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## OF LAW AND LEGACIES

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## OF LAW AND LEGACIES

*Eric Berger\**

## ABSTRACT

*This contribution to the symposium on President Obama's constitutional legacy examines the relationship between constitutional law and presidential legacies. Americans respect or even revere many presidents despite their apparent constitutional violations. Some unconstitutional actions, though, appear more forgivable than others. The effect constitutional transgressions may have on a president's more general legacy turns on a variety of contextual factors, including, among others, the president's values and vision, the administration's political successes and failures, political opponents' principles and behavior, the challenges confronting the country, and the nature of the constitutional norms at issue. Constitutional law, as articulated by lawyers and judges, is not irrelevant to presidential legacies, but it rarely defines them.*

*While some of President Obama's unilateral executive actions raised serious constitutional questions, it is unlikely his legacy will turn on those measures' legality. In most cases, President Obama followed past presidential practices and offered colorable (though admittedly contestable) legal defenses. Moreover, context helps explain, if not completely justify, many of Obama's controversial actions. To this extent, historians and members of the general public are likely to view the Obama presidency through a broader, nonlegal lens, considering, inter alia, the challenges he inherited, the policies he helped implement, and, especially, the vitriolic opposition he faced in Congress.*

*Indeed, the lead constitutional story from the Obama years will likely highlight not particular executive actions but rather our constitutional system's deficiencies more generally. U.S. politics became increasingly dysfunctional during Obama's presidency, and they have not improved since. Dysfunctional politics, of course, ought not immunize executive actions from legal attack.*

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\* Professor of Law and Associate Dean for Faculty, University of Nebraska College of Law. Thanks to Anne Duncan, Jeff Duncan, Matt Schaefer, Miguel Schor, Steve Willborn, and the participants in the 2017 Drake Constitutional Law Symposium, the University of Nebraska College of Law Workshop Series, and the University of Wisconsin Discussion Group on Constitutionalism for very helpful thoughts in conversation and on early drafts. I am also grateful to Professor Mark Kende and the editors of the Drake Law Review for organizing the symposium on President Obama's Constitutional Legacy. Finally, I thank Dillon Malone and his fellow editors for meticulous editorial assistance and Sarah Burghaus for very capable research assistance.

*However, the depth of this dysfunction should encourage lawyers to broaden their focus beyond narrow questions of legality in individual cases to more fundamental concerns about the health of our constitutional democracy.*

TABLE OF CONTENTS

I. Introduction .....	952
II. The Spectrum of Presidential Legacies .....	954
III. President Obama’s Legacy: Some Preliminary Thoughts .....	960
A. Foreign Affairs .....	963
B. Domestic Policy.....	969
C. Constitutional Hardball and the Obama Legacy .....	973
D. Legal and General Legacies .....	976
IV. Enter President Trump.....	979
V. Considering Constitutional Dysfunction.....	982

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“‘Tis easy to forgive those you like.” — *Irish proverb*

### I. INTRODUCTION

In assessing the constitutional legacy of President Barack Obama, or any president, we should clarify the nature of the inquiry. I therefore begin with a question: Might there sometimes be a meaningful distinction between a legalist inquiry and a historical one? In other words, might the court of history sometimes assess a president’s legacy differently than a court of law would?

The legalist inquiry asks whether judges and lawyers would find that president’s actions constitutional under current doctrine. The historical inquiry is necessarily broader and more multifaceted. It is less concerned with legal technicalities and considers presidential actions in light of a variety of contextual factors.

To borrow from Isaiah Berlin, under this framework, the legalist is a hedgehog, focusing single-mindedly on the legality of the president’s actions.<sup>1</sup> The historian is a fox, approaching presidents from a variety of perspectives.<sup>2</sup> To be sure, these conceptions of the lawyer and historian are artificial and oversimplified,<sup>3</sup> but the dichotomy helps highlight the extent to which lawyers focus on different questions than others. Both the legalist and historical inquiries are valuable, but they have different concerns.

Though the legal and historical analyses are distinct, they also can inform each other in important ways. The diligent historian will want to know whether a president violated established legal doctrine. The careful judge, for her part, will account for history and context in her written opinion.

That said, accumulated history is generally not considered the ultimate touchstone for constitutional meaning in the United States, as it is for the

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1. See ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* 1 (Henry Hardy & Aileen Kelly eds., 1966) (distinguishing between two types of intellectuals: hedgehogs, “who relate everything to a single central vision,” and foxes, “who pursue many ends, often unrelated and even contradictory”).

2. See *id.*

3. Historians are not the only ones who view events with a broader lens than lawyers judging the legality of particular action. To this extent, my “historian” is a construct encompassing not only academic historians but broader members of the informed public trying to assess events and figures through a generalist lens. See Gordon S. Wood, *History and Myth*, in *THE PURPOSE OF THE PAST* 249, 262 (2008).

British constitution.<sup>4</sup> In some cases, the historian's ultimate assessment—and, indeed, society's appraisal—of a president's legacy will seem out of step with the lawyer's. Indeed, oftentimes we assess a president's general legacy with minimal attention to constitutional issues, at least as those issues might be analyzed by lawyers and judges in actual litigation.<sup>5</sup> Put more bluntly, sometimes we celebrate presidents who broke the law.

For someone who used to teach constitutional law, President Obama's constitutional legacy includes some potentially serious blemishes, particularly involving his aggressive use of the executive power. He initiated wars in Libya and against ISIS without express congressional authorization.<sup>6</sup> He authorized numerous deadly drone strikes, including some on U.S. citizens (most famously Anwar al-Awlaki), arguably in violation of international and domestic law.<sup>7</sup> On the domestic front, President Obama aggressively used his office and the administrative state to create new policies in several areas such as immigration, climate change, health care, gun control, overtime rules, and minimum wage.<sup>8</sup>

I call these “potential” blemishes because there are colorable legal arguments to be made in support of each of these actions.<sup>9</sup> Let us assume for the sake of argument, however, that some of these actions pushed constitutional boundaries, at best, and would be deemed illegal by a majority

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4. See Miguel Schor, *The Other Path of Constitutionalism*, 50 TULSA L. REV. 469, 471 (2015) (noting that the principles of the Constitution of the United Kingdom are largely derived from the “best” practices of the British government).

5. Cf. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 26 (2007) (“Constitutional maintenance is above all a political task. As such, it must be considered in political terms.”).

6. See, e.g., Charlie Savage, *An Army Captain Takes Obama to Court Over ISIS Fight*, N.Y. TIMES (May 4, 2016), <http://www.nytimes.com/2016/05/05/us/islamic-state-war-powers-lawsuit-obama.html>; Linton Weeks, *If This Is Not ‘War’ Against Libya, What Is It?*, NPR (Mar. 22, 2011), <http://www.NPR.org/2011/03/22/134762513/If-this-is-not-war-against-libya-what-is-it>.

7. See, e.g., Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES MAG. (Aug. 27, 2015), <https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html>.

8. See, e.g., Rebecca Shabad, *Obama's Key Executive Actions*, HILL (July 6, 2014), <http://thehill.com/regulation/court-battles/211303-obamas-key-executive-actions>.

9. In a short symposium contribution about a large topic, I must paint with a broad brush. This overview, therefore, does not purport to offer a thorough legal or political analysis of the various issues discussed, or a comprehensive discussion of all the constitutional issues to arise during the Obama presidency.

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of fair-minded judges, at worst. My question here is whether history might forgive President Obama's constitutional transgressions. In other words, might the court of history care less about constitutional rules than many lawyers would care to admit?

## II. THE SPECTRUM OF PRESIDENTIAL LEGACIES

President Obama left office little over half a year ago, so it is too early to assess definitively his legacy, constitutional or otherwise. We can, however, look to past presidents to see if their legacies inform the relationship between the historical and legalist analyses. The obvious example is President Abraham Lincoln. Historians usually rate Lincoln as one of our nation's greatest presidents.<sup>10</sup> In our popular national mythology, too, Lincoln may be our greatest hero.

Constitutional scholars, however, often point out that President Lincoln took several constitutionally suspect actions.<sup>11</sup> He suspended habeas corpus, despite the fact that the Constitution appears to give the suspension power to Congress alone.<sup>12</sup> He erected a naval blockade of the Confederacy, despite the fact that his legal justification for the blockade was in tension with his constitutional theory justifying the war to hold the Union together.<sup>13</sup> He instituted the first national conscription under the Militia Act, an act that one eminent commentator deemed "presidential legislation."<sup>14</sup> He permitted military tribunals to hear cases against civilians, even sometimes in northern states that had not seceded and where the courts remained

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10. For example, a Wikipedia entry aggregates the results of various surveys of historians and political scientists, and lists President Lincoln as the top-ranked president. See *Historical Rankings of Presidents of the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Historical\\_rankings\\_of\\_presidents\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Historical_rankings_of_presidents_of_the_United_States) (last visited Aug. 23, 2017). Whether there is any merit to these kinds of rankings is, of course, a different question, but for my purposes, the important point is that President Lincoln is generally regarded very highly.

11. See, e.g., JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 513 (rev. ed. 1964) ("It is indeed a striking fact that Lincoln, who stands forth in popular conception as a great democrat, the exponent of liberty and of government by the people, was driven by circumstances to the use of more arbitrary power than perhaps any other President has seized.")

12. See *Ex parte Merryman*, 17 F. Cas. 144, 148 (D. Md. 1861).

13. See *The Prize Cases*, 67 U.S. 635, 641-42 (1862); Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 53, 58, 66 (Christopher H. Schroeder & Curtis A. Bradley, eds., 2009).

14. See RANDALL, *supra* note 11, at 239-74, 514.

open.<sup>15</sup> He issued the Emancipation Proclamation, a noble and righteous action, no doubt, but also one that at the time raised thorny constitutional questions.<sup>16</sup>

And yet, despite the fact that Lincoln pushed the Constitution to or beyond its limits on numerous occasions, he is regarded as one of the country's finest presidents—and for good reason. Lincoln is the president credited with freeing the slaves, with saving the Union, and with leading the country successfully through its most traumatic episode. Lincoln's constitutional infidelities—if they were that—were usually in service of noble goals.<sup>17</sup>

Perhaps we should not be surprised that the country does not hold Lincoln's constitutional infidelities against him. Historians, and arguably lawyers, are more willing to forgive constitutional excesses in times of crisis.<sup>18</sup> The Constitution might or might not build in implicit exceptions that would vindicate Lincoln's actions under a legalist analysis,<sup>19</sup> but the historical analysis surely permits careful consideration of such contextual factors. If any period in our history entitled the President to claim a constitutional "exception,"<sup>20</sup> surely it was the Civil War.

Lincoln's legacy also benefits from the fact that his opponents—primarily the seceding Confederates—are understood today to have violated the Constitution and basic human rights more than Lincoln did.<sup>21</sup> Secession is the constitutional sin that overshadows whatever transgressions Lincoln might have authorized in response.<sup>22</sup> And though the Constitution of 1787

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15. See *Ex parte* Milligan, 71 U.S. 2, 29–30 (1866); DANIEL A. FARBER, *LINCOLN'S CONSTITUTION* 163–65 (2003).

16. See FARBER, *supra* note 15, at 156–57; Henry L. Chambers, Jr., *Lincoln, the Emancipation Proclamation, and Executive Power*, 73 MD. L. REV. 100, 100–11 (2013).

17. See FARBER, *supra* note 15, at 196.

18. Cf. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN A TIME OF WAR* 224–55 (1998) (arguing that the Constitution still applies in times of war but speaks "with a somewhat different voice").

19. See *id.*; ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 11–12 (2010).

20. See generally GIORGIO AGAMBEN, *STATE OF EXCEPTION* 1–4 (2005) (exploring the "no-man's-land between public law and political fact" and the "state of exception" which constitutes "law's threshold").

