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Who Decides on Liberty?

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Whether approached as a matter of executive discretion, judicial role, or individual rights, questions about security are never far removed from questions about liberty. Tradeoffs between liberty and security often seem unavoidable. Defenders of unbounded executive power argue that security relies on experts to whom citizens and courts alike must defer. But, if the tradeoff between security and liberty is to be a real weighing of the risks, costs, benefits, burdens, and consequences of various policy decisions, then who has the necessary expertise to decide on liberty? After all, to make decisions about the appropriate balance between security and liberty implies that a decision-maker be an expert not only about security, but also about liberty. Otherwise, the idea of a balanced tradeoff is empty; either citizens and courts have non-exclusive authority to decide on both, or courts must grant executive officials expansive deference on matters of both security and liberty. This Article argues that the latter proposition is untenable and that, therefore, citizens and courts must have non-exclusive authority to make decisions about both national security and individual liberty. But nowhere in American constitutional traditions and practice can we find unchecked executive authority over matters of liberty. As a consequence, we should expect institutionally allocated authority over both liberty and security. Apart from the special knowledge citizens and courts might have about particular matters of liberty, an interest in allocating authority over questions of liberty is in part justified by the harms of concentrated decision-making a polity seeks to avoid. Advocates of unbounded executive authority argue that concern over tyranny is a phobia. Against this view, this Article argues that far from emotional responses to crises, American constitutional culture disperses authority over both liberty and security as a constitutive feature of constrained political practice.
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Who Decides on Liberty?

THOMAS P. CROCKER*

I. INTRODUCTION

Whether approached as a matter of executive discretion, judicial role, or individual rights, questions about security are never far removed from questions about liberty. We are often told that there must be a tradeoff between liberty and security. As Jeremy Waldron described the ubiquity of this claim, "[t]alk of a liberty/security balance has become so common that many view it as just an ambient feature of our political environment." Despite the purported equivalence of these two values, this tradeoff is seldom framed with reasons to adopt policies that make us more insecure to achieve the benefits of greater freedom. If "it has become part of the drinking water in this country that there has been a trade off of liberty for security," this is because talk of tradeoffs is unidirectional. Scholarly defenses of national security expertise will argue not that we must take care to preserve civil liberties, but "that the government must make tradeoffs, that policy should become less libertarian during emergencies, and that courts should stay out of the way."

This question of tradeoffs cannot be approached without asking the question of who decides on the proper allocation of liberty and security. Defenders of unbounded executive power argue that security relies on experts to whom citizens and courts alike must defer. Especially during emergencies, executive officials are presumed to have superior information

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1 JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 111 (2010); see also DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 17 (2007) ("While we agree that it is often wrong to sacrifice liberty, freedom, and rights in the search for security, we concede that trade-offs are inevitable and that in some circumstances sacrifices in liberty may be warranted if they can promise substantial improvements in security.").


4 See Aziz Rana, Who Decides on Security?, 44 CONN. L. REV. 1417, 1421-27 (2012) (tracing the "broader ideological context that shapes how the balance between liberty and security is struck.").

5 See, e.g., POSNER & VERMEULE, supra note 3, at 26–38.
about what is necessary to preserve security. According to the deference thesis, to impose constitutional limits on executive discretion risks creating security harms rather than enhancing freedoms. Deference to experts means "that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty." When citizens, scholars, or judges attempt to intervene in debates over the proper measure of security, defenders of unchecked executive power claim that "they are amateurs playing at security policy, and there is no reason to expect that courts can improve upon government's emergency policies in any systemic way." On this view, citizens and courts lack sufficient specialized knowledge to make optimal decisions about security. According to Judge Richard Posner, critics of executive expertise risk erroneous tradeoffs, because "civil libertarians tend to exaggerate the costs . . . and to ignore or slight the benefits" of security policy. To interpose legal principles protecting rights and liberties as barriers to security policy risks producing "tangible harms," while adding nothing relevant to expert decision making.

Such claims are puzzling in light of the image of balancing exemplified by blindfolded Justitia, who must weigh the relative merits of the competing claims of liberty and security. At the very moment talk of balancing liberty and security becomes salient, the rhetoric shifts to the necessity of security's priority to liberty. We are reminded of the fact that "without physical security there is likely to be very little liberty." Emergency provokes the direction of trade, for under the tradeoff thesis: "As threats increase, the value of security increases; a rational and well-motivated government will then trade off some losses in liberty for greater gains in increased security."

Presidential claims to expertise in matters of security are unexceptional. What follows from these assertions are another matter. From the founding, the President has benefitted from the claimed

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6 POSNER & VERMEULE, supra note 3, at 17 ("The deferential view . . . rests on a claim about relative institutional competence.").
7 Id. at 5.
8 Id. at 31.
10 POSNER & VERMEULE, supra note 3, at 24 (arguing that "sometimes tangible security harms do in fact occur when claims of civil liberties are respected").
12 POSNER, supra note 9, at 47. The philosopher Henry Shue makes a similar point, though in so doing emphasizes the fact that it is individuals who have a right to security: "No rights other than a right to physical security can in fact be enjoyed if a right to physical security is not protected. Being physically secure is a necessary condition for the exercise of any other right." HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 21–22 (1980).
13 POSNER & VERMEULE, supra note 3, at 27.
advantage that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man,"\textsuperscript{14} by comparison to larger deliberative bodies when it comes to matters of security. In addition, courts tend to defer to executive expertise under the commander-in-chief and foreign affairs powers, especially regarding military matters.\textsuperscript{15} For example, the Supreme Court defers to executive conclusions in security matters because "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."\textsuperscript{16} Executive officials are presumed to have superior institutional capacities to acquire and analyze information too complex and varied to leave to democratic processes. Centralized decision-making, combined with specialized knowledge and institutional capacities, define the conditions for expanded presidential power that Aziz Rana traces from the New Deal to the present.\textsuperscript{17} What is most notable is that the meaning of "security" changes during the twentieth century to accommodate the developing capacities of presidential administration.\textsuperscript{18} "Security" becomes a matter for experts who have access not only to specialized knowledge, but also privileged information, rendering it possible to claim that other academics and even judges are "amateurs"\textsuperscript{19} in the field of policy. Expanding presidential power has been a source of political and academic consternation, interrupted by occasional commendation, and driven by never-ending large and small crises purporting to require deference to

\textsuperscript{14} The Federalist No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{15} See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) ("Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him," and the Court must defer to this decision); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

\textsuperscript{16} Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010). The Court further elaborates: "[W]hen it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate." Id. (citing Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).

\textsuperscript{17} Rana, supra note 4, at 1451–58. This genealogy cuts across the political divide, finding advocates for expanded executive power among both progressives and conservatives, who seek to "reconstruct institutional relationships throughout American government around presidential initiative and administrative capacity." Stephen Skowronek, The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive, 122 Harv. L. Rev. 2070, 2074–75 (2009).

\textsuperscript{18} A consequence of the shifting meanings of "national security," Rana observes, is that "[t]he modern security discourse presented an image of politics marked by uncertainty, public ignorance, and the near continuous condition of threat or crisis." Rana, supra note 4, at 1458.

\textsuperscript{19} Posner & Vermeule, supra note 3, at 31.
executive expertise. If there is nothing exceptional regarding presidential claims of unique expertise in matters of security in American legal practice, the same cannot be said about matters of individual liberty.

