that advanced traditional social values.”).

<sup>14</sup> Many presidents had asserted the right to fire all executive branch officials at will. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 29 (2008).

<sup>15</sup> For a history of such claims to autonomous presidential powers under Article II’s war powers provisions, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941 (2008).

<sup>16</sup> The most extensively documented study in the rise of various means of direct presidential action, such as executive orders, is WILLIAM G. HOWELL, POWER WITHOUT PERSUASION (2003). As Professor Howell puts it: “While it was relatively rare, and for the most part inconsequential, during the eighteenth and nineteenth centuries, unilateral policy making has become an integral feature of the modern presidency.” *Id.* at 179. For the Clinton Administration, this point is chronicled in Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>17</sup> As a critic of modern presidential power puts it, “today, both major parties are in love with the presidency.” ACKERMAN, *supra* note 11, at 120.

## I. THE EXECUTIVE UNBOUND

The general outlines of this history are familiar. But in a bracing new book, *The Executive Unbound*, Professors Eric Posner and Adrian Vermeule want to take this story to a different quantum level. Posner and Vermeule insist not just that presidential powers have expanded dramatically in recent decades but that these powers are not effectively constrained by law. The stark reality of presidential power, as they put it, is that “law does little to constrain the modern executive” (p. 15). This is true, they assert, not just in exceptional circumstances, such as times of crisis or emergency, but in general in the modern state. This unconstrained power allegedly exists not just with respect to limited substantive arenas, such as foreign affairs or military matters, but across the board, with respect to domestic matters as well.<sup>18</sup> Thus, while some have long argued that *inter arma enim silent leges* (in times of war, the laws are silent),<sup>19</sup> Posner and Vermeule argue that the laws are always silent, in effect, when it comes to presidential power. Finally, they contend that this proposition is not just true with respect to some sources of potential legal constraint, such as the Constitution; it is central to their argument that statutes that purport to regulate presidential conduct are also largely ineffective. As

<sup>18</sup> Scholars have long concluded that presidential powers expand significantly during wartime, for example, in part because the other branches accede to greater presidential power. See, e.g., EDWARD S. CORWIN, THE PRESIDENT 262 (4th ed. 1957) (concluding that “the principal canons of constitutional interpretation are in wartime set aside so far as concerns both the scope of national power and the capacity of the President to gather unto himself all constitutionally available powers in order the more effectively to focus them upon the task of the hour”); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 12 (1948) (noting that “it is always the executive branch in the government which possesses and wields the extraordinary powers of self-preservation of any democratic, constitutional state”). In a recent, more empirically oriented confirmation and extension of this view, Professor William Howell, Saul Jackman, and Jon Rogowski conclude that “during war presidents obtain heightened degrees of success in both foreign and domestic affairs, including policies that only tangentially relate to conduct of war.” William G. Howell et al., The Wartime President 207 (July 15, 2011) (unpublished manuscript) (on file with the Harvard Law School Library). The authors note, though, that these effects vary with the particular war; while Presidents Franklin D. Roosevelt and George W. Bush had greater success in passing their preferred budgets during World War II and the war in Afghanistan than during non-war years, President Truman did not have similarly greater success during the Korean War. *Id.* The more debated issue is whether expansions of presidential powers during wartime recede once the crisis ends or lead to a more permanent expansion in presidential powers. See, e.g., ARTHUR M. SCHLESINGER, JR., WAR AND THE AMERICAN PRESIDENCY 52 (2004) (concluding that “while war increased presidential power, peace brought a reaction against executive excess”); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 284–85 (2002) (“Following (usually not during) each war, elites regret . . . restrictions on civil liberties because the restrictions often seem — from the *ex post* perspective . . . to be unwarranted or extreme.” *Id.* at 285).

<sup>19</sup> The phrase traces back to Cicero. Cicero’s phrase was “silent enim leges inter arma” (“When arms speak, the laws are silent”). 14 CICERO, *Pro T. Annio Milone Oratio*, in PRO T. ANNIO MILONE — IN L. CALPURNIUM PISONEM — PRO M. AEMILIO SCAURO — PRO M. FONTEIO — PRO C. RABIRIO POSTUMO — PRO M. MARCELLO — PRO Q. LIGARIO — PRO REGE DEIOTARIO 16–17 (N.H. Watts trans., Harvard Univ. Press 6th prtg. 1979) (n.d.). For a modern usage, see WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218 (1998).

they say, “the basic aspiration of liberal legalism to constrain the executive through statutory law has largely failed” (p. 112).

Thus, when Congress does impose legislative constraints, Posner and Vermeule assert, the laws are typically vague, leaving ample room for executive discretion. Statutes “have a Potemkin quality: they stand about in the landscape, providing an impressive facade of legal constraint on the executive, but actually blocking very little action that presidents care about” (p. 88). Those legal constraints that do exist, whether constitutional or statutory, are not aggressively enforced by courts — first, because American courts stay out of many controversies concerning presidential power, and second, because when courts do play a role, they defer substantially to executive action and interpretation (pp. 52–58). Indeed, presidents can act directly in the face of even clear law and can force other institutions, such as Congress and the courts, to try to stop them. Much of the time, these other institutions will be unable or unwilling to do so.

*The Executive Unbound* thus invites a general inquiry into the relationship between law and presidential power, rather than the more traditional, narrowly focused debates about presidential power during “emergencies,” or presidential control over military and foreign affairs.<sup>20</sup> As a more general matter, Posner and Vermeule insist we should abandon as naïve, self-deluded, and anachronistic the image and rhetoric of a President bound by law — an image they call that of “liberal legalism” or the “Madisonian framework” (p. 15). The imperial presidency, they suggest, is simply a fact: we need to become mature enough to accept it. And we should be clear about what the imperial presidency entails: presidential action that law does not meaningfully constrain.

Posner and Vermeule, however, urge us not to be anxious or worried about this state of affairs. We should not obsessively fear that we live, effectively, in a constitutional dictatorship. The alternative to a legally constrained President is not a President unconstrained altogether. Instead, Posner and Vermeule suggest that a variety of other constraints on presidential action have emerged as effective substitutes for the legal constraints that were originally envisioned in the Madisonian constitutional design or that “liberal legalist” proponents wish for today. Generally put, Posner and Vermeule call these alternative constraints “politics and public opinion” (p. 15), which are said to work effectively to cabin executive power to an appropriate extent. Much of their book is devoted to explaining in a systematic fashion how these nonlegal constraints purportedly work. Indeed, the combination that Posner and Vermeule both describe and celebrate of presidential discretion and nonlegal constraints on executive power yields a

<sup>20</sup> For general reflections on the virtues and vices of legal constraints in “exceptional contexts,” such as the use of military force or response to serious security threats, and a comparison of legal constraints to other constraints in these contexts, see Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT’L L. 145 (2003).

better functioning governmental system (presumably in utilitarian terms) than would a presidency seriously constrained by law.

First, they argue, a President unbound can produce better outcomes than a President bound to follow preexisting legislation: laws (constitutions and statutes) are always written in a specific context in the past, but technology, the economy, international dynamics, and other circumstances that characterize the modern age are exceptionally fluid and constantly shifting. Better to have presidents make their best judgment, all things considered, about the right action in the actual, immediate circumstances at hand than to have them be bound by laws that could not have contemplated these precise circumstances.

Second, and central to Posner and Vermeule's analysis, presidents do remain constrained — not by law, but by politics and the political judgment of others. As scholars since Richard Neustadt, if not earlier, have recognized, the actual, effective powers of a President (as opposed to the formal powers of the office) are directly rooted in, and limited by, his or her ongoing credibility.<sup>21</sup> Presidents want the capacity to exercise their best judgment as contexts arise. But other actors in the system, including "the public," will permit presidents to exercise more or less discretion depending on how credible those presidents are perceived to be (pp. 122–23). Credibility means generalized judgments about presidential performance, such as how well motivated the President is considered to be, how effective his or her actions are judged to be, and how wise or prudent his or her judgments are taken to be. "Credibility" in this context is analogous to what scholars of the Supreme Court have called long-term "diffuse support" for the Court; diffuse support means the willingness of the public to support the Court's discretionary power, even when people might disagree with particular outcomes, because they generally believe the Court is exercising these powers in sound ways for good reasons.<sup>22</sup> The more credible presidents make themselves, the more other actors will permit them to exercise broad discretion — including discretion to ignore or manipulate the law, which is the unique contribution of Posner and Vermeule's view.

Thus, argue Posner and Vermeule, presidents have strong incentives to adopt practices and take actions that establish and maintain their credibility

<sup>21</sup> See RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 185 (1990) (arguing that presidential influence rests on formal powers of the office, professional reputation — involving "impressions in the Washington community about the skill and will with which he put[s] those [formal powers] to use" — and prestige or public standing).

<sup>22</sup> See, e.g., Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992) (finding that "the mass public does not seem to condition its basic loyalty toward the Court as an institution upon the satisfaction of demands for particular policies or ideological positions"); Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676, 692–93 (2003) (concluding that public support of the Supreme Court as an institution generally remains strong despite perceptions of partisanship).

(p. 133). These incentives will lead smart presidents to adopt various sorts of *self*-binding mechanisms that limit their discretion: commitments to transparency so others can monitor and oversee; or commitments to multi-lateral approaches in foreign policy so that presidents can act only with approval of other nations; or commitments to ceding some power to independent actors, such as special prosecutors or other institutions within the executive branch; or similar approaches through which presidents accept limits on their own power (pp. 113–53). By acting consistently with these self-adopted constraints, presidents build up their credibility by signaling that they are using their discretion in acceptable ways and should therefore continue to be granted that discretion — including discretion to avoid, circumvent, or ignore the law when, in the President’s best judgment, doing so will produce better outcomes.

Here is one concrete example of what the Posner and Vermeule approach means in practice. During recent political conflicts over whether Congress should raise the government’s debt ceiling to avoid default, some constitutional academics debated whether the Constitution permitted the President unilaterally to meet the country’s financial obligations, such as by issuing new debt. This debate about whether Congress or the President had the lawful authority to act in this area was contentious enough. But Posner and Vermeule argued that this legal debate should be treated as a sideshow and bypassed altogether. Instead, they argued, President Obama should simply have asserted that he had unbounded emergency powers, including the power to honor and fund the debt of the United States — regardless of constitutional and legal issues concerning whether only Congress had the lawful power to do so — to avoid the tumult to the U.S. and world economies that would have resulted from a default.<sup>23</sup> On this line of thinking, when President Obama refused to follow this course and publicly stated that he had been advised this course would be illegal, he revealed either a confusion about how much law did or should constrain him or a simple lack of nerve.

Similarly, Posner and Vermeule believe presidents should not feel substantially constrained to follow the legal conclusions of the Department of Justice, including those of the Office of Legal Counsel (OLC), even though OLC was specifically organized and structured to provide authoritative legal analysis that binds the executive branch. During debates over whether the War Powers Resolution<sup>24</sup> (WPR) required President Obama to receive congressional approval to continue beyond sixty days the United States’ involvement in the NATO military operations against the Gaddafi

<sup>23</sup> See Eric A. Posner & Adrian Vermeule, Op-Ed., *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES, July 22, 2011, <http://www.nytimes.com/2011/07/22/opinion/22posner.html> (arguing that the President derives “authority from his paramount duty to ward off serious threats to the constitutional and economic system” and should thus raise the debt ceiling unilaterally).

<sup>24</sup> 50 U.S.C. §§ 1541–1548 (2006).

government in Libya, it was reported that OLC concluded the law did require congressional approval (which Congress never gave) — in which case the WPR also required the President to withdraw the uses of military force the WPR covered.<sup>25</sup> Senior lawyers from other parts of the executive branch, including the legal advisor to the State Department and the White House Counsel, concluded that the WPR did not apply.<sup>26</sup> In broad terms, the legal question was whether the President was waging an illegal war (or, put differently, conducting illegal military hostilities). And, when leaks revealed the internal executive branch deliberative process through which these issues were resolved, the President received a good deal of criticism on both procedural and substantive grounds for not properly respecting OLC's role in determining the legal constraints that should govern executive branch conduct.

