

## Foreword: Executive Power: From the Constitutional Periphery to the Constitutional Core

Mark A. Graber

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

Mark A. Graber, *Foreword: Executive Power: From the Constitutional Periphery to the Constitutional Core*, 73 Md. L. Rev. 1 (2013)

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol73/iss1/2>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

---

# MARYLAND LAW REVIEW

---

---

VOLUME 73

2013

NUMBER 1

© Copyright Maryland Law Review 2013

---

---

## Symposium

### The Maryland Constitutional Law Schmooze

#### EXECUTIVE POWER: FROM THE CONSTITUTIONAL PERIPHERY TO THE CONSTITUTIONAL CORE

MARK A. GRABER\*

In 2006, Jack Balkin and Sanford Levinson announced that the United States was transforming into a “National Surveillance State.”<sup>1</sup> This “National Surveillance State,” they claim “is characterized by a significant increase in government investments in technology and government bureaucracies devoted to promoting domestic security” as well as “gathering intelligence and surveillance using all of the devices that the digital revolution allows.”<sup>2</sup> While the al Qaeda attack of September 11, 2001 provided a crucial impetus for the development of this new regime, Balkin and Levinson insisted that the roots lie deeper. The National Surveillance State is a product of the way in which the communications revolution has augmented the capacity of terrorist organizations and ordinary criminals to commit heinous crimes while similarly augmenting the capacity of government officials to use technology to prevent those crimes and identify those criminals. As Balkin and Levinson note, “[f]ocusing on war as the primary cause of the National Surveillance State overlooks the fact that surveillance technologies that help the state track

---

Copyright © 2013 by Mark A. Graber.

\* Professor of Law, University of Maryland Francis King Carey School of Law. Thanks to the staff of the *Maryland Law Review* and all Schmooze participants.

1. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489 (2006).

2. *Id.* at 520–21.

down terrorists can also be used to track and prevent domestic crime.”<sup>3</sup> Balkin and Levinson predicted that the National Surveillance State would be bipartisan. They declared, “there may be no meaningful division between the Democratic and Republican Parties with regard to the imperatives for, and the broad outlines of, the National Surveillance State.”<sup>4</sup> Recent events suggest their prescience. As Jack Goldsmith noted in a recent book, the Obama Administration’s efforts in the War on Terror far more resemble Bush Administration practices than candidate Obama’s promises. “Contrary to nearly everyone’s expectations,” Goldsmith notes, “the Obama Administration would continue almost all of its predecessor’s policies, transforming what had seemed extraordinary under the Bush regime into the ‘new normal’ of American counterterrorism policy.”<sup>5</sup> Guantanamo Bay remains open, electronic surveillance continues, and Obama Administration officials, if anything, have increased the use of unmanned drones for assassination attempts on suspected terrorist leaders.

Balkin and Levinson in 2006 maintained that “increased executive power is one of the key elements of the emerging constitutional revolution.”<sup>6</sup> They regarded “enhancement of presidential power” as “the most important part of the Bush Administration’s constitutional agenda,” in particular “the need for strong executive leadership in . . . the ‘War on Terror.’”<sup>7</sup> They foresaw a nearly inevitable “shift [in] institutional power and authority from Congress to the presidency” as a result of the National Surveillance State.<sup>8</sup> One consequence of this transformation, they conclude, is “the scope of presidential authority to combat terrorism has become perhaps the central constitutional question of our era.”<sup>9</sup> The first constitutional threat Balkin and Levinson warned Americans about was distinctive to the present. “[T]he executive’s power to conduct war,” they feared, “will displace the area previously assumed to fall within the criminal justice system.”<sup>10</sup> Persons treated as enemy combatants, lawful or unlawful, do not have the full range of rights as persons treated as murderers or ordinary criminals. The other threat has deep roots in the American constitutional past. Just as the Framers thought the distinguishing feature of “despotic government” was the “concentrat[ion]”

---

3. *Id.* at 522.

4. *Id.* at 528.

5. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 5 (2012). See Julie Novkov, *The Dangerous Fantasy of Lincoln: Framing Executive Power as Presidential Mastery*, 73 MD. L. REV. 54, 64–65 (2013).

6. Balkin & Levinson, *supra* note 1, at 504.

7. *Id.* at 517–18.

8. *Id.* at 526.