If the tradeoff between security and liberty is to be a real weighing of the risks, costs, benefits, burdens, and consequences of various policy decisions, then who has the necessary expertise to decide on liberty? After all, to make decisions about the appropriate balance between security and liberty implies that a decision-maker be an expert not only about security, but also about liberty. Otherwise, the idea of a balanced tradeoff is empty, because it becomes nothing more than an assertion of security's priority over liberty, combined with institutional deference to the security decisions of executive officials. There would be a tradeoff—more security and less liberty—but not one that involves balanced consideration of both interests. Thus the question becomes: are decisions about the appropriate allocations and distributions of liberty ones that executive officials necessarily have superior knowledge and expertise to determine? To make the claim that some baseline of liberty must give way—if the tradeoff is to be more than a rhetorical charade—requires knowledge about how this loss of liberty will affect people’s lives through the costs it imposes, in light of the benefits in security expected to accrue. Such knowledge must extend beyond the slogans “security” and “liberty” to examine precisely what is to be gained and what is to be relinquished. Who has this knowledge? Apart from the epistemological question, upon whose moral consent are such decisions premised? Who has the democratic and institutional legitimacy

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20 On the part of consternation, see, for example, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 11 (2010) ("My concern is with the preservation of our tradition of republican values—most notably, the threat posed by the transformation of the White House into a platform for charismatic extremism and bureaucratic lawlessness.") (hereinafter ACKERMAN, FALL OF THE AMERICAN REPUBLIC); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 7–8 (1990) ("The [Iran-contra] affair exposed a serious and growing constitutional imbalance in our national processes of foreign affairs decision making."); ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY at x (1973) ("[U]nless the American democracy figures out how to control the Presidency in war and peace without enfeebling the Presidency across the board, then our system of government will face grave troubles."). On the part of commendation, see, for example, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 14–15 (2010) ("Our contrary thesis is that executive-centered government in the administrative state is inevitable, and that law cannot hope to constrain the modern executive."); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 13 (2005) ("[P]ractice has permitted the president to capture a large measure of independent initiative in setting and carrying out American foreign policy . . . ."). On the influence of emergencies, big and small, see, for example, BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: CIVIL LIBERTIES IN AN AGE OF TERRORISM 6 (2006) ("If left to their own devices, presidents will predictably exploit future terrorist attacks by calling on us to sacrifice more and more of our freedom if we ever hope to win this ‘war.’"); Kim Lane Schepple, Exceptions that Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 124, 143 (Jeffrey K. Tulis & Stephen Macedo eds., 2010) ("The way to deal with actually existing emergencies is to figure out how to live with them as a matter of normal constitutionalism.").
to make these determinations?

If security is said to be the special province of executive expertise, there is an absence of similar claims about liberty. When it comes to decisions about the proper scope and substance of individual liberties, constitutional practice reveals that citizens and courts, in addition to the political branches, have a role to play. Whether it involves the transformations "We the People" fashion, the interventions the people themselves make, or the interpretations courts construct, the protection of liberty is a shared enterprise. From the Constitution's Preamble, the goal is not to provide security alone as a matter of "common defence," but to "secure the Blessings of Liberty." This goal is to be realized through a divided structure of government suspicious of concentrated power.

Because of liberty's shared responsibility, there is a problem for the unbound executive: if the relationship between liberty and security entails tradeoffs, especially during perceived emergencies, and if liberty is a matter for both citizens and courts, then security must be as well. Since decisions about security necessarily entail decisions about liberty, for citizens and courts to have a role in the one is for them to have a role in the other. Alternately, we are left with the claim that given the relationship between security and liberty and given the special expertise required in deciding on security, citizens and courts should defer to executive decisions about both security and liberty. In short, the tradeoff thesis implies that whoever has authority to decide on liberty must also have authority to decide on security. This correspondence creates a dilemma: either citizens and courts have non-exclusive authority to decide on both, or courts must grant executive officials expansive deference on matters of liberty as well. This Article argues that the latter proposition is untenable and, therefore, citizens and courts must have non-exclusive authority to

\[21\] What the precise distribution of roles should be is another question, particularly when the constitutional meaning of a protected liberty is at stake. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980) (arguing courts should reinforce democratic representation).

\[22\] See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 384 (1998) ("The key notion...[is] unconventional adaption: at periods of peak mobilization, victorious movements use their control over standing institutions to take actions that go well beyond normal legal authority.").

\[23\] See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.").

\[24\] See Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

\[25\] U.S. CONST. pmbl.
make decisions about both national security and individual liberty.

This argument relies on the strength of the initial premise—liberty and security are in some way inextricable. On the one hand, this premise needs no further defense because those who advocate the necessity of tradeoffs assume it to be true. On the other hand, the premise tells us nothing about the complex ways liberty and security relate in political and constitutional practice. Moreover, both liberty and security are themselves complex concepts subject to multiple meanings. Yet whatever the more precise connections between liberty and security, under the tradeoff thesis decisions about the one will entail consequences for the other. Because of this interconnectedness, whomever has the authority to decide on liberty must also decide on security. This latter conclusion is one not recognized by advocates of tradeoff, and has important implications for decision-making processes. As Part II explains, neither American constitutional text nor tradition recognizes any special presidential authority over questions of liberty, even where both might assign authority to the president to decide war and foreign affairs matters. Moreover, when it comes to making judgments about the tradeoff between liberty and security, there is no justification for special deference to executive officials. Rather, as Part III explains, given the nature of the relation between security and liberty, and given how institutional constraints work under the Constitution, citizens and courts who have authority to decide matters of liberty also have valuable input into matters of security. Apart from the special knowledge citizens and courts might have about particular matters of liberty and the roles they play in individual lives, an interest in allocating authority over questions of liberty is in part justified by the harms of concentrated decision-making a polity seeks to avoid. In a long American tradition articulated well by the Declaration of Independence, these harms are sometimes labeled “tyranny.” Advocates of unbounded executive authority seek to foreclose the need to distribute decision-making authority by arguing that concern over tyranny is a phobia. Against this view, Part IV argues that far from emotional responses to crises, American constitutional culture disperses authority over both liberty and security as a constitutive feature of constrained political practice.

II. CONSTITUTIONAL DECISIONS ON LIBERTY

Liberty plays such a central role in American constitutional theory and practice that it becomes, at times, the very air in which more substantive values breathe. From the foundational arguments urging ratification of the Constitution, the view has been that “[t]he genius of republican liberty, seems to demand on one side, not only that all power should be derived

26 See infra Part III for a complete discussion of the tradeoff thesis.
from the people; but that those entrusted with it should be kept in
dependence on the people . . . . 27 Under the Madisonian framework, not
only does power ultimately reside in the people, but the separation of
powers "is admitted on all hands to be essential to the preservation of
liberty." 28 Liberty could be threatened by factions using government to
advance their own selfish agendas or by corrupt officials wielding the
power of office in defiance of the common good. Madison's design
problem then is "not only to guard the society against the oppression of its
rules, but to guard one part of the society against the injustice of the other
part." 29 Each of these governing problems could be solved through
constitutional design. By "giving to those who administer each department
the necessary constitutional means and personal motives to resist
encroachments of the others," Madison argued that the Constitution could
provide "security against a gradual concentration of the several powers." 30
Office holders were to identify with their offices, jealously guarding them
against encroachments from other departments. In this way, legislators
would be inclined to identify with the powers and virtues of their office
and contest aggrandizement of their power by executive officials. By
maintaining a federal structure and a divided national government, "a
double security arises to the rights of the people." 31 In turn, an enlarged
republic would "make it less probable that a majority of the whole will
have a common motive to invade the rights of other citizens." 32 In these
ways, structural design could turn mere "parchment barriers," 33 which by
themselves are "not a sufficient guard against those encroachments which
lead to a tyrannical concentration of all the powers of government in the
same hands . . . ." 34 into a means of securing constitutional rights.

These constitutional design features seek to disperse decision-making
authority across offices and actors in order to best preserve and promote
liberty. No thought was given to the proposition that liberty would be best
preserved in times of crisis through concentration of powers over liberty or
security in the executive department. In fact, quite the opposite is the case.
A theme repeated throughout The Federalist Papers is that the "security of
liberty" 35 is to be achieved through a constitutional design of separated
powers. Constituting government to provide "security for civil rights," 36

27 THE FEDERALIST NO. 37, supra note 14, at 227 (James Madison).
28 THE FEDERALIST NO. 51, supra note 14, at 321 (James Madison).
29 Id. at 323.
30 Id. at 321.
31 Id. at 323.
32 THE FEDERALIST NO. 10, supra note 14, at 83 (James Madison).
33 THE FEDERALIST NO. 48, supra note 14, at 308 (James Madison).
34 Id. at 313.
35 THE FEDERALIST NO. 1, supra note 14, at 35–36 (Alexander Hamilton).
36 THE FEDERALIST NO. 51, supra note 14, at 324 (James Madison).
suggests, along with the goal to "secure the Blessings of Liberty," that security and liberty are often mutually reinforcing goals subject to dispersed authority. Responsibility for security is shared by Congress, which has the power to declare war, raise, support, and make rules for armies and a navy, and to call forth the militia to suppress insurrections or invasions, and the President, who is the Commander in Chief with foreign relations powers and duties to faithfully execute the laws. In addition, some responsibility for security resides with "the People" who comprise the militias.

