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CONSTITUTIONAL FAITH, OR CONSTITUTIONAL STEALTH?—THE PUZZLING RESURGENCE OF AMERICAN MONARCHISM

THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING. By Eric Nelson.[1] Cambridge, Mass.: Belknap Press, 2014. Pp. 400. $29.95 (cloth).

THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner[2] & Adrian Vermeule.[3] New York: Oxford University Press, 2011. Pp. 256. $31.95 (cloth), $19.95 (paper).

SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY. By Rahul Sagar.[4] Princeton: Princeton University Press, 2013. Pp. xiii + 304. $35.00 (cloth), $24.95 (paper).

Daniel N. Hoffman[5]

I. INTRODUCTION

Veneration for the Constitution is a staple of American political culture, as is vigorous debate about the meaning of specific terms. Yet events of recent years have raised pointed questions about the Constitution's viability: is it truly well-adapted in today's world for delivering on the promises of its Preamble; or is it, rather, maladapted, ineffective, and obsolete? Does the Constitution adequately describe how we are actually governed; and, if not, need we be concerned?

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Short of formal amendment, the common way to remedy perceived defects of the Constitution has been by shifts in interpretation. The Supreme Court has done this on many occasions, with varying political impact. Some of these shifts focused on personal rights, others on governmental powers. Some were enabled by transformative Court appointments, but others reflected shifts in opinion prompted by dramatic national and world events or successful political movements. All were able to draw support from scholarship that criticized the previously dominant interpretations. Perhaps the most significant shift was the abandonment in the 1930s of doctrines that had severely restricted both governmental regulation of the economy and broad delegations of power by Congress to bureaucratic agencies. A major consequence was a tremendous increase in the size of the federal executive branch, the scope of its powers, and the money it spends. These changes have aroused continued controversy as to their wisdom, with some supporters and critics regarding them as tantamount to constitutional—or unconstitutional—revolution. The controversy, however, has played out largely in political and academic discourse, not in the judiciary.

In recent years, the discourse has shifted in surprising ways. As late as 1988, Sanford Levinson's *Constitutional Faith*[6] sought to find coherent meaning in a close and reverential reading of the Constitution's text. By 2006, Levinson was calling for a new Convention to remedy its profound defects.[7] Other scholars, however, see no need for formal amendment or replacement. Instead, they contrive to find in the Constitution, as it stands, principles and virtues wildly different from the familiar literal readings and traditional understandings. The conventional discourse shows signs of exhaustion.

This essay considers three recent books that boldly but differently defend remarkably strong views of the powers our Constitution bestows on the presidency: *The Royalist Revolution*, by Eric Nelson; *The Executive Unbound*, by Eric Posner & Adrian Vermeule; and *Secrets and Leaks*, by Rahul Sagar. All three come from prestigious presses, with jacket blurbs from a diverse group of prominent scholars. These may surprise, until we reflect that veneration for the presidency has never been confined to a narrow ideological faction. Presidents of all parties have consistently

6. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

7. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 180–94 (2006).

appealed to it, argued for it before Congress and the courts, and gained significant, often bipartisan support. Political leaders deeply opposed to incumbent presidents have historically tended to attempt capturing the office, not to weaken it.

Presidential powers, as Madison observed, thrive most dangerously in times of war: "Of all the enemies to public liberty war is, perhaps, the most to be dreaded . . . . [T]he discretionary power of the executive is extended . . . . No nation could preserve its freedom in the midst of continual warfare."[8] Today, we find ourselves in an era of permanent war, or at least its threshold. In addition, Congress, the primary institutional check on executive power, is held these days in unprecedented contempt. This suggests the question, how far are we from outright (if elective and term-limited) monarchy? The books at issue argue that in effect we already have one, and it's a good thing, too.[9] (Full disclosure: I have long argued that our Constitution imposes lawful restraints on the president, withholding monarchical powers.[10])

II. *THE ROYALIST REVOLUTION*

Eric Nelson's work is an intellectual history of the presidency, exploring the views about monarchy of prominent Americans during the colonial, revolutionary, and Constitution-framing eras. His thesis is that pre-revolutionary colonists loved and admired the king, whose predecessors had chartered their colonies and granted them substantial self-rule. When Parliament began to impose new taxes and commercial regulations, they saw this as usurping the king's prerogatives, and looked to him, the foremost guardian of the rights of British subjects, to preserve their liberties. Only after he ignored their many pleas did they turn against him and pursue independence. While some thereafter followed Thomas Paine's lead in *Common Sense*,[11] opposing anything that smacked of monarchy and adopting "whiggish" State constitutions with feeble executives, "royalist" leaders like Ben Franklin, James Wilson, John Adams and Alexander Hamilton adhered to the view that the British monarchy had in

8. JAMES MADISON, 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491 (1865).

9. "[A]nd it's a good thing, too" is inspired by STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1993).

10. *See infra* notes 21, 25 & 27.

11. *See, e.g.*, THOMAS PAINE, COMMON SENSE AND OTHER WRITINGS (Gordon Wood ed., 2003).

fact proven too weak, and that a strong republic would require an extremely powerful executive. At the Constitutional Convention, Nelson claims, they prevailed. "The very same principles that had underwritten the patriot campaign to rebalance the imperial constitution in favor of the Crown demanded in 1787 the creation of a recognizably Royalist constitution for the new United States" (p. 7).

In support, Nelson offers a raft of letters, pamphlets, sermons, etc., from colonists that extol the blessings of monarchical "prerogative," placing these in the context of ongoing debates about the flaws of the British Constitution as the source of the colonies' increasing plight. These writers often denounced the corruption of Parliament and/or their lack of representation therein, even while debating competing theories of representation and different views of the limits of Parliament's power to legislate concerning the colonies. Some highlighted the tyranny over Britain of the Long Parliament after the execution of Charles I, hailing the Stuart Restoration as a return to more balanced government, but lamenting the incompleteness of the restored prerogative, in that the king's veto power had fallen into disuse. Colonists repeatedly reproached George III for failing to veto the laws to which they objected.

Nelson takes issue with scholars who have dismissed arguments like these as perhaps insincere and self-serving, aimed at justifying actions whose real motives were different. He shows that this "royalist" line of thought survived the advent of independence and had some influence on later constitution-making. His depiction of the Constitution of 1787 as a triumph of royalism, however, falls seriously short. It is utterly clear the colonists' arguments, however sincere, were context-driven, and that none offered a coherent theory of representation or of legitimacy capable of persuading modern readers who believe in majority rule, local self-government, equal human dignity or a fundamental right to vote. All seem to have accepted the obsolete concept of "virtual representation," though differing on its rationale, and many agreed that the colonies were outside the "realm" of Parliament's jurisdiction, governed only as the personal "dominion" of the king. These viewpoints are simply irrelevant to a proper understanding of presidential powers under the U.S. Constitution.