21. See FARBER, *supra* note 15, at 144–46.

22. See *id.* at 196.

clearly protected it,<sup>23</sup> slavery was such an evil that today we understand the Union to be righteous and the Confederacy depraved.<sup>24</sup> Additionally, Lincoln's immediate predecessor, James Buchanan, and successor, Andrew Johnson, manifestly lacked Lincoln's moral vision, political skill, and nuanced constitutional understanding.<sup>25</sup> Heroes need foils, and Lincoln had foils aplenty.

Moreover, Lincoln took the Constitution seriously. He rarely acted without serious deliberation, and he carefully weighed the constitutional arguments for and against most of his actions.<sup>26</sup> As Professor Farber argues, Lincoln was extraordinary because he saw the need to take dramatic action to save the Union, while simultaneously maintaining a sense of perspective about proper measures and their human and legal costs.<sup>27</sup>

Indeed, to the extent he realized he was sometimes on constitutional thin ice, President Lincoln also took care to ensure that his measures were no broader than necessary. For example, when he first suspended habeas corpus, he did so only on the supply line between Philadelphia and Washington, D.C., to protect Union troops who had been attacked while switching trains in Baltimore.<sup>28</sup> If he faced a temptation to suspend habeas more broadly then, Lincoln resisted it.

Even so, it is worth emphasizing that Lincoln's favorable legacy depends a good deal on circumstance. We are willing to forgive Lincoln's constitutional record in large part because we deem him a great president. Had the war turned out differently, we likely would see Lincoln and his actions differently. Indeed, had the election of 1864 occurred a few months earlier (before some important Union battlefield victories), Lincoln may

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23. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (three-fifths clause); *id.* art. I, § 9, cl. 1 (protecting slave trade until 1808); *id.* art. IV, § 2, cl. 3 (fugitive slave clause).

24. See, e.g., *Confederate Monuments Are Coming Down Across the United States. Here's a List.*, N.Y. TIMES, <http://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html> (last updated Aug. 28, 2017) (exemplifying the general modern attitude toward the Confederacy).

25. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 177 (1989) [hereinafter FONER, RECONSTRUCTION] (noting that as president, Johnson found himself "thrust into a role that required tact, flexibility, and sensitivity to the nuances of public opinion—qualities Lincoln possessed in abundance, but that Johnson lacked").

26. See FARBER, *supra* note 15, at 198-99.

27. See *id.* at 199.

28. See *id.* at 158; BRIAN MCGINTY, LINCOLN AND THE COURT 70-71, 79 (2008).

well have lost, and his legacy would have been very different.<sup>29</sup>

On the other end of the spectrum is President Richard Nixon, who lost his legal battle in the court of law<sup>30</sup> and continues to lose in the court of history. The defining events of the Nixon presidency—Watergate and the subsequent cover-up—were egregious legal violations. For many Americans, Nixon epitomizes the corrupt, lawless president.<sup>31</sup>

The differences between Lincoln and Nixon are obvious and numerous. Nixon unquestionably broke the law; the Supreme Court, indeed, unanimously rejected his constitutional argument to quash the subpoena for the tapes.<sup>32</sup> Though subsequent commentators have criticized the Court's reasoning, most agree that the result was correct.<sup>33</sup> By contrast, reasonable people disagree about whether some of Lincoln's controversial actions did in fact violate the Constitution.<sup>34</sup>

Even if we assume, however, that Lincoln *did* break the law, his violations look very different from Nixon's. If Lincoln violated the Constitution, he did so for the noble causes of saving the Union and (eventually) freeing the slaves.<sup>35</sup> Lincoln also guided the country through the greatest calamity in its history, and he was well aware that the Founders' constitutional experiment would likely perish if the Union did not win the war.<sup>36</sup> As he asked when he initially suspended habeas corpus, "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest

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29. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 1770–71* (1988).

30. *United States v. Nixon*, 418 U.S. 683, 714–16 (1974).

31. See Julian Zelizer, *Distrustful Americans Still Live in Age of Watergate*, CNN (July 7, 2014), <http://www.cnn.com/2014/07/07/opinion/zelizer-watergate-politics/index.html>.

32. See *Nixon*, 418 U.S. at 685–86 (1974) (Justice Rehnquist took no part).

33. See, e.g., Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1405 (1999).

34. Professor Farber, for instance, points out that many of Lincoln's controversial actions were consistent with Congress's intentions. See FARBER, *supra* note 15, at 132–38.

35. *Id.* at 196–200. Though Lincoln genuinely loathed slavery, his public stances towards the institution changed both before and during his presidency. See generally ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* (2010) [hereinafter FONER, *FIERY TRIAL*] (tracing President Lincoln's ideas and policies on slavery).

36. See Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863) (transcript available at the U.S. National Archives & Records Administration).

that one be violated?”<sup>37</sup>

Nixon’s constitutional theory, by comparison, was purely self-serving. The break-in at the Democratic National Committee Watergate headquarters and the subsequent cover-up served only Nixon’s political interests.<sup>38</sup> Moreover, Nixon’s constitutional argument that “separation of powers doctrine precludes judicial review of a President’s claim of privilege” conveniently would have protected Nixon from disclosing incriminating information.<sup>39</sup> The country, of course, did face serious problems, but Nixon’s bogus assertion of executive privilege was not directed at solving them.<sup>40</sup> The court of history is more willing to forgive abuses committed toward national, rather than selfish, ends. Of course, it is often debatable which ends are selfish, but in the cases of Lincoln and Nixon, the answers are mostly uncontroversial.

The presidents’ personal characteristics also distinguish them. Americans admire Lincoln in part because of his qualities as a man: his empathy, his intellectual rigor, his folksy humor, and his “capacity for growth.”<sup>41</sup> Nixon, though highly competent, possessed few endearing qualities, deficiencies that likely contribute to his unfortunate legacy.<sup>42</sup>

The quick contrast between Lincoln and Nixon serves to demonstrate that context, including nonlegal factors, matters.<sup>43</sup> Some legalists may give both Lincoln and Nixon low scores for their constitutional legacy, but most historians will rate Lincoln highly and Nixon poorly.<sup>44</sup> Phrased somewhat

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37. MCGINTY, *supra* note 28, at 81 (alteration in original) (quoting Abraham Lincoln, Message to Congress in Special Session Message (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 403 (Roy P. Basler ed., 1953–1955)).

38. See Christopher H. Schroeder, *The Story of United States v. Nixon: The President and the Tapes*, in PRESIDENTIAL POWER STORIES 343 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

39. See *United States v. Nixon*, 418 U.S. 683, 703 (1974).

40. See Schroeder, *supra* note 38, at 329–30, 343.

41. FONER, *FIERY TRIAL*, *supra* note 35, at xix.

42. See *40 Years After Watergate, A Look Back at Nixon’s Downfall*, NPR (May 21, 2014), <http://www.npr.org/2014/05/21/314596874/40-years-after-watergate-a-look-back-at-nixon-s-downfall>.

43. Needless to say, a symposium contribution cannot examine the many other presidents whose legacies fall elsewhere on the spectrum. For a fascinating study examining several presidencies, see generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

44. See, e.g., *Presidential Historians Survey 2017*, C-SPAN, <https://www.c-span.org/presidentsurvey2017/?page=overall> (last visited Sept. 9, 2017).

differently, a president's general legacy will often matter much more than his constitutional legacy. Constitutional transgressions matter, but perhaps more so when they reinforce an unfavorable legacy more generally. Nixon's conception of near-absolute executive privilege has defined his legacy because it fits the broader Watergate narrative of "Nixon the crook."<sup>45</sup> Nixon—the man and the President—was obviously more complicated, and his presidency included some important successes that helped the country.<sup>46</sup> Nevertheless, President Nixon's legacy, constitutional and otherwise, is shaped by the Watergate scandal and his response to it.

Lincoln's legacy, by contrast, transcends his constitutionally questionable decisions. Interestingly, this is probably not because we now accept Lincoln's constitutional arguments.<sup>47</sup> To the contrary, lawyers usually do not assume today that Lincoln's example necessarily vindicates similar subsequent presidential actions.<sup>48</sup> Rather, when we assess Lincoln's legacy generally, we forgive his constitutional excesses.

This is an obvious point, but it can be lost on lawyers, who sometimes think of legal questions as binary—that is, of actions as either legal or illegal.<sup>49</sup> Judges, after all, must decide how to rule in each case. Historical analysis is inherently more open ended. The historian, whether professional or lay, can identify unconstitutional actions, but unlike the judge, such a finding need not conclude the analysis. The historian can search for explanations, examine tensions, and highlight paradoxes.<sup>50</sup> The historian can also take account of subsequent generations' moral attitudes. Whereas the judge must focus (or, at a minimum, appear to focus) on legal analyses, the

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45. See, e.g., Amar, *supra* note 33, at 1405–07.

46. See, e.g., Joan Hoff, *Nixon Had Some Successes, Before His Disgrace*, N.Y. TIMES (June 13, 2012), <https://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/nixon-had-some-successes-before-his-disgrace>.

47. See Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional?: Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1148–50 (2001) [hereinafter Levinson, *Was the Emancipation Proclamation Constitutional?*].

48. See FARBER, *supra* note 15, at 197.

49. See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 861–62 (1992).

50. See, e.g., Eric Berger, *Originalism's Pretenses*, 16 U. PENN. J. CONST. L. 329, 367–68 (2013); Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. REV. 1346, 1347 (2003) (“Unlike lawyers, we [historians] are not trained to speak with the voice of the advocate or the adversary. . . . The nuance, subtlety, and respect for ambiguity that we [historians] cherish and relish in our research cannot easily be translated into urgent political discussion.”).

historian, like society more generally, can engage with the president's values and vision, as well as his ability "to advance his agenda and to maintain his political coalition."<sup>51</sup> To this extent, the historian is likely to go beyond judge-made constitutional doctrine and examine the complex web of institutional, ideological, legal, and partisan commitments that simultaneously empower and constrain the president.<sup>52</sup> Of course, historians exploring these issues do not often consciously seek to define the legacy of public figures, but their projects contribute to those legacies. Those projects usually consider much more than whether a public actor followed the letter of the law.

### III. PRESIDENT OBAMA'S LEGACY: SOME PRELIMINARY THOUGHTS

How, then, will history judge President Obama's legacy in light of these broader factors? It is fair to say that Barack Obama was neither a Lincoln nor a Nixon. Though I greatly admire him, I do not think President Obama will be remembered as one of the country's greatest presidents. I am also confident he will not be remembered as one of the worst. Even critics who disliked the Obama presidency must concede that he was no crook.<sup>53</sup> Like most presidents, Obama's legacy will be mixed.

Of course, it is difficult to assess a president's legacy without reference

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51. WHITTINGTON, *supra* note 5, at 18; *see also* Levinson, *Was the Emancipation Proclamation Constitutional?*, *supra* note 47, at 1150 ("When all is said and done, we place far greater emphasis on whether we substantively like the outcomes, than on their legal pedigree.").

52. *See* WHITTINGTON, *supra* note 5, at 22.

53. Though "scandals" are often in the eye of the beholder, the Obama White House, unlike many recent presidents, lacked a major scandal. *See* Glenn Kessler, *Has the Obama White House Been 'Historically Free of Scandal'?*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/01/19/has-the-obama-white-house-been-historically-free-of-scandal/?utm\\_term=.db4a81ca55db](https://www.washingtonpost.com/news/fact-checker/wp/2017/01/19/has-the-obama-white-house-been-historically-free-of-scandal/?utm_term=.db4a81ca55db). Political opponents complained about the IRS's alleged targeting of conservative political groups seeking tax-exempt status. This narrative, if true, would point to an appalling abuse of power (though one not necessarily linked directly to the President). In all events, recent findings by the Department of the Treasury's Inspector General indicate that the IRS similarly scrutinized organizations associated with liberal causes and likely put the political firestorm to rest. *See* Alan Rappeport, *In Targeting Political Groups, I.R.S. Crossed Party Lines*, N.Y. TIMES (Oct. 5, 2017), [https://www.nytimes.com/2017/10/05/us/politics/irs-targeting-tea-party-liberals-democrats.html?\\_r=0](https://www.nytimes.com/2017/10/05/us/politics/irs-targeting-tea-party-liberals-democrats.html?_r=0).

to one's own normative biases.<sup>54</sup> Indeed, the historical inquiry, like the legalist inquiry, is value laden. Historians, both lay and professional, will disagree with each other, just as judges do.