Against Madison, some scholars argue that this structural design has failed because it does not adequately constrain executive discretion in the modern administrative state. Particularly in times of crisis, Congress, courts, and citizens are prone to grant great deference to executive decisions, providing oversight, if at all, with minimalist interventions. Whatever Madison may have intended, the complexity of modern government means that Congress no longer has the ability to monitor the executive's implementation of legislation. Add to this complexity the institutional problems of collective action, asymmetry of knowledge, and party identification, and Madisonian checks can seem optimistic at best. Moreover, the presumed incentive structure seems not to be borne out in practice, as officials care less about the interests of their departments than

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37 U.S. CONST. pmbl.
41 See, e.g., Cass R. Sunstein, Minimalism at War, 2004 SUP. CT. REV. 47, 76 ("In the context of war, minimalists want above all to avoid large-scale interventions into democratic processes.").
42 See Adrian Vermeule, Our Schmittian Administrative Law, 122 HARV. L. REV. 1095, 1133 (2009) ("Black holes arise because legislators and executive officials will never agree to subject all executive action to thick legal standards."). Congress has greater powers of oversight, but repeatedly fails to use them. See Josh Chafetz, Congress's Constitution, 160 U. PA. L. REV. 715, 723 (2012) (examining congressional powers that "have been systematically underused or misused in a way that tends to diminish Congress's power vis-à-vis the other branches.").
about their own. Recognition of these failures have led to passage of framework statutes meant to cabin executive power, as well as unrealized proposals for further structural reform. To the critics, the cycle—expanding executive power, leading to new statutory checks, followed by renewed expansion of executive power—demonstrates that the primary check is political, not constitutional.

Whether these criticisms hit their mark or not, they do not establish who decides on liberty. Even if Madisonian structural design has not always succeeded in full, failure to provide adequate oversight of executive administration does not mean that executive officials either do or should make final decisions on matters of liberty. The American constitutional tradition often expects such decisions to involve the judiciary, as the Supreme Court made clear regarding the military detention and trial of civilians in Ex parte Milligan: “We all know that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the government.” More broadly, the judiciary’s role includes oversight of fundamental liberties against legislative majorities when it comes to matters of speech, association, privacy, and marriage, among others.

Even during military actions under emergency conditions, executive authority over the detention of individuals does not remain free from judicial oversight, deferential as it might be at times. The Supreme Court

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44 Levinson, Parchment and Politics, supra note 40, at 729.
46 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 63 (1866).
47 See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (limiting power of “a State to forbid or proscribe advocacy of the use of force or of law violation”).
50 See Loving v. Virginia, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).
51 Even deferential holdings during wartime required initial review of whether executive decisions adequately safeguarded individual liberties, as the Court acknowledged in the Nazi saboteur cases. See Ex parte Quirin, 317 U.S. 1, 21 (1942) (“In view of the public importance of the questions raised . . . and of the duty which rests on the courts, in time of war as well as in time of peace, to
retrainted habeas jurisdiction over “enemy combatant” detainees held at Guantanamo Bay in Boumediene v. Bush, and concluded that the president lacked unilateral powers to try terrorism suspects in military commissions that did not comply with domestic and international legal standards in Hamdan v. Rumsfeld. Although the scope and meaning of these judicial interventions are subject to interpretation, what remains clear is that constitutional cases do not recognize an unchecked presidential authority to decide matters of liberty, even during emergencies or wartime. Perhaps during a prior military conflict, the Court’s opinion in Korematsu might represent a high water mark of presidential deference, coming closest to upholding a nearly unchecked executive authority over the liberty of persons. Yet, even here, the Court purports to apply “the most rigid scrutiny” in upholding the detention of persons of Japanese ancestry on the basis of military necessity. Much, however, in the development of domestic and international law has changed since the Court’s decision in Korematsu, providing a very different context for judicial oversight of executive detention practices. In this context, the Supreme Court recognized that the executive might have an important security interest in establishing detention policies, but that “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.” Contested though they may be, and imperfectly implemented as critics might allege, Madisonian structures continue to provide the framework in which decisions about liberty and security are made.

Within Madisonian structures, institutional roles are not immutably

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52 Boumediene v. Bush, 553 U.S. 723 (2008) (“The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”).


55 Id. at 216.

56 Jack Goldsmith argues that courts, Congress, the press, and both military and non-military legal culture have developed mechanisms to hold presidents accountable to such an extent that “we have witnessed the rise and operation of purposeful forms of democratic (and judicial) control over the Commander in Chief, and have indeed established strong legal and constitutional constraints on the presidency.” Jack Goldsmith, Power and Constraint: The Accountable Presidency after 9/11, at xvi (2012). Moreover, the Supreme Court “did push back against the President . . . ultimately proving to be one of the most important agents for making the Constitution’s checks and balances work in the last decade.” Id. at 166.


58 Regarding protected First Amendment liberties, the Supreme Court rejected the president’s national security arguments that sought to enjoin the New York Times from publishing a classified study, stating that “[t]he word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.” New York Times v. United States, 403 U.S. 713, 719 (1971).
fixed, but require continual renewal in light of experience and prevailing constitutional understandings and practices. According to Cass Sunstein, two contrasting positions might define the available options regarding who decides on liberty and security, especially during emergencies: National Security Maximalism and Liberty Maximalism. Each produces its own pathologies. By focusing on national security, officials risk giving “support [to] unjustified intrusions on civil liberties.” By focusing on liberty, courts risk rendering insufficiently informed decisions that may harm national security. In between these two extremes, Sunstein argues that Congress should provide clear authorizations for deprivations of fundamental liberties, and that courts should provide incompletely theorized opinions while insisting that executive decisions to detain individuals be subject to minimal due process review.

At first blush, Sunstein’s *tertium quid* recognizes no special executive prerogative to decide matters of liberty. Courts and Congress each have at least a minimal role to play in making decisions affecting liberty. On closer inspection, a minimalist judicial role, especially in the context of the problems identified by Madisonian critics, yields no recognition of the special expertise courts have in articulating the meanings of rights and liberties. Under minimalism, the substance of judicial review is confined to whether Congress has provided clear statements authorizing executive action or to whether the outer limits of fundamental rights, such as free speech, are protected. Under-theorized opinions can lead to theoretical distortions as executive officials fill the public sphere with dramatic—and hyperbolic—security claims. That is, national security maximalism defines the executive’s approach, while no institution stands as a counterweight to advocate liberty maximalism. At best, academics and civil libertarians are left to argue for liberty, as minimalist courts focus on procedure and process.

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59 Sunstein, *supra* note 41, at 108.
60 Id. at 109.
61 Id. at 108.
62 Id. at 109.
63 Id. at 53–54.
64 See Owen Fiss, The Perils of Minimalism, 9 THEORETICAL INQUIRIES IN LAW 643, 647 (2008) ("[T]he Court sits not to resolve the dispute before it, which may leave the Court free to choose the narrowest ground that would serve that purpose, but rather to nourish and protect the basic values of the Constitution.").
66 For example, Attorney General Ashcroft attracted much attention for the following: “Emboldened by public opinion surveys showing that Americans overwhelmingly support the administration’s initiatives against terrorism, Mr. Ashcroft told the Senate Judiciary Committee, ‘To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.’” Neil A. Lewis, A Nation Challenged: The Senate Hearing: Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes, N.Y. TIMES, Dec. 7, 2001, at A1.
Because far more institutional heft supports security over liberty, what Sunstein presents as two extremes on a continuum—national security maximalism and liberty maximalism—turn out to occupy asymmetrical positions. If the criticisms of Madison’s structural design have any force, then the institutional involvement of Congress does not entail a strong check focused on the needs and meanings of liberty either. Thus, under minimalism, the executive decides on liberty—its scope and meaning—subject to deferential judicial review. This outcome is puzzling, since there is no reason to expect executive officials to have the incentives or knowledge to value liberty appropriately, and ample reasons to expect that they will overvalue security. Despite the lack of reasons, and perhaps more as a matter of inclination, advocates of the deference thesis claim that civil libertarians overvalue liberty (or undervalue risks to security), suggesting as a consequence that executive officials are better at valuing liberty after all.

Background institutional practices of minimalism themselves provide incentives for executive officials to overvalue security. Invoking threats to national security triggers statutory powers, burnishes political power, and raises barriers to criticism of presidential policy. Once the executive cites emergency, then judicial review shifts towards minimalism, freeing executive decisions from more searching inquiry. As a consequence of this dynamic, rule of law critics contend that the resulting legal “grey holes” grant “the façade or form of the rule of law rather than any substantive protections”\(^\text{67}\) to unconstrained executive action. Defenders of unbounded executive power respond by arguing that “[j]udges defer because they think the executive has better information than they do, and because this informational asymmetry or gap increases during emergencies.”\(^\text{68}\)

Even while presidents prefer to govern through administration, relying on their own powers and broad readings of congressional delegations,\(^\text{69}\) governing through emergency provides still greater prospects for unchecked creativity.\(^\text{70}\) Minimalism contributes incentives for the president to govern through emergencies, small and large, because emergencies require the knowledge and expertise over which executive officials claim special

\(^{67}\) DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3 (2006).