The terminology of the documents can be confounding to readers today. Quite often, statements seem incoherent or inconsistent with other views of the speaker. For example, we

commonly think of the powers of Parliament and of "the Crown" as mutually exclusive. Yet in 1621 we find Lord Baltimore opposing proposed legislation regarding Virginia by arguing that "if Regall Prerogative have power in any thinge it is this . . . Virginia is not annex't to the Crowne of England And therefore not subject to the Lawes of this Howse [of commons]" (p. 39). Nelson does wonders trying to make sense of his materials, but one may doubt sometimes whether they really do make sense, or whether his interpretations are the only ones plausible.

Nelson launches his account with a confusing 1775 debate in Parliament, where the wisdom of Coercive Acts against the colonies became entangled with the question whether to commemorate the "martyrdom" of Charles I. The Whig John Wilkes opposed both measures and depicted the colonists as sharing his opposition to royal prerogative rule. Yet Lord North mocked Wilkes for joining the colonists, who he claims were advocating Tory principles that extended prerogative across the ocean, while halting parliamentary authority at the shore. Nelson's summary, in turn, places the colonists even to the right of 1775 Tories, "drifting perilously close to Jacobitism" (p. 31). The history reviews numerous occasions where colonists pleaded the constitutional theories of "dominion" and royal prerogative mentioned above. Jefferson and John Dickinson were significant exceptions, in that they, while agreeing that Parliament had overreached its powers, voiced concern also at the prospect of unbridled royal tyranny and rejected the Jacobite nostalgia expressed by others. George III's determination to defend and enforce the laws passed by Parliament made these constitutional debates largely moot, but Nelson, anticipating the Declaration of Independence, argues paradoxically that in denouncing there only the king and ignoring Parliament, patriots only reaffirmed "their continuing attachment to the neo-Stuart theory of empire" (p. 65).

The next step examines more closely the contending concepts of representation espoused by patriots. On one view, that term required a body whose composition reflected that of the whole people. Hanna Pitkin, in *The Concept of Representation*,[12] presented this as John Adams's view. Nelson, however, maintains that Adams's focus was on authorization: the people had a right to erect any government they wished, including a hereditary limited monarchy, which would then be "the representative of the

12. HANNA PITKIN, THE CONCEPT OF REPRESENTATION 60–61 (1972).

whole nation, for the management of the executive power" (p. 67). Still, it is clear that Adams strongly endorsed the principles of separation of powers and rule of law. It was the inclusion of these in the British system that enabled him to call that system a "republic." Those principles seem incompatible with a concept of prerogative in the sense of rule outside the law.

Whether or not the king could represent them, patriots were agreed that Parliament did not. None, of course, were advocates of the modern norm of universal suffrage. They accepted the idea that members of Parliament "virtually" represented even voteless inhabitants of Britain. But here they parted ways: some simply insisted that the colonists had never authorized Parliament to represent them. Others argued that voting was a necessary condition for authorization, and the colonists had no votes for Parliament. Some went so far as to assert that "one could only be said to have authorized a representative for whom one had voted" (p. 70), raising thorny questions about whether those who might abstain or vote for the losing side are represented. No adequate theory of representation emerges here—least of all Nelson's royalist theory of representation through royal prerogative. Oddly absent is the slogan, "No taxation without representation," and the history of demands made and later retracted for seats in Parliament, amidst occasional British offers of same. That omitted tale leaves an impression that "no taxation" was the only point on which the colonists were clear and united.

Next, Nelson focuses on the impact of Paine's *Common Sense*. Paine's attack on the evils of monarchy revived an old debate regarding two Old Testament passages on the appropriateness of that institution for the Hebrews. The passages, from *Deuteronomy* and *Samuel*, respectively, appear to look both ways. On one interpretation, they can be reconciled by focusing on the contingent vice of unbridled discretion; on the other, by citing the inherent vice of idolatry, of bowing before man rather than God. Nelson places *Common Sense* firmly in the second camp, where prerogative is not the issue. Thus, the republican turn sparked by Paine could accommodate the essence of the royalism of other patriots, which was prerogative power and not the trappings of monarchy. Nelson acknowledges in passing that Paine himself was always "a committed opponent of prerogative power" (p. 144 n. 182), but ends the section with an approving reference to John Adams's 1789 characterization of the new Constitution as "a monarchical republic, or if you will, a limited monarchy" (p. 145).

Nelson's review of state constitution-making from 1776 to 1780 shows that many states had vigorous debates over executive powers, and the veto power in particular. In general, the whiggish opponents of prerogative prevailed. The "royalists," though, for the most part (Franklin excepted) adhered to their convictions and bided their time. Adams, who had consistently maintained that a republic must be "an Empire of Laws and not of Men" (p. 161), now advocated for the states a relatively strong governor, endowed with the veto and "the whole Executive Power," yet limited to three one-year terms in office and, significantly, divested "of most of those Badges of Domination call'd Prerogatives" (p. 162). At first, only South Carolina accepted the veto power. In contrast, Pennsylvania in 1776 opted for a unicameral legislature and a subservient, plural executive. James Wilson's movement to right the balance was successful in 1790; New York had adopted a qualified veto power in 1777 and Massachusetts had done so in 1780. Nelson sees the tide here shifting back toward "sweeping prerogatives" (p. 177).

We come at last to the federal Constitution of 1787. The Convention of that year was a response to perceived defects of the Articles of Confederation. While its primary aim was creating a stronger central government vis-a-vis the states, Nelson focuses entirely on the creation of a new, separate executive branch. The Virginia Plan, which largely set the Convention's agenda, had simply called for a "National Executive" to be chosen by the legislature, and endowed with authority to execute the laws and the (unspecified) "Executive rights vested in Congress by the Confederation." From the outset of debate, the structure and powers of the executive were entangled with the method of its selection—whether by Congress, popular vote, or otherwise. James Wilson's proposal for a single executive, elected by the people for a limited term and endowed with an "absolute negative" (pp. 185-186), encountered objections on every score. Randolph, Sherman, Dickinson and Franklin thought the plan smacked of monarchy, while Hamilton thought the president should serve for life or during good behavior. Wilson was obliged to acknowledge that "he did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers" (p. 189). The Convention ultimately rejected both popular election and the absolute negative. The president's veto, treaty and appointment powers were limited; his term was four years, and he was made subject to impeachment.