9. *Id.* at 520.

10. *Id.* at 523.

of “all the powers of government . . . in the same hands,”<sup>11</sup> so Balkin and Levinson warn about “the inevitable dangers of concentrating too much power in one branch of government without accountability and transparency.”<sup>12</sup>

Several important trends in American politics are also pushing separation of powers issues from the constitutional periphery to the constitutional core. The United States is presently experiencing the longest period of divided government in the nation’s history. Since Richard Nixon was elected in 1968, Democrats have controlled all three branches of government for eight years and Republicans for only four. Each party has controlled at least one branch of the national government during the other thirty-two years.<sup>13</sup> Unsurprisingly, much separation of powers law dates from the struggles Nixon had with Democrats in Congress over presidential war powers,<sup>14</sup> executive privilege,<sup>15</sup> and presidential authority to implement (or not) federal statutes.<sup>16</sup> Every two-term president since Nixon has experienced one or more major separation of powers crises.<sup>17</sup> The parties have become more polarized on more issues than at any other time in American history.<sup>18</sup> Conservative Democrats and Liberal Republicans have disappeared.<sup>19</sup> Polarized politics combined with divided government is a recipe for intense separation of powers conflicts, as partisans and interest groups struggle to empower the branch of government they control while enfeebling rival institutions.

The centrality of constitutional concerns over executive power distinguishes the National Surveillance State and the contemporary era from almost any other constitutional regime experienced by the United States.

---

11. THE FEDERALIST NO. 48, at 311 (James Madison) (Clinton Rossiter ed., 1961).

12. Balkin & Levinson, *supra* note 1, at 527.

13. David Mayhew notes “encountering undergraduates and even young graduate students who seemed to view unified party control as a rare event on the order of an eclipse of the moon.” DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at x (2nd ed. 2005).

14. See 1 HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT* 547–53 (2012).

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

16. *Train v. City of New York*, 420 U.S. 35 (1975).

17. Consider the Iran-Contra Affair during the Reagan presidency, the Clinton impeachment, the controversy over Bush Administration policies during the War on Terror, and Obama Administration policies on both the War on Terror and the Defense of Marriage Act.

18. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 44 (2000) (noting a marked polarization of the national parties at the elite level); Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and “Conflict Extension” in the American Electorate*, 46 AM. J. POL. SCI. 786, 799 (2002) (discussing the increasing polarization of parties on social welfare, racial, and cultural issues).

19. See NICOL C. RAE, *SOUTHERN DEMOCRATS* (1994); NICOL C. RAE, *THE DECLINE AND FALL OF THE LIBERAL REPUBLICANS: FROM 1952 TO THE PRESENT* (1989).

Robert McCloskey in his classic, *The American Supreme Court*,<sup>20</sup> identified three constitutional eras before 1960. The first was concerned with the relationship between the federal government and the states. The second was concerned with the regulation of business enterprise. The third was concerned with civil rights and liberties.<sup>21</sup> Executive power and separation of powers issues played relatively minor roles in each of these regimes. Howard Gillman, Mark Graber and Keith Whittington's *American Constitutionalism*<sup>22</sup> pays more attention to issues of executive power in American history, devoting a section in each chapter to such issues. Nevertheless, the very chapter titles evince the relatively low salience of separation of powers controversies until recently. Most chapters covering the first 175 years of constitutional practice in the United States are named for the dominant partisan coalition of the time or their central program, for example, the Jacksonian Era, the Republican Era, and the New Deal/Great Society Era.<sup>23</sup> These categories highlight how the driving forces of American constitutional change in the nineteenth century and first two-thirds of the twentieth century were visions that united most governing officials. Before 1968, national separation of powers issues tended either to be such isolated episodes as whether President Truman could seize the steel mines<sup>24</sup> or such struggles between coalitional partners as were the debates over habeas corpus and martial law during the Civil War.<sup>25</sup>

The 2013 University of Maryland Constitutional Law Schmooze sought to explore this new constitutional universe in which executive power is arguably the most central constitutional issue challenging the political regime.<sup>26</sup> Participants from the legal academy, the social sciences, and the humanities considered a wide range of topics. Contributions explored presidential authority from Abraham Lincoln to Barack Obama. Conversations ranged from presidential management of the War on Terror to executive interventions in the cultural wars.