With that major caveat, I think President Obama's general legacy will be much more positive than negative. Obama inherited very difficult situations and in many respects left the country much better than it was when he took office.<sup>55</sup> Perhaps most notably, he came to office during the country's greatest economic crisis in 70 years, and his policies helped avert economic catastrophe.<sup>56</sup> While no president deserves too much credit (or blame) for the economy, the unemployment rate, which had peaked at 10 percent early in the Obama presidency, was down to 4.7 percent by the time he left office.<sup>57</sup> As one commentator put it, "If other policy decisions had been made, things could have been very different, and much worse."<sup>58</sup>

Obama also changed the national debate on important issues, especially health care. The Affordable Care Act (ACA) is undoubtedly a flawed statute, but it cut the number of uninsured Americans nearly in half.<sup>59</sup> Not everybody thinks this is a good thing, but the law has changed the debate surrounding health insurance.<sup>60</sup> As a result, even Republicans who loathe the ACA have not been able to agree on a replacement.<sup>61</sup> Were it not for President Obama, the fate of 20 million people's health insurance likely would not have had enough political salience to fracture the Republican

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54. To that extent, I fully admit that my own views have partially shaped my analysis here, though I have also tried to be fair-minded.

55. See John Cassidy, *Obama's Economic Record: An Assessment*, NEW YORKER, (Jan. 9, 2017), <http://www.newyorker.com/news/john-cassidy/obamas-economic-record-an-assessment>.

56. See *id.*

57. See *id.*

58. *Id.*

59. See Louise Radnofsky, *Percentage of Uninsured Historically Low*, WALL ST. J. (Sept. 7, 2016), <https://www.wsj.com/articles/percentage-of-uninsured-historically-low-1473220802>.

60. See Gary Westphalen & Serena Marshall, *The Obama Legacy: A Promise of Hope*, ABC NEWS, <http://abcnews.go.com/Politics/deepdive/obama-legacy-promise-hope-44597110> (last visited Sept. 24, 2017).

61. See Robert Y. Shapiro & Greg M. Shaw, *Why Can't the Senate Repeal Obamacare? Because Its Policies Are Actually Popular*, WASH. POST (July 19, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/19/why-cant-the-senate-repeal-obamacare-because-its-actual-policies-are-popular/?utm\\_term=.432fa31202e4](https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/19/why-cant-the-senate-repeal-obamacare-because-its-actual-policies-are-popular/?utm_term=.432fa31202e4).

Party as it has in 2017.<sup>62</sup> It is too early to assess the long-term policy implications of these developments, but the effect on the national debate has been significant.

President Obama also served in profoundly divisive times<sup>63</sup> and carried himself with unflinching dignity and grace. Compared to many colleagues from both parties in Congress, President Obama often seemed like the only grownup in the room.<sup>64</sup> In an era of intense political vitriol, President Obama modeled respectful, thoughtful discourse.<sup>65</sup>

President Obama's political opponents undoubtedly contest these characterizations. Some also hasten to enumerate his unconstitutional actions.<sup>66</sup> Such rhetoric may be politically effective, but it fails to wrestle with the issues' legal complexities. This is not to say that all these lists' conclusions are necessarily wrong, but rather that in many cases there are reasonable (and complicated) arguments to be made on each side.<sup>67</sup>

More to the point, even assuming *arguendo* that President Obama violated the Constitution on some occasions, that conclusion on its own tells us little about the Obama legacy more generally. When Americans look back on a president's constitutional decisions, they do not do so in a vacuum. We should, of course, ask how lawyers would analyze particular actions, but we should also recognize that the legalist analysis is often but a splotch on the historian's wider canvas.

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62. *See id.*

63. *See* Michael Dimock, *How America Changed During Barack Obama's Presidency*, PEW RES. CTR. (Jan. 10, 2017), <http://www.pewresearch.org/2017/01/10/how-america-changed-during-barack-obamas-presidency/>.

64. *See, e.g., Rep. Wilson Shouts, 'You Lie' to Obama During Speech*, CNN POL. (Sept. 10, 2009), <http://www.cnn.com/2009/POLITICS/09/09/joe.wilson/>.

65. *See* The Times Editorial Board, *Farewell to Barack Obama: A Humane, Intelligent, and (Mostly) Effective Leader*, L.A. TIMES (Jan. 14, 2017), <http://www.latimes.com/opinion/editorials/la-ed-obama-appraisal-20170114-story.html>.

66. *See, e.g.,* Ilya Shapiro, *President Obama's Top 10 Constitutional Violations of 2013*, FORBES (Dec. 23, 2013), <https://www.forbes.com/sites/realspin/2013/12/23/president-obamas-top-10-constitutional-violations-of-2013/#5ea526bb7667>; Ilya Shapiro, *Top 10 Ways Obama Violated The Constitution During His Presidency*, FEDERALIST (Jan. 19, 2017), <http://thefederalist.com/2017/01/19/10-ways-obama-violated-constitution-presidency/>.

67. *Cf.* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 671–78 (2015) [hereinafter, Berger, *Rhetoric*] (lamenting the certainty of tone that pervades much rhetoric about the Constitution).

*A. Foreign Affairs*

With those more general (and admittedly contestable) observations in mind, how would the legalist evaluate President Obama's constitutional legacy? On the foreign affairs front, Obama authorized repeated drone strikes—including against U.S. citizens—in places like Yemen and Somalia. He also ordered the assassination of Osama bin Laden in Pakistan<sup>68</sup> and initiated military action, without express congressional authorization, against Moammar Qaddafi in Libya and against ISIS in Iraq and Syria.<sup>69</sup>

There certainly are legal arguments to be made against these actions. Commentators disagree about what circumstances beyond self-defense, if any, permit the president to authorize force abroad without congressional authorization.<sup>70</sup> However, even if we infer from our history that the president sometimes has authority to take military action without congressional authorization,<sup>71</sup> it is far from clear that the circumstances here necessitated unilateral executive action.<sup>72</sup> Qaddafi was a brutal dictator, but he posed a minimal threat to the United States.<sup>73</sup>

Similarly, while ISIS is unquestionably dangerous, it is less clear how much of a direct threat it poses to the United States' national security.<sup>74</sup> Most of its atrocities during the Obama years were committed in Syria and Iraq,

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68. Razzan Nakhlawi, *The Kill List: Islamic State Leaders Taken off the Battlefield*, L.A. TIMES (Nov. 4, 2016), <http://www.latimes.com/world/middleeast/la-fg-targeted-killings-drone-snap-htmlstory.html>.

69. In light of justiciability doctrines like standing and the political question doctrine, judges might not tackle such issues often, even if the president does act unconstitutionally. However, lawyers advising the president on such action, such as those in the Office of Legal Counsel, can draw legal lines, as can the legal academy.

70. See, e.g., Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L. J. 2512, 2514–15 (2006) (summarizing different scholarly views).

71. See Lori Fisher Damrosch, Comment, *War and Uncertainty*, 114 YALE L.J. 1405, 1408 (2005) (“Only nine times has Congress acted with bright-line clarity to authorize initiation of major combat.”).

72. See, e.g., Deborah Pearlstein, *Syria Insta-Symposium: The President's Wise Decision*, OPINIO JURIS (Sept. 1, 2013), <http://opiniojuris.org/2013/09/01/presidents-wise-decision/>.

73. See Stephen Zunes, *Libya, the United States, and the Anti-Gaddafi Revolt*, HUFFPOST, [http://www.huffingtonpost.com/stephenzunes/libya-the-united-states-a\\_b\\_828199.html](http://www.huffingtonpost.com/stephenzunes/libya-the-united-states-a_b_828199.html) (last visited Sept. 10, 2017).

74. See Massimo Calabresi, *Understanding the ISIS Threat to Americans at Home*, TIME (Sept. 9, 2014), <http://time.com/3313613/isis-barack-obama-terrorism-threat/>.

or in Europe.<sup>75</sup> Indeed, some critics have argued that U.S. intervention against ISIS in Syria and Iraq may *increase* the risk to our country by inspiring future attacks.<sup>76</sup> Even were this projection inaccurate, it is hard to see how military action in the Middle East helps protect the country against ISIS-inspired attacks in the United States, such as the terrible shooting in Orlando, which was committed by a radicalized U.S.-born citizen.<sup>77</sup>

Additionally, the Obama Administration's claim that Congress's 2001 Authorization of the Use of Military Force (AUMF) authorized its war against ISIS strained credulity.<sup>78</sup> The AUMF was an immediate response to the terrorist attacks of September 11, 2001, and targeted al Qaeda and the Taliban.<sup>79</sup> Though ISIS, like al Qaeda, is an extremist Sunni terrorist

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75. *Id.*

76. See, e.g., Peter Beinart, *Why Attacking ISIS Won't Make Americans Safer*, ATLANTIC (Mar. 2016), <https://www.theatlantic.com/magazine/archive/2016/03/why-attacking-isis-wont-make-americans-safer/426861/> (stating that sending more U.S. troops to Iraq and Syria would likely spark more terrorism against the United States, at least in the short term); David Coates, *Weighing the Arguments on U.S. Military Action Against ISIS*, HUFFPOST (Mar. 9, 2015), [http://www.huffingtonpost.com/david-coates/weighing-the-arguments-on\\_b\\_6830606.html](http://www.huffingtonpost.com/david-coates/weighing-the-arguments-on_b_6830606.html); Richard Lebaron, *Should We Go to War Against ISIS?*, NEWSWEEK (Nov. 17, 2015), <http://www.newsweek.com/should-we-go-war-against-isis-395653> (indicating increasing U.S. effort might increase the risk in the United States where ISIS has not been a significant threat).

77. See Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>.

78. See, e.g., Conor Friedersdorf, *The Perils of Obama's Latest Undeclared War*, ATLANTIC, (Nov. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/11/the-perils-of-president-obamas-latest-undeclared-war/413566/> ("Obama just keeps pretending that he isn't quite waging war."); Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME, (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush/> <http://time.com/3326689/obama-isis-war-powers-bush/> [hereinafter Goldsmith, *Obama's Breathtaking Expansion*] ("The President's gambit is, at bottom, presidential unilateralism masquerading as implausible statutory interpretation.").

79. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Interestingly, President Obama chose to justify his military actions on statutory grounds, in contrast to President George W. Bush's aggressive assertions of Article II authority. See Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 871-73 (2007) ("It is no secret that the administration of President George W. Bush has consistently asserted a breathtakingly broad view of the scope of executive authority under Article II of the United States Constitution."); Mary Louise Kelly, *When the U.S. Military Strikes, White House Points to a 2001 Measure*, NPR (Sept. 6, 2016),

organization, its strategy, theology, and goals differ substantially from al Qaeda's.<sup>80</sup> ISIS did not even exist when Congress passed the AUMF.<sup>81</sup> The AUMF did not grant the President authority to wage war against all Islamic terrorism in perpetuity.<sup>82</sup> Moreover, Congress did not signal to President Obama that it approved of his actions against ISIS.<sup>83</sup> To this extent, President Obama's aggressive use of the military seemed an end run around Congress and the War Powers Resolution of 1973.<sup>84</sup>

Furthermore, Congress did not retroactively approve Obama's actions (at least not while he was still in office).<sup>85</sup> Though Lincoln was probably incorrect when he asserted that the President possessed the suspension power, Congress almost certainly would have suspended the writ at his request, had it been able to convene.<sup>86</sup> Indeed, Congress ultimately signaled its assent by passing a statute permitting the President to suspend the writ.<sup>87</sup> President Obama could point to no retroactive congressional approval of his military actions against Qaddafi or ISIS.<sup>88</sup>

Nor did international law appear to give legal cover to the President's

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<http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure>.