Nelson reviews the ratification debates, in which Antifederalists continued criticizing the presidency, while Federalists, and Hamilton in particular, defended it by depicting its powers as less than those of either the British king or New York's governor. Federalists made no public reference to a "monarchical republic." In private, meanwhile, Convention delegate Abraham Baldwin, according to Max Farrand's *The Framing of the Constitution of the United States,* was writing: "Nor did it appear that any Members in Convention had the least Idea of insidiously laying the Foundation of a future Monarchy . . . . But were unanimously guarded and firm against every Thing of this ultimate Tendency."[13]

According to Nelson, the leading Framers had fought to establish "a transcendent chief magistrate, one who would stand above faction . . . ." (p. 231), and drafted "a recognizably Royalist constitution, investing its chief magistrate with the very same prerogative powers that Charles I had defended against the great whig heroes of the seventeenth century" (p. 232). I would suggest, however, that no president, including Washington, has succeeded in standing above faction. Moreover, had the Federalists openly avowed their Constitution as royalist, it would not have been ratified. If we began with a royalist Constitution, then, it was a work of stealth.

The Royalist Revolution does not directly address current issues in constitutional law, whether those about specific presidential powers or broader questions about the binding force of Framers' intent/original meaning. Given the gulf between historians' and jurists' methods and concerns, this seems wise. Yet Nelson's findings leave room for presidentialists to offer them in support of expansive readings of presidential power, including arguments that presidents have "inherent power" to act outside of or even against the law. Nelson's work does not and cannot support such arguments. While some delegates to the Convention were admirers of what they saw as the British constitution, they could not have copied it if they chose, for Britain had no written constitution. Patriots' various, shifting and conflicting conceptions of "prerogative," "representation," or even "republican" were not debated, let alone codified and ratified. By 1800, the High Federalist views of Hamilton and Adams were

13. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 162 (1913).

mocked and rejected. The Constitution as we know it reflects Madison's insight that power corrupts.

III. *THE EXECUTIVE UNBOUND*

Eric Posner and Adrian Vermeule focus on the special demands of the modern administrative state, in which, they maintain, competence and power belong overwhelmingly to the executive branch, and the traditional, legalistic checks and balances of the "Madisonian republic" are obsolete. Congress and the courts now play essentially reactive and marginal roles. The authors are quite comfortable with this state of affairs, since it is essential to effective government.

They begin with a sharp critique of "liberal legalism"—the view that law does and should constrain the executive. The reality, they hold, is that in the modern administrative state, such legal constraints are "shaky in normal times and weak or nonexistent in times of crisis" (p. 4). For this point they draw upon the legal thought of Carl Schmitt, the "crown jurist of the Third Reich,"[14] though they reject his contempt for democracy. Schmitt has grown remarkably popular of late, with 420 law review citations since the year 2000. Schmitt argued that the pace and complexity of modern life pose challenges that legislatures and courts are institutionally incapable of managing.

The chief reasons for the failure of liberal legalism to constrain executive power are emergency and delegation. Why Schmitt's authority is essential for these points is not obvious. The Weimar Constitution that Schmitt deplored expressly provided for its suspension by the executive during emergencies; ours does not. If constitutions matter, that would be an advantage for the U.S. system. Delegation, the authors say, flowed inevitably from the size and complexity of the tasks entrusted to modern government during and since the New Deal, tasks which Congress could not but delegate to a growing bureaucracy. Early judicial resistance to delegation withered after 1937. Wars and economic emergencies have prompted further, sweeping assertions of executive power. While Congress has enacted a number of framework statutes aiming to limit and oversee executive discretion, these have proven largely ineffective in the face of complexity, secrecy, and collective action problems that weaken Congress and the courts. Even when laws are clearly violated,

14. *See* Charles E. Frye, *Carl Schmitt's Concept of the Political*, 28 J. POL. 818 (1966).

there is often no effective remedy available. Yet, the authors insist, the election system forces politicians to maintain their popularity and credibility and to submit to extraordinary scrutiny by a highly educated population. Politics and public opinion thus supply sufficient nonlegal constraints on executive power: "The administrative state generates the cure for its own ills" (p. 14).

There follows a powerful, extended critique of Madison's theories of separated powers and checks and balances. First, he wrongly predicted that officeholders' ambitions would generally lead them to vigorously defend the powers of their current office. Second, his assumption that Congress and the courts will monitor the workings of the executive has been rendered obsolete by the increased complexity and scale of the latter. Third, the legislative and judicial processes are too cumbersome to keep pace with the policymaking of the modern administrative state, to which so much power is necessarily delegated.

The first point rests on several aspects of the collective action problem: many members of Congress will be loyal to the president as their party leader; many will see his leadership as essential in times of crisis; and (my own point) not a few may themselves hope to be president one day. In short, the interests of a congressman do not always coincide with the powers of that place. Second, congressional monitoring is hindered by scant resources, lack of expertise and entrenched secrecy. The judiciary labors under similar disadvantages; while a few famous cases have announced checks on executive power, these have been the exception and not the rule.

Posner & Vermeule illustrate their case with detailed accounts of two crises: 9/11 and the 2008 financial crash. After 9/11, Congress quickly enacted measures delegating broad new powers to the administration, though not everything it had requested. Litigation on the scope of these delegated powers, as well as the additional, inherent powers repeatedly claimed by the administration, eventually produced three Supreme Court decisions that, although they ruled against the government on a number of narrow points, in practice left its hands virtually untied regarding its indefinite detention and surveillance programs. The financial crisis yielded a similar mix of unilateral executive actions and largely successful requests for expansions of delegated power, which could then be given extremely sweeping interpretations by the Bush and Obama administrations. For the authors, the legislative role in these episodes exhibited little Madisonian deliberation and self-regard, but ample signs of Schmittian

helplessness. "[T]he executive asks to take three steps forward; Congress, pushing back somewhat, has no choice but to allow it to take two" (p. 45). Post hoc congressional oversight has been relatively feeble—even, surprisingly, under conditions of divided government; judicial review has been too late and too deferential to make much difference. Insofar as courts eventually announce limits to executive power, "the public will not take much notice of those precedents, and they will have little sticking power when the next crisis rolls around" (p. 54). On the other hand,

> the sheer complexity of the government response to regulatory problems limits the impact of a single person, and renders inappropriate the use of words like "dictator" to describe the president . . . . [A] large area of public policy is determined by a self-replicating career bureaucracy . . . . The traditional separation-of-powers model does not, of course, capture this phenomenon (p. 59).

The "unitary executive" theory is not mentioned.