Applying the framework developed in their book, Posner and Vermeule assert that these criticisms were fundamentally misconceived. As they put it: "A president need not have or consult any legal advisers at all; nothing prevents Obama from shutting down OLC and the other executive branch legal offices altogether and deciding the administration's legal positions for himself."<sup>27</sup> In other words, according to Posner and Vermeule, no good reason exists that presidents should be presumptively bound by OLC's legal conclusions or that the public should be concerned about the processes by which the President decides whether to follow OLC. If the risk is that presidents will otherwise manipulate or ignore the law altogether, Posner and Vermeule's answer is that "politics and public opinion" will determine whether any President will be permitted to take the action at issue. (I will leave aside for the moment the shortcomings of this argument; willingness to follow OLC interpretations would seem to be the quintessential kind of executive self-binding constraint that Posner and Vermeule otherwise advocate as critical to presidential credibility.)

If this description of Posner and Vermeule's argument sounds like a caricature, it is not. Posner and Vermeule do not argue in qualitative terms; they do not assert, for example, that presidents comply "less often" with law than traditional legalist accounts suggest, or that certain statutes in particular have failed to be effective constraints, or that in certain limited areas or contexts, presidents might be more willing to bend or avoid the law than in more routine contexts. The point of their book is to unite analyses of the President in domestic and foreign affairs and to present a

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<sup>25</sup> Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES, June 17, 2011, at A1, available at <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>.

<sup>26</sup> *Id.*

<sup>27</sup> Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There's Nothing Wrong with Obama Ignoring Some of His Own Legal Advisers on Libya*, SLATE (July 5, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/libyan\\_legal\\_limbo.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html).

coherent, clear, and penetrating framework for a general assessment of the relationship between law and presidential power.

For those inclined to think Posner and Vermeule's descriptive account is a tendentious one intended to justify expansive presidential power, it is noteworthy that scholars like Professor Bruce Ackerman see a similar reality, though Ackerman writes as a fearful critic.<sup>28</sup> Ackerman, too, concludes that the President has become less and less constrained by law; he believes that we face the risk of a "runaway presidency"<sup>29</sup> and a White House transformed "into a platform for charismatic extremism and bureaucratic lawlessness."<sup>30</sup> In addition, Ackerman views liberal as well as conservative scholars as currently engaged in a project of legitimating and justifying lawless and illegal presidential power. Thus, he views now-Justice Kagan's scholarship as confirming the reality of rampant presidential lawlessness; he characterizes her work as documenting that the Clinton White House (where she served for three years) "generated recurring bouts of lawlessness as the bureaucracy tried to fulfill the president's directives."<sup>31</sup> From a normative point of view, he considers her work to argue "that the dangers of charismatic lawlessness are outweighed by the president's unique claims to democratic legitimacy."<sup>32</sup> Concluding that Justice Kagan's academic work treats "the risk of lawlessness as an acceptable price to pay for presidential centralization,"<sup>33</sup> Ackerman asserts that her work has played a "key role" in forging a bipartisan elite consensus in support of dramatically expanded, and often lawless, presidential power.<sup>34</sup> I doubt Justice Kagan would consider this account an accurate description of her scholarship, but the fact that Ackerman sees an existing reality of widespread presidential illegality, in addition to the significant volume of scholarship that purportedly sees a similar reality, reveals that if Posner and Vermeule's views are idiosyncratic, they are neither unique nor confined to legal academics traditionally labeled "conservatives."

Ackerman differs from Posner and Vermeule, of course, on what he thinks ought to follow from the shared perception of presidents increasingly unconstrained by law. For Ackerman, the situation demands radical institutional innovation. Thus, he proposes creation of a "Supreme Executive Tribunal," a nine-member body of presidentially nominated, Senate-confirmed "judges for the executive branch" serving staggered twelve-year terms, before whom members of Congress would be able to bring actions (without traditional standing barriers) to challenge the legality of presiden-

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<sup>28</sup> See generally ACKERMAN, *supra* note 11.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Id.* at 37.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 37–38.

tial actions.<sup>35</sup> Once this tribunal resolves an issue, “its understanding of the law will be binding on the executive branch.”<sup>36</sup> Unless we redesign the basic separation-of-powers institutions in this dramatic fashion, argues Ackerman, we will face increasingly “extremist” and unconstrained presidencies. Posner and Vermeule, by contrast, essentially see the modern transformation in presidential powers, including the legally unconstrained executive, as both inevitable — so that Ackerman is tilting at windmills — and desirable: a cause for celebration, not alarm (pp. 5, 16).

It would be a mistake to dismiss too easily Posner and Vermeule’s analysis as obviously exaggerated. But even if the issue is not whether presidents ever comply with law but when they do and why, Posner and Vermeule’s book provides a novel, systematic framework for grappling with these questions. In the area of presidential studies, the Posner and Vermeule approach is particularly fresh. For many decades, legal scholarship on presidential power was confined to assessing how much formal legal power the President should be understood to have, as a matter of the original understanding at the time of the Constitution’s adoption or subsequent legal and political practice. In other disciplines, scholarship on the presidency was heavily personality based — organized around studies of individual presidents, or case studies of particular episodes, or narrative accounts of how various presidents had, for example, used military force.<sup>37</sup>

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<sup>35</sup> *Id.* at 143–46.

<sup>36</sup> *Id.* at 146. It is unclear whether Ackerman actually intends that the decisions of this tribunal would legally bind the executive branch. He sometimes writes that his proposed tribunal would generate legal answers that would be “binding on the executive branch,” *id.*, but in other passages seems to contemplate the possibility that the President might legitimately “defy the tribunal,” as long as the President was willing to pay the price of doing so, *id.* at 150. More recently, in response to criticisms of his proposal for a non-Article III tribunal that would “bind” the President, Ackerman appears to disclaim the position that the tribunal’s opinions would be formally binding on the President; instead, he argues that the point of the tribunal would be to generate great pressure on the President to comply with the tribunal’s legal interpretations. See Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 39 (2011) (arguing that an adverse tribunal judgment would cause “a wave of anxiety” among officials who normally enjoy immunity when following presidential orders (quoting ACKERMAN, *supra* note 11, at 150–51)).

<sup>37</sup> In the 1980s, political scientist Professor Stephen Wayne, for example, criticized presidential studies for these kinds of reasons: “By concentrating on personalities, on dramatic situations, and on controversial decisions and extraordinary events, students of the presidency have reduced the applicability of social science techniques.” Stephen J. Wayne, *An Introduction to Research on the Presidency*, in STUDYING THE PRESIDENCY 3, 6 (George C. Edwards III & Stephen J. Wayne eds., 1983). In the 1990s, Professor Gary King reiterated the complaint: “Presidency research is one of the last bastions of historical, non-quantitative research in American politics.” Gary King, *The Methodology of Presidential Research*, in RESEARCHING THE PRESIDENCY 387, 388 (George C. Edwards III et al. eds., 1993). Nonetheless, in the 2000s political scientists were still raising the same issue. As Professor Matthew Dickinson wrote in 2004: “Compared, for example, to election or congressional studies, presidency research is frequently deemed less clearly conceptualized, more qualitative and descriptive, overly focused on the personal at the expense of the institutional, and too prone to prescribing reforms based on uncertain inferences.” Matthew J. Dickinson, *Agendas, Agencies and Unilateral Action: New Insights on Presidential Power?*, 31 CONGRESS & PRESIDENCY 99, 99 (2004).

But the greater emphasis in the social sciences in recent decades on institutional analysis has recently reached presidential studies, and an emerging series of works now seeks to analyze the presidency not through individual personalities but through the more systematic tools of empirical and theoretical analysis.<sup>38</sup> Posner and Vermeule's book, in its effort to theorize systematically about the actual (rather than formal) scope of presidential power, should be seen in this light.

## II. THE THIN AND INDETERMINATE EMPIRICAL CASE

The actual structure of the argument in *The Executive Unbound* is elusive. Getting a handle on it is not easy. The structure is in some ways bigger, and in some ways smaller, than the book initially seems to suggest. Part of what makes the book elusive is that it simply posits a general Holmesian stance toward law, in which public officials are never motivated by any normative sense of an obligation to obey the law but comply only when other actors, such as courts, force those officials to obey. Yet Posner and Vermeule do not make much of an effort to *show* that this Holmesian account is true; they devote little space to demonstrating that American presidents do not believe themselves obligated to follow the law or that presidents comply only when others are in a position to force them to do so. That presidents take this Holmesian attitude is, in essence, simply a working premise for their work, not an empirical fact that they establish.<sup>39</sup>

Moreover, with respect to whether public officials are Holmesians or Hartians, there is nothing unique about the President, in Posner and Vermeule's view. Their approach — or the premise of their work in general — is that public officials obey the law not for normative reasons but only when the benefits of legal compliance in specific contexts outweigh the costs. Posner's work on international law, for example, rests on the same assumption: according to Posner, states comply with international law not for normative reasons but only when cost-benefit calculations favor compliance.<sup>40</sup> In this way, the structure of Posner and Vermeule's argument is larger than the book suggests. We can replace “the President” with “the nation-state” and nothing much changes in the analysis.

In many ways, then, the book is not about the President at all: it is about the nature of legal constraints in general. Posner and Vermeule do not explore the presidency in any great institutional detail. They do not argue that specific circumstances make presidents more (or less) likely to be Holmesians than other public actors. In their view, all public actors are

<sup>38</sup> In addition to HOWELL, *supra* note 16, other examples include ACKERMAN, *supra* note 11, DOUGLAS L. KRINER, AFTER THE RUBICON (2010), and Howell et al., *supra* note 18.

<sup>39</sup> I am indebted here, and in the paragraphs that follow, to Professor Adam Cox for helping me to see these points more clearly.

<sup>40</sup> See generally JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

Holmesians, and this framework is just a working premise of their analysis here, as of their analyses of other areas of law. The President is thus essentially a placeholder for any public official. Yet if one does suspend judgment and just assume presidents are Holmesians, the claim of the book becomes much smaller. For Posner and Vermeule do go on to elaborate many reasons that presidents will nonetheless be constrained in their exercise of power. As I show in Part III, those same reasons lead to the conclusion that presidents will often comply with, and welcome, legal (and other) constraints on their power. As a result, even for Holmesian presidents, there are many reasons to believe, as Part III shows, that purely instrumental cost-benefit calculations will still conclude that presidents ought to comply with law.

With such a strong likelihood of compliance, the precise stakes in the Posner and Vermeule position become unclear. What we will observe is presidential compliance with law. The actual reasons for that compliance, however, are likely to remain mysterious, absent access to internal deliberations, let alone internal access to the minds of presidents. They might be complying for normative reasons. Or they might be complying based on cost-benefit calculations that come out in favor of compliance. As social scientists say, the behavior will be “observationally equivalent” in the two contexts. Thus, we have two competing theoretical accounts of why presidents comply — and no likely access to empirical facts that would resolve which motivational account is true. So what, then, is at stake in offering one theory rather than the other to explain compliance? In this way, the argument is smaller than it might at first seem, despite the initial impression conveyed by the dramatic imagery and rhetoric of a President “unbound.” Later, I will suggest one circumscribed context in which there might be something at stake if it is true, as Posner and Vermeule assert, that presidents comply with law only when the cost-benefit calculations favor compliance. But even in that limited context, there is less at stake in the choice between the Posner and Vermeule view and a more Hartian view of the reasons presidents comply with law than initial impressions of the book might suggest.

The structure of the argument is also elusive because it wavers between two different positions. The core of Posner and Vermeule’s argument appears to be that modern presidents are not constrained by law because they can usually get away with ignoring law. This is a story about presidential defiance of law. It is reflected in Posner and Vermeule’s discussion of what they call framework statutes — such as the War Powers Resolution, the National Emergencies Act,<sup>41</sup> the International Emergency Economic Powers Act,<sup>42</sup> the Ethics in Government Act of 1978,<sup>43</sup> and the Inspector

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<sup>41</sup> Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified in scattered sections of 50 U.S.C.).

<sup>42</sup> Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701–1707 (2006)).

General Act of 1978<sup>44</sup> — many enacted during the 1970s, the post-Watergate period in which Congress was particularly insistent in seeking to rein in executive power (pp. 84–89). Posner and Vermeule pronounce these statutes (which mostly address issues of warmaking, foreign affairs, and emergencies) to be “conspicuous failure[s]” and “dead letters” (p. 84).