80. See Ali Rod Khadem, *Why Should Law and Policy Makers Understand Extremist Beliefs? The Islamic State (ISIS) as a Case Study: Past, Present, and Future* 31–45 (unpublished manuscript) (discussing the political, tactical, and theological differences between Al Qaeda and ISIS).

81. See *id.* at 23.

82. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (articulating the purpose as authorizing “the use of United States Armed Forces against those responsible for the recent [9/11] attacks launched against the United States”) (emphasis added); Deborah Pearlstein, *Is It Legal? No.*, OPINIO JURIS, (Sept. 11, 2014), <http://opiniojuris.org/2014/09/11/legal/>; Jens David Ohlin, *The 9/11 AUMF Does Not Cover ISIS*, OPINIO JURIS (Sept. 11, 2014), <http://opiniojuris.org/2014/09/11/911-aumf-cover-isis/>.

83. See Friedersdorf, *supra* note 78.

84. Some presidents, of course, have contested the constitutionality of features of the War Powers Resolution. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1109 n.665 (2008).

85. See Friedersdorf, *supra* note 78. One wonders whether members of Congress may now approve similar actions taken by a different president. See *infra* note 151 and accompanying text.

86. FARBER, *supra* note 15, at 158–61.

87. See *id.* at 159.

88. See Friedersdorf, *supra* note 78.

actions. For example, with regards to the bombing in Syria, there was no United Nations Security Council resolution and no apparent claim that the U.S. Government was acting in self-defense.<sup>89</sup> Some commentators sought to justify the action on humanitarian grounds.<sup>90</sup> However, as Professor Pearlstein argued at the time, the law did not clearly support such a theory, and the U.S. Government's behavior calls into serious question whether the government genuinely acted for humanitarian reasons.<sup>91</sup>

At the same time, the President's unilateral military actions in Libya and against ISIS were not without precedent. In recent decades, U.S. presidents have unilaterally initiated smaller wars in places like Grenada, Panama, Bosnia, Somalia, and Haiti.<sup>92</sup> Admittedly, some of these interventions may be distinguishable on various grounds. For example, some lasted fewer than 60 days and therefore would have fit within the War Powers Resolution.<sup>93</sup> Other interventions were arguably pursuant to treaty obligations and therefore should be evaluated according to different legal criteria.<sup>94</sup>

Nevertheless, the fact remains that U.S. presidents in recent decades have repeatedly committed military force without congressional authorization.<sup>95</sup> This precedent should not mean that a president may always act without constitutional constraint in the field of military affairs. Past practices, however, matter to both historians and judges.<sup>96</sup> President

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89. See Deborah Pearlstein, *Not Even the Brits Can Make the Case Bombing Syria Is Lawful*, OPINIO JURIS (Aug. 30, 2013), <http://opiniojuris.org/2013/08/30/even-brits-can-make-case-bombing-syria-lawful/> [hereinafter Pearlstein, *Not Even the Brits Can Make the Case*].

90. See, e.g., Harold Hongju Koh, *Another Legal View of the Dissent Channel Cable on Syria*, JUST SECURITY (June 20, 2016), <https://www.justsecurity.org/31571/legal-view-dissent-channel-cable-syria/>.

91. Pearlstein, *Not Even the Brits Can Make the Case*, *supra* note 89.

92. See SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE TWENTY-FIRST CENTURY 268 (2015) [hereinafter LEVINSON, AN ARGUMENT OPEN TO ALL]; Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I—The Constitution, the Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013), <http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/>.

93. See 50 U.S.C. §§ 1541–1548 (2012); Lederman, *supra* note 92.

94. See Lederman, *supra* note 92.

95. See Damrosch, *supra* note 71, at 1409.

96. See, e.g., *Youngstown Sheet & Tubing Co. v. Sawyer*, 343 U.S. 579, 597–602 (1952).

Obama's military interventions in Libya, Iraq, and Syria may be hard to defend in terms of constitutional text, the War Powers Resolution, or congressional action. Measured against his predecessors' actions, however, his interventions seem consistent with common executive practices in recent decades.<sup>97</sup> Moreover, Congress did not cut off military funding to prevent President Obama's interventions, suggesting some degree of legislative acquiescence.<sup>98</sup>

Further complicating the analysis, Congress put President Obama in an impossible situation. President Obama inherited difficult problems, including ongoing wars in Iraq and Afghanistan and an unstable Middle East region that soon erupted in widespread unrest and violence.<sup>99</sup> Nevertheless, few members of Congress were willing to engage seriously with these dangers. Congress did not want to give the President the authority to fight ISIS, but it also did not want to limit his authority either.<sup>100</sup> Members of Congress realized that each approach had serious downsides and that it was politically more perilous to take a stand than not.<sup>101</sup> Congress here didn't so much disagree with the President as punt the decision to him, knowing it could criticize him for whatever he did.<sup>102</sup>

Past executive practice is a contextual factor that both historians and

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97. See Lederman, *supra* note 92.

98. See Benjamin Wittes, *The AUMF is Dead. Long Live the AUMF*, LAWFARE (Apr. 14, 2015), <https://www.lawfareblog.com/aumf-dead-long-live-aumf>; see also Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988) (noting that appropriations "are not only legislative specifications of money amounts, but also legislative specifications of the powers, activities, and purposes—what we may call, simply, 'objects'—for which the appropriated funds may be used"); Fred Kaplan, *Empty Threats*, SLATE (Feb. 11, 2015), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2015/02/congress\\_will\\_authorize\\_president\\_obama\\_s\\_war\\_on\\_isis\\_legislators\\_don\\_t.html](http://www.slate.com/articles/news_and_politics/war_stories/2015/02/congress_will_authorize_president_obama_s_war_on_isis_legislators_don_t.html).

99. See, e.g., Scott Anderson, *Fractured Lands: How the Arab World Came Apart*, N.Y. TIMES MAG. (Aug. 11, 2016), <https://www.nytimes.com/interactive/2016/08/11/magazine/isis-middle-east-arab-spring-fractured-lands.html>.

100. See Russell Berman, *The War Against ISIS Will Go Undeclared*, ATLANTIC (Apr. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/>.

101. See Julie Hirschfeld Davis, *Neither Obama Nor Congress Seems Eager for a Vote on Military Action in Iraq*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/us/politics/in-washington-little-appetite-for-a-vote-on-iraq.html>.

102. See *id.*

judges consider as part of the constitutional calculus.<sup>103</sup> Congressional bad faith, by contrast, is not. The legality of unilateral presidential action does not turn on whether Congress has been cooperative.<sup>104</sup>

Historians, however, can take account of congressional behavior, and this perspective shines new light on President Obama's unilateralism.<sup>105</sup> Admittedly, Obama, unlike Lincoln, did not confront challenges that threatened the very existence of the nation.<sup>106</sup> Nevertheless, the dangers he confronted were serious, and historians evaluating the actions against ISIS may offer President Obama more of a constitutional pass than lawyers would. Congress's political cowardice put the President in an impossible position.<sup>107</sup> The President himself made this very point, telling Congress, "Guys, you can't have it both ways here. . . . You can't be ducking and dodging and hiding under the table when it comes time to vote, and then complain about the president not coming to you . . . ." <sup>108</sup>

As a legal matter, the President probably had it wrong; Congress *can* have it both ways. Nothing requires Congress to bring questions of foreign policy to a vote or to refrain from criticizing the president. While context and past practices are part of the legal inquiry, a legalist analysis could reasonably (though not necessarily) conclude that President Obama's unilateral military interventions exceeded his authority.<sup>109</sup>

Where the law is sometimes blind, though, historians can still take notice. However much we lament the President's failure to get congressional approval, we must also recognize that he believed innocent people's lives

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103. See, e.g., *Youngstown Sheet & Tubing Co. v. Sawyer*, 343 U.S. 579, 597–602 (1952); FARBER, *supra* note 15, at 148–49.

104. Cf. Jack Goldsmith, *Why the President Should Seek Congressional Authorization for the Use of Force Against the Islamic State [UPDATE on War Powers Resolution]*, LAWFARE (Aug. 22, 2014), <https://www.lawfareblog.com/why-president-should-seek-congressional-authorization-use-force-against-islamic-state-update-war>.

105. See, e.g., William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 788–90.

106. See FARBER, *supra* note 15, at 14–15.

107. See Hirschfeld Davis, *supra* note 101. As Senator Tim Kaine put it, "This is not about an imperial presidency. It's about a Congress that's reluctant to cast tough votes on U.S. military action." *Id.*

108. *Id.*

109. See, e.g., Ilya Somin, *Obama's Constitutional Legacy*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/19/obamas-constitutional-legacy/?utm\\_term=.cd44b5dd7801](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/19/obamas-constitutional-legacy/?utm_term=.cd44b5dd7801).

were at stake, national security was threatened, and Congress would not engage.<sup>110</sup> The President responded by doing what he thought was best for the nation's security and basic human rights.<sup>111</sup> Historians assessing these episodes will likely judge Congress harshly for refusing to engage with such pressing matters. By comparison, President Obama, though imperfect, will probably look much better.

### B. *Domestic Policy*

On the domestic front, Obama also encountered congressional obstruction. During the first two years of the Obama presidency, Congress passed the American Recovery and Reinvestment Act of 2009 (a major economic stimulus package),<sup>112</sup> the Dodd–Frank Wall Street Reform and Consumer Protection Act (a financial regulation statute),<sup>113</sup> and the Patient Protection and Affordable Care Act (a major overhaul of the country's health care system).<sup>114</sup> In 2010, however, Republicans gained back a Senate seat to deprive the Democrats of their filibuster-proof majority.<sup>115</sup> Later that year, Republicans retook the House.<sup>116</sup>

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110. See President Barak Obama, Remarks by the President on the Administration's Approach to Counterterrorism, (Dec. 6, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/06/remarks-president-administrations-approach-counterterrorism>.

111. See *id.* See generally Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 502–03 (2013) (offering consent-based intervention as a way to reconcile the tension between sovereignty norms militating against humanitarian intervention unauthorized by the U.N. Security Council and human rights proponents who believe human rights norms should trump state sovereignty concerns).

112. See American Recovery and Reinvestment Act of 2009, 123 Stat. 115.

113. See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2012).

114. See Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012). The ACA raised important constitutional questions. The Supreme Court upheld most of the statute, though it held that the Medicaid expansion provision exceeded Congress's Spending Clause power, and the Court also indicated that the individual mandate exceeded Congress's Commerce Clause authority. *NFIB v. Sebelius*, 567 U.S. 519, 588 (2012). This contribution focuses primarily on President Obama's executive actions, though legislation he championed, of course, will also be part of his constitutional legacy.

115. See Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES (Jan. 19, 2010), [http://www.nytimes.com/2010/01/20/us/politics/20election.html?\\_r=0](http://www.nytimes.com/2010/01/20/us/politics/20election.html?_r=0).

116. See Jeff Zeleny, *G.O.P. Captures House, but Not Senate*, N.Y. TIMES (Nov. 2, 2010), <http://www.nytimes.com/2010/11/03/us/politics/03elect.html?pagewanted=all>.

From that point on, time and again, Congress refused to work with President Obama on almost anything.<sup>117</sup> As with foreign policy, the Obama Administration responded to this legislative resistance by acting without Congress when it could.<sup>118</sup> The Environmental Protection Agency promulgated several important regulations, such as the Clean Power Plan, limiting power plants' greenhouse gas pollution.<sup>119</sup> Knowing that it lacked the resources to deport all illegal immigrants, the Department of Homeland Security implemented the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs, establishing criteria for determining when officials enforce immigration laws.<sup>120</sup> And, of course, agencies, such as the Internal Revenue Service and the Department of Health and Human Services, helped implement the ACA.<sup>121</sup> In short, President Obama pushed significant policy decisions through administrative action without going through Congress.