\(^{68}\) Vermeule, supra note 42, at 1135.

\(^{69}\) See Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2248 (2001) (“[P]residential control of administration . . . expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President’s own policy and political agenda.”).

\(^{70}\) As Vermeule emphasizes: “[e]mergencies . . . put a premium on creativity and fresh solutions.” Vermeule, supra note 42, at 1145. By contrast, Ackerman argues that government by emergency “legitimates the idea that the presidency may revolutionize the status quo in a matter of moments, without the decade-long process of mobilized deliberation and decision required by the standard operation of the separation of powers.” ACKERMAN, supra note 20, at 74.
Security facilitates, whereas liberty constrains, expansive presidential power. In a choice between liberty and security, therefore, one can expect presidential action will gravitate to its least inhibited position.

A presidential interest in governing within spheres of greatest discretion has not gone unnoticed by courts. Such assertions of presidential prerogative occur within a constitutional tradition suspicious of unilateral action. In his separate concurrence in *Hamdi v. Rumsfeld*, Justice Souter acknowledged the structural problem of deferring to executive decisions about liberty:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.

Such reasoning is also at home in other Supreme Court opinions limiting the power of executive officials to employ claims of emergency and

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71 See Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 836 (2006) (“[T]he ‘normal’ American constitutional order can be seen as thoroughly shot through with emergency law and . . . this constant sense of emergency has fundamentally shaped the possibilities of American constitutionalism.”). Because of the dynamic in which emergencies beget emergency powers (and vice versa), Americans face the prospect of a repetitive cycle in the face of future terrorist attacks:

> After each successful attack, politicians will come up with a new raft of repressive laws that ease our anxiety by promising greater security—only to find that a different terrorist band manages to strike a few years later. This new disaster, in turn, will create a demand for more repression, and on and on. . . . [T]he pathological political cycle will prove devastating to civil liberties by 2050.

necessity to justify unchecked action. Justice Jackson concurred in the Court's decision to deny President Truman the power to seize the domestic steel industry, warning that emergencies create "a ready pretext for usurpation," and "that emergency powers would tend to kindle emergencies."74

Skepticism about the executive's unilateral expertise on matters impacting liberties can be bolstered by attention to the cognitive limitations that attend group polarization or the constant availability of large and small security threats.75 Charged with keeping America safe, executive officials may find no security risk too small to pursue, despite the costs to liberty.76 President Obama, for example, claims that his responsibility for the nation's security is "the first thing that I think about when I wake up in the morning. It's the last thing that I think about when I go to sleep at night."77 The more a President listens only to those charged with similar responsibilities, the greater the risk that the group of decision-makers collectively will produce more polarized threat assessments and less constrained policies to address them.78 These dynamics—a temptation to

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73 See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (plurality opinion) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

74 Id. at 650 (Jackson, J., concurring). This reasoning also reflects Hamilton's argument in Federalist No. 8, where he wrote:

Safety from external danger, is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

THE FEDERALIST No. 8, supra note 14, at 67 (Alexander Hamilton).

75 See CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 62–63, 98–99, 204–05 (2005) (defining group polarization, and explaining the need to counteract the "various cognitive limitations that people face in thinking about risks" because "public fear might produce unjustified intrusions on civil liberties"). See generally DANIEL KAHNEMAN, PAUL SLOVIC, AND AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

76 See RON SUSKIND, ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11, at 18 (2006) (quoting Vice President Cheney as stating that "it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.").

77 Barack Obama, Remarks at the National Archives and Records Administration, 1 PUB. PAPERS 689, 690 (May 21, 2009); see also GOLDSMITH, supra note 56, at 25–29 (discussing ways that information, responsibility, national security culture, and executive-branch perspectives all contribute to forming the President's views on national security matters).

78 For present purposes, the possibility of cognitive bias provides reasons to doubt that expertise over security implies unchecked expertise over liberty. To avoid errors caused by polarization or other rational biases, one strategy is to involve more voices and perspectives—the Madisonian solution. See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 145 (2003) ("[T]he American founders' largest contribution consisted in their design of a system that would ensure a place for diverse views in..."").
over-inflate security risks, a focus on institutional duties to provide
security, and the possibility of cognitive bias—are reasons to think that the
executive does not have any particular expertise to decide on liberty. Skepticism, combined with the existence of constitutional constraints, provides reasons to look elsewhere for expertise on questions of liberty. asserting dispersed authority to decide on liberty, Justice O’Connor’s plurality opinion in Hamdi claimed that “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”79 Because decisions about security are often also about liberty, the Court reserves a role in checking the President’s claims to decide on questions of individual liberty by deciding on matters of national security.80

Despite these robust claims to limit executive discretion, emergency powers affecting fundamental liberties have also met with deferential Supreme Court decisions. Who decides matters of liberty is sometimes a story of shifting, albeit shared, responsibilities. The Court upheld exclusion of persons of Japanese ancestry from the West Coast in Korematsu v. United States, 81 and upheld curfews imposed on civilians by a military commander in Hirabayashi v. United States.82 Even in Hamdi, the Court held that the President could detain individuals as unlawful enemy combatants subject only to minimal due process review,83 and in Hamdan v. Rumsfeld 84 it implied that military tribunals authorized by Congress would satisfy due process standards. These cases are consistent with minimalist rulings, leaving questions of liberty largely to the executive to determine while the Court remains “wary and humble”85 concerning its own limited expertise in matters affecting national security. In a case considering the constitutionality of a statute that prohibited persons from providing material support to foreign entities designated by the State Department as terrorist organizations, as applied to persons who proffer lawful and nonviolent forms of aid, the Court adopted a position of deference to executive expertise. The Court reasoned that “when it comes

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80 About the importance of adhering to constitutional process, even if inconvenient, the Court instructs: “With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.” INS v. Chadha, 462 U.S. 919, 959 (1983).
82 320 U.S. 81, 104–05 (1943).
83 Hamdi, 542 U.S. at 537.
85 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (Frankfurter, J., concurring).
to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked, and respect for the Government’s conclusions is appropriate. Justice Frankfurter's concurring opinion in *Youngstown* provides a defense of such narrow and deferential decisions, admonishing that “[r]igorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution,” because of the limited expertise judges have about questions of security.

Deference to the safety and security decisions of executive officials are not limited to national security contexts, but exist in reviewing ordinary policing and correctional practices. Considering whether the Fourth Amendment requires reasonable suspicion to strip search persons detained for minor violations, the Court concluded that “[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.”

Expertise in law enforcement practices yields judicial deference on matters of what constitutes reasonable suspicion in the totality of the circumstances, or whether exigent circumstances justify police fears that destruction of evidence is imminent. If we take the view espoused by Justice Frankfurter as the model for flexible deference to executive officials’ claims to expertise in matters of safety and security, then constitutional criminal procedure reveals that the dynamic question of who decides between liberty and security is not one confined to the dramatic setting of the “War on Terror.” Political dynamics that have created the administrative rule by experts, as Rana traces, have created pressures on courts to focus on political process as a means of deciding questions of liberty.

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87 *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).
89 See United States v. Arvizu, 534 U.S. 266, 277 (2002) (holding that a border patrol agent had reasonable suspicion based on the totality of his observations to stop and search the plaintiffs’ vehicle).
90 See *Kentucky v. King*, 131 S. Ct. 1849, 1853-54 (2011) (“It is well established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.”).
91 See Rana, *supra* note 4, at 52 (examining Justice Frankfurter’s deference in national security cases).
92 See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 4 (2004) (describing the conflict between the executive unilateralists and the civil libertarian idealists who advocate for differing expertise when confronted with security threats). As scholars have argued, these dynamics also lead the Supreme Court to focus on procedure over substance, especially regarding executive detention policies. See, e.g., Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. PA. J. CONST. L. 491, 494 (2010) (arguing that rather than risk institutional capital by issuing substantive rulings, “[t]he Court,
Deferential judicial decisions by themselves tell an incomplete story. Deference is only possible in the context of judicial review of executive decisions, requiring officials to justify their practices to skeptical judges and publics. As cases such as *Rasul*\(^93\) and *Hamdan*\(^94\) attest, a president may advance views the Supreme Court rejects, especially regarding the locus of authority to decide fundamental matters of individual liberty. President Bush asserted authority to hold individuals at Guantanamo Bay free from judicial oversight and unencumbered by the obligations imposed by the Geneva Conventions. By claiming expertise over security, the President also claimed to be the sole authority over the liberty of those he designated as “enemy combatants.” Even minimalist constitutional decisions rejected the President’s claim to unchecked authority over matters of liberty. Because the Supreme Court is the institution with traditional constitutional authority over questions of liberty, minimalism provides no justifications for executive authority over liberty, though its effects may at times over-value the institutional decisions executive officials make.