But a secondary strain in the argument seems to be that the President is not constrained by law because whatever actions he wants to take *are* generally legal. The breadth of this discretion comes about for two reasons. First, the relevant sources of law — such as statutes — are so vague and delegate such vast powers that nearly anything the President wants to do will formally be legal. Congress may have enacted many statutes in the past forty years to constrain presidential power, but these statutes do not generate meaningful constraint (pp. 84–112). And second, other institutions, such as courts, are likely to defer a great deal to presidential assertions of legality, particularly during “emergencies” or “crises,” which means that even when arguable legal constraints on presidential power do exist, courts and others will tend to endorse the President’s claim to be acting lawfully (pp. 31–61). Thus, presidents will always be able to act with a patina of legal authority, but that authority is largely formal and meaningless. In this strain of the book, the story is thus one of law as a source of public illusion or self-deception. This account might be even more troubling than the book’s dominant one. We take comfort in the belief that presidents are constrained by law in a meaningful and substantive sense. But the reality is that presidents only appear to be acting legally because “the law” that purportedly constrains them is so diaphanous. In my view, the book remains unclear about which of these two accounts (or both) it means to offer; perhaps the coauthors have different views on the question, and the book does not fully resolve those differences.

Trying to determine the extent to which various sources of law (Constitution, statute, regulation, executive order, and the like) internally constrain government actors — in practice, not just in form — in the absence of judicial enforcement is notoriously difficult. One could try to test Posner and Vermeule’s descriptive assertions by examining narrative accounts from participants in these decisions in both routine contexts and situations in which political stakes are exceptionally high. Posner and Vermeule do offer a few accounts in which presidents arguably have exercised discretion beyond the relevant statutory terms, such as when the Treasury Department used Troubled Asset Relief Program (TARP) funds to bail out the automobile manufacturers as “financial institutions” — despite the White House’s specific failure to get express statutory authorization (p. 40). But they offer few specific examples or case studies to support their claims,

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<sup>43</sup> Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, and 28 U.S.C.).

<sup>44</sup> Pub. L. No. 95-452, 92 Stat. 1101 (codified at 5 U.S.C. app. at 466–98 (2006)).

and those examples they do invoke are presented in skeletal form. Countervailing specific examples are just as easy to muster; many internal accounts exist, even in settings where the stakes, political and policywise, are exceptionally high, in which participants describe law as having played a major role in blocking desired presidential actions or channeling them in legal rather than illegal directions.

Indeed, on the Posner and Vermeule view, it is difficult to understand much of the legal agenda of Vice President Cheney, Secretary of Defense Rumsfeld, and others that was developed both before and during the George W. Bush presidency.<sup>45</sup> As has been well documented, even before 9/11, Vice President Cheney believed that the presidency had been seriously weakened by a series of statutory enactments and judicial decisions that had begun in the wake of Watergate and President Nixon's resignation.<sup>46</sup> Further, Vice President Cheney and others of like mind in the Administration had identified restoring the legal powers of the presidency to their pre-1970 state as a central ambition of the George W. Bush presidency.<sup>47</sup> When 9/11 came, the Administration needed to make numerous difficult decisions about how policy ought to be adapted to respond to the threat of modern terrorism. On their substantive terms alone, these choices were difficult enough. But under the influence of Vice President Cheney's office, the Administration chose to engage this battle on a second dimension as well — the constitutional allocation of lawful authority to make these difficult substantive policy choices. Why take on this second dimension of struggle? As I note later, I believe it was unwise to have done so. But wise or not, Vice President Cheney and others obviously believed a great deal was at stake.

Perhaps Posner and Vermeule believe Vice President Cheney and others were simply mistaken in their understanding of how executive power works and in their view of how much the post-1970s legal developments actually impeded the ability of presidents and their advisors to follow the course of action they deemed best. Or perhaps Posner and Vermeule believe Vice President Cheney chose to undertake a purely symbolic or expressive battle for reasons unrelated to whether actual issues of material power were at stake. But on matters of how the presidency actually works and whether law constrains the President (for better or worse), readers might be forgiven for concluding that the more reliable cues come from Vice President Cheney and Secretary of Defense Rumsfeld than from Posner and Vermeule.

Similarly, it is odd that Posner and Vermeule have nothing to say about the front-page role of their colleague and occasional co-author, Professor

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<sup>45</sup> A full account is provided in SAVAGE, *supra* note 13, at 10–84.

<sup>46</sup> See *id.* at 26.

<sup>47</sup> See *id.* at 69 (arguing that Vice President Cheney "had been cultivating" an agenda to expand the powers of the presidency for "nearly thirty years").

Jack Goldsmith, in his position as head of OLC, in nearly precipitating a constitutional and political crisis over his conclusion that President Bush's then-classified counterterrorism surveillance program was illegally designed and could not continue absent modifications.<sup>48</sup> To the Administration, this program was an essential national security tool, yet when a phalanx of top government lawyers — the acting Attorney General, the FBI Director, Goldsmith, and others — threatened to resign if the program continued, President Bush agreed to modify the program to bring it into legal compliance (despite Vice President Cheney's insistence that the President not accede to the legal objections). Similarly, the 9/11 Commission and others recognized that the legal "wall" between intelligence gathering and law enforcement that the Foreign Intelligence Surveillance Act of 1978<sup>49</sup> (FISA) created had been followed and, as a result, may have made "the government less effective in protecting the country from foreign threats."<sup>50</sup> That is why the government made such a multifront, ultimately successful effort to dismantle this legal wall after 9/11 (and why civil libertarians resisted this dismantling, for they too believed the legal wall had practical effect<sup>51</sup>).

<sup>48</sup> For Goldsmith's account, see JACK GOLDSMITH, THE TERROR PRESIDENCY (2007); Jack Goldsmith, *How Dick Cheney Reined in Presidential Power*, N.Y. TIMES MAG., Sept. 15, 2011, at MM15. Goldsmith's account has been corroborated by others. See, e.g., David Johnston, *Bush Intervened in Dispute over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1 (reporting former Deputy Attorney General James Comey's testimony that he "literally ran up the stairs" to intercept White House officials visiting Attorney General John Ashcroft's hospital sickbed after Comey had refused to approve the program).

<sup>49</sup> Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

<sup>50</sup> David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 521 (2006). Ironically, the one judicial decision on the issue concluded that the wall, which had been created through internal executive self-constraint as an interpretation of FISA, was in fact never required as a matter of either constitutional law or FISA itself. *In re Sealed Case*, 310 F.3d 717, 736, 746 (FISA Ct. Rev. 2002). In addition to the contention of David Kris, who served as Assistant Attorney General for National Security from 2009–2011, that the wall's "harm is real," Kris, *supra*, at 521, other studies — some internal to the government, others external — reach similar conclusions. See, e.g., U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S REVIEW TEAM ON THE HANDLING OF THE LOS ALAMOS NATIONAL LABORATORY INVESTIGATION 701–06 (2000). As Kris says, once the legal wall was removed, "dozens of prosecutors, in the Criminal Division and in U.S. Attorneys' Offices, now legally enjoy[ed] access to FBI intelligence investigations, and they increasingly work[ed] with agents, though not yet in something approaching a full cooperative model." Kris, *supra*, at 527.

<sup>51</sup> See, e.g., 147 CONG. REC. S11,020–23 (daily ed. Oct. 25, 2001) (statement of Sen. Russell Feingold) (stating, in opposition to the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S. Code), that "[i]f we lived in a country that allowed the police to search your home at any time for any reason . . . then the government would no doubt discover and arrest more terrorists. But that probably would not be a country in which we would want to live. . . . When Congress passed FISA in 1978, it granted to the executive branch the power to conduct surveillance in foreign intelligence investigations without having to meet the rigorous probable cause standard under the fourth amendment that is required for criminal investigations. . . . But the law currently requires that intelligence gathering be the primary purpose of the investigation in order for this much lower standard to apply. The bill changes that requirement. The Government now will only have to show that intelligence is a 'significant purpose' of the investigation. So even if the primary

Similarly, Professor Trevor Morrison recently noted in these pages several high-stakes examples of OLC legal advice rejecting avid presidential claims to legal authority, such as OLC's conclusions that the President lacks inherent authority to impound appropriated funds, that he lacks an inherent line-item veto power, and that a former President lacks immunity from prosecution even if the same conduct had been the subject of an unsuccessful impeachment proceeding.<sup>52</sup> Or, as a recent biography of President Eisenhower chronicles, there is Eisenhower's insistence during the 1956 military confrontation over the Suez Canal that he would not commit major military forces to defusing the conflict without prior congressional approval because, President Eisenhower believed, the Constitution required that approval<sup>53</sup> — even though he faced a Congress controlled by the other party and believed that failure to defuse the conflict threatened a world war. This position reflected President Eisenhower's view that President Truman had acted unconstitutionally in committing massive U.S. ground forces to Korea without congressional approval.

Documenting presidential decisionmaking in the shadow of the law — by examining formal OLC opinions, for example — is difficult for still further reasons. Consider the legislation passed in early 2011 that strengthened and extended the legislative restrictions on transferring detainees out of Guantánamo and either into the United States for prosecution or to third-party countries.<sup>54</sup> These legal constraints imposed major obstacles to the accomplishment of one of the first objectives President Obama announced, the closing of Guantánamo; these constraints also impeded the President's ability to make the optimal strategic judgments, which involved national security and foreign relations concerns, regarding how best to process specific detainees. In addition, these restrictions constituted unprecedented "wartime" legislative interference with presidential decisionmaking concerning alleged enemy detainees. Not surprisingly, the Obama Administration has vigorously objected to these provisions and attempted to fight them off.<sup>55</sup> Now that real-time reporting of internal exec-

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purpose is a criminal investigation, the heightened protections of the fourth amendment will not apply. . . . Protecting the safety of the American people is a solemn duty of the Congress. . . . But the Congress will fulfill its duty only when it protects both the American people and the freedoms at the foundation of American society.”).

<sup>52</sup> Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1718 (2011) (reviewing ACKERMAN, *supra* note 11).

<sup>53</sup> DAVID A. NICHOLS, EISENHOWER 1956, at 148 (2011) (describing President Eisenhower as saying that “no affirmative U.S. military course of action would be determined except with the concurrence of Congress” (quoting John Foster Dulles, Memo for Record (Aug. 6, 1956) (on file with the Eisenhower Library)) (internal quotation marks omitted)).

<sup>54</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032–1033, 124 Stat. 4137, 4351–52 (2011).

<sup>55</sup> See, e.g., Charlie Savage, *New Measure to Hinder Closing of Guantanamo*, N.Y. TIMES, Jan. 8, 2011, at A11 (reporting the President’s intention to seek a repeal of the constraints); see also Letter from Eric Holder, Att’y Gen., to Harry Reid, Senate Majority Leader, and Mitch McConnell, Senate

utive branch deliberations is more common, we also have news reports suggesting that within the executive branch, serious consideration was given to whether the President should have also declared these provisions to be unconstitutional intrusions on his Article II powers.<sup>56</sup>

Had the lawyers been prepared to endorse that conclusion, the Administration would have had a more forceful hand to play in resisting the provisions. At a minimum, the President would likely have issued a signing statement declaring that he had concluded the provisions were unconstitutional and nonbinding. Yet when President Obama signed the bill into law, his signing statement merely expressed profound policy objections to the provisions.<sup>57</sup> The statement did not assert that the provisions were unconstitutional; the Administration's criticisms of these and similar restrictions have continued to rest on policy, not legal or constitutional, grounds.<sup>58</sup> Why? As a first cut, it seems highly likely that OLC was unwilling to reach the conclusion that a strong enough constitutional argument could have been made that these provisions violate Article II, despite how unprecedented they were. Yet if that was indeed the case, one will never see an OLC memo reaching that conclusion — not now and not down the road. The White House would neither need nor want a formal OLC opinion that concluded Congress did have the constitutional power to impose these restrictions. On the other hand, if OLC had concluded the provisions were unconstitutional and the President decided to press that view, there would likely have been a formal OLC opinion so concluding, and it would have become public — because the White House would have relied on that opinion to make its case to Congress and the public. Thus, there is neither a formal record of an OLC view on this issue nor an opinion to cite. It is

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Minority Leader (Dec. 9, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-ag-1411.html> (writing that proposed legal constraints would “undermine my ability as Attorney General to prosecute cases in Article III courts” and “would set a dangerous precedent” without “any parallel . . . in the history of our nation”).