As a descriptive matter, there is nothing unusual about this. The President's policymaking power has increased through the generations, in substantial part due to presidents' increased directive authority over the administrative state.<sup>122</sup> President Obama's critics accused him of usurping Congress's legislative role,<sup>123</sup> but U.S. presidents, starting with President

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117. See Jennifer Steinhauer, *G.O.P. vs. Obama: Disrespect or Just Politics?*, N.Y. TIMES (Sept. 1, 2011), <http://www.nytimes.com/2011/09/02/us/politics/02cong.html>.

118. See Binyamin Applebaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html>.

119. See Robinson Meyer, *How Obama Could Lose His Big Climate Case*, ATLANTIC (Sept. 29, 2016), [theatlantic.com/science/archive/2016/09/obama-clean-power-plan-dc-circuit-legal/502115/](http://theatlantic.com/science/archive/2016/09/obama-clean-power-plan-dc-circuit-legal/502115/).

120. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 138–40 (2015).

121. See Adam Sonfield, *Implementing the Affordable Care Act: Enrollment Strategies and the U.S. Family Planning Effort*, GUTTMACHER INST. (Nov. 8, 2011), <https://www.guttmacher.org/gpr/2011/11/implementing-affordable-care-act-enrollment-strategies-and-us-family-planning-effort>.

122. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–319 (2001) (discussing the “sea change”—beginning during the Reagan Administration and continuing during the Clinton Administration—that gave the President far more policy influence over administrative agencies).

123. See, e.g., Elizabeth Slattery & Andrew Kloster, *An Executive Unbound: The Obama Administration's Unilateral Actions*, HERITAGE FOUND. (Feb. 12, 2014), <http://www.heritage.org/the-constitution/report/executive-unbound-the-obama->

Reagan, have wielded very substantial domestic policymaking authority through administrative agencies.<sup>124</sup> Though in theory the President's control over independent agencies should be reduced because he can only remove their leaders for cause (as opposed to executive agencies, whose leaders he may fire at will), in practice, the President exerts significant power over most administrative agencies.<sup>125</sup> We might quibble with the legality and wisdom of particular administrative actions, but it is simply wrong to suggest that President Obama's reliance on administrative agencies to further policy goals was anomalous.

Thus, in most instances, the legal questions surrounding Obama's domestic executive actions implicated not constitutional law, but administrative law and statutory interpretation.<sup>126</sup> Did the agency act properly given its statutory mandate? Did it employ proper administrative procedures? Constitutional norms may inform those inquiries, but they are, for the time being, primarily statutory and administrative ones.<sup>127</sup>

While Republicans accused President Obama of exceeding his executive powers, Obama's supporters responded that Congress was historically inert during the Obama years, at least after 2010.<sup>128</sup> The country faced numerous difficulties, and Congress, despite the President's pleas, did nothing.<sup>129</sup> Congressional Republicans seemed to follow a simple rule: if President Obama favored something, they opposed it.<sup>130</sup> As one reporter put

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administrations-unilateral-actions.

124. See Kagan, *supra* note 122, at 2277 (explaining that President Reagan broke from past presidential practices by "self-consciously and openly adopt[ing] strategies to exert" influence over agency policy).

125. See POSNER & VERMEULE, *supra* note 19, at 6.

126. See Garrett Epps, *Obama Leaves the Constitution Weaker than He Found It*, ATLANTIC (Jan. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/01/obama-leaves-the-constitution-weaker-than-he-found-it/512015/>.

127. Should Justice Gorsuch and other Justices revive the nondelegation doctrine or other doctrines challenging the legitimacy of the administrative state, these inquiries could once again become constitutional. See generally Kevin Russell, *Judge Gorsuch on Separation of Powers and Federalism*, SCOTUSBLOG (Mar. 15, 2017), <http://www.scotusblog.com/2017/03/judge-gorsuch-separation-powers-federalism/> (discussing then-Judge Gorsuch's views on the administrative state).

128. See, e.g., Ezra Klein, *Goodbye and Good Riddance, 112th Congress*, WASH. POST (Jan. 4, 2013), [https://washingtonpost.com/news/wonk/wp/2013/01/04/goodbye-and-good-riddance-112th-congress/?utm\\_term=.7cc0b742F985](https://washingtonpost.com/news/wonk/wp/2013/01/04/goodbye-and-good-riddance-112th-congress/?utm_term=.7cc0b742F985).

129. See *id.*

130. See Michael Grunwald, *The Victory of 'No'*, POLITICO MAG. (Dec. 4, 2016), <http://www.politico.com/magazine/story/2016/12/republican-party-obstructionism->

it, the Republicans treated Obama “not just as a [P]resident from the opposing party but an extreme threat to the American way of life.”<sup>131</sup>

President Obama’s willingness to resort to administrative regulation needs to be understood in light of a Republican Congress whose *raison d’être* was to see him fail. Of course, the Constitution’s requirement of bicameralism and presentment makes legislation hard to pass in all events,<sup>132</sup> and various congressional rules and practices make it still harder, even in saner political times.<sup>133</sup> But congressional paralysis during the Obama years was especially acute.<sup>134</sup>

The legalist and historical analyses, thus, will likely diverge here, as well. The law does not particularly care if the President took administrative action because Congress refused to act. Administrative regulations must stand or fall on their own legal merits. This is not to say that any particular Obama-era regulation was illegal, but that the administrative law analysis for assessing those regulations’ legality would not typically examine congressional behavior.

Historians and members of society more generally, however, *do* care about political motives, and their perceptions of those motives can color the way they remember presidents and congresses.<sup>135</sup> There are countless differences between Lincoln’s and Nixon’s constitutional transgressions, but motive was an important one. History has deemed Lincoln’s motives disinterested and Nixon’s self-serving. A good deal of our country’s collective historical consciousness about those two figures flows from those assessments.<sup>136</sup>

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victory-trump-214498.

131. *Id.*

132. *See* U.S. CONST. art. I, § 7, cl. 2.

133. *See* William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1442–43 (2008).

134. *See, e.g.*, Phillip Bump, *It’s a Holiday Miracle! The 113th Congress (Probably) Wasn’t the Least Productive Ever!*, WASH. POST (Dec. 19, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/12/19/its-a-holiday-miracle-the-113th-probably-wasnt-the-least-productive-ever/?utm\\_term=.0d42e76a888a](https://www.washingtonpost.com/news/the-fix/wp/2014/12/19/its-a-holiday-miracle-the-113th-probably-wasnt-the-least-productive-ever/?utm_term=.0d42e76a888a) (“The 113th was barely not the least productive Congress in recent history.”); Klein, *supra* note 128 (noting that the 112th Congress was unproductive compared to any other Congress since 1948).

135. *See, e.g.*, Levinson, *Was the Emancipation Proclamation Constitutional?*, *supra* note 47 at 1150–51.

136. *See supra* text accompanying notes 35–38.

### C. Constitutional Hardball and the Obama Legacy

How then will historians see the motives of President Obama and Congress from 2010 to 2016? These judgments are difficult to make without the benefit of some distance. That said, even at this early stage we can offer some tentative reactions, and they do not shine a flattering light on Congress. To be sure, President Obama's inability to negotiate successfully with Congress will surely inform his legacy. That said, congressional attitudes towards President Obama will probably negatively impact those Congresses' legacies more than the President's.

Some of congressional Republicans' obstruction can be chalked up to genuine ideological differences with the President, but much of it was politics at its worst.<sup>137</sup> Senate Majority Leader Mitch McConnell, indeed, announced that his "number one priority is making sure President Obama's a one-term president."<sup>138</sup> Top Republican congressional leaders, including Representatives Paul Ryan, Eric Cantor, and Kevin McCarthy, met the night of President Obama's inauguration to devise a plan to "mortally wound" the President politically.<sup>139</sup> Compromise was not part of congressional Republicans' game plan, committed as they were to what Professor Tushnet has called "constitutional hardball."<sup>140</sup> Congress's primary objective for the last six years of the Obama presidency was to obstruct anything the President wanted, even if workable compromises might have been available.<sup>141</sup>

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137. I concede that observers who do not share my view of these Congresses will most likely view President Obama's tenure differently.

138. See Glenn Kessler, *When Did McConnell Say He Wanted to Make Obama a 'One-Term President'?*, WASH. POST (Sept. 25, 2012), [https://www.washingtonpost.com/blogs/fact-checker/post/when-did-mcconnell-say-he-wanted-to-make-obama-a-one-term-president/2012/09/24/79fd5cd8-0696-11e2-aff-d6c7f20a83bf\\_blog.html?utm\\_term=.a1ee2a6520bc](https://www.washingtonpost.com/blogs/fact-checker/post/when-did-mcconnell-say-he-wanted-to-make-obama-a-one-term-president/2012/09/24/79fd5cd8-0696-11e2-aff-d6c7f20a83bf_blog.html?utm_term=.a1ee2a6520bc) (attributing quote to an interview to the National Journal from Oct. 23, 2010).

139. See ROBERT DRAPER, *DO NOT ASK WHAT GOOD WE DO: INSIDE THE U.S. HOUSE OF REPRESENTATIVES xv-xix* (2012); Marshall, *supra* note 105, at 773.

140. See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (defining "constitutional hardball" as political practices that are "within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings. . . . [because its practitioners] believe the stakes of the political controversy their actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold").

141. See Joshua Green, *Strict Obstructionist*, ATLANTIC (Jan./Feb. 2011), <https://www.theatlantic.com/magazine/archive/2011/01/strict-obstructionist/308344/>.

For example, despite the ACA's flaws, Republicans refused to work with the President to improve the law.<sup>142</sup> Some of this disagreement was ideological, reflecting opposing visions of government's proper role in society.<sup>143</sup> Much of it, though, was simply partisan politics.<sup>144</sup> Though most everybody agreed the ACA needed improvement, Congress refused even to consider additional legislation to try to minimize its glitches.<sup>145</sup> Republicans in Congress preferred that the law operate as poorly as possible, even if many Americans would suffer in the meantime.<sup>146</sup> After all, an improvement to the ACA might be a "win" for the President.<sup>147</sup>

At the time, many Republicans justified their behavior on the ideological grounds that they opposed the ACA in its entirety.<sup>148</sup> During the early weeks of the Trump Administration, however, many of these same politicians supported a bill that would have retained key ACA provisions, such as the protection of dependent care until age 26, the pre-existing-conditions policy, the essential-health-benefits requirement, and the prohibitions on annual and lifetime limits.<sup>149</sup> Admittedly, there were crucial points of genuine philosophical disagreement, but future events help demonstrate that many Republicans found some parts of the law acceptable.

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142. See Zoë Carpenter, *A Blueprint for the GOP's Attempt to Sabotage Obamacare*, NATION (July 25, 2013), <https://www.thenation.com/article/blueprint-gops-attempt-sabotage-obamacare/>.

143. See *id.*

144. See *id.*

145. See Steven Waldman, *The Obamacare Exchanges Are a Mess and It's Not Really Obama's Fault*, FORTUNE (Oct. 4, 2016), <http://fortune.com/2016/10/04/obamacare-exchanges/> (explaining that in the last six years, there were no major fixes to the ACA); Jeffrey Young, *Congress Could Easily Fix a Huge Obamacare Problem. It Won't*, HUFFPOST (Aug. 5, 2014), [http://www.huffingtonpost.com/2014/08/05/obamacare-lawsuits\\_n\\_5648871.html](http://www.huffingtonpost.com/2014/08/05/obamacare-lawsuits_n_5648871.html).