The authors next offer a novel theory of constitutional change. Contrary to Nelson's view, executive supremacy was not inscribed in the 1787 Constitution; rather, the Madisonian Constitution has profoundly changed via unorthodox routes. Neither formal Article V amendment, judicial interpretation, nor Ackerman's moments of "higher lawmaking"[15] could produce the quantity and speed of constitutional change that a dynamic polity demands. Formal amendment is unwieldy and rare, and many serious constitutional questions go unlitigated. Ackerman's "moments," meanwhile, are vaguely defined, yet surely too infrequent to supply the needed, routine, medium-size adjustments. Instead, constitutional change occurs through interbranch "showdown" conflicts mediated by public opinion—"a special kind of politics accompanied by legalized rhetoric" (p. 63). "Constitutional conflict over the distribution of policymaking authority is continual and ubiquitous" (p. 66).

The authors' first example of these showdowns is impeachments, which, they claim, "inevitably create precedents" (p. 63). They describe Lincoln's unpunished defiance of a habeas decree as "a (nonjudicial) constitutional precedent" (p. 69). With legalism repudiated, it is unclear just what "precedent" or "constitutional" are to mean, beyond describing successful

15. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

political actions. Indeed, they acknowledge that important precedents often continue to be controversial. However, if one branch totally or partially acquiesces in the actions of another, this can create "a political precedent couched in constitutional terms" (p. 71) that may have "some positive force in decision making during later periods" (p. 72). Rational actors, after all, must weigh the benefits of following precedent against the costs.

Often, say the authors, disagreements about the allocation of constitutional authority are settled in the short term by the force of public opinion. The influence of "public constitutional sentiment" is felt when a showdown threatens to paralyze the government, rousing important elites, interest groups and others to attention. Then, the competing claimants to authority must assess their respective degrees of public support in order to decide how far to press their positions. The authors acknowledge that public constitutional sentiment is not necessarily profound or even intelligent, yet its indirect influence legitimates the outcome under our "plebiscitary constitution." Whether or not the competing views are based on "good-faith interpretation of relevant texts and traditions," somehow the prevailing view will reflect "more fundamental, quasi-constitutional instincts than the views that prevail in ordinary politics" (p. 78).

Now, Ackerman identifies the 1936 election as a constitutional moment. My father, who had a law degree, voted for FDR in that election. When I asked him whether he was thereby endorsing FDR's theory of federal power under the Constitution, he responded, "He was a good guy. I wanted to give him a chance." In *The Executive Unbound*'s remarkable extension of Ackerman's theory, the public voice is heard without holding a single election; nor is it ascertained through opinion polls. Their hypothetical example, in which Congress wants to end a war and the president wants to continue it, raises the question: what chance is there that actual public opinion would be based on views of the two branches' constitutional authority, as opposed to the wisdom of the war itself? In short, "public constitutional sentiment" is probably a political fiction, akin to virtual representation. Nelson offered us constitutional creation by stealth; here we have constitutional reform by stealth.

Posner & Vermeule go on to examine "framework statutes" designed to constrain executive power, such as the War Powers Resolution, the National Emergencies Act, the Inspector General Act, and the Administrative Procedure Act. All but the last are declared to be relatively or even utterly ineffective, due to

congressional laxity in using their override provisions and in punishing violations of their various requirements. Presidents and Congresses alike know that in cases of showdown, by and large "the public will be unlikely to care too much about the legal niceties" (p. 88)—a statement in sharp tension with that quoted above from page 78. As for the APA, while it does impose some constraints on executive agencies in normal times, it does not apply to the President himself, exempts a range of national security affairs, and is not strictly enforced by the courts in situations of perceived emergency. Such APA terms as "agency," "agency action," "military or foreign affairs functions," "committed to agency discretion," and "for good cause," as interpreted by the courts, leave many important decisions outside the checking powers of other branches.

Anticipating legalist objections that their theory of constitutional change makes the rule of law a mere façade, the authors assure us that

> Candor is not always desirable, and hypocritical lip-service to the rule of law may even be best for the (thick) rule of law in the long run . . . . The best way to preserve those norms or values may be to draw a veil of decency over behavior that everyone knows is going on (p. 103).

They do not make clear in what sense "everyone knows" what is going on, or knows that escape hatches from liberal legalism are a Schmittian necessity, or in what "thick" sense these escape hatches preserve the rule of law. Nor do they show how, in the absence of candor, public constitutional sentiment can validly referee charges of unlawful executive action.

The authors' account of the real, effective constraints on the executive begins with a broad, remarkably sanguine statement:

> Through its long history and all of its wars and crises, the U.S. government has generally been responsive to the public interest, and has always ranked as a leader among countries around the world in . . . democratic responsiveness and civil liberties. And American practices in these respects have only improved over the decades and centuries, during the same period in which the separation of powers has eroded (p. 113).

This claim is documented by a single comparative political science source that relies on a few objective indicators. Its assumed validity is then explained by reference to the election and party systems, and by the political culture's allegedly deep distrust of executive power. Elections allow the public to remove leaders

whose conduct does not serve their interest; hence the ubiquity of elections, it is said, in the worlds of business, universities, and government—as if all of these domains were democratically governed. The national election system is admittedly flawed by rent-seeking and lack of voter information, but the authors do not see that the separation of powers is a necessary or sufficient cure for such flaws. In any event, it opens the door for gridlock that makes the system unworkable—thus, there seems to be "a general sense among the political elites that the erosion of separation of powers has not been a bad thing" (p. 120). Despite the distrust of executive power, it is Congress that takes the blame for gridlock.

The concentration of power in the executive, they maintain, has actually resulted in the advancement of our liberty. Presidents must strive to maintain popularity and credibility, and so the public's (undocumented) commitment to civil liberties[16] obliges them to act accordingly. Presidents know the voters' "ultimate" preferences, which are assumed to be fixed; presumably, support for liberty is such a preference, though support for separation of powers is not. Well-motivated or not, presidents use various strategies to maintain credibility, so that their exercise of discretion will be trusted. They know that excessive secrecy might undermine this effort, and the authors assert, remarkably, that there is no evidence for such an excess. (Here they cite an article by Rahul Sagar.)[17] Presidents can purport to "bind themselves" by relying (non-bindingly) on independent agencies and commissions, bipartisan appointments, multilateral engagements, promises of transparency, or even, as a last resort, by requesting express statutory authorization.

True, it is hard for the public to know whether the executive is indeed well-motivated, but the risk that the public will fail to trust a well-motivated president is just as serious as the opposite risk. Trust is justified, because in general "[t]he president knows the range of options available, their likely effects, their expected costs and benefits—thanks to the resources and expertise of the executive branch" (p. 130). If mistakes are made by a well-motivated executive, it is only because "greater accuracy would not have been cost-justified" (p. 131). These astoundingly optimistic statements fit uneasily with certain more sober comments: "Bush's policies in the war on terror might have been

16. *See generally* ROBERT MCCLOSKEY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 232–73 (1983).