<sup>56</sup> See Charlie Savage, *Obama May Bypass Guantanamo Rules, Aides Say*, N.Y. TIMES, Jan. 4, 2011, at A15 (citing an internal Administration debate about whether to recommend that the President issue a signing statement asserting constitutional power to disregard the legal restrictions).

<sup>57</sup> See Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523> (stating that restricting transfers into the United States “represents a dangerous and unprecedented challenge to critical executive branch authority” and that restricting transfers to foreign countries would “interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations”).

<sup>58</sup> In response to Congress imposing similar or more expansive restraints in the National Defense Authorization Act for Fiscal Year 2012, President Obama did issue a signing statement that asserted potential constitutional issues concerning these restraints. Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011), available at <http://www.gpo.gov/80/fdsys/pkg/DCPD-201100978/pdf/DCPD-201100978.pdf>. It is not entirely clear why the Administration asserted that the constraints in the 2012 defense authorization bill raised constitutional concerns but did not raise similar objections in the signing statement for the 2011 defense bill.

only because journalists are now able to reveal more about internal executive branch deliberations that we know of these facts or can speculate about them credibly. Yet, assuming this account is accurate, OLC's view of the law would have had a powerful effect — in a high-stakes matter of central importance to the President's agenda — on what the President could argue and how strongly he could push back against Congress.<sup>59</sup>

To be sure, detailed exploration of these and other contexts might reveal that presidents have refrained from their preferred actions not because of legal constraint alone but rather because of a complex mix in particular settings of legal, political, and policy considerations. But in any event, it is not clear how much progress a battle of competing narratives can make in deciding the extent to which presidents are in fact legally constrained. More empirical studies, such as investigations of how often formal OLC legal memoranda say "no" to the President by concluding that proposed courses of action would be illegal,<sup>60</sup> offer only a limited perspective: even assuming presidents comply, these studies cannot capture contexts in which the White House does not seek OLC input in the first place (including if the White House chooses not to do so precisely because of concern that the legal answer would be "no") or contexts in which advice giving is oral. And while internal, ethnographic accounts are often fascinating sources to explore in trying to determine when presidents (in contexts in which judicial review was unlikely) were constrained by law and why these accounts, especially those of legal advisors, run the risk of being self-serving or suffering various forms of self-attribution bias.<sup>61</sup>

<sup>59</sup> I am indebted to Professor Trevor Morrison for highlighting this example for me. As a second cut at explaining this example, one might speculate that the President avoided making the Article II argument not because he was convinced it was legally weak but because for political purposes he did not want to appear to be making the kind of legal arguments about Article II powers that President George W. Bush did. At that point, Posner and Vermeule might say President Obama resisted making this argument for "political" reasons, not "legal" ones. See, e.g., Editorial, *The Rule of Law*, N.Y. TIMES, Jan. 8, 2011, at A20 ("[T]he president was right not to declare his intention to defy [the transfer prohibition] in an accompanying statement. By doing so, he demonstrated a greater respect for the law than did President George W. Bush."). But that move would just confirm how empty this distinction is in these types of contexts, or how intertwined political judgments are with legal judgments. President Obama's attempt to signal, for political purposes, that he is "different" from President Bush is completely embedded in a view of the lawful authority of the President under Article II.

<sup>60</sup> Morrison reports that from 1977 to 2009, OLC memoranda approved presidential action seventy-nine percent of the time, rejected it thirteen percent of the time, and provided a mixed response in the remaining instances. Morrison, *supra* note 52, at 1717–18.

<sup>61</sup> For a rich internal account of the legal deliberations behind President Franklin D. Roosevelt's famous, unilateral destroyers-for-bases deal with the British before the United States formally entered World War II, which under international law likely made the United States a co-belligerent, see ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 75–110 (John Q. Barrett ed., 2003). This episode is particularly striking: many analysts at the time and since have viewed President Roosevelt's unilateral action as pushing to the limits of or beyond his legal authority, though it was obviously the right thing to do substantively. In Attorney General Jackson's account, however, legal considerations played a significant role in deciding both whether the deal could be made and how it could be structured to be legal. As an intriguing example of how debates about legal com-

The empirical problems are still further confounded by the phenomenon of the undoubted tendency of presidents to make decisions, or avoid them, with an eye toward the anticipated responses of other relevant actors.<sup>62</sup> As one of the leading empirical scholars of the presidency puts it: “The deeper constraints on presidential power, however, remain hidden, as presidents anticipate the political responses that different actions are likely to evoke and adjust accordingly.”<sup>63</sup> Presidents and their advisors might have a substantive preference for a particular course of action but never get far in even considering adopting that preference unilaterally because the President so clearly lacks the legal authority to do so. As a matter of policy, President Obama has an announced preference in favor of raising taxes on the wealthy, but one can safely assume there has not been any internal executive branch discussion of attempting to do so unilaterally, given the clear legal and constitutional understanding that the President cannot alter tax rates on his own. Having so internalized the anticipated response to a presidential declaration of unilateral authority to raise tax rates, President Obama and his advisors are unlikely even to consider, let alone discuss, let alone seriously debate, the assertion of such authority. If Posner and Vermeule were to say that it is not the lack of constitutional authority that is stopping the President here but rather his recognition that the courts or Congress or the public would revolt were he to attempt to do so, we are then just dealing in empty word games. As I elaborate later in more detail,<sup>64</sup> those “political” reactions would be motivated directly by the position that the President was acting “unlawfully”; judgments of legality and political resistance to the President are so intertwined here as to make it meaningless to purport to distinguish them. Law will have constrained the President on a major policy item, but without any recoverable trace of its effect. This fact seems obvious but, in light of Posner and Vermeule’s arguments, perhaps needs to be said.

Similarly, presidents might decide not to pursue a certain action because they doubt either their legal authority, the wisdom of the action, or both. In such cases, the outcome observed (the failure to pursue the action) will be observationally equivalent regardless of the primary explana-

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pliance can dominate debates over the underlying substantive policy itself, President Roosevelt noted at the time that one of the benefits of publicly disclosing Attorney General Jackson’s legal analysis was that “[t]hey will get into a terrific row over your opinion instead of over my deal, but after all, Bob, you are not running for office.” *Id.* at 99 (internal quotation marks omitted). That prediction turned out to be correct.

<sup>62</sup> For a survey of the game-theoretic literature that models and studies these institutional interactions, including the President’s anticipation of the response of other actors, see Rui J.P. de Figueiredo et al., *The New Separation-of-Powers Approach to American Politics*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 199 (Barry R. Weingast & Donald A. Wittman eds., 2006).

<sup>63</sup> William G. Howell, *Quantitative Approaches to Studying the Presidency*, in THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY 9, 25 (George C. Edwards III & William G. Howell eds., 2009).

<sup>64</sup> See *infra* TAN 79–81.

tion for it: whether the President concluded the action was illegal or simply bad policy. In the famous discussions leading up to the destroyers-for-bases deal in World War II between the United States and Great Britain, the initial proposals entailed having the United States give, loan, or sell the destroyers.<sup>65</sup> As advised by Attorney General Robert Jackson, President Roosevelt insisted internally and to British Prime Minister Churchill that he would require congressional approval, which would obviously not be forthcoming at the time, for such a transaction (Churchill reportedly replied that the trouble must be in the Attorney General, rather than in the U.S. Constitution — a testament, perhaps, to Churchill's view of law).<sup>66</sup> Did President Roosevelt resist the deal in this form because he genuinely thought, as his Attorney General did, that he lacked legal authority or because he thought it would be bad policy or bad politics? Either way, the result was the same. In this context, we have a detailed internal account of the deliberations, yet even so, it is difficult to gauge whether law, policy, or politics drove the outcome. It is all the more difficult when such internal accounts are lacking. The problem of observational equivalence offers further reason still to doubt that anyone can credibly conclude how often presidents comply with law.

A definitional problem also exists: What do or what should we mean when we ask whether presidents are complying with law in contexts in which courts will not provide judicial answers? Is the President obligated to adopt the “best” interpretation of law, such as the one that an impartial, detached legal interpreter would take? Or is it enough that the President’s position be a “plausible” legal one? Traditionally, OLC lawyers have characterized their role as somewhere in between these positions.<sup>67</sup> In addition, if disagreements exist among credible, knowledgeable lawyers within the executive branch, has the President complied with the law if he takes a position supported by any of those legal actors? When presidents take plausible but self-serving legal positions, Posner and Vermeule might argue that we should be honest and acknowledge that the President is really going beyond the law in these contexts, while others might argue that the President has discharged his duty to follow the law.

In sum, Posner and Vermeule do not actually present much evidence at all, let alone convincing evidence, for their descriptive claim that modern presidential power is largely unconstrained by law. To the extent that this claim resonates with readers, it might be because it trades on the fact that presidential power has indeed increased dramatically since the nineteenth century. The increase reflects not only aggrandizement but also the greater burdens of responsibility the office bears given public demands that the na-

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<sup>65</sup> See JACKSON, *supra* note 61, at 75–110.

<sup>66</sup> *Id.*

<sup>67</sup> See *infra* TAN 102–104 for a full description of OLC’s conception of its obligations with respect to legal interpretation and what legal compliance means.

tional government and the President successfully address all manner of problems, such as natural disasters, for which earlier presidents were not held accountable. But an increase in presidential power is not itself an increase in presidential defiance of law or presidential lawlessness. Posner and Vermeule's claim might also trade on the well-recognized fact that in certain extreme contexts — such as use of military force or genuine emergencies, in which actions must be taken immediately to forestall catastrophic consequences — debates have long existed about how much law does or should constrain presidential action. Posner and Vermeule, however, are determined to argue that “emergencies [are] merely the extreme on a continuum of policy problems” (p. 215 n.25). Yet they offer little empirical basis for inferring that, whatever the role of law might be in these extreme contexts, it is the same in more routine matters.

When Posner and Vermeule do offer evidence, their accounts are brief and skeletal — seemingly offered to confirm their preexisting legal cynicism rather than to explore in depth the role, if any, of law. Nor do they ever confront conflicting evidence — contexts in which legal constraints have been effective (for better or worse) — let alone explore which sets of accounts on balance better reflect the true role of law in modern presidential power. They dismiss the effectiveness of legislation creating inspectors general (IGs) within many departments of the executive branch, for example, on the basis of studies from the early 1990s (pp. 86–87), but ignore the dramatic, front-page role IGs in the CIA and Department of Justice have played in the last decade.<sup>68</sup> They do not attempt to assess whether their account is more persuasive in certain specific contexts than in others. Admittedly, getting to the bottom of that question is difficult; we might never be able to get a full empirical grasp on it. But Posner and Vermeule do not even try to do so. They are hyperrealists by inclination, not by evidence.

### III. THE INCOMPLETE CONSEQUENTIALIST THEORY FOR THE ROLE OF LAW

For these reasons, I want to move beyond empirical issues and engage Posner and Vermeule on their own terms, and at a deeper, more theoretical, and general level. Posner and Vermeule see presidents as Holmesians, not Hartians.<sup>69</sup> Yet even if we enter their purely consequentialist world, in

<sup>68</sup> See JACK GOLDSMITH, POWER AND CONSTRAINT (forthcoming Mar. 2012) (manuscript at 99–108) (on file with the Harvard Law School Library) (documenting the significant role of IGs in holding executive departments legally accountable).

<sup>69</sup> For the classic account of law as a practice that is experienced as normatively binding, see H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994). For the Holmesian view that law should be viewed from the perspective of the “bad man,” who will comply only when the costs of noncompliance exceed its benefits, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares

which presidents follow the law not out of any normative obligation or the more specific duty to faithfully execute the laws but only when the cost-benefit metric of compliance is more favorable than that of noncompliance, powerful reasons suggest that presidents will comply with law far more often than Posner and Vermeule imply. And analysis of those reasons might also point us to understanding better the contexts in which presidents are less likely to comply (either by invoking disingenuous or wholly unpersuasive legal interpretations or by defying the law outright).