When we examine our constitutional tradition, we find assurances that the Constitution protects liberty through all three branches of government existing in an uncertain relation of deference to executive decisions regarding security. Likewise, every scholarly thrust made on behalf of concerns for civil liberties can be parried on behalf of greater deference to the security decisions of executive officials.\(^95\) Unlike the imagery of thrust and parry, which suggests equality of strength and position, the practice of deferring to executive expertise on matters of security is a way of deciding on liberty. Executive officials decide on liberty by deciding security. This

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method is on display in criminal procedure decisions that decide on the liberty and privacy protected under the Fourth Amendment by examining the need of law enforcement officials and the expertise they possess, sometimes without even articulating the liberty interests at stake.96 Here is the puzzle. Given security’s fraught relation to liberty, why would expertise of the kind that requires knowledge of threats and the technology of solutions also produce expertise on matters of the constitutional constraints that exist on those solutions? Expertise in one area does not make one expert in another.97

In light of this ambivalence about expertise, there are two possible responses. First, one might claim that we really have given the president authority over liberty, checked only by ordinary politics. In this case, judicial rhetoric and academic scholarship to the contrary have failed to acknowledge actual political practice and institutional development. A second response is that the president does not have special authority over liberty, because constitutional constraints—from the writ of habeas corpus, to structural and internal checks, to the role of courts in protecting liberty—as well as legally informed politics disperse that authority. On this account, neither principle nor practice provides executive officials with explicit authority to decide matters of individual liberty. For either possibility, the extent of executive authority over liberty must be found in the principles and practices governing the tradeoff between liberty and security.

III. TRADEOFFS

The tradeoff thesis asserts the inevitable existence of conditions under which it will be impossible for policymakers to improve security without curtailing liberty. Taken by itself, it purports to describe a feature of the world devoid of normative evaluation. It just so happens that liberty and security relate in this way. But tradeoffs are not mechanical exercises, nor are the values at stake always fungible. Tradeoffs require allocative choices implicating institutional actors and normative principles that complicate their seeming simplicity.

The tradeoff thesis trades on an equivocation. At first glance, the tradeoff thesis says that if our allocations are already operating at a Pareto frontier with regard to any two suitably related goods (security and liberty, for example), to have more of the one means necessarily having less of the

97 Such was the lesson of Plato's Apology: Athenians who were skilled at one craft, thought themselves expert on other fundamental matters as well. PLATO'S APOLOGY, in PLATO COMPLETE WORKS 22 (John M. Cooper ed., G.M.A. Grube trans., 1997) ("[E]ach of them, because of his success at his craft, thought himself very wise in other most important pursuits.").
other. To operate at a Pareto frontier means that any gain in one good must entail a loss in the other. For example, if we have already done as much on behalf of both security and liberty at airports, such that there is nothing more we can do to improve security without further impacting liberties, then there will have to be a tradeoff. But notice that under the assumption that we are not operating below the frontier, such that improvements in both liberty and security are possible, the kinds of liberties that might be traded are of the everyday sort. Our freedom to travel with imprecise identification is curtailed by the requirement that the name on our flight reservation match the name on our government identification. Such a policy is said to improve security while costing us some of our liberty. But the myriad ways that freedom of movement in an airport, or on a public street, might be impacted by government policy designed to improve everyone's security are not the kinds of issues that are of primary concern to civil libertarians. Rather, the tradeoff thesis becomes problematic when it assumes that fundamental liberties are no different than the quotidian. Under conditions of scarcity, trading security for liberty may be no different than trading guns for butter. Policy decisions have allocative effects not only on the matter at hand—provision of specific security policies—but on other matters affected—like specific liberties. By contrast, trading the freedom from unreasonable searches and seizures or the rights to free speech for purported gains in security raises different issues.

The specific constitutional protections afforded such rights means that they have a special status within our politics. They exceed the normal tradeoffs.

Judicial review of government policies that impact rights and liberties exemplify this distinction. If government establishes policies that touch on non-fundamental liberties, the Supreme Court reviews government actions under a rational basis standard, asking only whether the policy bears some rational relation to a legitimate government interest. By contrast, if

98 POSNER & VERMEULE, supra note 3, at 26 (The Pareto frontier "identifies a range of points at which no win-win improvements are possible: any change in policies that makes A better off must make B worse off.").

99 Jeremy Waldron makes a related point about the fact that "liberty could be a matter of more or less." WALDRON, supra note 1, at 30.

100 Although the distribution of burdens under a tradeoff can produce inequalities—often the lost liberties are those of others, as David Cole suggests—the equivocation occurs in treating all liberties alike. See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 21 (2003) ("[T]he government has repeatedly targeted noncitizens, selectively denying them liberties that citizens rightfully insist upon for themselves."). To borrow from John Rawls' critique of utilitarian distributions of goods that do not respect "the distinction between persons," the tradeoff thesis does not respect the distinction among liberties. See JOHN RAWLS, A THEORY OF JUSTICE 24 (rev. ed. 1999).

101 See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that
government policy affects fundamental rights, then the Court reviews the
government action under strict scrutiny, asking whether government has
pursued a compelling interest through narrowly tailored means. On
closer inspection, the tradeoff thesis applies not only to the banal tradeoffs
of everyday policy, but also to the contentious derogations of fundamental
rights such as the right to free speech or the right to be free from
unreasonable searches and seizures. By ignoring relevant differences, the
tradeoff thesis trades on losses in liberty to increase security in the
quotidian case to justify the more fundamental. Under this equivocation,
"[c]onstitutional rules do no good, and some harm, if they block
government's attempts to adjust the balance as threats wax and wane."

On this argument, the tradeoff thesis applies equally to the everyday and
the constitutionally significant case.

Tradeoffs are inevitable only when goods and values are available for
trade. Availability depends on the background values and priorities to
which a constitutional polity commits itself. Constitutional values are not
absolute, and are subject over time to changing circumstances and
choices. But at any given moment, particular values and principles will
be central to a constitutional culture's self-understanding, and therefore not
amenable to trade. For example, under present constitutional
understandings, a free and independent press is a good unavailable for

there is an evil at hand for correction, and that it might be thought that the particular legislative measure
was a rational way to correct it."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938)
("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced
unconstitutional unless... it is of such a character as to preclude the assumption that it rests upon some
rational basis within the knowledge and experience of the legislators.").

See Loving v. Virginia, 388 U.S. 1, 11 (1967) ("[I]f [racial classifications] are ever to be
upheld, they must be shown to be necessary to the accomplishment of some permissible state objective,
independent of the racial discrimination which it was the object of the Fourteenth Amendment to
eliminate."); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) ("Where
there is a significant encroachment upon personal liberty... the law must be shown necessary, and
not merely rationally related, to the accomplishment of a permissible state policy.").

Stephen Holmes notes that the selective focus on liberty has an additional partisan political
valence, as "[a]dvocates of unconstrained executive discretion... selectively emphasize some forms of
liberty while neglecting others, effectively advocating a sharp reduction of the liberties prized by their
liberal opponents, while passing over in silence the liberties dear to conservatives." Stephen Holmes,
In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Calif. L. Rev. 301, 314
(2009).

POSNER & VERMEULE, supra note 3, at 31.

See JACk M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST
WORLD 62 (2011) (discussing constitutional dynamics when "the content and features of the
constitutional system are constantly changing.").

See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional
culture supplies understandings of role and practices of argument through which citizens and officials
can propose new ways of enacting the society's defining commitments—as well as resources to resist
those proposals.").
trade, even if it were true that a less-informed public could be made more secure through censorship. The point of protecting particular rights and liberties under a constitution is to make them unavailable to ordinary tradeoffs. Focusing official claims that tradeoffs of fundamental liberties are necessary through an analysis of compelling interests and narrow tailoring, as Supreme Court doctrine requires, is a way of incorporating constitutional values into the allocative decision-making of governing officials. A tradeoff of a fundamental liberty like the freedom of the press would mean something very different to a constitutional culture than would a tradeoff of an everyday good such as uninhibited movement through airports. This difference makes some tradeoffs that might otherwise appear hypothetically possible according to the tradeoff thesis, practically and constitutionally unavailable. Equivocation regarding this distinction occurs by ignoring the distinctive role that constitutional principles and practice play in the political lives of both citizens and officials.