17. *See* Rahul Sagar, *On Combating the Abuse of State Secrecy*, 15 J. POL. PHIL. 404 (2007).

optimal, insufficient, or excessive; we will not know for many years, to whatever extent the fog of history will allow us to know at all" (p. 135). There is, at least, "a middle range in which voters' information and competence are high enough that the credibility mechanisms are useful, but not so high that voters can just directly assess whether the executive has good motivations and is adopting optimal policies" (p. 152). At any rate, "the unchecked executive is generally too weak to adopt abusive policies" (p. 153). (Apparently, it is self-evident that the Iran-Contra affair, the second Iraq War, and the Bush-Obama counterterrorism policies, presumably motivated by sincere patriotism, do not count as abuses.)

This account depicts an implausible world of highly informed, entirely rational actors, where the public is united—not polarized—around fixed and meaningful constitutional sentiments. A benign, invisible hand operates in the political sphere, so that government action is presumed to serve the public interest, regardless of what is done and even regardless of the laws. Our system of electoral accountability is not unduly weakened or distorted by factors such as the electoral college, gerrymandering, legal restrictions on voting, the electoral power of money, subservient media, negative campaign ads, poor schooling, public ignorance and apathy, hero worship, pervasive secrecy, or the permanent bureaucracy (most of which are not even mentioned). This fable seems grounded in theoretical law and economics speculation, not empirical evidence. It ignores the fact that, though unpopular presidents may have difficulty obtaining desired legislation, they can still use executive orders and the Commander-in-Chief power to undertake muscular initiatives.

The authors next consider, and predictably reject, the proposition that international law can be an additional check on the American executive. While courts may regard human rights treaties and the laws of war as binding in principle, experience shows that the norms are vague and that violations generally have no effective sanction. International bodies are weak, foreign courts can rarely effectively intervene, and domestic courts are almost always deferential to the executive. Occasional references to foreign or international law in interpreting the United States Constitution have proved highly controversial, and a number of important treaties have failed of ratification or been saddled by the Senate with weakening reservations. In sum, "global liberal legalism seems like a rearguard action—an ideological effort to

reconcile the new era of executive power with traditional notions of rule of law" (p. 175).

The ensuing discussion of "tyrannophobia" argues that liberal legalism displays an exaggerated fear of tyranny, because it overlooks the political constraints on executive power identified above. Our country has never come close to a dictatorship, but tyrannophobia likely deserves no credit for this good fortune. Much discourse about tyranny is hyperbolic: occasional abuses of power by an elected leader, or even time-limited dictatorships, do not amount to true dictatorship. Moreover, even true dictatorship need not be catastrophic for public welfare, in terms of its social and economic policies; though he is not mentioned here, one senses the ghost of Schmitt nodding approvingly.

The authors trace tyrannophobia back to the founding era. They state, contrary to Eric Nelson, that, along with Caesar and Cromwell, James II and George III were antimodels for the Framers. Colonists had exaggerated views of the king's actual powers; the king, not Parliament, was the focus of the Declaration of Independence. Post-revolutionary constitutions established extremely weak executives, but experience with legislative tyranny prompted a movement to strengthen the national executive. After a prolonged stalemate, the Framers created an independent executive, vested with vague, undefined powers, whose limits would be subject to ongoing debate—including about "the executive power to violate laws in order to protect the nation" (p. 184 n. 31).

Over time, presidential power has shown a gradual upward trend, punctuated by cyclical peaks and valleys. Wars, in particular, expand presidential power, which contracts with the return to peace. "Americans admire the military but the culture is not militaristic" (p. 186). (Apparently, the authors are not familiar with typical July 4 crowd celebrations.) Powerful presidents long tended to be followed by weaker ones, perhaps due to political backlash; yet the most powerful presidents, such as Lincoln and FDR, have gained the approval of history. FDR's administration was a watershed; since then, only Nixon's abuses—though actually "pathetic stuff" (p. 200)—created a major backlash.

Is tyrannophobia a valuable, strong constraint on the executive; an irrational, strong obstacle to needed institutional change; or just insignificant rhetoric? Cross-national surveys provide no evidence that tyrannophobia is more prevalent in democracies; rather, it is general demographic variables, such as

wealth and its distribution, education, and ethnic and linguistic homogeneity, or else overlapping social cleavages, that distinguish democracies from non-democracies. "The contemporary United States is too wealthy, with a population that is too highly educated, to slide into authoritarianism" (p. 193). Even if tyrannophobia was justified at the Founding, today it is "an element of the broader paranoid style in American politics" (p. 195). The erosion of legal checks and the overlooking of political checks on the presidency (which have actually grown stronger) drive ongoing, irrational distrust. "The modern presidency is a fishbowl . . . [to] a wealthy, educated population and a super-educated elite whose members have the leisure and affluence to care about matters such as civil liberties, who are politically engaged, and who help to check executive abuses" (pp. 201-202). Even so, "There is no evidence that tyrannophobia deters low-level executive abuse . . . for an educated and leisured population, and the regular cycle of elections, will themselves check executive abuses" (pp. 203-204). A very puzzling footnote adds: "We do not claim, however, that we live in the best of all possible worlds. When the executive engages in abuses, legal or constitutional reform may be justified" (p. 204 n. 96). Here they cite certain legalist reform proposals,[18] though, in view of their antilegalist stance, they cannot endorse the necessity or efficacy of same.

The book concludes with several reassuring remarks: Congress retains the power to make laws, regulate the bureaucracy and create independent agencies; declarations of emergency and actions taken thereunder must face the prospect of withering public skepticism; post-Watergate governments will not dare to target and monitor political opponents. Each of these claims invites rebuttal, based respectively on gridlock; the wars in Iraq and Libya; and FBI surveillance of environmental and Occupy activists, plus unprecedented prosecutions for leaking.

The Executive Unbound's account of the desuetude of legal checks on executive power is persuasive and disturbing. The argument for sufficient political constraints, however, is abstract and empirically flimsy; the ease of propagating an overwhelming sense of emergency makes those constraints especially fragile. Finally, the admiring use of the ideas of the unrepentant Nazi Carl Schmitt is, to say the least, in very questionable taste.

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18. *See* Sanford Levinson & Jack Balkin, *Constitutional Dictatorship: Its Dangers and Design*, 94 MINN. L. REV. 1789, 1858 (2010).