The Posner and Vermeule approach is characteristic of a general approach to assessing public institutions and the behavior of judges, legislators, presidents, and other public officials that has emerged recently within legal scholarship. Under the influence of rational-choice theory and empirical social science from other disciplines, such as political science and economics, some public law scholarship has shifted to trying to predict and understand the behavior of public officials wholly in terms of the material incentives to which they are posited to respond. These incentives include the power of effective sanctions other actors can impose on public officials who deviate from those actors' preferred positions. In this general rational-choice approach, considerations of morality or duty internal to the legal system do not motivate public actors. Indeed, in the case of Posner and Vermeule's book, that is more the working assumption of the approach than a fact that the theories actually prove. Public officials do not follow the law out of any felt normative sense of official or moral obligation. In what they view as hard-headed realism, scholars like Posner and Vermeule believe a more external perspective is required to understand presidential behavior. All that matters, from this vantage point, are the consequences that will or will not flow from compliance or defiance and manipulation of the law. If other actors, including Congress, the courts, or "the public" (whatever that might mean, precisely) will accept an action, the President will be able to do it; if not, his credibility and power will be undermined. It is that externally oriented cost-benefit calculation — not the law and not any internal sense of obligation to obey the law — that determines how presidents act in fact. Thus, "politics," not "law," determines how much discretion presidents actually have.

This approach to presidential power finds its analog in the way a number of constitutional law scholars have come to portray the behavior of the Supreme Court. These scholars, such as Professors Michael Klarman,<sup>70</sup>

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only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

<sup>70</sup> See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 5–6 (2004).

Barry Friedman,<sup>71</sup> Jack Balkin,<sup>72</sup> and others, have asserted various versions of what I call the “majoritarian thesis”<sup>73</sup>: the claim that Court decisions are constrained to reflect the policy preferences of national political majorities (or national political elite majorities), rather than the outcomes that good-faith internal elaboration of legal doctrine would compel based on normative considerations about appropriate methods of legal reasoning and interpretation. In some versions of the majoritarian thesis, these potential external sanctions impose outer boundaries on the degrees of freedom the Court has; within those boundaries, the Court remains free to act on its own considerations, including perhaps purely legal ones as viewed from an internal perspective. In other versions, the Court is cast as almost mirroring the preferences of national political majorities. Here, too, the behavior of the Court is seen as based less on internal, legal considerations and more on the anticipated external reactions to decisions.

At an even broader theoretical level, Professor Daryl Levinson has employed the same kind of purely consequentialist framework to analyze what he calls the “puzzle” of the stability and effectiveness in general of constitutional law.<sup>74</sup> Constitutional law decisions often frustrate the preferences of political majorities. As Levinson puts it, the question of why those majorities do or should ever abide by such decisions is much like the question of why presidents do or should abide by law. For Levinson, as for Posner and Vermeule, legal compliance, to the extent that it occurs, cannot be explained by more traditional accounts of the normative force of law or by the sense that courts are politically legitimate institutions whose authority ought to be accepted for that reason. Instead, the explanation must lie in considerations external to the legal system, such as the material incentives other actors have to obey, or ignore, Court decisions. Levinson then catalogues an array of material incentives political majorities confront in deciding whether to follow Court decisions whose outcomes they dislike; the resulting cost-benefit calculations end up making compliance with

<sup>71</sup> See BARRY FRIEDMAN, THE WILL OF THE PEOPLE 369 (2009) (arguing that the Court’s decisions “will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line”).

<sup>72</sup> See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 562–63 (2009) (comparing the Warren Court, which upheld federal laws enacted by a “bipartisan liberal coalition” in the 1960s, to the Rehnquist Court, which supported the “ascendant conservative movement”).

<sup>73</sup> See Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 104–05 (noting political scientist Robert Dahl’s argument that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States” (quoting Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957)) (internal quotation marks omitted)).

<sup>74</sup> See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011) (inquiring why “powerful social and political actors” are willing and able “to make sustainable commitments to abide by and uphold constitutional rules and institutions”).

Court decisions usually the “rational” course of action even for disappointed political majorities (at least in well-functioning constitutional systems).<sup>75</sup> Thus, the rational-choice and normative views end up converging in practice. And presumably, most actors do not actually run through these consequentialist calculations in deciding whether to obey particular Court decisions. Instead, these calculations lie deep beneath the surface of much larger systems of education, socialization, public discourse, and the like; most individuals, including public officials, comply with Court decisions unreflectively, because it is the “right” thing to do. But the rational-choice framework leaves open the possibility that, at any given moment, the actors the Court’s decision limits — the President, Congress, state legislatures, or others — could mobilize the underlying cost-benefit calculations that otherwise lie latent and conclude that, this time around, refusal to abide by the law is the more “rational” course.

But as Levinson’s work helps to show, even on its own terms, Posner and Vermeule’s approach offers an incomplete account of the role of law. Levinson’s work, for example, is devoted to showing why constitutional law will be followed, even by disappointed political majorities, for purely instrumental reasons, even if those majorities do not experience any internal sense of duty to obey. He identifies at least six rational-choice mechanisms that will lead rational actors to adhere to constitutional law decisions of the Supreme Court: coordination, reputation, repeat-play, reciprocity, asset-specific investment, and positive political feedback mechanisms.<sup>76</sup> No obvious reason exists to explain why all or some of these mechanisms would fail to lead presidents similarly to calculate that compliance with the law is usually important to a range of important presidential objectives. At the very least, for example, the executive branch is an enormous organization, and for internal organizational efficacy, as well as effective cooperation with other parts of the government, law serves an essential coordination function that presidents and their advisors typically have an interest in respecting. There is a reason executive branch departments are staffed with hundreds of lawyers: while Posner and Vermeule might cynically speculate that the reason is to figure out how to circumvent the law artfully, the truth, surely, is that law enables these institutions to function effectively, both internally and in conjunction with other institutions, and that lawyers are there to facilitate that role. In contrast to Posner and Vermeule, who argue that law does not constrain, and who then search for substitute constraints, scholars like Levinson establish that rational-choice theory helps explain why law does constrain. Indeed, as Posner and Vermeule surely know, there is a significant literature within the rational-

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<sup>75</sup> See *id.* at 694–95.

<sup>76</sup> I am indebted to the concise summary in Josh Chafetz, *The Political Animal and the Ethics of Constitutional Commitment*, 124 HARV. L. REV. F. 1, 2 (2011).

choice framework that explains why powerful political actors would agree to accept and sustain legal constraints on their power, including the institution of judicial review.<sup>77</sup>

That Posner and Vermeule miss the role of legal compliance as a powerful signal, perhaps the most powerful signal, in maintaining a President's critical credibility as a well-motivated user of discretionary power is all the more surprising in light of the central role executive self-binding constraints play in their theory. After asserting that "one of the greatest constraints on [presidential] aggrandizement" is "the president's own interest in maintaining his credibility" (p. 133), they define their project as seeking to discover the "social-scientific microfoundations" (p. 123) of presidential credibility: the ways in which presidents establish and maintain credibility. One of the most crucial and effective mechanisms, in their view, is executive self-binding, "whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors" (p. 137). As they also put it, "a well-motivated president can distinguish himself from an ill-motivated president by binding himself to a policy position that an ill-motivated president would reject" (p. 135).

By complying with these constraints, presidents signal their good faith and accrue more trust to take further action. Most importantly from within Posner and Vermeule's theory, these constraints, many self-generated through executive self-binding, *substitute* for the constraints of law. Law does not, or cannot, or should not constrain presidents, in their view, but rational-actor presidents recognize that complying with constraints is in their own self-interest; presidents therefore substitute or accept other constraints. Thus, Posner and Vermeule recognize the importance of "enabling constraints"<sup>78</sup> in effective mobilization and maintenance of political power; that is, they recognize that what appear to be short-term constraints on the immediate preferences of actors like presidents might actually enable long-term marshaling of effective presidential power. Yet they somehow miss that law, too, can work as an enabling constraint; when it comes to law, Posner and Vermeule seem to see nothing but constraint. Indeed, this failing runs even deeper. For if presidents must signal submission to various constraints to maintain and enhance their credibility — as Posner and Vermeule insist they must — Posner and Vermeule miss the fact that the single *most powerful* signal of that willingness to be constrained, particularly in American political culture, is probably the President's willingness to comply with law.

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<sup>77</sup> See, e.g., Matthew C. Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 85 (2003) ("[J]udicial review serves a valuable insurance function for competitors in a stable democracy.").

<sup>78</sup> See generally STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 134–77 (1995) (analyzing "the idea of a profound opposition between majoritarian politics and constitutionally anchored restraints," *id.* at 134).

In theoretical terms, then, Posner and Vermeule emerge as inconsistent or incomplete consequentialists. Even if law does not bind presidents purely for normative reasons, presidents will have powerful incentives to comply with law — even more powerful than the incentives Posner and Vermeule rightly recognize presidents will have to comply with other constraints on their otherwise naked power. To the extent that Posner and Vermeule mean to acknowledge this point but argue that it means presidents are not “really” complying with the law and are only bowing to these other incentives, they are drawing a semantic distinction that seems of limited pragmatic significance, as the next Part shows.

#### IV. THE FALSE DISTINCTION BETWEEN LAW AND POLITICS

Thus far, I have tried to show that, to the extent Posner and Vermeule’s analysis rests on an empirical “realism” about how little law actually constrains modern presidents, that claim is more of a stipulation or assumption of their work, not a point they have actually documented in any meaningful or convincing way (particularly outside the areas of use of military force, foreign affairs, and genuine emergency contexts, all areas in which the issue has long been debated). Then, insofar as the book offers a theoretical argument about why we ought to expect few legal constraints to bind the President, that theoretical argument is internally self-defeating. *The Executive Unbound* offers a rich account of why self-interested presidents, motivated only by instrumental considerations, would choose to create or accept many forms of external constraint on their otherwise unlimited discretion; yet the book never explains why law would not be one of those constraints — indeed, why compliance with law would not be the most significant constraint even for presidents motivated only by instrumental considerations. In this section, I now want to push deeper into what I believe is the most profound and most illuminating failing in their conceptual framework.

Their framework relies upon a sharp separation of law and politics (or public opinion or public reactions).<sup>79</sup> In arguing that the effective constraints of politics and public opinion substitute for the ineffective ones of law, their approach suffers from one substantial blind spot: law (and the perception of legality) is not hermetically sealed off from politics and public opinion. That is, as a sociological reality within American political culture, at least, perceptions of whether presidents are complying with law are

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<sup>79</sup> Posner and Vermeule occasionally do bow toward recognizing a somewhat more interconnected relationship between law and politics. They acknowledge, for example, that “[l]aw and politics are hard to separate and lie on a continuum — elections, for example, are a complicated mix of legal rules and political norms — but the poles are clear enough for our purposes, and the main constraints on the executive arise from the political end of the continuum” (pp. 4–5). But they never incorporate these occasional asides into their analysis; after making these stipulations, their actual argumentative structure and analysis proceed from an assumption of largely separate domains of law and politics.

not utterly divorced from political and public responses to presidential action. To the contrary, perceptions about lawful authority — about whether the President is following the law or not — are inextricably intertwined with political and public responses to presidential action. Even as a pragmatic matter of hardheaded realism, we cannot separate law (an irrelevant non-constraint) from political and public responses to assertions of presidential authority (the so-called “real” constraints). To begin, it is no great insight to recall that law is constitutive of the very processes of political struggle that Posner and Vermeule make central to their account.<sup>80</sup> The public offices within which political competition is organized are themselves, of course, defined by law. “The President” is a legal creation, as are the requirements that presidents take office on a certain date and serve a fixed term of four years (with no recognized recall or vote of confidence procedure that could remove them from office). Similarly, presidents recognize that valid legislation requires approval of both the House and Senate; that presidential vetoes can validly be overridden by two-thirds majorities; that presidential appointees must be nominated, appointed, and confirmed according to processes the Constitution and statutes lay out; and that the military is subordinate to civilian authorities. “Politics” takes place within a widely accepted structure of legal rules that constitute the political process and the roles and powers of public officials who engage in that process. These rules might be so taken for granted (except, perhaps, in revolutionary contexts) that it is easy to miss the extent to which they constrain and routinely command compliance.