---

20. ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* (Sanford Levinson, ed., 4th ed., rev. 2005).

21. *Id.* at 15, 121–22.

22. *See* AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, *supra* note 14.

23. *See id.* at v–x.

24. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

25. *Ex parte Milligan*, 71 U.S. 2 (1866); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863). *See generally*, AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, *supra* note 14, at 295–316. My sense is that outside of these materials, few constitutional law casebooks give any attention to separation of powers cases or issues that were debated before Richard Nixon took office.

26. For a brief outline of the nature of a schmooze, see Mark A. Graber, *Foreword: From the Counter-majoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1, 4 (2006).

Two problems emerged as central to both the Schmooze conversations and executive power in the modern state. The first concern is the extent to which presidential discretion ought to be more cabined or increasingly unleashed in the modern state. Carl Schmitt and his contemporary followers insist that extensive executive prerogative powers are the *sine qua non* of the modern state, a permanent feature of constitutional politics.<sup>27</sup> Presidents are at most checked by politics, and we are told law no longer plays a role in alleged separation of powers systems.<sup>28</sup> Other commentators insist that finding legal constraints on executive power remains as vital today as in 1787<sup>29</sup> or that increased interbranch deliberation is essential to ensuring fundamental constitutional ends.<sup>30</sup> The second concern is the status of rights in a world where the Executive plays a much greater role than other institutions in determining who is at liberty to do what. Much inherited wisdom proclaims that courts are vital means for preventing ambitious executives from violating fundamental liberties.<sup>31</sup> The Supreme Court's decisions in *Hamdi v. Rumsfeld*<sup>32</sup> and *Hamdan v. Rumsfeld*<sup>33</sup> are Exhibits A and B for this position. Nevertheless, as both the Emancipation Proclamation<sup>34</sup> and the Obama Administration's refusal to defend the Defense of Marriage Act in court<sup>35</sup> demonstrate, the executive branch may be an effective bully pulpit for certain rights causes.

Kimberley L. Fletcher provides some historical background for the increased presidential discretion exhibited by both the Bush and Obama

---

27. See CARL SCHMITT, *CONSTITUTIONAL THEORY* (Jeffrey Seitzer, ed. & trans., Duke University Press, 2008) (1928).

28. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).

29. See generally HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009); PETER N. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

30. See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013); MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013).

31. The canonical citations here are *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (“[C]ourts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”).

32. 542 U.S. 507 (2004).

33. 548 U.S. 557 (2006).

34. Abraham Lincoln, *Emancipation Proclamation*, in 6 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 28–30 (Roy P. Basler, ed., 1953).

35. Eric Holder, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (February 23, 2011), in 2 *AMERICAN CONSTITUTIONALISM*, *supra* note 14, at 945.

Administrations in foreign affairs. In her view, the Supreme Court's decision in *United States v. Curtiss-Wright Export Corporation*<sup>36</sup> provided crucial foundations for contemporary views that presidents have enhanced freedom of action abroad. The federal judiciary before 1936, she claims, strictly policed executive discretion, limiting presidential war powers, for example, to opposing sudden invasions and fighting wars declared by Congress.<sup>37</sup> Fletcher maintains that Justice George Sutherland's opinion in *Curtiss-Wright*, by taking a quote from Congressman John Marshall out of context, put executive power on a new, far more dangerous path. When Marshall in 1800 declared that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"<sup>38</sup> he meant that presidents were responsible for "announcing, not formulating—American foreign policy."<sup>39</sup> In the hands of Sutherland, future Justices, and contemporary members of the State Department, Marshall's quote was reinterpreted as giving the President near exclusive power to make foreign policy. As Fletcher details, Sutherland's opinion among attorneys from the executive branch quickly became the "'*Curtiss-Wright*, so I'm right' cite" whenever the need arose to sanction presidential discretion to use military force or intervene in a foreign crises.<sup>40</sup> Truman was the first President who assumed increased executive war powers to fight "long wars,"<sup>41</sup> but Fletcher reminds us of the crucial role a unanimous Court played in *Curtiss-Wright*, giving judicial blessing to "the growth of the President's unilateral powers and institutionaliz[ing] this prerogative in the area of foreign affairs."<sup>42</sup>

Clement Fatovic makes the important point that the difference between executive powers cabined by law and the extralegal prerogative powers Fletcher and others fear may be less than meets the theoretical eye. Fatovic observes that "executive power and prerogative" lie "along a continuum that stretches from the least rule-bound to the most rule-bound exercises of power."<sup>43</sup> Just as "legal rules structure and regulate exercises of even the most extraordinary forms of prerogative," so "there is an unavoidable element of discretion irreducible to law in even the most ordinary exercises

---

36. 299 U.S. 304 (1936).