Combining the tradeoff thesis with the deference thesis, Posner and Vermeule argue that "[w]hen judges or academic commentators say that government has wrongly assessed the net benefits or costs of some security policy or other, they are amateurs playing at security policy, and there is no reason to expect that courts can improve upon government’s emergency policies in any systematic way."\textsuperscript{107} On the Pareto frontier, executive policy makers can decide on the best allocation of liberty and security since the two goods are said to relate directly, but judges and academics are amateurs at security policy. Are they also amateurs regarding liberties? As we have seen, there is no tradition of claiming that executive officials have special expertise to decide the proper scope and distribution of individual rights and liberties, nor any indication that citizens and courts are unqualified to determine matters of liberty.

Perhaps the claim is somewhat different: when security is at stake, executive officials have special expertise to decide on both security and liberty because of the particular way these two values trade off.\textsuperscript{108} To decide on the proper allocation of security is to decide on the appropriate protections for liberty. If this is the claim, two problems arise. First, several unarticulated questions about the tradeoff need to be asked: how are security and liberty more specifically supposed to relate; what kinds of security gains are to be balanced against which liberties; and what epistemic standards govern these decisions?\textsuperscript{109} If to decide on security is

\textsuperscript{107}Id.

\textsuperscript{108}See Shue, supra note 12, at 70 ("A mutual dependence holds between enjoyment of rights to some liberties and enjoyment of security and subsistence and, in the other direction, between enjoyment of rights to security and subsistence and enjoyment of some liberties.").

also to decide on liberty, then executive officials will be expected to
to provide public justifications that articulate answers to these questions. It
is not enough simply to describe past situations when courts have deferred
to presidential decisions or to assert that citizens and courts ought to defer
to those decisions. Presidential powers may be ambiguously constrained
and may have discretionary institutional advantages, but they must still
operate within democratic processes dependent on public justifications for
deprivations to everyday liberty. As in the case of ordinary tradeoffs,
such justifications require articulating public necessity in light of the
effects on specific liberties. Because justifications are subject to judicial
and public evaluation, both law and politics will constrain the available
means by which Presidents pursue specific security protections. Security
decisions affecting liberty must be justified according to the appropriate
epistemic standards—reasonableness in everyday matters and narrowly
tailored compelling interests regarding fundamental rights. Unreasonable
procedures are likely to meet with public disapprobation and non-
compelling interests will fail judicial review. Public expectations about the
protections afforded constitutional rights will in turn inform the political
constraints operating on executive discretion. In this way, legal and
political constraints are mutually reinforcing. In short, if the tradeoff thesis
claims that Presidents decide questions of liberty by deciding questions of
security, it fails to establish any basis for special deference to the President
or any deficiency in public or judicial expertise, given the expectations of
public justification.

But if Presidents decide matters of liberty by default when they

110 See generally Rainer Forst, The Right to Justification 2 (Jeffrey Flynn trans., 2012)
(exploring a basic right to justification that "expresses the demand that there be no political or social
relations of governance that cannot be adequately justified to those affected by them.").

111 Posner and Vermeule urge that the "unbound executive" is constrained by politics, requiring
mechanisms of justification and review. See Posner & Vermeule, supra note 20, at 113. Though
one effective source of justification in politics is law itself, as Professor Pildes argues: "[J]udgments of
legality and political resistance to the President are so intertwined here as to make it meaningless to
purport to distinguish them." Richard H. Pildes, Law and the President, 125 Harv. L. Rev. 1381,
1401 (2012).

112 One example is public disapproval of the PATRIOT Act's provision allowing Federal Bureau
of Investigation personnel to apply for an order that required the production of "any tangible things
(including books, records, papers, documents, and other items)" in the course of an international
(codified at 50 U.S.C. §§ 1861–62 (2006)). Library records became the most fiercely contested
tangible things," as librarians led the public in demanding the legislation be revised. See, e.g., Anne
Klinefelter, The Role of Librarians in Challenges to the USA PATRIOT Act, 5 N.C. J. L. & Tech. 219
(2004); Judith Krug, Letter to the Editor, FBI 'Fishing Expeditions' Librarians' Biggest Worry, Wall
St. J., May 24, 2004, at A15. In response to the furore, Congress provided heightened requirements for
officials to gain access to library records and patron lists. USA PATRIOT Improvement and
U.S.C. § 1861(a)(3)).
establish security policy, there need be no explicit institutional acknowledgment of their authority over liberty. If they have authority, they have it by default. On this view, executive officials need do no more than establish their expertise regarding security to have authority over liberty. This authority therefore need not be visible, wrapped always in the appearance of security policy. Yet even in this case, Presidential decision-making regarding security is constrained by the ways it must consider constitutional and other legal norms protecting liberty. To keep the decisions regarding liberty hidden, they must not have readily perceived effects. One way of achieving this goal is to minimize the effects on liberty, thereby preserving liberty while pursuing security. The other way requires secrecy. For example, the Bush administration engaged in secret warrantless surveillance of electronic communications of U.S. citizens, impacting protected liberties through unobserved means. Because of the program’s effects on liberty, secrecy became impossible to sustain. Attempts to justify the program as necessary for maintaining security failed to win widespread legal support, leading to both internal and external constraints. Internal, because some officials argued the program was illegal. External, because Congress provided a revised legal framework to guide executive practice. Either way, consideration of liberty was inseparable from considerations of security. Yet, supposed expertise regarding security does not lead to deference regarding liberty. Executive officials seek either compliance or secrecy because there is likely to be little institutional or political deference to executive decisions regarding

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113 The secret National Security Agency program of warrantless electronic surveillance was first revealed to the public by the New York Times. See James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. TIMES, Dec. 16, 2005, at A1; see generally ERIC LICHTBLAUF, BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE (2008) (providing the full story of the surveillance program). The Department of Justice defended the legality of the Bush Administration’s practices, citing inherent presidential powers to protect national security. See U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 7 (Jan. 19, 2006) (“[b]ecause of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation’s foreign affairs.”).

114 There was internal dissension in the administration over the legality of the NSA surveillance program, leading the administration to take steps to bring the program in line with existing law. See David Johnston & Scott Shane, Notes Detail Pressure on Ashcroft over Spying, N.Y. TIMES, Aug. 17, 2007, at A14; Scott Shane & David Johnston, Mining of Data Prompted Fight over U.S. Spying, N.Y. TIMES, July 29, 2007, at A1; see also JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 181 (2007) (“After 9/11 [David Addington and Vice President Cheney] and other top officials in the administration dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.”); LICHTBLAUF, supra note 113, at 176–85.

liberty. In this manner, the mutual dependence of liberty and security can be just as constraining on Presidents as it can be potentially liberating.

Second, constitutional liberties often constrain executive action regarding all kinds of circumstantial exigencies without further claims that executive officials should be granted deference in determining when constitutional constraints apply. For example, although police may face exigent circumstances when investigating crime, courts decide when exigencies permit deviation from background constitutional requirements. What is more, the Court, asserting its power to protect liberties against executive claims of exigency, rejected President Truman’s claim that seizing steel mills was necessary under emergency circumstances. Even in the “War on Terror,” the Court has pushed back against the idea that deference grants the President a “blank check” when it comes to individual rights and liberties. Perhaps such confrontations between courts and presidents are relatively rare, and tend to occur after the initial emergency subsides. Their dearth could be a consequence of judicial avoidance or because presidents internalize basic constitutional constraints and values in their own decision-making. Office of Legal Counsel (“OLC”) opinions, which are binding on executive officials, are

116 To the extent that a President succeeds in keeping deep secrets, then neither law nor politics can check government policy. In this case, however, the problem of secrecy takes on an entirely different pallor having little to do with deference under tradeoffs. See Heidi Kitrosser, Secrecy and Separated Powers: Executive Privilege Revisited, 92 IOWA L. REV. 489, 522 (2007) (“Because [secrecy] is a tool that poses unique dangers of being used tyrannically and of being undiscoverable when so used, strenuous efforts must be made to keep the tool within the sight of its ultimate owners, the people.”); David E. Pozen, Deep Secrecy, 62 STAN. L. REV. 257, 323 (2010) (arguing that “deep state secrecy ought to be avoided whenever feasible.”). Transparency can also be difficult to achieve, particularly as the goal of openness can hide as much as it reveals. See Mark Fenster, Seeing the State: Transparency as Metaphor, 62 ADMIN. L. REV. 617, 622 (2010) (“The state’s large, organizationally and physically dispersed public bureaucracies perform a variety of functions and make a staggering number of decisions of varying importance, not all of which can be viewed before the fact or even easily reviewed later.”).


118 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) (plurality opinion) (affirming the lower court’s finding that the seizure of steel mills was not justified as an emergency situation).