IV. *SECRETS AND LEAKS*

Rahul Sagar's *Secrets and Leaks* is a narrowly focused paean to executive secrecy regarding foreign and military affairs. His heroes among the American founders are largely those Nelson identifies as the leading, royalist Framers of the Constitution—in particular, Wilson, Hamilton and Adams. The book is timely, in view of debates about alleged abuses connected with the War on Terror, the invasion of Iraq, and the massive leaks by Chelsea Manning and Edward Snowden. It is well written and copiously footnoted, with an extensive bibliography of historical, legal and political science sources.

Sagar emphasizes the difficulty of designing an effective regulatory framework to prevent the abuse of state secrecy. "[S]o long as there is state secrecy, our ability to guard against its misuse depends not so much on the checks and balances established by the Constitution as on the virtues and vices of those men and women who secretly take the law into their own hands in order to either open our eyes or close our minds" (p. 7). This premise is reminiscent of the antilegalist approach of Posner & Vermeule, though it speaks of personal virtue rather than political calculations. Despite this discounting of constitutional checks, the author proceeds to place the Constitution at the heart of the dilemma. The crucial aspect of the Constitution is the sweeping powers it vests in the president, on whose virtue we must then depend.

To support the proposition that the Framers subscribed not to a "principle of disclosure" but instead to one of secrecy, Sagar cites "republican" writers from Renaissance Italy and the absolutist Stuart monarchy, who taught that the state's flourishing in a world of international and domestic conflict depends on a regular and secure practice of secrecy. The capaciousness of his use of "republican" is evident in the book's opening epigram—a quote from Machiavelli's *The Prince*.[19] Machiavelli indeed taught that "virtu" was the prime ingredient for princely success, and the sole restraint on his actions. That thinker returns only on the final page, where Sagar exhorts us to "forgo platitudinous calls for 'transparency' and quixotic endeavors to tame 'the prince'" (p. 204); yet his spirit is evident throughout.

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19. NICCOLÒ MACHIAVELLI, THE PRINCE (W.K. Marriott, trans., J.K. Dent & Sons 1958) (1515), *available at* https://ebooks.adelaide.edu.au/m/machiavelli/niccolo/m149p/complete.html.

Expounding the constitutional separation of powers, the author argues that only the executive is endowed with the information, unity and energy needed to make national security decisions wisely and quickly, and to keep them confidential. Sharing the relevant information with Congress is unsafe, since individual members are prone to leak secrets confided to them, even when the body ordains secrecy. Thus, disclosure to Congress cannot be deemed constitutionally required. Courts, meanwhile, lack expertise and must be deferential when national security is at stake.

After convincingly showing, through many episodes over the years, that "neither Congress nor the courts have intervened strongly" against excesses of executive secrecy (p. 48), the author goes on to argue, reminiscent of Posner & Vermeule, that they are structurally incapable of doing so. Due to want of information, of incentives and of effective sanctions, they cannot reliably compel disclosure. Where national security is concerned—and Sagar insists that it is for the president alone to determine when this is the case—the separation of powers is hopelessly ineffective. Besides, he argues, it is a luxury we cannot afford; the other branches have wisely accepted doctrines such as the state secrets privilege and executive privilege, recognizing that "necessity knows no law" (p. 82). In the end, it seems, those doctrines are grounded more in perceived necessity than in the constitutional text.

Sagar challenges critics of secrecy to prove that, overall, the harms caused by abuses of secrecy exceed those caused by unauthorized disclosures (p. 93). Having deftly shifted the burden of proof to the other side, he needs to say little about the harms or benefits of the many secrets and leaks he offers as examples. Instead, he falls back upon the claim that, because the other branches lack the expertise and institutional capacity to keep secrets, mandated sharing of information with them cannot be safe.

His historical and institutional analyses lead the author to the very plausible conclusion that the most effective practical check against abuses is the leaking of the secrets. This prompts a close inquiry into the conduct of leakers and whistleblowers. Sagar provides insightful analysis of the options, incentives and risks that would-be leakers encounter. Unless the leaks are beneficial to the president, prospects for the leaker are generally bleak, suggesting that leaks might not be excessively common. Yet the author offers a normative claim ostensibly based on democratic

theory: Only the president is elected nationwide and empowered to determine the national interest on behalf of the People; thus, would-be leakers have no business substituting their judgment for his.

Sagar repeatedly recognizes that secrecy can be abused, but his vision of the virtuous presidency leads him to a very narrow definition of abuse. Not just any unlawful act will qualify, but only unlawful acts that deliberately pursue selfish rather than truly national interests—as if presidents do not generally believe that what is good for them is good for the country. Excluding Congress and the public from vital decisions in which they have a right to participate is not itself an abuse (pp. 127-130). Given this narrow definition, the author easily concludes that, while on rare occasions leaks may be necessary to expose the gravest abuses, for the most part leaks are unjustified and potentially harmful. His foremost worry is that leaks can sometimes cause gigantic harms—which cannot themselves be publicly detailed, for fear of causing even more damage. Necessarily, his examples are hypothetical.

Though disabled from examining the motives and judgments of secret-keepers, Sagar speculates at length about the possible bad motives and judgments of leakers. By their "usurpation" of the president's personal authority to determine what must be secret (p. 114), leakers make themselves subject to criminal sanctions, unless they can meet a stringent five-point test to justify their conduct. The disclosure must (1) concern an abuse of public authority, as narrowly defined; (2) there must be clear and convincing evidence of wrongdoing (difficult or impossible to come by); (3) the leak must not pose a disproportionate threat to public safety (also hard to know); (4) the means of disclosure must be the least drastic possible (publication to the world being the most drastic); and (5), leakers must identify themselves and be prepared to undergo the predictable formal and informal sanctions. Thus, leakers must accept the burden of proving that the president's motives were improper, and, in addition, of proving that their own motives in leaking information are not biased by "sectional," "partisan," or "personal" motives.

The author's policy recommendations accordingly focus primarily on steps to reduce the incidence of leaking. He is skeptical of the Posner/Vermeule proposal that presidents enhance their credibility by resorting to bipartisan appointments and multilateral actions, since those steps will limit the president's plenary control (pp. 189-191). Instead, he exhorts the press to

employ greater self-restraint, and advocates for "an independent and well-funded organization dedicated to scrutinizing media performance, which could name and shame reporters and editors who misuse anonymous sources, and the publishers who condone such behavior" (p. 201).

Secrets and Leaks has the skilled rhetorical earmarks of a carefully balanced argument; yet its positions on questions of historical interpretation, constitutional theory and democratic theory are extreme. Central here is the Machiavellian emphasis on voter-determined presidential virtue as the sole and sufficient safeguard.