37. Kimberley L. Fletcher, *The Court's Decisive Hand Shapes The Executive's Foreign Affairs Policymaking Power*, 73 Md. L. Rev. 247 (2013).

38. 10 ANNALS OF CONG. 613 (1800).

39. See Fletcher, *supra* note 37, at 260.

40. *Id.* at 285 (citation omitted).

41. See GRIFFIN, *supra* note 30, at 52–98.

42. Fletcher, *supra* note 37, at 286.

43. Clement Fatovic, *Blurring the Lines: The Continuities Between Executive Power and Prerogative*, 73 MD. L. REV. 15, 16 (2013).

of executive power.”<sup>44</sup> Presidents must inevitably make policy when implementing federal law. “[T]he very act of following a rule,” Fatovic notes, “involves an act of interpretation that is always to some degree discretionary.”<sup>45</sup> More often than not, presidential prerogative powers have roots in congressional mandates. Fatovic details how “much of the tremendous growth in executive power has been the result of statutory delegations.”<sup>46</sup> The Framers are notoriously unhelpful when Americans in the twenty-first century make efforts to distinguish when prerogative power goes too far, since James Madison and associates did not provide clear boundaries for executive prerogative.<sup>47</sup> As a result, Fatovic concludes “there may be an element of prerogative in all executive power.”<sup>48</sup>

These ambiguities provide numerous openings for presidents to refrain from implementing laws passed by Congress. Corinna Barrett Lain notes that executives have at least three “passive-aggressive” options other than refusing to implement a law (while hoping no one complains) and implementing the law under protest.<sup>49</sup> Executives can implement laws in ways that undermine the purpose of the law. Montana responded to a federal law mandating a 55-miles per hour limit on state highways by fining speeders five dollars while making clear to police officers that the revenue from the fines was far less than the enforcement and processing costs.<sup>50</sup> The congressional demand that Montana legally limit speeding was complied with, but no speeding was actually deterred.<sup>51</sup> Given the inevitable scarcity of resources, executives can declare that they lack the finances necessary to implement the law. The Obama Administration has informed federal attorneys that in light of “limited investigative and prosecutorial resources,” they should not bother marijuana users who are complying with local laws.<sup>52</sup> Changes in professional practices may enable executives to claim they lack the expertise to implement the law. The Carter Administration refused to implement federal judicial decisions declaring that gay and lesbian aliens not be admitted to the United States as “psychopathic personalities”<sup>53</sup> after psychiatrists abandoned previous

---

44. *Id.*

45. *Id.* at 20.

46. *Id.* at 29.

47. *Id.* at 37–44. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244–87 (1996).

48. Fatovic, *supra* note 43, at 53.

49. Corinna Barrett Lain, *Passive-Aggressive Executive Power*, 73 MD. L. REV. 227, 227–28 (2013).

50. *Id.* at 232–35.

51. *Id.*

52. *Id.* at 237–39 (citation omitted).

53. *Boutilier v. INS*, 387 U.S. 118, 120 (1967).

beliefs that homosexuality was a disorder.<sup>54</sup> These alternatives, Lain states, have severe democratic problems. They “shirk[] executive branch duties,” and send “inconsistent signals about where, when, and how laws will be enforced.”<sup>55</sup>

Kathleen Tipler is more enthusiastic about the democratic virtues of presidential power not to enforce laws. Following a Jacksonian model of the presidency, which emphasizes that the President holds the only office “elected by the nation,”<sup>56</sup> she sees the President as having distinctive representative duties. She writes, “both the electoral character of the executive office as outlined in Article II, as well as the Take Care Clause, generate a constitutional duty of democratic representation.”<sup>57</sup> As such, the President may have special obligations to lead as a constitutional interpreter and to support the powerless. Both obligations, in Tipler’s view, justify the apparent paradoxical willingness of President Obama to implement the Defense of Marriage Act, but not defend that measure in court. In her view, putting aside some complex standing issues, “the Obama Administration engaged in a constitutionally adequate balancing of conflicting constitutional duties including conflicting duties of representation.”<sup>58</sup> In particular, Tipler maintains that the decision not to defend DOMA in court was consistent with Obama’s previous “campaign promise to work for LGBT rights,”<sup>59</sup> and consistent with an executive obligation to give “special protection [to] historically disempowered minorities,”<sup>60</sup> while possibly creating “conditions more conducive to dialogue and persuasion.”<sup>61</sup>