146. Waldman, *supra* note 145 (arguing that Republicans intentionally decided to make Americans suffer to try to damage President Obama politically).

147. Admittedly, given sharp ideological disagreements, it would have been difficult for Democrats and Republicans to agree on substantial revisions to the ACA. That said, Republicans refused even to negotiate over revisions, deciding that they wanted Americans to suffer from the law's flaws so that they could blame Democrats rather than make improvements that could potentially increase the ACA's popularity. See *id.*

148. See *id.*

149. See Haeyoun Park & Margot Sanger-Katz, *The Parts of Obamacare Republicans Will Keep, Change or Discard*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/republican-obamacare-replacement.html>.

Republicans' refusal to work with the President was hardly limited to health care. Congress similarly refused to address other problems facing the nation, neglecting even routine obligations such as passing a budget and raising the debt ceiling.<sup>150</sup> Whereas Republicans during the Obama years professed to be appalled at the level of governmental debt, some of those same politicians seemed more willing to raise the debt ceiling and avoid defaulting on the country's debts once their own party regained the White House in 2017.<sup>151</sup>

The Republicans' bad faith was also evident in the field of foreign affairs. For example, when President Obama requested congressional authorization to respond with force to President Assad's chemical weapons attack in Syria, most Republicans opposed such permission.<sup>152</sup> Prominent congressional Republicans such as Mitch McConnell, Marco Rubio, Paul Ryan, and Mac Thornberry all opposed President Obama's plan to respond with force.<sup>153</sup> All four reversed course and supported President Trump's decision to use unilateral military force responding to Assad's chemical attack a few years later.<sup>154</sup> To be fair, some Republicans such as Rand Paul opposed intervention in both instances, and others, such as John McCain and Lindsey Graham, contended on both occasions that military strikes should be part of a broader overall strategy.<sup>155</sup> But many Republicans opportunistically and hypocritically opposed President Obama at every turn, seemingly without consideration of the merits of the issue.

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150. See Jonathan Weisman, *House G.O.P. Raises Stakes in Debt-Ceiling Fight*, N.Y. TIMES (Sept. 26, 2013), <http://www.nytimes.com/2013/09/27/us/politics/house-gop-leaders-list-conditions-for-raising-debt-ceiling.html>; Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html>.

151. See, e.g., Bess Levin, *Surprise: Republicans No Longer Care About the Debt Ceiling*, VANITY FAIR (Mar. 14, 2017), <http://www.vanityfair.com/news/2017/03/surprise-republicans-no-longer-care-about-the-debt-ceiling>; Damian Paletta, *McConnell Says There Is 'Zero Chance' Congress Will Fail to Raise Debt Ceiling*, WASH. POST (Aug. 21, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/08/21/mcconnell-says-zero-chance-congress-will-fail-to-raise-debt-ceiling/?utm\\_term=.3a177d2ed017](https://www.washingtonpost.com/news/wonk/wp/2017/08/21/mcconnell-says-zero-chance-congress-will-fail-to-raise-debt-ceiling/?utm_term=.3a177d2ed017).

152. See Alicia Parlapiano, *Where Top Lawmakers Stand on Syria: Now and in 2013*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/interactive/2017/04/07/us/politics/congress-quotes-on-syria-airstrikes.html>.

153. See *id.*

154. See *id.*

155. See *id.*

#### D. Legal and General Legacies

I concede that some informed observers might view these events differently. For the purposes of this symposium contribution, my primary concern is not where to place the moral and political blame (though I obviously have my views), but the various factors that help shape a president's legacy. The example of Lincoln suggests that constitutional violations shape a president's legacy less than some lawyers might care to think.<sup>156</sup> President Lincoln, to be sure, confronted not just political dysfunction but civil war, so we should be careful not to generalize too much from his example. But other presidents also have committed constitutional violations without much apparent damage to their historical reputations. President Thomas Jefferson, for instance, completed the Louisiana Purchase, and his presidency is generally well regarded, though he himself believed the transaction to be unconstitutional.<sup>157</sup> The Supreme Court invalidated President Harry Truman's seizure of the steel mills,<sup>158</sup> but Truman ranks highly on many historians' lists.<sup>159</sup> Depending on the context, we are sometimes willing to forgive constitutional transgressions, even when judges, rather than pundits, have pronounced the deeds unconstitutional.<sup>160</sup>

Different critics will characterize the actions of President Obama and his Republican adversaries differently, and it is well beyond the scope of this symposium contribution to attempt a definitive account of the era's political skirmishes. For the sake of argument, though, let's hypothesize that many congressional Republicans during the Obama years played constitutional hardball with particularly unscrupulous bad faith.<sup>161</sup> How should this assessment of congressional motives affect our view of President Obama's constitutional legacy?

Congress's bad faith does not alter the legalist analysis. For better or worse, a central principle of our Constitution is that it should be difficult for government to act, so congressional obstruction does not license the

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156. See *supra* Part II.

157. See Levinson, *Was the Emancipation Proclamation Constitutional?*, *supra* note 47, at 1149–50; see *Presidential Historians Survey 2017*, *supra* note 44.

158. See *Youngstown Sheet & Tubing Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

159. See *Presidential Historians Survey 2017*, *supra* note 44.

160. See, e.g., *Youngstown*, 343 U.S. at 589.

161. See Marshall, *supra* note 105, at 773 (noting that President Obama faced “one of the most obstructionist Congresses in American history”); Tushnet, *supra* note 140, at 523.

President to act instead.<sup>162</sup> Judges reviewing military or (more likely) administrative actions usually do not consider whether Congress is playing nice.

These legal lines matter less to historians, who enjoy the luxury of considering events through multiple lenses. With this in mind, I suspect historians writing this period won't dwell too long on the constitutionality of Obama's actions. To be sure, President Obama made some constitutionally questionable decisions.<sup>163</sup> His drone strike program, in particular, was troubling, because the Administration was less than fully transparent about the criteria it used to target the lives of specific individuals.<sup>164</sup>

For the most part, though, President Obama's constitutional actions were well within the range established by his predecessors. Perhaps particular administrative actions were illegal on statutory or administrative grounds, but, as noted above, President Obama's reliance on the administrative state was hardly unusual.<sup>165</sup> Similarly, Obama's willingness to use military force without congressional authorization fits within established, albeit controversial, precedents, and they addressed a fast-

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162. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 29 (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*] (“[M]ore than one representative and senator has accompanied retirement from Congress with comments about their own frustration at the difficulty of actually getting anything done . . .”). Whether this constitutional feature serves our country well is an entirely different question. See *id.* at 29–32 (discussing the strengths and weaknesses of bicameralism).

163. See *supra* Part III.

164. See, e.g., DEP'T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION AGAINST A U.S. CITIZEN WHO IS A SENIOR ORGANIZATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE*, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (“[T]he threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence.”); Spencer Ackerman, *Obama Claims US Drone Strikes Have Killed Up to 116 Civilians*, *GUARDIAN* (July 1, 2016), <https://www.theguardian.com/us-news/2016/jul/01/obama-drones-strikes-civilian-deaths> (quoting Humans Rights First as saying that the information released did not provide enough data); Deborah Pearlstein, *Re-Engaging on an ISIL AUMF*, *OPINIO JURIS* (Sept. 22, 2016), <http://opiniojuris.org/2016/09/22/re-engaging-on-an-isil-aumf/> (“[T]he secrecy surrounding U.S. drone operations for most of the Administration contributed to the problem, making it almost impossible for the people to perform any meaningful check on executive uses of force abroad . . .”); The Editorial Board, *Transparency in the Drone Wars*, *N.Y. TIMES* (Mar. 19, 2016), <https://www.nytimes.com/2016/03/20/opinion/sunday/transparency-in-the-drone-wars.html> (stating what information should have been given for transparency).

165. See *supra* notes 124–25 and accompanying text.

changing terrorist threat.<sup>166</sup> Even the drone strike program, though relying on new technology, is arguably not dramatically different from past covert military actions.<sup>167</sup>

Phrased somewhat differently, while President Obama certainly used his office aggressively, he followed a well-tread path. As Professor Skowronek has put it, the Presidency is an office “that regularly reaches beyond itself to assert control over others, . . . one whose normal activities and operations alter system boundaries and recast political possibilities.”<sup>168</sup> The Obama presidency was surely consequential from a variety of perspectives, but Obama’s use of the powers vested in his office was mostly unremarkable. Of course, reasonable people can lament the vast powers that accrue to the president in our constitutional system, but that is a question that transcends any particular president’s legacy.<sup>169</sup>

From that perspective, President Obama’s legacy does not have strong constitutional implications. More or less, he stayed the course established by his predecessors. Not all presidencies are constitutionally transformative. As Professor Whittington argues, “Few presidents have the desire or authority to challenge inherited constitutional and ideological norms and attempt to construct a new political regime. Far more common are affiliated leaders, who rise to power within an assumed framework of goals, possibilities, and resources.”<sup>170</sup>

Moreover, even if we accept that some of President Obama’s actions exceeded constitutional boundaries, it is far from clear that that legal story would bury his legacy more generally.<sup>171</sup> To the contrary, the historian would likely note the President’s accomplishments despite difficult challenges and

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166. *See supra* notes 92–98 and accompanying text.

167. For example, efforts to try to assassinate foreign leaders or to overthrow foreign governments are arguably roughly analogous. *See, e.g.*, Daniel L. Byman, *Why Drones Work: The Case for Washington’s Weapon of Choice*, BROOKINGS (June 17, 2013), <https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice/>. The argument is not that these actions are legally (or morally) unproblematic, but rather that President Obama does not appear to have ventured into radically new constitutional territory. *See id.* Moreover, to the extent that precise drone strikes, at least in theory, can kill dangerous terrorists with minimal damage to innocent civilians and U.S. troops, there are serious policy arguments in their favor.

168. SKOWRONEK, *supra* note 43, at 4.

169. *See infra* Part V.

170. WHITTINGTON, *supra* note 5, at 23.

171. *See supra* text accompanying notes 56–77.

a bitter opposition that wasn't willing to work with him on anything. To this extent, the lead story from 2010 to 2016 may be Congress's profound intransigence rather than the Administration's reliance on administrative agencies.<sup>172</sup> Similarly, while history may judge some of Obama's military interventions less kindly, in this sphere, too, it must recognize that Congress took no constructive steps to address serious situations.

My objective here is not to be an apologist for President Obama, whose legacy does include some unfortunate blemishes.<sup>173</sup> Rather, it is to point out that the court of history often eschews legal analysis, especially when there are plausible legal arguments on either side. However historians come down on Obama's constitutional legacy, they will write the era differently than lawyers would.

#### IV. ENTER PRESIDENT TRUMP

The *x* factor for President Obama's legacy—and for the future of our country—is his successor, President Trump. How will the Trump White House's own constitutional legacy color historians' views of President Obama? Presidents are remembered in part by whom they succeeded and

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172. See *supra* notes 128–31 and accompanying text.