But the point is not just that law is constitutive of politics or that these legal constraints are complied with routinely. The broader point is that Posner and Vermeule offer no explanation or theoretical basis for understanding why *these* types of laws are constraining but other types are not. Because Posner and Vermeule’s work is a broadside against the proposition that law constrains the executive — a total assault obviously exaggerated once we consider even these kinds of constitutive laws — their analysis does not offer any basis for more precise, and potentially more convincing, theoretical accounts of *which* types of laws, enacted or applied in *which*

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<sup>80</sup> See, e.g., Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197–98 (1990) (“[Some theorists imagine that ‘democracy’ involves] a collective will already in existence, lying in wait for democratic institutions to discover. Before institutions are formed, however, no such collective will exists. Political institutions and decision procedures must create the conditions out of which, for the first time, a political community can forge for itself a collective will. Those institutions and procedures specify whose views will be counted in determining the collective will and define the means by which the collective will can be recognized. No uniquely ‘rational’ institutional architecture exists for constructing that will. Each bundle of institutions and practices represents a *distinct* social constitution of the collective will.” (footnotes omitted)).

circumstances, might in fact be less effective constraints than other types of laws.

One response may be that it is not these constitutive legal provisions that are doing the actual work of constraint, but rather the fact that if presidents defied these provisions, there would be massive political and public response. However, the claim then becomes such a purely semantic one that it is not clear what to make of it or why we should care. Consider a two-term President contemplating seeking a third term (without constitutional amendment). If presidents since the Twenty-Second Amendment have not taken this idea seriously because the public would overwhelmingly reject a President defying such a clear constitutional rule, is that because the “law” constrains the President or because the anticipated “public outrage” at the President defying the law constrains him? Posner and Vermeule want to say that “the law” is not doing the work here but rather the anticipated public or political response. But at this point, it seems that we are simply dealing with semantic distinctions: the constraint arises from some

inextricable mix of law and public responses tied to the law, and we have no way of separating out how these two interact. Thus, what is at stake in calling the constraint “legal” or “political” is, at best, enigmatic.

Ever since H.L.A. Hart’s *The Concept of Law*, theorists have recognized that the existence of a legal system ultimately depends on a socially shared rule of recognition, at least among public officials; in that sense, law always depends ultimately on a shared social practice of recognizing and accepting legal rules as binding.<sup>81</sup> But to conclude from this fact that legal constraints are nonexistent or epiphenomenal or meaningless — because social acceptance, at the end of the day, is doing all the “real” work — is confused. Yet that confusion is essentially what drives *The Executive Unbound*. The entire legal system can, of course, dissolve if the system’s rule of recognition loses its hold. But within a functioning legal order, law can operate as an effective constraint, even if that constraining power ultimately rests on social and political acceptance. At that point, whether we attribute that constraint to the law or to the underlying social acceptance of the law seems largely a semantic matter.

As a further way of exposing the limitations in treating “law” and “politics” as wholly distinct domains, return to the debt ceiling example. Suppose, for example, Congress had refused to increase the debt ceiling, but President Obama had followed the path Posner and Vermeule suggested and ordered new government bonds to be issued on his own (claim of) au-

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<sup>81</sup> See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (developing and critiquing Hartian perspectives on U.S. constitutional law and theory).

thority. Even if the goal, avoiding default, would widely have been seen as desirable, the resulting turmoil to the United States and world economy would not have been much different than had the United States actually defaulted: the country would have been tied in knots for a year or more about whether the President had acted unconstitutionally; impeachment surely would have loomed; and it is unclear who would have bought U.S. debt, and at what price, given all the legal uncertainty that would have existed about whether the President had issued the debt lawfully. Why all this market and political instability? Not because of the substance of the action — honoring the debt — but because of perceptions that the President was throwing the whole constitutional order up for grabs, that no one could be certain whether any bonds issued to pay off the existing debt were legally valid, and that the United States was turning into an unreliable debtor country in which presidents were free to do whatever they thought expedient at any moment. The key point is this: the world of public and political responses to presidential action is filtered through law itself. In many contexts, no separation between law and public judgment exists: public judgment is constantly refracted through judgments about whether various actors, including the President, are acting lawfully.

Indeed, law can serve as a crucial focal point for widely shared judgments about presidential credibility.<sup>82</sup> Even when citizens or formal political actors have diverging views about substantive policies, they often will coalesce in broad agreement around the point that public officials should comply with the law. Because the law has this focal-point significance, the allegation that the President has violated the law is often what *transforms* an event into a scandal. Thus, the Iran-Contra affair under President Reagan, in which aides to the President sought covert ways to finance the Contra fighters who opposed the Sandinista government of Nicaragua, reached the level of public debate that it did because of the claim that these aides were violating a specific congressional prohibition (the Boland Amendment) written for the express purpose of denying this kind of financial assistance.<sup>83</sup>

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<sup>82</sup> On law as a focal point for collective judgments about presidential conduct, see generally John Ferejohn & Rick Hills, *Blank Checks, Insufficient Balances* (May 10, 2011) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>83</sup> The term “Boland Amendment” generally refers to three separate legislative amendments between 1982 and 1984 that all sought to limit U.S. government financial assistance to the Contras. See, e.g., Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982) (“None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country’s armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.”). For one contemporaneous allegation that Reagan aides had violated a specific congressional provision, see Laurence H. Tribe, Op-Ed., *Reagan Ignites a Constitutional Crisis*, N.Y. TIMES, May 20, 1987, at A31 (“Congress’s control over the purse would be rendered a nullity if the President’s pocket could conceal a slush fund dedicated to purposes and projects prohibited by the laws of the

Even when disputes about legal authority do not rise to the level of scandal, political controversy often turns on disputes about lawful authority in which there is more widespread agreement about the need for legal compliance than about the underlying substantive policy issues. As an example, President George W. Bush and Secretary of Defense Donald Rumsfeld have both acknowledged in their memoirs, as Goldsmith notes, that the Bush Administration undermined itself — and the powers of the presidency — by insisting on the unilateral authority to adopt various antiterrorism measures.<sup>84</sup> Among many parts of the public (as well as the Supreme Court), a reaction against the Administration emerged that was at least as much about the perception that the President refused to accept valid legal constraints as it was about the substance of these antiterrorism measures. And those perceptions played a significant role, in my view, in both the 2006 and 2008 elections.<sup>85</sup> Again, it is not as if these reactions

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United States.”). For a detailed history of this episode, see generally THEODORE DRAPER, A VERY THIN LINE (1991).

<sup>84</sup> Goldsmith, *supra* note 48, at MM15 (documenting passages in President Bush’s memoir *Decision Points* and Secretary Rumsfeld’s memoir *Known and Unknown* that acknowledge this point).

<sup>85</sup> Documenting this kind of political judgment is of course difficult, given the challenge of gaining information about what motivates voters’ decisions. But here is some relevant information regarding how views on these and related issues changed during the 2000s: When Gallup asked whether “the government should take all steps necessary to prevent additional acts of terrorism in the U.S. even if it means your basic civil liberties would be violated” or “the government should take steps to prevent additional acts of terrorism but not if those steps would violate your basic civil liberties,” 47% of respondents in January 2002 said to take steps even if civil liberties were violated, compared to 49% of respondents who indicated the government should take steps but not violate civil liberties. Support for civil liberties rose dramatically thereafter, and by December 2005, only 31% answered the former while 65% said the latter. *Civil Liberties*, GALLUP, <http://www.gallup.com/poll/5263/Civil-C2%AD%E2%80%90Liberties.aspx> (last visited Feb. 25, 2012).

An NBC News/Wall Street Journal poll conducted in September and October 2006 asked respondents about the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, which the (soon to be outgoing) Republican majority had just enacted. The question described the law as preventing torture, “allow[ing] these suspects to be held indefinitely without being charged of a crime, and prevent[ing] them from challenging their imprisonment in U.S. courts.” Forty-seven percent disapproved of the law, compared to only 43% who approved. Hart/McInturff, *Study #6066*, WALL ST. J. 4 (Sept. 30-Oct. 2, 2006), [http://online.wsj.com/public/resources/documents/061003\\_NBC-WSJ\\_Release.pdf](http://online.wsj.com/public/resources/documents/061003_NBC-WSJ_Release.pdf). The same poll found that as a result of “what you have seen or heard over the past few weeks,” which presumably would have included the Military Commissions Act, 41% of respondents were less favorable toward retaining a Republican majority in Congress, while only 18% were more favorable. *Id.* at 2. In an NBC News/Wall Street Journal poll conducted a few weeks earlier, in September 2006, the pollster asked whether respondents favored the Bush Administration’s new policy of military tribunals whereby “lawyers would not be allowed to view any evidence that has been classified for security reasons that is brought against [suspects], and in some cases the suspects would not be allowed to be present at their court hearings.” Fifty-one percent of respondents opposed the policy, including 30% who said they were strongly opposed, compared to only 41% who were in favor. Hart/McInturff, *Study #6065*, WALL ST. J. 18–19 (Sept. 8–11, 2006), <http://online.wsj.com/public/resources/documents/poll20060913.pdf>.

were purely “political” reactions divorced from views about their lawfulness; to the contrary, it was in part the *process* by which these measures were adopted and defended — whether the President rightfully had the *legal authority* to act unilaterally — that was the basis for the political reaction against them. Policies about detention of alleged enemy combatants or the use of military commissions to try them became less controversial when they were legally justified, having been authorized by Congress rather than grounded on unchallengeable, unilateral presidential powers. Indeed, an important feature of partisan politics going back to the 1790s is precisely the claim that the other side, including the President, is acting unlawfully or unconstitutionally;<sup>86</sup> partisans would not invoke this argument and seek to manipulate popular perceptions about presidential legality if voters cared only about the substance of presidential actions and not about their legality. Indeed, Posner and Vermeule have no account of why administrations typically seek to hide, obscure, or deceive the public about illegal actions when they occur. Thus, even in a *realpolitik* world in which presidents feel no normative obligation to comply with the law, but instead engage in cost-benefit calculations regarding compliance in individual contexts, presidents are likely nonetheless to end up complying with the law a great deal of the time to maintain their credibility and elicit continued support and cooperation from others.<sup>87</sup>

Moreover, Posner and Vermeule focus almost exclusively on the President in isolation from the rest of the executive branch. But the executive branch is teeming with departments, agencies, bureaus, and the like, many of which have large general counsel offices. The lawyers in these offices

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In addition, by the fall of 2006, the public seemed skeptical of the Bush Administration’s particular use of wartime power. When asked whether President Bush comparing Iraq to the “fight against the Nazis” was an “inappropriate comparison that is only being made to justify the Bush policy in Iraq” or “an appropriate comparison” reflecting the current danger, 61% of respondents to the NBC News/Wall Street Journal poll indicated it was inappropriate. *Id.* at 24. When an August 2006 CBS News/New York Times poll asked whether it would be “a good idea or a bad idea for the president to have the authority to make changes in the rights usually guaranteed by the Constitution,” 59% of respondents answered that it was a bad idea. *CBS News/New York Times Poll, Aug. 2006*, CBS NEWS POLL DATABASE (Aug. 17–21, 2006), [http://137.99.31.42/psearch/question\\_view.cfm?qid=1663549&pid=1&ccid=1](http://137.99.31.42/psearch/question_view.cfm?qid=1663549&pid=1&ccid=1).

<sup>86</sup> See generally JOANNE B. FREEMAN, AFFAIRS OF HONOR (2001).