Peter E. Quint worries about the personnel who will implement presidential decisions not to enforce or, more often, enforce federal law in light of presidential policies.<sup>62</sup> He maintains a clear distinction exists between the role of the Senate in confirming federal Justices and the Senate role in confirming executive branch officials. The Senate ought to review the credentials of federal Justices carefully, in his view, because Justices have independent authority to interpret the law. Quint writes, “[t]he

---

54. Lain, *supra* note 49, at 240–41.

55. *Id.* at 246.

56. Kathleen Tipler, *Obama Administration’s Non-Defense of DOMA and the Executive Duty to Represent*, 73 MD. L. REV. 287, 300 (2013). See Andrew Jackson, *Paper on the Removal of the Deposits*, in AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, *supra* note 14, at 235.

57. Tipler, *supra* note 56, at 290.

58. *Id.* at 306.

59. *Id.* at 307–08.

60. *Id.* at 308.

61. *Id.* at 311.

62. Peter E. Quint, *Implications of the President’s Appointment Power*, 73 MD. L. REV. 85 (2013).

President and the Senate are collaborating in the choice of a member of the third branch. . . . [I]t is an independent branch not within the actual purview of either of the departments that are collaborating in the choice.”<sup>63</sup> Far less Senate scrutiny is justified when the President recommends an executive branch appointment. These persons are responsible for carrying out executive branch policy. Thus, Quint thinks the Supreme Court, when considering questions about the presidential appointment and removal powers, as the Justices will be doing in 2014 when resolving *Noel Canning v. NLRB*,<sup>64</sup> should interpret the Constitution “to give significant weight to the President’s authority to appoint those executive officers who, in the President’s opinion, are most fit for the purpose of exercising discretion under Article II . . . .”<sup>65</sup>

Henry L. Chambers, Jr. invokes Abraham Lincoln when justifying broad presidential power under the Take Care Clause of Article II, which declares that the President “shall take Care that the Laws be faithfully executed.”<sup>66</sup> Chambers is particularly interested in the constitutionality of the Emancipation Proclamation, which he claims might be better justified by the President’s “Take Care” power than, as was actually the case, the presidential power as Commander in Chief.<sup>67</sup> Lincoln was on strong constitutional grounds when freeing slaves owned by disloyal masters. Doing so merely implemented the First and Second Confiscation Acts.<sup>68</sup> More controversially, Chambers points out that the Emancipation Proclamation might be understood as implementing the more general anti-slavery animus underlying various congressional programs enacted by the Thirty-Seventh Congress. “[W]hen taken as a whole,” he declares, “Civil War legislation passed before the Emancipation Proclamation was issued makes clear that Congress was willing to move toward emancipation as a war measure.”<sup>69</sup> Lincoln, when deciding to free slaves of both disloyal and loyal citizens in places under Confederate control, in this view, was faithfully executing the vision animating congressional measures, what

---

63. *Id.* at 86–87.

64. 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

65. Quint, *supra* note 62, at 97.

66. U.S. CONST. art. II, § 3.

67. Henry L. Chambers, Jr., *Lincoln, the Emancipation Proclamation, and Executive Power*, 73 MD. L. REV. 100, 101–02 (2013). Chambers notes that the preliminary drafts of the Emancipation Proclamation placed greater emphasis on previous legislation than the final version Lincoln issued. *Id.* at 115–16. Compare Abraham Lincoln, *Emancipation Proclamation—First Draft*, in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 34, at 336–37, with Abraham Lincoln, *Emancipation Proclamation*, in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 34, at 28–30.

68. Chambers, *supra* note 67, at 125–27.

69. *Id.* at 103–04.

Chambers calls “the general arc of legislation,”<sup>70</sup> even if Lincoln’s precise actions were not explicitly warranted by any federal statute.