119 See Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).

120 See, e.g., Ex parte Endo, 323 U.S. 283, 297 (1944) (“We are of the view that Mitsuye Endo should be given her liberty. . . . For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.”).

one way that executive practice can internalize constitutional norms.122 Another way that presidents are constrained is in the very constitutional nature of the office—its Article II assignment of powers, executive branch traditions and precedents, established institutional practices, the expectations of other institutions, public opinion and political participation, in addition to legal commitments as a matter of internal perspectives on the responsibilities of office.123 But in either case, there is no institutional, political, or legal admission that the President has special authority to decide matters of liberty—even in the process of making decisions about security.124 Presidential authority over liberty is constrained by other institutional actors, internalized legal norms, and public expectations.

Posner and Vermeule provide another version of the argument on behalf of presidential authority over liberty. They insist that law provides no constraint on executive decisions regarding tradeoffs. Practical political considerations, not legal constraints, determine the nature of tradeoffs. If this is true, then there is nothing about law or the Constitution that constrains presidential decisions on how or when to trade liberty for security.

If this is the final refuge for the unbound executive, it provides no shelter. For starters, the very responsibility for security is itself a construction of law—from the assignment of commander-in-chief powers to the President, to the duty to “take care that the laws be faithfully executed,” to congressional assignment of emergency powers and

122 Although OLC memos are not always checks on Presidential action, serving at times to facilitate as much to constrain. The “torture memos” are the most notorious in this regard. See, e.g., MEMORANDUM FROM JAY S. BYBEE, HEAD OF JUSTICE DEPARTMENT’S OFFICE OF LEGAL COUNSEL, TO ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT, STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. §§ 2340–2340A, at 31 (Aug. 1, 2002); see also, Dawn E. Johnson, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. REV. 1559, 1583 (2007) (“The Torture Opinion relentlessly seeks to circumvent all legal limits on the CIA’s ability to engage in torture, and it simply ignores arguments to the contrary.”). Nonetheless, OLC can provide normalizing standards for executive-branch legal advice. See Walter E. Dellinger et al., Principles to Guide the Office of Legal Counsel, 81 IND. L.J. 1348, 1349 (2004) (“It is incumbent upon the Attorney General and the President to ensure that OLC’s advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions.”).

123 See Thomas P. Crocker, Presidential Power and Constitutional Responsibility, 52 B.C. L. REV. 1551, 1555 (2011) (“No matter the emergency, a president will not vote on legislation, a court will not issue executive orders, and Congress will not represent the nation in international affairs.”); Richard H. Fallon, Jr., Constitutional Constraints, 97 CALIF. L. REV. 975, 979 (2009) (“To be a president or a member of Congress or a justice of the Supreme Court is to serve in an institution that is constituted and empowered by the Constitution and, as a result, necessarily constrained by it.”).

124 Nor do presidents always assert special prerogative to value security over liberty through tradeoffs. President Barack Obama declared in his 2009 inaugural address, for example: “As for our common defense, we reject as false the choice between our safety and our ideals.” Barack Obama, Inaugural Address, 1 PUB. PAPERS 1, 2 (Jan. 20, 2009).
Beyond these assignments, constitutional liberties circulate in both politics and in judicial decisions, each establishing legal limits to and expectations about presidential authority over both liberty and security. To the extent that the executive branch fails to acknowledge legal constraints constitutive of its very powers and responsibilities, it becomes more of a deviant institution than the judiciary ever could be. Legally unconstrained decisionism no more fits American constitutionalism than unlimited powers of judicial review would. The idea that law fails to constrain presidential authority over liberty in practice—even if legal texts, coordinate institutions, and public expectations all suggest otherwise, at least in theory—provides no basis for thinking that the President does or should receive deference in matters affecting fundamental liberties.

Using Posner and Vermeule’s terminology, are executive officials then “amateurs” playing at constitutional decision-making regarding liberty? Such overstatement is no more warranted here than with regard to judicial review of decisions affecting security. Even if there has been a near unbroken trend of increased executive expert authority over questions of security, there has been no similar change in the institutional balance of who decides on matters of fundamental liberty. The tradeoff thesis, as presented by advocates of presidential deference, fails to account for the bi-directional relation of security and liberty with different institutional capacities and responsibilities over each.

The problem may be that the question of who decides on security fails because of its own success. Taken in isolation, as a question about specific policies regarding resource allocation, intelligence gathering, military deployments, or diplomatic relations, security can be seen as requiring special expertise of executive officials. But as soon as security decisions become inextricably tied to decisions affecting fundamental liberties

125 See Pildes, supra note 111, at 1410 (“‘Politics’ takes place within a widely accepted structure of legal rules that constitute the political process and the roles and powers of public officials who engage in that process.’”).


127 The contrary view—that liberal legalism cannot escape decisionism—belongs to CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1985) (1922) (“Sovereign is he who decides on the exception.”), and has been more recently advocated by Vermeule, supra note 42, at 1098–1101. Against decisionism, see NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 5 (2009) (“There is no exception; rights do not lose their force, and the values underlying the rule of law do not lose their power.”).

128 POSNER & VERMEULE, supra note 3, at 31.

129 See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (“In this vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”); see also Curtis A. Bradley & Jack L. Goldsmith, CONGRESSIONAL AUTHORIZATION AND THE WAR ON TERRORISM, 118 HARV. L. REV. 2047, 2086 (2005) (“[T]he President has significant concurrent constitutional authority in the foreign affairs (and especially the war powers) field.”).
through tradeoffs, the complex relation between security and liberty undermines executive claims to expertise and deference. If to decide on security is to decide on liberty, then expertise on liberty must entail authority to decide questions of security. In this way, the tradeoff runs in both directions, as does the authority to decide matters of liberty and security.

IV. THE FALLACY OF “PHOBIA” IN DECIDING MATTERS OF LIBERTY AND SECURITY

Why does the question of who decides on matters of liberty and security matter? What is the state of affairs which American legal institutions are thought to foreclose by purporting to limit the decisional authority of executive officials over liberty? Because of the close relationship between security and liberty, is it plausible to think that no sufficient deprivation of liberty occurs through presidential decisions on matters of security to warrant a strong check on executive authority over both liberty and security? Even absent a tradition recognizing executive authority over questions of liberty, Posner and Vermeule argue that concern over legally unchecked executive power either “produces no benefits . . . or it produces minimal benefits and substantial costs.” Since the founding, American constitutional culture has viewed the threat of tyranny to require institutional and political vigilance. From the Declaration of Independence’s “history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States,” to Franklin Roosevelt’s 1944 State of the Union address’s concern that “[p]eople who are hungry and out of a job are the stuff of which dictatorships are made,” Americans have adapted institutional design and political practice to address the threat of legally unconstrained executive authority.

Viewing the effectiveness of this strain of American constitutional culture with skepticism, Posner and Vermeule argue that Americans suffer from “tyrannophobia”—“the fear of dictatorship”—when they distrust executive officials to decide matters of liberty free from legal constraints. They articulate their position this way: “We suggest that liberal legalists overlook the importance of de facto constraints arising from politics, and thus equate a legally unconstrained executive with one that is unconstrained tout court. The horror of dictatorship that results from this fallacy and that animates liberal legalism is what we call

130 POSNER & VERMEULE, supra note 20, at 204.
131 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
132 Franklin D. Roosevelt, Message on the State of the Union, 13 PUB. PAPERS 32, 41 (Jan. 11, 1944).
133 POSNER & VERMEULE, supra note 20, at 177.
‘tyrannophobia.’” One consequence of Posner and Vermeule’s argument is that the question of who decides on liberty is preempted by the claim of tyrannophobia. Civil libertarian concerns are ruled out ex ante as mere “phobias” said to accomplish nothing good, and that may in fact wreak some harm on the polity. The other consequence is that, similar to the asymmetry that exists in Sunstein’s dichotomy between national security maximalism and liberty maximalism, rational public discourse is free to fear insufficient provision for security, but irrational to fear illegitimate deprivations of liberty.