<sup>87</sup> At the level of moral theory, Professor David Gauthier makes a similar point by showing that even if individuals were motivated only by rational self-interest, they would accept and follow a system of morality that others followed as well and that this system would be stable. Morally “constrained maximizers” would, under certain conditions, receive benefits via cooperation with other similarly constrained maximizers greater than the benefits that would accrue to pure maximizers of self-interest. DAVID GAUTHIER, MORALS BY AGREEMENT 14–15, 175–76 (1986). Professor Jens Ohlin argues that the structure of the relationship between a state’s national self-interest and its fidelity to legal norms has essentially the same relationship as that between individual self-interest and Gauthier’s stable system of morality. Ohlin uses this analysis to explain why states would tend to accept international legal constraints, at least under certain specified circumstances. Jens David Ohlin, Essay, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 883–86 (2011).

serve many functions, including protecting the employees in their institutions by advising about legal compliance and using law to protect their institutions against encroachments, including at times those that emanate from the White House. These lawyers are likely to be more risk averse with respect to legal questions than the President, for the President is the one likely to reap the political benefits of successful policy choices that push the boundary of legality, while lawyers who advise illegal actions are more likely to suffer adverse reputational effects down the road.<sup>88</sup> These lawyers can increase the political costs to the President of acting in ways they believe put their own professional reputations at risk; they can, and today often do, leak stories or documents to show that the President is acting contrary to legal advice. To be sure, some government lawyers might be extremely supple tools of presidential power, and even when there is significant internal legal resistance, presidents might nonetheless contravene their advice when the stakes are high enough. Considering these dynamics, the ways in which the extensive legal bureaucracy that now exists throughout the executive branch functions with respect to legal issues, particularly in more routine contexts, must be incorporated into an analysis of the pressures that push or pull presidents to and away from legal compliance.

In addition, part of the problem with the stark separation between law and other mechanisms of constraint is that many of Posner and Vermeule's own "substitute" mechanisms in fact depend on law. Here, too, law is constitutive of the very constraints Posner and Vermeule invoke, but they see those constraints as wholly nonlegal. For example, they offer presidential commitments to transparency and oversight as important means of constraint that self-interested presidents will have reasons to embrace. But much of the law regulating presidential action is precisely about transparency, ranging from the Freedom of Information Act<sup>89</sup> to various reporting requirements to Congress. If presidents have rationally self-interested reasons to favor transparency, why would those same interests not create reasons for complying with laws that regulate transparency? Similarly, Posner and Vermeule suggest that presidents can gain credibility for their actions by forming alliances on policy issues "with independent agencies that have a reputation for expertise and integrity (or political goals different from those of the executive)" (p. 142). But of course, if independent agencies are potentially unique reputational sources for expertise and integrity, it is precisely because those agencies have a distinct legal structure from executive agencies — and presidents have respected those legal constraints. Posner and Vermeule might or might not be accurate about the

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<sup>88</sup> I am indebted to Professor Daniel Meltzer for this point.

<sup>89</sup> 5 U.S.C. § 552 (2006 & Supp. 2010).

actual reputation of independent agencies,<sup>90</sup> but their theory is coherent only if presidents respect the legal constraints that keep independent agencies independent.

Law does not inherently have this cultural role and compliance with law is not necessarily the kind of signal in all democratic cultures that it is in the United States. Perhaps because of its common law origins; or the fact that the United States began with a legal text, the Constitution, rather than a shared national identity based in religion, ethnicity, or other sources; or the longstanding role of the Supreme Court, American political culture has often been characterized as particularly process-based and law-based.<sup>91</sup> That characterization does not hold true for all democratic countries. Legal theorists have argued, for example, that Israeli political culture reflects a much more instrumentalist stance toward law, particularly in areas of national security — compliance with law is not widely considered as important as “getting the job done”; when security issues are perceived to be existential ones going to the continued existence of the state or even a cultural or religious group more generally, perhaps a more instrumental stance toward law is to be expected.<sup>92</sup> But regardless of whether this description accurately characterizes Israel, the general point remains: executive compliance with law will be a powerful signal of credibility only in cultures that already have a particular normative stance toward law. Therefore, in the United States, where a political culture of shared identity is bound up with law in the form of the Constitution, the violation of law by public officials tends powerfully (though not necessarily in every context) to undermine those officials’ credibility.

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<sup>90</sup> See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 672 (2010) (chronicling the emergence of devices that bring independent agency decisionmaking more into line with presidential preferences and that undermine the traditional binary distinction thought to exist between independent and executive agencies).

<sup>91</sup> See generally, e.g., MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909 (1995); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

<sup>92</sup> See Ehud Sprinzak, *Elite Illegalism in Israel and the Question of Democracy*, in ISRAELI DEMOCRACY UNDER STRESS 173, 175 (Ehud Sprinzak & Larry Diamond eds., 1993) (arguing that “Israel’s political culture contains a strong dimension of elite illegalism, an instrumental orientation of the nation’s leadership toward the law and the idea of the rule of law”). Professor Ehud Sprinzak offers this revealing quotation from Israel’s then–Prime Minister, Yitzhak Shamir:

The law is not an end in itself. Like bread, which is eaten not for itself but in order to keep the body alive, the law ought to serve the state and not vice versa. It is possible to imagine situations of a dictatorship of law as of yikov hadin et hahar (the law can penetrate the mountain), but something like that is unacceptable. The law was only destined to make orderly life possible.

*Id.* at 174; see also Gabriella Blum, *Judicial Review of Counterterrorism Operations*, 47 JUSTICE 17 (2010), available at [http://www.intjewishlawyers.org/main/files/Justice\\_all11\\_3b-final.pdf](http://www.intjewishlawyers.org/main/files/Justice_all11_3b-final.pdf).

## V. WHAT REMAINS?

Posner and Vermeule's theoretical framework for analyzing the relationship between presidential power and law therefore remains elusive on every level. Descriptively, they simply posit that presidential administrations experience no normative sense of obligation to follow the law, and they offer little convincing empirical evidence to establish that presidential defiance of law is widespread or that law does not exert genuine constraint on presidential action. Theoretically, Posner and Vermeule fail to explain why law cannot or does not serve as one of the external constraints on presidential action that they themselves view as so central to sustaining and enhancing the President's capital of credibility. To avoid acknowledging the role of legal constraints, they relabel as "political" the kind of constraints that many others would characterize as "legal." Sociologically, they miss the powerful intertwining of judgments of legality and politics within American political culture in political and public assessments of presidential conduct. Given all these concerns, it might be tempting to dismiss their approach to thinking about presidential power. Nonetheless, doing so would be a mistake. For despite these limitations, their work can be read to provoke at least two important sets of ideas and questions.

The first might be characterized as a plea for a shift in contemporary academic and cultural attitudes toward presidential power. With the book's argument recast in this way, its value lies not as much in the analytical arguments it makes as in the changed stance toward presidential power it seeks to cultivate (sometimes explicitly, often implicitly). As I noted at the outset, for most of the twentieth century, Progressives, New Dealers, and liberals advocated for and developed the powerful modern presidency. Only in the 1970s did these groups and their descendants begin to become more conflicted, anxious, and ambivalent about presidential power. Buried within Posner and Vermeule's book is a more subtle claim that can be understood to link to this deeper tradition and practice. In a passage that a Progressive Era scholar might have just as easily written, they state: "Our major claim is that, in the United States, executive power is undervalued for ideological reasons, while at the same time being essential to peace and prosperity" (p. 171). This claim is bolstered by their argument that the United States suffers from excessive anxieties of "tyrannophobia" — the obsessive fear that every increase in presidential power in response to modern circumstances creates the risk of an imminent lapse into dictatorial control (pp. 176–205). In the wake of the American Revolution, the Constitution was indeed created in a culture deeply fearful of monarchical power. Though analogs to this fear wax and wane, the specter of overly concentrated power in the hands of a chief executive has remained a persistent strain in American political culture, even as the actual powers of the presidency have steadily expanded.

Posner and Vermeule suggest that we instead see this tyrannophobia — perhaps a fear unique to America among well-established democracies —

as a now-dysfunctional remnant of our infancy, an irrational fear that precludes desirable institutional development (p. 187). Our long history of political stability should generate more confidence that we need not see dictatorship lurking around the corner of every novel exercise of presidential power; moreover, the levels of education and wealth in the United States provide a sturdy foundation, judged by comparative experience, against a lapse into authoritarian rule.<sup>93</sup> Because debates over presidential power become so tied to their immediate political context, it is too easy to cast Posner and Vermeule's book as a defense of the expansive claims of presidential power of the recent Administration of George W. Bush. But because Posner and Vermeule frame their analysis in general and systematic terms, the work can prod us to think about the presidency through the much wider horizon of at least a century of the "modern" presidency — a presidency that long ago left behind the limited conception of the office in the original constitutional design. Thus, Posner and Vermeule might be taken to be pressing for a shift — one more cultural than legal — in the understanding of the value and importance of active presidential power.

To the extent that the book seeks to change attitudes toward presidential power, however, that ambition might well be undermined by the argumentative structure of the book. A more nuanced claim that American political culture is excessively fearful of presidential discretion and power is quite different from Posner and Vermeule's more radical argument that law does not, cannot, and should not constrain the President. Belief in a need for greater presidential powers, in response to economic, security, and other current circumstances, does not require belief in an executive generally unbound by law. Advocacy for the latter can easily undermine the credibility of claims for the former. Indeed, if one believes executive power is too little valued and that we ought to be less concerned about presidential discretion, the principal signal of these burdensome constraints would presumably be laws that deny the President necessary power — and that do so effectively. Presidents might already legitimately have more legal power than critics recognize; perhaps specific laws that constrain presidential power ought to be changed to enable the country to deal more effectively with specific problems. But to argue more generally that presidents are not, and should not be, constrained by law in general does not seem likely to further these more specific aims.

Ironically, in this respect Posner and Vermeule might reproduce the mistake that presidents often make about the relationship between law, credibility, and power. Since 9/11, for example, the threat of terrorism might have justified, in pragmatic terms, the use of governmental powers

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<sup>93</sup> In support, Posner and Vermeule note the oft-cited fact that no democracy has collapsed in countries whose average per capita income is over \$6000 in 1995 dollars, which the United States exceeds by a factor of about six (p. 189).

not used in ordinary times or in response to conventional crime. Some of these powers might have deep roots in past American practice and law during conventional wars (such as detention); others might be relatively more novel (such as targeted killings). In either case, the use of these more coercive and less familiar powers understandably triggers concerns about whether what is being done is justified, whether the actions rest on sound reasons, whether the government is using these powers in appropriately restrained ways, and whether the government is acting consistently with the rule of law. The capacity of the government to sustain these kinds of policies over extended periods of time is intimately tied to the credibility of these policies with various audiences, such as Congress, the courts, and public opinion. And where international cooperation and support are inevitably required, these policies will have to be credible to international audiences as well.

Yet the executive branch all too often refuses to disclose and explain the framework of law and principles under which it carries out these less familiar, more coercive policies. As a result, even when the executive branch is acting lawfully, critical support for its policies can be undermined if government is not perceived to be acting credibly. To justify more active and expansive uses of power, presidents often have to find ways to signal that power is being used appropriately. Similarly, if Posner and Vermeule seek to encourage greater acceptance of presidential power and discretion, it is not obvious that the best route to doing so is by arguing that presidents are, and should be, unconstrained by law.

Second, if Posner and Vermeule's approach is refined to ask more narrowly framed questions, it can pry open another set of productively challenging issues. Lawyers, for example, tend to think that presidents should be obligated to comply with the law in virtually all situations. Posner and Vermeule go to the other extreme and assert that law does not and cannot constrain, but that presidential calculations of the costs and benefits of legal compliance, weighed against the benefits of substantive policies, will determine presidential actions. In turn, I have suggested that even if compliance with law is instead just one factor in presidential cost-benefit calculations, it is likely to be such an exceptionally powerful factor, even in instrumental or pragmatic terms, that presidents are likely to comply far more often than Posner and Vermeule suggest. But if the consequentialist approach accurately captures the way White Houses "think" — a big if — a more modest version of this approach might suggest that presidents do not think of law as an absolute constraint, but as one factor, albeit an exceptionally important one, in their decisions. Even that more modest view, if persuasive, offers a much less conventional account of the role of law in presidential action. Does this kind of consequentialist framework — in which presidents take law into account as an exceptionally important factor, but still only as a factor — offer more realistic insight than do frameworks in which presidents routinely comply with law (with a few presi-

dents as exceptions) or routinely dismiss legal constraints (as Posner and Vermeule imply)?