Julie Novkov is more interested in debunking, or at least interrogating, what might be called the “Lincoln would, so it must be good” citation practice.<sup>71</sup> She begins by noting how both President George W. Bush and President Barack Obama have sought public approval for unilateral exercises of presidential power by appealing to Lincoln’s example. Both Presidents, Novkov observes, have “courted comparisons to Lincoln and invoked him.”<sup>72</sup> Bush cited Lincoln in justifying his policies in the War on Terror.<sup>73</sup> Obama does so when presenting himself as a racial moderate and calling for bipartisanship.<sup>74</sup> The result is to sanctify everything Lincoln did, much of which might be questionable. Novkov is particularly disturbed by how the movie *Lincoln* invokes Lincoln hagiography for subtle right-wing purposes. By presenting the Thirteenth Amendment as devoted almost exclusively to the abolition of human bondage, a claim that is almost certainly wrong historically,<sup>75</sup> and formal legal equality only, the producers are privileging an anti-classification interpretation of the post-Civil War amendments as opposed to a more progressive anti-subordination interpretation that might provide greater justification for affirmative action and other measures that will help persons of color. In doing so, Novkov fears, *Lincoln* “reinforces a particular strand of conservative racial ideology that understands the civil rights movement and legal reforms of the twentieth century to have achieved the promise of racial equality, leaving the responsibility for remaining inequalities squarely on the shoulders of those experiencing them.”<sup>76</sup>

Leslie F. Goldstein is somewhat more optimistic about executive capacity to protect rights.<sup>77</sup> Her comparative study of how different institutions responded to claims made by various minorities during the late nineteenth century finds that the national executive was somewhat more progressive than the other branches of government. She notes how “[t]he administration of (Republican) President Theodore Roosevelt provides a

---

70. *Id.* at 130.

71. Julie Novkov, *The Dangerous Fantasy of Lincoln: Framing Executive Power as Presidential Mastery*, 73 MD. L. REV. 54 (2013).

72. *Id.* at 70.

73. *Id.* at 67–68.

74. *Id.* at 70, 74–75.

75. See Symposium, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications*, 112 COLUM. L. REV. 1447 (2012); Symposium, *The Maryland Constitutional Law Schmooze*, 71 MD. L. REV. 12 (2011).

76. Novkov, *supra* note 71, at 82.

77. Leslie F. Goldstein, *How Equal Protection Did and Did Not Come to the United States, and the Executive Branch Role Therein*, 73 MD. L. REV. 190 (2013).

limited exception to the otherwise dismal picture for African American civil rights that prevailed between 1885 and 1910.”<sup>78</sup> In a time period when Congress repealed civil rights laws<sup>79</sup> and the Supreme Court sustained racial segregation<sup>80</sup> while refusing to intervene when minorities were fraudulently disenfranchised,<sup>81</sup> Roosevelt “prosecute[d] Klan-type mobs” and other persons who violently sought to subordinate racial minorities.<sup>82</sup> Goldstein admits that her data is limited and bound to a particular period. Nevertheless, her study provides some reason for thinking that the President, at times, may have the right balance of relative electoral insulation and national responsibility necessary to lead some crusades for justice while preserving the gains of previous crusades. Presidential protection of rights, Goldstein suggests, reflects “the presidency [having] a constituency significantly different from that of the House of Representatives,” and “an international diplomatic constituency” that “played a role in moderating . . . Congress’s inclination . . . to deal harshly with the Chinese people.”<sup>83</sup> At least in some special instances, Goldstein concludes, the “institutional features” of the presidency “mitigate[d] the harshness of majority tyranny.”<sup>84</sup>

Ronald Kahn provides a more abstract connection between executive power and individual rights.<sup>85</sup> His analysis breaks down the conventional distinction between the polity principles typically taught in the first semester of constitutional law and the rights principles typically taught in the second semester of constitutional law. As both Kahn and Justice Kennedy recognize, Americans adopted particular structures of government in large part because they thought particular governing arrangements were more likely than enumerated rights to protect fundamental freedoms. In a concurring opinion declaring the line-item veto unconstitutional, Kennedy wrote, “[L]iberty is always at stake when one or more of the branches seek to transgress the separation of powers.”<sup>86</sup> Kahn similarly states, “debates over polity principles informing the powers of government institutions raise

---

78. *Id.* at 194.