For example, the author's treatment of the Founding period is highly selective. Historians conventionally expound the conflict in the 1790s between Hamilton and Madison over the risks and benefits of executive power, concluding that the issues have remained unresolved. Sagar, however, barely examines Madison's side of the argument, using contributions by Hamilton and Jay to *The Federalist Papers*[20] to characterize the Constitution as profoundly Hamiltonian. While he provides ample evidence that the Founders often resorted to secrecy, those actions alone cannot establish valid legal precedents. Neither the full range of historical facts nor the opposing interpretations developed by me[21] and other writers, such as Louis Fisher[22] and Heidi Kitrosser,[23] are seriously addressed.

Sagar relies heavily on the so-called Jay Treaty precedent (as did Chief Justice Burger in *United States v. Nixon*[24]), when George Washington refused to share requested papers with the House of Representatives, which nevertheless, moved by partisan loyalties and fears of war, granted funds to implement the treaty. The author seems unaware that this "precedent" was actually a sudden, unilateral, politically motivated departure from the previous practice, in which the president would forward requested documents, but sometimes ask Congress to keep them

20. THE FEDERALIST NOS. 2–5 (John Jay), NOS. 69, 70 (Alexander Hamilton).

21. *See* DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 20–33 (1981); Daniel N. Hoffman, *A Republic If You Can Keep It*, 82 MICH. L. REV. 997 (1984).

22. *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 221, 253–62 (2006); LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE (2004).

23. *See* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 192–210 (2015); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 ILL. L. REV. 881 (2008).

24. United States v. Nixon, 418 U.S. 683 (1974).

confidential. Moreover, the House formally protested this innovation, and President John Adams soon repudiated it in the XYZ Affair. Yet Sagar accepts on faith that George Washington was virtuous, making it irresponsible to criticize his conduct. Nor does he recognize how the ramming through of Jay's Treaty exacerbated the partisan divide, leading to ongoing popular and press protests that in turn provoked the notorious Sedition Law of 1798. This dynamic of secrecy leading to protests leading to repressive counter-reactions should serve as a cautionary precedent in its own right. The historical account here also ignores the fact that, even though the Federalists in the 1790s were repeatedly outraged by leaks that they thought endangered their "infant empire," none of the known miscreants was prosecuted. Their Sedition Law did not criminalize leaking, but only defamatory comments.[25] Even so, it was unconstitutional by modern standards,[26] and Jefferson's election in 1800 might be offered as another constitutional counterprecedent.

The author's more recent historical materials are extensive, but equally selective. There is no close examination of the long record of troublesome wars and treaties that we have entered under the influence of secrets and lies. For example, the roles played by secrecy and deception in launching and prolonging our Vietnam and Iraq wars are not assessed, because these are prime examples of politically controversial actions about which the president necessarily knows best. How could anyone be so irresponsible as to question the "talents and integrity" of virtuous leaders like George Washington and Dick Cheney (p. 187)? (The term "war crimes," by the way, does not appear in the book.) Sagar does show the great difficulty we have had in combatting excesses of secrecy, but his materials do not support his claim that "state secrecy is approved in principle and censured in practice" (p. 49); rather, they suggest the opposite.

Though our Framers explicitly attempted to avoid the tyranny of centralized power and to instill the rule of law, Sagar, akin to Nelson, has them stealthily enshrining in the presidency a sweeping principle of secrecy. His claim that the Framers allowed the president a free hand on secrecy has no textual basis, and it vitiates the separation of powers and the First Amendment. To capably perform their assigned roles, Congress, the courts, the

25. *See* Daniel N. Hoffman, *Contempt of the United States: The Political Crime That Wasn't*, 25 AM. J. LEGAL HIST. 343, 347 (1981).

26. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

press and the public often need access to information held by the executive branch; yet he rejects the logical inference that each must have a corresponding power or right to obtain it.

In particular, First Amendment protection for leaking is fully consistent with the Amendment's text, the Founders' scruples, and the novelty of prosecutions for leaking. Yet, despite having shown that courts are unavoidably prone to defer to executive power claims, Sagar confidently relies on a line of court decisions, mostly quite recent, holding in effect that officials are properly bound to secrecy: they are presidential servants, not free citizens. Those decisions are vulnerable to strong criticism.[27]

Only Daniel Ellsberg's unauthorized disclosures enabled us to realize that our government had systematically used secrets and lies to mobilize and sustain public support for a war of highly questionable value. Yet the author sees no constitutional bar to prosecutions for leaks under the 1917 Espionage Act—save perhaps for those of journalists, which he acknowledges might violate the freedom of the press (pp. 171-180). The notion that Ellsberg (or Edward Snowden, whose story post-dates the book) deserves to be honored and constitutionally protected from prosecution seems unthinkable.

It is vital to recognize that governmental secrecy, both literally and in every practical sense, is a prior restraint on speech. Its entire purpose is to prevent anyone, including foreign enemies, but also members of congressional oversight committees, courts, the press, and voters, from learning of and responding to what the government is doing or contemplating. By design, secrecy systematically undermines official accountability, checks and balances, and the rule of law. It accordingly deserves the same, highest level of scrutiny applied to other forms of prior restraint. There is no basis in the Constitution or democratic theory for carving out a categorical national security exception to the First Amendment.[28] In this domain too, the wisdom and justice of policy depend on accurate information and a free marketplace of ideas.

Giving broad discretion to the executive in the national security domain can easily extend into other domains, and has in fact done so, just as domestic executive powers have expanded in

27. DANIEL N. HOFFMAN, OUR ELUSIVE CONSTITUTION: SILENCES, PARADOXES, PRIORITIES 127–28 (1997).

28. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 742 (1971).

tandem with international ones. As early as *Marbury v. Madison*,[29] the Court sought to distinguish between official actions pertaining to foreign or defense affairs and disputes affecting individual rights, with the former being matters of discretion and the latter questions of law. Plainly, however, many actions fit into both categories. That an action may serve national security does not logically imply that no right is violated.

Moving beyond constitutional law, the *democratic* theory Sagar invokes must envision a far more active, influential role for the public than did classical republican theory, necessitating even broader access to information. Yet he asserts, akin to Posner & Vermeule, that leaking of secrets is very seldom warranted, simply because our election system adequately ensures that presidents will generally be virtuous. The pronounced variations of presidential ability, as well as virtue, do not figure in this argument. The author's strongly patriotic sentiments, reflected in the book's dedication, "To these great and glorious United States," somehow translate into veneration of the presidency as an institution, almost regardless of the conduct of its occupant—Richard Nixon's Watergate being the sole acknowledged exception. Nixon, of course, believed that "when the President does it, that means it can't be illegal."[30] What if he had played the national security card, as he considered doing, and destroyed his tapes? Sagar's "democratic" theory is tantamount to making the president sovereign, not the People. Here, stealth becomes not just a feature attributed to constitutional adoption or change, but the central principle of everyday governance.