In addition, if presidents weigh law as merely one factor in decisionmaking, can we begin to theorize more specifically about the contexts in which considerations of legality will be overridden in favor of other policy objectives? Perhaps certain laws simply have less political or public support than other laws. Thus, even if law and political responses are intertwined, political actors or citizens might respond differently to perceptions of illegality depending on the nature of the underlying law at issue. From the perspective of legalism, for example, consider the surreal nature of the debates over the War Powers Resolution<sup>94</sup> (WPR) and the United States' military role in the NATO-led Libya operation. President Obama's position was that the WPR did not apply because that role did not meet the WPR's triggering definition of "hostilities."<sup>95</sup> Both the House and the Senate (in the latter's case, in the form of the relevant committee),<sup>96</sup> as well as many commentators,<sup>97</sup> rejected that legal position and concluded that the WPR did apply; the House went further and affirmatively refused to authorize the Libya operation.<sup>98</sup> The direct legal consequence of that conclusion, under the WPR itself, would have been that the Obama Administration was required to disengage from these "hostilities" after sixty days, since Congress had not approved the action.<sup>99</sup> Yet even as the House and others insisted that the WPR applied and the President had to get congressional approval, virtually no one in Congress pushed this argument to its direct legal conclusion — that the President was obligated to withdraw.

<sup>94</sup> 50 U.S.C. §§ 1541–1548 (2006).

<sup>95</sup> See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 12–16 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State) (providing justification for the Obama Administration's conclusion that U.S. involvement in the Libya operation was consistent with the WPR).

<sup>96</sup> See, e.g., Jennifer Steinhauer, *House Rebukes Obama for Continuing Libyan Mission Without Its Consent*, N.Y. TIMES, June 4, 2011, at A4, available at <http://www.nytimes.com/2011/06/04/world/africa/04policy.html> (reporting on passage of a House resolution, by a vote of 268–145, that criticized the President for maintaining operations in Libya without express congressional consent); Jennifer Steinhauer, *Senate Panel Votes in Favor of U.S. Measures in Libya*, N.Y. TIMES, June 29, 2011, at A8, available at <http://www.nytimes.com/2011/06/29/us/politics/29powers.html> (reporting that the Senate Foreign Relations Committee had passed a resolution, by a vote of 14–5, that authorized American operations in Libya, while also noting that "members [had] skeptically grilled the administration's legal adviser [Harold Koh] over his assertion that airstrikes and other military measures did not amount to hostilities").

<sup>97</sup> See, e.g., Bruce Ackerman, Op-Ed., *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27, available at <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html> (arguing that the Obama Administration had engaged in "trivialization" of the WPR because its position on whether the WPR applied "lacks a solid legal foundation").

<sup>98</sup> See H.R.J. Res. 68, 112th Cong. (2011) (rejected by House, June 24, 2011); see also Jennifer Steinhauer, *House Rebuffs Libya Mission; No Funds Cut*, N.Y. TIMES, June 25, 2011, at A1, available at <http://www.nytimes.com/2011/06/25/us/politics/25powers.html> (reporting on rejection of a resolution in the House, by a vote of 123–295, that would have authorized military operations in Libya).

<sup>99</sup> See 50 U.S.C. § 1544(a).

And that odd conjunction of views cannot be ascribed to congressional unwillingness to assume responsibility. Some academic commentators who demanded that the President get congressional authorization also did not insist that the failure to get that authorization obligated the President to withdraw.<sup>100</sup>

A plausible explanation for these positions is that many of those who believed presidential consultation with Congress was legally required did not believe that the statutory sanction for failure to gain congressional approval was wise or prudent policy — even though it was the law. Given what these commentators thought was at stake in the successful completion of the Libya operation, such as the credibility of NATO and the United States and the future of international cooperation for humanitarian intervention, the WPR's legal default rule — which turns congressional failure to act into an affirmative decision to end an operation — probably seemed like disastrous policy. Apparently, there were many who thought the WPR applied but were not prepared to enforce it. That tacit consensus counts as a point in favor of a more modest version of Posner and Vermeule's approach.

Similarly, their approach does help suggest the role of political and public perceptions of legality as important constraints on presidential action. That suggestion, in turn, raises a series of intriguing questions about the sources and bases of these perceptions. With respect to public perceptions, for example, what kinds of issues rise to the level of mobilizing and organizing substantial numbers of people to have views about the legality of presidential action, and through what processes? How much do those perceptions correspond to what a neutral, legally sophisticated actor would consider the law actually to be? How easily manipulated are those public perceptions, including by partisan political actors for partisan ends? And with respect to congressional enforcement of legality, how much is Congress motivated by views of what the law requires as opposed to partisan political considerations?

In addition, the provocative question of how much constraining power law should have in presidential decisionmaking can be viewed as directly

<sup>100</sup> Professors Bruce Ackerman and Oona Hathaway, for example, initially argued vociferously that the proverbial “clock” was “ticking” on “Obama’s War” in Libya and insisted that the WPR required congressional approval. See Bruce Ackerman & Oona Hathaway, *The Constitutional Clock Is Ticking on Obama’s War*, FOREIGN POL’Y (Apr. 6, 2011), [http://www.foreignpolicy.com/articles/2011/04/06/the\\_constitutional\\_clock\\_is\\_ticking\\_on\\_obamas\\_war](http://www.foreignpolicy.com/articles/2011/04/06/the_constitutional_clock_is_ticking_on_obamas_war). However, once the statutory sixty-day limit had been breached, instead of demanding that the operation end, they urged that the President seek ex post ratification from Congress to enable the operation to continue. See Bruce Ackerman & Oona Hathaway, *Obama’s Illegal War*, FOREIGN POL’Y (June 1, 2011), [http://www.foreignpolicy.com/articles/2011/06/01/obamas\\_illegal\\_war](http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war). And long after the House had voted down approval, Ackerman continued to argue not that the operation had to end but that Congress ought to approve it. See Bruce Ackerman, *Why Has the French Parliament, but Not the American Congress, Voted on the Libya Intervention?*, BALKINIZATION (July 13, 2011, 1:26 PM), <http://balkin.blogspot.com/2011/07/why-has-french-parliament-but-not.html>.

ties to issues of institutional design. Ackerman's proposal of an independent tribunal to bind the President firmly to the law implicitly rests on the assumption that law ought to be an absolute constraint on presidential action.<sup>101</sup> After all, for those drawn to the view of law as an absolute constraint, why would it make sense (even though it might be constitutionally required) to leave nonjudicial legal interpretation in the hands of institutional actors, like the Attorney General or OLC, who serve at the pleasure of the President and self-consciously define their role as construing the law from the perspective of the executive branch in general? As described in a set of best-practice guidelines drafted by former OLC lawyers, OLC "serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power."<sup>102</sup> Thus, OLC lawyers self-consciously proclaim that the office's work should "reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office."<sup>103</sup> As Goldsmith, a former head of OLC, puts it, OLC does *not* always aspire to provide rulings "like a politically neutral ruling from a court."<sup>104</sup>

If we ask why that interpretive bias ought to be acceptable — there are few detailed defenses of it in the academic literature — one answer might be that it is desirable, in terms of good substantive policy outcomes, if presidents have some latitude in their interpretation of law. This latitude, in OLC's understanding of its role, does not extend all the way to permitting any "plausible" interpretation to prevail. But it does permit interpretations that differ from those that courts would reach. What justifies OLC's more permissive understanding (and, to the extent that OLC's understanding is more generally accepted, the understanding of our political system)

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<sup>101</sup> The extent to which Ackerman actually seeks institutional mechanisms to ensure that the law absolutely binds the President or to ensure only that fidelity to law is a highly significant factor in presidential decisionmaking is not entirely clear in Ackerman's writings. *See supra* note 36.

<sup>102</sup> Walter E. Dellinger et al., Principles to Guide the Office of Legal Counsel 3 (Dec. 21, 2004), available at <http://www.acslaw.org/pdf/OLCGuidelinesMemo.pdf>. OLC has also issued two other important memoranda in recent years defining best practices for the office. *See* Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005), available at <http://www.justice.gov/olc/best-practices-memo.pdf>.

<sup>103</sup> Dellinger et al., *supra* note 102, at 3. As Morrison puts it, OLC believes that its interpretations might be "more protective of executive prerogatives than are [the interpretations of] non-executive actors." Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63 n.6 (2011). *See generally* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1502 (2010) (discussing the relationship between OLC's obligation to seek its best view of the law and the "generally pro-executive tenor in OLC's opinions").

<sup>104</sup> GOLDSMITH, *supra* note 48, at 35.

regarding the scope of lawful presidential discretion? Does that understanding reflect an implicit view that the “best” interpretation of the law should not always be an absolute trump on presidential action? In other words, does existing practice implicitly recognize — even though the practice is rarely defended expressly in these terms — that good reasons suggest presidents should not be bound to follow the best interpretation of law, in the sense a neutral court would render? Does this practice implicitly concede more to Posner and Vermeule’s view than many proponents of this practice might recognize or acknowledge? If that view of law and presidential power is correct, then it would help to justify leaving interpretive power in the hands of OLC. One, however, may inquire: if we were free to design institutions on a blank slate, upon what vision of the relationship of presidential power to law would we act, and what institutional structures would best reflect that conception?

Serious analysis of these issues is difficult because presidents and their advisors almost never directly admit to not following the law, nor do they state that they view the law as merely one factor in their ultimate decisionmaking. Presidents present themselves as complying with the law — in part confirming the theme of this essay, which is that political and public judgments of presidential credibility are deeply bound up with judgments about whether the President has acted lawfully. But when presidents rely on thin and unpersuasive interpretations of the law — on interpretations that differ from those that courts or other detached, expert interpreters would reach — should we view presidents as complying with the law? Or, under Posner and Vermeule’s tutelage, is it more realistic to view presidents as circumventing the law but providing legal arguments that create the appearance of legal compliance? The latter practice would be, perhaps, the presidential analog of Supreme Court decisions that do not formally overrule precedents but do so “stealthily” through unconvincing distinctions that erode the precedent by refusing to adhere to its logical implications.<sup>105</sup> Part of the virtue of Posner and Vermeule’s book is that it presses toward a realistic appraisal of whether presidents comply with law, what compliance does and should mean, and whether de facto noncompliance (even if not admitted) is both more regular and more justified than most legal analysis assumes.

Finally, if we think about legal compliance not as an internal, normative matter, but in terms of whether other actors are prepared to sanction public officials who deviate from the law, we might gain further insight into *which* public officials and institutions are more likely than others to be able to circumvent or avoid the law. Given the powerful cultural role of law in the United States, for example, presidents who are widely perceived

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<sup>105</sup> See generally Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

to have violated the law are likely to come under intense scrutiny. But suppose we are prepared to see the Supreme Court not as moved primarily by internal legal considerations, but by the preferences of Justices for outcomes that are constrained instead only by public and political acceptance or rejection. In that case, we might conclude that the Court has greater latitude to deviate from the law (which would mean not following faithfully the relevant, authoritative sources of law) than has the President. To some extent, the Court's own decisions are more inherently self-legitimizing with respect to public perceptions concerning legality. That is, if public and political perceptions of legality are a major source of the actual constraints on the Court and President, we might conclude that because the Court itself is perceived as a source of legal authority, unlike the President, the Court will have more freedom of action to depart from the law without sanction.

#### CONCLUSION

Between the legal romantic's vision of presidents treating legal compliance as the highest value and always acting on the basis of the best, good-faith interpretation of the law, and the cynic's vision of presidents willing to ignore the law when judicial enforcement is unlikely, lie the complex realities of the relationship between presidential power and law. Presidents rarely proclaim in public their outright defiance of law, but they (and their legal advisors) at times push the boundaries of legal compliance by embracing tendentious legal positions not widely shared among legally knowledgeable interpreters but that nonetheless enable presidents to pursue their policy aims. In addition, apparent legal constraints on presidential power sometimes leave presidents with more discretion than the symbolism of those constraints would suggest. And perhaps contexts do exist in which large public and political majorities would prefer presidents to act on the basis of their best policy judgments, even if those judgments might be in tension with existing law.

Yet at the same time, a close relationship exists between presidential credibility and effective power. In the United States, that credibility is bound up with perceptions about whether presidents are complying with domestic law. Law, politics, and public opinion are not separate domains hermetically sealed off from each other. Public and political responses to assertions of presidential power are, in the United States at least, inextricably tied to perceptions of whether those assertions rest on legitimate, lawful sources of authority. These processes do not ensure complete or even optimal presidential compliance with law, but they do provide an important constraint on presidential temptations to ignore the law, to which even presidents not inclined to obey the law for its own sake nonetheless must attend.