79. See XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910*, at 254–59 (1997).

80. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

81. *Giles v. Harris*, 189 U.S. 475 (1903).

82. Goldstein, *supra* note 77, at 194–95.

83. *Id.* at 213.

84. *Id.* at 214.

85. Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133 (2013).

86. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., dissenting).

important questions about individual rights.”<sup>87</sup> This fusion of polity and rights principles was particularly evident when the Supreme Court decided *National Federation of Independent Business v. Sebelius*.<sup>88</sup> Justice Scalia’s opinion in that case concluded, “the fragmentation of power produced by the structure of our Government is central to liberty.”<sup>89</sup> Kahn and Justice Ginsburg disagree, but only because they see the Affordable Care Act not simply as within federal power, but as liberty enhancing. Ginsburg points out, “[v]irtually everyone . . . consumes health care at some point in his or her life. . . . Health insurance is a means of paying for this care, nothing more.”<sup>90</sup> Kahn emphasizes that executive and legislative powers are more to be feared in some instances than others. He maintains, “eliminating privacy rights would allow government to abuse individuals and minority groups in ways that giving government permission to impact their economic decisions would not.”<sup>91</sup>

Executive power is likely to remain at the core of American constitutionalism for the foreseeable future. The National Surveillance State seems relatively enduring as President Obama modifies only at the margins Bush Administration policies and prefers not to implement more conservative rather than more liberal laws.<sup>92</sup> Politics has been surprisingly stable since 1994. Democrats have won the popular vote in five of the last six Presidential elections. Republicans have enjoyed a good margin in the House of Representatives for eight of the last ten Congresses. The recent government shutdown highlights how polarization among elites remains vibrant. Under these conditions, executives are likely to push for increased powers, while facing increased pushback from Congress and, perhaps, the courts.

The articles in this symposium may nevertheless reflect a subtle turn in American thinking about the separation of powers. The first wave of separation of powers thinking took place at a time when Republicans were thought to have a lock on the Electoral College and Democrats relatively permanent control of the House of Representatives.<sup>93</sup> In this political environment, prominent conservatives developed the notion of a unitary executive, whose control over the executive branch could not be interfered

---

87. Kahn, *supra* note 85, at 135.

88. 132 S. Ct. 2566 (2012).

89. *Id.* at 2677 (Scalia, J., dissenting).

90. *Id.* at 2620 (Ginsburg, J., concurring in part and dissenting in part).

91. Kahn, *supra* note 85, at 189.

92. See Lain, *supra* note 49, at 235–43 (noting that the Obama Administration has not been willing to implement or fully defend certain federal bans on marijuana, mandates to deport certain immigrants, and the Defense of Marriage Act).

93. See Steven Taylor, *Whatever Happened to the Republican “Lock” on the Electoral College*, 7 NEW ENG. J. POL. SCI. 25, 26 (2013).

with by Congress.<sup>94</sup> John Yoo, the architect of bold presidential war powers claims,<sup>95</sup> was a member of the second Bush Administration. This symposium may reflect a second wave of separation of powers thinking at a time when Democrats seem to have a greater lock on the Electoral College and Republicans more enduring control of the House of Representatives.<sup>96</sup> Some liberals, most notably Novkov and Fletcher, retain the previous generation's skepticism about the merits of executive power. Others, most notably Tipler and Chambers are more enthusiastic. Their articles suggest the possibility of a new constitutional order in which liberals seek to expand the constitutional authority of Democrats in the White House, while more conservative scholars emphasize the virtues of a Congress controlled by Republicans. After all, the articles in this volume and public discourse in 2013 might have been quite different if the focus of debate over presidential domestic power was the refusal of a Republican president to implement the Freedom of Access to Clinic Entrances Act<sup>97</sup> and an executive order interpreting the "arch of congressional legislation" as justifying a national ban on same-sex marriage.

---

94. *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

95. *See generally* JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

96. *See* Taylor, *supra* note 93, at 55–56; Harold D. Meyerson, *Why the House Didn't Flip*, *THE AMERICAN PROSPECT* (Nov. 7, 2012), <http://prospect.org/article/why-house-didn%E2%80%99t-flip>.

97. 18 U.S.C. 248 (1994).