173. For example, President Obama insisted that the Assad regime would cross a “red line” if it used chemical weapons and then failed to act when Assad crossed that line. Greg Jaffe, *The Problem with Obama's Account of the Syrian Red-Line Incident*, WASH. POST (Oct. 4, 2016), [http://www.washingtonpost.com/news/post-politics/wp/2016/10/4/the-problem-with-obamas-account-of-the-syrian-red-line-incident/?utm\\_term=.7702141c3602](http://www.washingtonpost.com/news/post-politics/wp/2016/10/4/the-problem-with-obamas-account-of-the-syrian-red-line-incident/?utm_term=.7702141c3602). But see Derek Chollet, *Obama's Red Line, Revisited*, POLITICO MAG. (July 19, 2016), <http://www.politico.com/magazine/story/2016/07/obama-syria-foreign-policy-red-line-revisited-214059> (arguing that Obama's handling of this situation “accomplished everything it set out to do”). Obama himself acknowledged mistakes in his handling of the Libya situation. See Dominic Tierney, *The Legacy of Obama's 'Worst Mistake'*, ATLANTIC (Apr. 15, 2016), <https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461/>. Even fans of the ACA would acknowledge that the initial rollout of the exchanges was haphazard and unprofessional. See, e.g., Tom Cohen, *Rough Obamacare Rollout: 4 Reasons Why*, CNN (Oct. 23, 2013), <http://www.cnn.com/2013/10/22/politics/obamacare-website-four-reasons/index.html>. President Obama also did not take meaningful steps to address the role of money in politics (though admittedly judicial precedent limited his options here). See, e.g., LAWRENCE LESSIG, *REPUBLIC LOST?* 191–92, 280–81 (2012). Finally, President Obama's aggressive crackdown on national security whistleblowers and leakers likely harmed both governmental transparency and free speech norms. See Eyal Press, *Obama Leaves Trump a Mixed Legacy on Whistle-Blowers*, NEW YORKER (Dec. 7, 2016), <http://www.newyorker.com/news/daily-comment/obama-leaves-trump-a-mixed-legacy-on-whistle-blowers>.

preceded. Lincoln's legacy, for instance, is likely enhanced in part by Andrew Johnson's disastrous presidency and the vague sense that Reconstruction might have turned out differently somehow had Lincoln presided over it.<sup>174</sup> There is, no doubt, a loony sort of hindsight bias to this; Lincoln (obviously) was dead when Johnson was President, so it seems odd to judge him by events and decisions over which he had no control. But we make sense of events and public figures by comparing them to other things we know, and historians glean insights by comparing presidents within the same era.<sup>175</sup>

Only half a year into the Trump Administration, it is too early to make any definitive assessments, but the early months suggest he does not take the rule of law seriously. President Trump's decision to fire FBI Director James Comey, who was investigating possible collusion between the Trump presidential campaign and Russia, appears to be an obstruction of justice reflecting disregard for the rule of law and important governmental institutions.<sup>176</sup> Even if Trump himself did not collude with the Kremlin, his action interfering with an ongoing investigation eliminated vital institutional checks within the Executive Branch.<sup>177</sup> Similarly, President Trump's refusal to divest his assets to mitigate potential conflicts of interest indicates that he will put his personal interests above legal norms.<sup>178</sup> Indeed, Trump's apparent willingness to accept benefits from foreign governments, such as payments from governments whose officials stay in his hotels, creates an avoidable Emoluments Clause issue.<sup>179</sup>

More generally, President Trump seems utterly ignorant of and indifferent to the law. The President's open disdain of judges who rule

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174. See FONER, *RECONSTRUCTION*, *supra* note 25, at 184.

175. See SKOWRONEK, *supra* note 43, at 8 ("Certainly it is no accident that the presidents most widely celebrated for their mastery of American politics have been immediately preceded by presidents generally judged politically incompetent.").

176. See David Cole, *Trump's Constitutional Crisis*, N.Y. REV. BOOKS (May 10, 2017), [www.nybooks.com/daily/2017/05/10/trumps-constitutional-crisis-james-comey](http://www.nybooks.com/daily/2017/05/10/trumps-constitutional-crisis-james-comey).

177. See *id.*

178. See Elizabeth Drew, *Trump: The Presidency in Peril*, N.Y. REV. BOOKS (June 22, 2017), [www.nybooks.com/articles/2017/06/22/trump-presidency-in-peril](http://www.nybooks.com/articles/2017/06/22/trump-presidency-in-peril).

179. See Norman L. Eisen et al., *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* 16, 18–21, GOVERNANCE STUDIES BROOKINGS (DEC. 16, 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/g\\_s\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/g_s_121616_emoluments-clause1.pdf). Admittedly, there is no precedent fleshing out the Emoluments Clause, but there are certainly colorable arguments that President Trump is violating the Clause. See *id.*

against him suggests he sees constitutional conflict not as an opportunity to articulate a constitutional vision, but as a political stage on which to flex his muscles and denigrate anyone who stands in his way.<sup>180</sup> It is not simply that Trump does not know much about the Constitution; it is that he seems proud of his ignorance and uninterested in the constitutional rules and standards that define his own power.<sup>181</sup> Time will shed more light on whether Trump is truly lawless or merely obnoxious, but the early months of his Administration suggest a man whose knowledge of and respect for the Constitution are remarkably low for a U.S. president.

Will President Obama seem constitutionally scrupulous by comparison, or, as Professor Somin argues, should he be blamed for transgressions that left President Trump with a “loaded gun?”<sup>182</sup> It is too early to answer this question definitively, but I find the “loaded gun” theory overblown. For one, most of the constitutional questions arising so far during the Trump presidency largely have nothing to do with President Obama’s example. Furthermore, even if President Trump were to follow Obama’s aggressive use of the administrative state, for instance, the reliance on administrative agencies is hardly a phenomenon tied to one predecessor. Presidents had progressively augmented the Executive’s authority long before Obama took office.<sup>183</sup> President Obama may have contributed to this phenomenon, but the office he took over was already a very powerful one.<sup>184</sup> If Trump found a loaded gun in the Oval Office, it was a gift from decades of predecessors, not just one.<sup>185</sup>

Additionally, even if President Obama sometimes exceeded constitutional limits, he never lost sight of the Constitution. When the

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180. See Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades Are ‘Worse than Wrong’*, WASH. POST (Apr. 26, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm\\_term=.f0cd5ca56256](https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.f0cd5ca56256).

181. See Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, CHAPMAN L. REV. (forthcoming 2018) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3028725](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028725).

182. Somin, *supra* note 109.

183. POSNER & VERMEULE, *supra* note 19, at 5–7 (discussing the tremendous power of the U.S. President over the vast federal bureaucracy); Kagan, *supra* note 122, at 2246 (“We live today in an era of presidential administration.”).

184. See POSNER & VERMEULE, *supra* note 19, at 5–7.

185. *Contra* Somin, *supra* note 109.

Obama Administration took controversial constitutional actions, it sought to justify them with the language of the law.<sup>186</sup> The legal arguments may sometimes have been unconvincing (especially to political opponents), but the Administration offered serious constitutional explanations for its actions.<sup>187</sup>

The contrast with the Trump Administration is stark. If President Trump does not disdain the law, he certainly gives the appearance of doing so. Obama was no Lincoln, but Trump may well be another Nixon—that is, a president determined to abuse his office to enhance his own power and insulate himself from legal consequences. This is, after all, a man reportedly looking into using the pardon power to pardon not only his family members, but also himself.<sup>188</sup> It is still early in his Administration, and, perhaps in hindsight, President Trump will not look so bad. So far, however, Trump seems to view the law as a political weapon or a pesky technicality.<sup>189</sup> President Obama, by comparison, was constitutionally devout.

#### V. CONSIDERING CONSTITUTIONAL DYSFUNCTION

The more important question may be not how history will judge President Obama after the Trump years, but how it will judge the Constitution. It is no secret that the country and Congress are bitterly divided along party lines.<sup>190</sup> These deep divisions make it very difficult for Congress to act, leaving most policymaking in the hands of the executive branch.<sup>191</sup>

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186. See, e.g., REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (Dec. 2016), [https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf).

187. See, e.g., *id.* at ii (issuing report “to enhance the public’s understanding of the legal and policy principles that have guided U.S. national security operations”).

188. See, e.g., Jonathan Turley, *Yes, Trump Can Legally Pardon Himself or His Family. No, He Shouldn’t*, WASH. POST (July 21, 2017), [https://www.washingtonpost.com/outlook/yes-trump-can-legally-pardon-himself-or-his-family-no-he-shouldnt/2017/07/21/6134fb12-6e2d-11e7-b9e2-2056e768a7e5\\_story.html?utm\\_term=.bf98f8ccdd4c](https://www.washingtonpost.com/outlook/yes-trump-can-legally-pardon-himself-or-his-family-no-he-shouldnt/2017/07/21/6134fb12-6e2d-11e7-b9e2-2056e768a7e5_story.html?utm_term=.bf98f8ccdd4c).

189. See *supra* notes 179–82 and accompanying text.

190. See *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

191. See POSNER & VERMEULE, *supra* note 19, at 11 (noting that the Executive

If your party controls the White House, this may not seem like such a bad thing, but this arrangement deprives the country of democratic deliberation about many important policy issues. It also results in policies more easily changed by future administrations, as new regulations can supplant old ones, generally without congressional input. Of course, administrative procedures like notice-and-comment rulemaking are arduous and time-consuming,<sup>192</sup> but, at least in theory, each new administration can roll back the previous administration's accomplishments without engaging democratically elected legislators.<sup>193</sup> The result is not coherent, long-term policy, but rather a series of policy reversals as the presidency flips between political parties.

The Constitution does not explicitly confer this policymaking power on the President, but in practice, all the checks and balances that make it difficult for Congress to act funnel such discretion to the President.<sup>194</sup> This phenomenon should force us all to ask whether our Constitution is functioning well. The Framers wanted to foster deliberation and check legislative excess,<sup>195</sup> but instead legislators frequently abdicate their policymaking responsibilities altogether. Presidents, thus, enjoy great de jure power and even greater de facto power.<sup>196</sup> To the extent many find this phenomenon troubling,<sup>197</sup> we should admit it is a problem that far transcends any one president.<sup>198</sup>

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Branch drives policymaking in the United States).

192. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010).

193. See Kagan, *supra* note 122, at 2347 (noting that Congress “cannot often marshal the resources necessary to overturn administrative actions backed by” the President).

194. See POSNER & VERMEULE, *supra* note 19, at 5–7, 11 (describing the Executive’s tremendous power).

195. See, e.g., Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L. J. 449, 489 (1991) (discussing *Bowsher v. Synar* and *INS v. Chadha*).

196. See POSNER & VERMEULE, *supra* note 19, at 11.

197. Professor Daryl Levinson argues that this narrow focus on the power of the presidency (and related questions of structural constitutional law) centers too much on government institutions at the expense of “the coalitions of policy-seeking political actors—comprising officials, voters, parties, politicians, interest groups, and other democratic-level actors—that compete for control of these government institutions and direct their decisionmaking.” Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 40 (2016).

198. See, e.g., Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 726 (2016) (“[P]residential control over the regulatory state is here to stay. It has

This acknowledgement need not imply the illegitimacy of the administrative state writ large. I, for one, generally support the legitimacy of administrative agencies, but nevertheless consider it problematic when most federal policymaking happens outside Congress.<sup>199</sup> Regardless of our political views, we should all ask if the Constitution is working properly when Congress is so impotent.

The Obama years also raise other questions about the Constitution. If historians ultimately do not judge President Obama's constitutional transgressions too harshly, what would that assessment tell us about our nation's fundamental law? The fact that Presidents Jefferson, Lincoln, and Truman (and others), despite apparent constitutional violations, rate highly suggests that constitutional law sometimes, perhaps even usually, gives way to political reality. Given these examples, why should we care about the legalist analysis—at least where we don't have an actual case pending in court?<sup>200</sup>

One answer might be that law does matter, but only when its requirements are clear. On this view, because the Constitution is under-determinate, presidents have substantial leeway to push the Constitution's boundaries so long as they do not clearly violate it.<sup>201</sup> Some of President Obama's actions were constitutionally questionable, but plausible legal arguments could still be made in their favor. Similarly, President Lincoln was able to offer plausible, if contestable, constitutional justifications for most of his actions.<sup>202</sup> This may suggest that the historical and legalist legacies are interconnected. Were a president to violate the Constitution blatantly, the historian (like the judge) will so rule. But where the president's actions are within the range of plausibility, the historian will more likely turn to nonlegalist factors.

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become woven into the fabric of the regulatory state, and it occurs regardless of the political party in the White House.”).

199. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2101–02 (2011).

200. See Levinson, *Was the Emancipation Proclamation Constitutional?*, *supra* note 47, at 1149–51.

201. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?pagewanted=all>.