Moreover, to argue as if the president personally made all decisions on secrecy wrongly conflates executive power with presidential power. Over one million officials currently have power to classify documents wholesale, subject only to vague and scarcely enforced standards, and presidents are easily misled by classified briefings. The author acknowledges that these unelected bureaucrats systematically favor secrecy over disclosure, and that, indubitably, way too much information is classified; yet these facts seem not to affect his weighing of risks and benefits and do not figure in his "democratic" theory. Secrets and lies have clearly played great roles in the decline of public trust in government in

29. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

30. Interview by David Frost with Richard Nixon (May 18, 1977), *available at* http://www.streetlaw.org/en/Page/722/Nixons_Views_on_Presidential_Power.

recent decades. To blame this decline primarily on irresponsible leakers and publishers seems perverse.[31]

Sagar does endorse Jack Goldsmith's advice[32] that an administration "should be as open as possible, and when secrecy is truly necessary it must organize and conduct itself in a way that is beyond reproach, even in a time of danger" (p. 188). Yet it is difficult to show that this has generally been the case—or even that it has ever been the case. Because it is hard to know what officials have done, let alone why they did it, the author advises that lawmakers, judges, and the press must "refrain from picking sides" (p. 202). Yet picking sides is central to both democratic politics and the judicial process. By not picking sides about the recent, unprecedented burst of prosecutions for leaking, and this under a president who had promised unparalleled transparency, we effectively side with rampant executive secrecy.[33]

V. CONCLUSIONS

Taken together, the teaching of these three books is that, de facto if not de jure, we have a monarchical Constitution, and it's a good thing, too. They make a strong case for the ineffectiveness, today at least, of Madisonian restraints on executive power. Their complacency about our politics and disdain for the rule of law remain somewhat mystifying. Veneration for our "democracy" and the presidency are commonplace, but usually packaged with veneration for the Constitution and the rule of law. Our authors are sophisticated enough to see the tensions within this package. Political scientists Nelson and Sagar preserve most of the package by reading the Constitution as monarchical, with the prince above the law. Ironically, it is the law professors, Posner & Vermeule, who cast aside the legalist niceties of Madison's Constitution in favor of one advocated by the Nazi Carl Schmitt. Perhaps this is an unintended consequence of the debunking achieved by the Legal Realist and Critical Legal Studies movements, which explored the workings of power under the guise of law. Neither law and economics rationalism nor classical republican thought seems to offer a satisfying account of those workings today.

31. *See also* SCOTT HORTON, LORDS OF SECRECY: THE NATIONAL SECURITY ELITE AND AMERICA'S STEALTH WARFARE (2015).

32. Jack Goldsmith, *Secrecy and Safety*, THE NEW REPUBLIC, Aug. 13, 2008, at 35 (reviewing ERIC LICHTBLAU, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE (2008)).

33. *See also* CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY (2015).

Clearly, the Constitution inscribes the value of robust, effective government. Equally clearly, it inscribes restraints on overconcentration of power and respect for individual freedom. These books honor the first commitment, but dismiss the others as unnecessary. In place of goals always in profound tension, they offer us laurels for a virtuous monarchy. Neither history nor political science warrants this move. Their core claims are speculative, unrealistic and of dubious provenance: to wit, James I, Carl Schmitt and Machiavelli, respectively.

Skeptics are left to mull a problematic array of hard-to-dispute facts: a world of far-extended American power constantly under threat; a long list of emergency executive actions, ostensibly justified by highly classified information[34]; mainstream media that often fail to discover or to closely question these moves; a public in position to find fault with such actions only when putatively unlawful leaks occur; a new practice of systematic indictment of leakers who oppose government policy; presidents that, regardless of party, generally work to maintain and expand executive powers, securing immunity from legal process for high-level abusers, including their political enemies[35]; repeated congressional authorization of measures that value security over liberty[36]; a Court that interprets secrecy as an executive power rather than a First Amendment issue,[37] and free speech as whatever speech money can buy,[38] leaks excepted; an education system focused more on vocational training than on critical thinking; an influential dogma of American exceptionalism that teaches "my country, right or wrong"; a public especially revering wartime presidents like Lincoln and FDR, who did whatever they deemed necessary; a public fascinated with Britain's royals and accustomed to dynasties named Kennedy, Bush, and Clinton; a public whose constitutional sentiments often are vague, yet polarized; and a public that typically, in low-turnout,

34. Drone killings and the invasion of Iraq are examples of varying scale and visibility.

35. Though President Obama acknowledges that crimes such as torture were committed during the Bush administration's war on terror, his administration has not prosecuted those ultimately responsible; it agrees with the doctrine that high officials generally have at least qualified immunity from civil and criminal liability; it invokes the state secrets and executive privilege doctrines to withhold relevant documents, including legal advice memos, from domestic and international tribunals; and it hinders Congress from investigating and publicizing such abuses.

36. For example, sweeping surveillance and indefinite detention without trial, under the Patriot Act and Authorization for Use of Military Force Resolution (2001).

37. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980).

38. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).

gerrymandered elections, reelects most members of Congress, despite professing contempt for its ineffectual operations, while often perpetuating the very gridlock that it disdains.

One may question whether we inhabit a vibrant democracy, or something closer to the late Roman republic. Then, we may contemplate the sobering possibility of a constitutional Convention larded with neo-monarchist delegates, perhaps influenced by books like these. Many calls for a new constitutional Convention under Article V have been submitted to Congress. Most were expressly aimed at a narrow, specific amendment, though it is quite possible that, if convened, a Convention would feel free to propose whatever changes it pleased, or even an entirely new Constitution. Congress has so far chosen not to tabulate together the dozens of Convention calls from different eras or specifying different topics. If it did, or if only five more states endorse the call for a balanced budget amendment, Congress would be obliged to call a Convention and to specify, without constitutional guidance, the terms for selecting delegates.

We would then find out what the delegates want; that is not to say that we would find out what the American people want. The ancient Hebrews, it is said, desired a king; what Americans want today is hard to know. How and when the People can speak remains an essentially contested question of constitutional theory. Academics have always debated the Constitution's meaning; these three books raise the deeper question: at this point, in what sense do we really have a Constitution at all? Through different avenues, they find legally unchecked power in the president, making his/her wisdom and virtue our primary safeguard. We the People, ostensibly sovereign, seem to have great difficulty ascertaining what the Constitution prescribes, when and how it changes, whether our leaders are virtuous, or even what they are actually doing. Are we truly a constitutional republic, or have we—without a coup, formal amendment or transformative Court decision—been stripped of that advantage and reduced to lawlessness, by constitutional stealth?