To illustrate this asymmetry, imagine a people ambivalent about executive power having emerged from a recent history of tyrannical rule. Within the context of a state’s duty to provide security, suppose the governing policy were to provide that if there is a one percent chance of tyranny, given the catastrophic consequences for people’s political lives and liberties, it must be treated as a near certainty and responded to accordingly with institutional checks and balances governed by law. Could we make sense of such a policy? Would this be tyrannophobia? Would it be illegitimate or unjustified? By contrast, now recall the actual policy of the Bush administration. As described by Ron Suskind, the policy pursued by Vice President Dick Cheney provided that “[e]ven if there’s just a one percent chance of the unimaginable coming due, act as if it is a certainty.” Ensuing policies treated the unimaginable terrorist attack as certainty and bent policy and law around the expert capacities of executive agents. Were such policies the products of irrational phobias? Whatever one’s answer to this question, it is clear that Posner and Vermeule’s argument is meant to defend the asymmetry between the phobias of physical insecurity, which are rational matters for executive expertise, and the phobias of political insecurity, which are pathologies to be avoided. But why is it any more rational to adopt policies that might deprive persons of fundamental liberties in pursuit of a one percent chance of insecurity, than it is to adopt policies that might burden some means of pursuing security in pursuit of a one percent chance of future tyranny? Mere recitation of executive expertise over matters of security does not provide an answer. Nor do (probably true) assertions that particular forms of tyranny are unlikely in the United States.

134 Id. at 176.
135 See supra notes 59–66.
136 On the ambivalence of executive power, see HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 291 (1989) (“For a constitutional people, nothing is more difficult, nor more necessary, than to define what executive power is.”). On conflict with tyranny, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 23 (1969) (“Liberty, defined as the power held by the people, was thus the victim and very antithesis of despotism.”).
137 SUSKIND, supra note 76, at 62.
Posner and Vermeule argue that dictatorship is not possible in the United States because it is "too wealthy, with a population that is too highly educated." Neither institutional design nor psychological factors are sufficient to explain the low risk of tyranny. Only the nation's wealth and associated politics can account for the absence of executive authoritarianism. From these claims—tyrannophobia does no good, dictatorship is not a real possibility, the only check on executive power is wealth and politics—Posner and Vermeule conclude that liberal legalism is guilty of a fallacy: "the assumption that the only possible constraints on the executive are de jure constraints." But this conclusion does not follow from the argument. At best, the "tyrannophobia" argument might establish that fear of tyranny has no political or legal efficacy in checking executive power. The argument says nothing at all about the viability of legal constraints on the executive, or the forms that those constraints might take.

Legal constraints, though contingently derived from a founding period concerned about tyranny, rely on rational justifications of constitutional and institutional design, as well as past practice. Moreover, the tyrannophobia argument overlooks the role that constitutional culture plays in explaining the absence of tyranny in American political practice. American constitutional culture—in principle and in practice—is committed to resolving political questions through Madisonian frameworks wherein popular conceptions of constitutional rights and governing limits play a distinctive role. Constitutional culture is a means of legal constraint. The unlikely prospect of the United States devolving into

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138 POSNER & VERMEULE, supra note 20, at 193.
139 Id. at 204.
140 As Rebecca Brown argues, democratic accountability can further protections for liberty not only at the polls, but by "involving the polity in standing behind a political structure which includes a judicial branch empowered to step in if the majority is itself carried away by an impulse to tyrannize (a countermajoritarian check)." Rebecca L. Brown, Accountability, Liberty, and the Constitution, 98 COLUM. L. REV. 531, 536 (1998).
141 See Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 76 (2003) ("Constitutional law draws inspiration, strength, and legitimacy from constitutional culture, which endows constitutional law with orientation and purpose."); see also Siegel, supra note 106, at 1342–43 ("[P]opular confidence that the Constitution is the People's is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution."). Part of this culture is to recognize as constitutionally significant fundamental legal changes wrought outside of Article V processes through popular political participation deploying contested constitutional meanings. See ACKERMAN, supra note 22, at 361 ("The Court's transformative opinions of the early 1940's have served as the functional equivalents of Article Five amendments, establishing fixed points for legal reasoning during the next era."); Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 441 (2007).
142 If it is correct to say, as it undoubtedly is, that "[c]onstitutional law is historically conditioned and politically shaped," H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION
tyranny cannot be explained without accounting for the role that constitutional culture plays in advancing shared conceptions of constrained institutions functioning in part to protect constitutional guarantees of liberty. These shared conceptions constitute a collective identity in part through the narratives and conversations about the values, rights, liberties, and powers that constitute the preconditions for political life. It is only through these shared, yet contingent and mutable, conceptions of constitutional meaning—relying on the wide participation of citizens, lawyers, judges, and legal scholars—that the politics on which Posner and Vermeule’s thesis relies become possible. Moreover, presidents are bound by their need to justify their policies through the meanings a constitutional culture makes available.

The tyrannophobia argument also conflates concern over deprivations of liberty with irrational fears of tyranny. That persons and institutions might be concerned to constrain executive officials from policies that impinge on fundamental liberties does not in any obvious way reflect “irrational beliefs” about the prospects of tyranny. Fear of dictatorship is not the same thing as concern that constitutional design and practice constrain governing officials from interfering with fundamental liberty. Nor are such fears the same as the belief that a president unconstrained by law is more likely to violate the People’s liberties. Only by making this further identification—that concern over liberty is also “tyrannophobia”—can we make sense of their further claim that with some frequency welfare-increasing policies “are blocked by ‘libertarian panics’ and tyrannophobia.” With this identification, tyrannophobia becomes

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143 See Balkin, supra note 105, at 126–38, 178–79; Sanford Levinson, Constitutional Faith 4 (1988) (examining “constitutional faith” as the “wholehearted attachment to the Constitution as the center of one’s (and ultimately the nation’s) political life”).


145 Posner & Vermeule, supra note 20, at 175.

146 For example, they cite Washington’s Farewell Address as an example of tyrannophobia. Id. at 175. But, Washington admonished the American public regarding the national government that “[r]espect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty.” George Washington, Farewell Address (Sep. 19, 1796), in 35 Writings of Washington 214, 224 (John C. Fitzpatrick ed., 1940). That a duty to obey the Constitution is necessary for providing liberty, for example, is far from an irrational fixation on tyranny.

147 Posner & Vermeule, supra note 20, at 203; see also, Posner & Vermeule, supra note 3, at 155 (arguing that a government that preserves existing liberties in the face of terrorist threats “is pathologically rigid, not enlightened, and that rigidity is at least as great a threat to national values or to the nation’s existence”). It would seem that the purported civil libertarian’s fears of tyranny are outdone by Posner and Vermeule’s fears that questions of constitutional liberties might constrain executive officials—what would seem to be a form of “libertarianophobia.”
the view that constitutional culture—the inter-generational conversation that structures available understandings of the presidential office, and its powers and responsibilities, through constitutional forms that constrain the possibilities for executive discretion—would itself have to be a manifestation of tyrannophobia. Contrary to such a conclusion, it seems clear that American constitutional practice is not under the grips of irrational fear, even as it seeks to channel constraints on executive power through Madisonian constitutional forms.

In sum, the tyrannophobia argument attributes irrational phobia to those who adhere to constitutional principles and practices that assign responsibility for liberty to governing institutions other than the executive. On this view, expertise over security is no different from expertise over liberty, constrained not by reference to law or constitutional culture and traditions, but by the political stability of wealth. At root, however, tyrannophobia is a straw-man argument. It substitutes an emotional state—fear—for constitutional principles and practices that value commitment to legal constraint as a constitutive feature of the polity. If tyranny is the limit case for how things might go badly for a democratic republic, there are many lesser forms of executive overreach helpfully constrained by constitutional commitments shared by citizen and governing official alike. One need not posit irrational fear to believe that governing form matters to function, that law is a constitutive feature of our political practices and expectations, and that liberty is not a matter best left to the discretion of the unbounded executive.

V. CONCLUSION

By adhering to a living constitutional tradition, Americans distribute authority over liberty—and security—not simply to avoid tyranny, but to embed trust and responsibility for each throughout the polity. Dispersed power creates dispersed responsibility. More than responsibility for the politics in which policy is practiced, citizens and courts have a role in establishing the constitutional culture in which particular distributions of liberty and security are possible. The social and political reproduction of what liberty and security mean within the constitutional life of the polity requires widely dispersed participation, even when executive officials at times play a leading role. Because under the tradeoff thesis to decide matters of security is often to decide questions of liberty, better decisions about each become possible through wider participation in crafting policies that attend properly to both. Such a conclusion is necessary because the alternative is untenable within our constitutional tradition. Given the fact that liberty and security tradeoff, to grant unbounded executive authority to decide matters of security would be to grant similar authority over questions of liberty. But nowhere in American constitutional traditions and practice can we find unchecked executive authority over matters of
liberty. As a consequence, we should expect institutionally allocated authority over both liberty and security.

American constitutional culture recognizes that expertise in technical matters of security fails to produce expertise over the fundamental matters of both liberty and security as they impact institutional prerogatives, constitutional powers, or fundamental rights. For these issues, who decides on liberty becomes a way of opening up the question of who decides on security.