202. See, e.g., *The Prize Cases*, 67 U.S. 635, (1862) (upholding legality of Union blockades); Levinson, *Was the Emancipation Proclamation Constitutional?*, *supra* note 47, at 1140 (suggesting, but not endorsing, constitutional arguments in favor of Emancipation Proclamation's applicability to Confederate states but not border states).

There may be some truth to this hypothesis, but there is also more to it. Society mostly evaluates presidents' legacies by nonlegalist criteria.<sup>203</sup> We condemn Nixon and praise Lincoln not because Lincoln's constitutional transgressions were "closer" legal questions, but because we consider Nixon's goals corrupt and Lincoln's righteous.<sup>204</sup> Put differently, most people care more about normative concerns than legalist analysis.

Norms, after all, are the foundation for public support. Nixon's corruption lost him public support, including from his own party.<sup>205</sup> When his public support evaporated, Nixon's legal violations suddenly mattered a great deal.<sup>206</sup> By contrast, though Lincoln and Obama both went through periods of unpopularity, both maintained enough public support to protect them enough from widespread charges of illegality. On this account, popular opinion matters more than formal legal analysis, at least for presidents.

It also matters which constitutional provisions and values are in play. Constitutional provisions are not all created equal, at least not in the public's eye. The Supreme Court unanimously ruled that President Obama had improperly made recess appointments to the National Labor Relations Board,<sup>207</sup> but outside the legal community, it is unlikely this decision will much affect the Obama legacy. The issue simply lacks the political or moral salience to play a large role in shaping society's broader assessment of the Obama presidency,<sup>208</sup> especially given that Obama merely followed the

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203. See Levinson, *Was the Emancipation Proclamation Constitutional?*, *supra* note 47, at 1150.

204. See *supra* notes 38–42 and accompanying text.

205. See *The Damaging Legacy of Nixon and Watergate*, CHI. TRIB. (Aug. 7, 2014), [www.chicagotribune.com/news/opinion/editorials/ct-edit-nixon-watergate-resign-0807-jm-20140807-story.html](http://www.chicagotribune.com/news/opinion/editorials/ct-edit-nixon-watergate-resign-0807-jm-20140807-story.html) (discussing Nixon's resignation as being motivated by his recognition that he had lost public support and would likely be impeached).

206. See HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. Rep. No. 1305, 93d Cong., 2d Sess., arts. I–V (1974).

207. See *Nat'l Labor Rel. Bd. v. Canning*, 134 S. Ct. 2550, 2556–57 (2014). Though the Justices all agreed these recess appointments were invalid, they disagreed strenuously on the reasoning.

208. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9–11 (1999) (contrasting the "thin" Constitution, which represents the document's "fundamental guarantees of equality, freedom of expression, and liberty" and which are central to Americans' national identity, and the "thick" Constitution, which details "how government is to be organized").

example of past presidents.<sup>209</sup> To be sure, the recess-appointments issue is connected to the broader, crucial issue of executive power, and legal scholars could fairly claim that President Obama ought not to have expanded the presidency's already vast powers.<sup>210</sup> For many members of the public, however, seemingly technical questions involving little known constitutional provisions like the Recess Appointments Clause likely lack the political salience to count much towards the President's legacy one way or another.

If there are truths in these hypotheses, we should ask whether society cares less about the Constitution writ large than it professes. Americans purport to revere the Constitution as our nation's civic religion,<sup>211</sup> but they often disagree about what it means and discount evidence militating against their preferred view.<sup>212</sup> At the end of the day, people value their own beliefs more than abstract constitutional principles.<sup>213</sup> We give Lincoln a constitutional pass because we admire his values and accomplishments. Notwithstanding our sworn fealty to the higher cause of the Constitution, we often insist that our civic religion must fit our values rather than the other way around.<sup>214</sup>

Perhaps these attitudes, however suppressed, reflect a constitutional vision that is surprisingly closer to the British constitution, which embodies the accumulated wisdom acquired through generations of government.<sup>215</sup> As Professor James Randall once explained, the U.S. Constitution, like the British, "is a matter of growth, development, and interpretation."<sup>216</sup> Originalists may contest this characterization as a normative matter, but, as a descriptive one, it is hard to dispute that the nation has molded the Constitution to fit its needs through different eras.<sup>217</sup> To this extent, our attitudes towards past presidents' constitutional missteps may reflect an unstated recognition that constitutional norms change, that some of those

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209. See *Canning*, 134 S. Ct. at 2560 ("Presidents have made recess appointments since the beginning of the Republic.").

210. See, e.g., Marshall, *supra* note 105, at 792.

211. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 10–11, 17 (1988).

212. See Berger, *Rhetoric*, *supra* note 67, at 729.

213. See RANDALL, *supra* note 11, at 2 ("Laws and constitutions have importance not in themselves, but because of the social purposes which they embody.").

214. See Berger, *Rhetoric*, *supra* note 67, at 726.

215. See *supra* note 4 and accompanying text.

216. RANDALL, *supra* note 11, at 5.

217. See generally 2 BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS (1998); RANDALL, *supra* note 11, at 5.

norms are more important than others, and that there are higher presidential virtues than constitutional adherence.<sup>218</sup>

In more recent years, we should also ask whether we care less about legalist analysis because we recognize that the Constitution is not working as well as we like to think it is. This attitude may be implicit in our national discourse, but it is rarely explicit.<sup>219</sup> To be sure, some scholars, most notably Professor Sandy Levinson, have emphasized the Constitution's serious defects.<sup>220</sup> Levinson, in fact, has called for a new constitutional convention.<sup>221</sup> The mainstream public, however, still says it loves its Constitution.<sup>222</sup>

If we dig a little deeper, however, we find an unstated, yet palpable discomfort with the Constitution. Most Americans today agree that contemporary politics, certainly at the national stage, are dysfunctional.<sup>223</sup> Calls for a constitutional convention are growing more frequent and not just within the professoriate.<sup>224</sup> While some (mostly conservative) critics claim they merely want to restore the document's true meaning,<sup>225</sup> the implicit acknowledgement is that today's constitutional framework is not serving us well.

The political dysfunction underlying those calls to reform was

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218. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1323 (2006) ("Social movements change the ways Americans understand the Constitution.").

219. See Miguel Schor, *The Federalist as a Primer on Constitutional Design: A Critical Appraisal of Separation of Powers and Written Constitutionalism* (July 24, 2017) 19–21 (unpublished manuscript at 19–21) (on file with author) [hereinafter Schor, *The Federalist*].

220. See, e.g., LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 162, at 11; Miguel Schor, *Constitutional Dialogue and Judicial Supremacy* 21–23 (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1730202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1730202); Schor, *The Federalist*, *supra* note 219, at 27.

221. See generally SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 391–92 (2012).

222. See Berger, *Rhetoric*, *supra* note 67, at 726.

223. *Public Says Dysfunctional Government Is Nation's Top Problem*, PEW RES. CTR. (Oct. 10, 2013), <http://www.pewresearch.org/fact-tank/2013/10/10/public-says-dysfunctional-government-is-nations-top-problem/>.

224. See, e.g., Ashley Balcerzak, *The Constitutional Convention 2016?*, SLATE (Jan. 26, 2016), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/01/liberals\\_and\\_conservatives\\_are\\_teaming\\_up\\_to\\_call\\_a\\_new\\_constitutional.html](http://www.slate.com/articles/news_and_politics/politics/2016/01/liberals_and_conservatives_are_teaming_up_to_call_a_new_constitutional.html).

225. See, e.g., *Republican Platform: A Rebirth of Constitutional Government*, GOP, <https://gop.com/platform/we-the-people/> (last visited Sept. 11, 2017).

especially acute during the Obama years,<sup>226</sup> and whether or not a new convention is the proper remedy, the Constitution deserves some of the blame.<sup>227</sup> Our system not only makes it very hard to pass legislation, but it also encourages extremism.<sup>228</sup> Various interrelated phenomena such as partisan gerrymandering, political primaries, and winner-take-all voting districts have pushed House representatives to either end of the political spectrum.<sup>229</sup>

Of these phenomena, gerrymandering is probably the most objectionable as it effectively allows representatives to select their electors, rather than the other way around.<sup>230</sup> The Constitution alone does not create this phenomenon, but it tolerates it.<sup>231</sup> As a result, new district lines protect incumbents, and Representatives can speak to their bases without worrying about other portions of the electorate.<sup>232</sup> Indeed, many Representatives are at far greater risk of losing in a primary to a fellow party member pandering to the base, rather than in the general election to an opponent from the other party.<sup>233</sup> Given this environment, most House members have little incentive to cooperate across the aisle, thus further contributing to ideological extremism.<sup>234</sup>

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226. *Public Says Dysfunctional Government is Nation's Top Problem*, *supra* note 224.

227. *See generally* LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 162, at 25–27.

228. *See id.* at 28–29.

229. *See id.*

230. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993).

231. *See* *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (upholding partisan gerrymandering against constitutional challenge). The Supreme Court recently heard oral argument in a case that will give it the opportunity to revisit this issue. *See* *Gill v. Whitford*, 137 S. Ct. 2289 (June 19, 2017) (staying lower court judgment “pending disposition of the appeal in this Court”).

232. *See* ALAN WOLFE, *DOES AMERICAN DEMOCRACY STILL WORK?* 52–56 (2006).

233. *See* *How Can Republicans Be Both Safer and More Numerous?*, *ECONOMIST* (Oct. 3, 2013), <https://www.economist.com/blogs/democracyinamerica/2013/10/gerrymandering>.

234. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 46 (2012); Christopher Ingraham, *A Stunning Visualization of Our Divided Congress*, *WASH. POST* (Apr. 23, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/04/23/a-stunning-visualization-of-our-divided-congress/?utm\\_term=.04e14d71ef62](https://www.washingtonpost.com/news/wonk/wp/2015/04/23/a-stunning-visualization-of-our-divided-congress/?utm_term=.04e14d71ef62).

The Constitution erects a different kind of districting in the Senate.<sup>235</sup> As a result, Senator Mitch McConnell could brazenly admit that his political goal was to ruin the Obama presidency and know that it would probably help him in Kentucky.<sup>236</sup> Likewise, Senate Republicans could refuse even to grant a hearing to Chief Judge Merrick Garland, an eminently qualified and fair-minded Supreme Court nominee, and find that their tactic worked.<sup>237</sup> By giving disproportionate political power to smaller states, the Constitution creates further potential for democratic minorities to thwart the will of the majority.<sup>238</sup> Along similar lines, the Electoral College disproportionately weighs smaller states so that Donald Trump could win the 2016 election despite losing the popular vote by about 3 million votes.<sup>239</sup>

Critics of the contemporary Republican Party must accept that our electoral structures in 2016 richly rewarded the Republicans' behavior. Indeed, what appears to be "bad faith hardball" to some is shrewd political strategy to others.<sup>240</sup> The Republicans' vitriolic opposition to President Obama seemed beyond the pale to many observers.<sup>241</sup> However, just as constitutional structures encouraged and permitted Republicans to obstruct Obama's agenda, so too did they help the GOP claim victory in 2016. Of course numerous factors contributed to these outcomes, but constitutional structures were among them.

How then do we assess the success of a Constitution that rewards politicians who relentlessly seek to sabotage their opponents? Similarly, how do we assess a political system that pushes most major policy decisions into a complex web of administrative bureaucracy far beyond the attention and

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235. See LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 162, at 49–51.

236. See LEVINSON, *AN ARGUMENT OPEN TO ALL*, *supra* note 92, at 195.

237. See Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN POL. (Nov. 9, 2016), <http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html>.

238. See Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES, <http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html> (last visited Sept. 27, 2017) [hereinafter Liptak, *Smaller States*].

239. See LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 162, at 81–93 (critiquing our "dreadful" system for electing the President); Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>.

240. See Tushnet, *supra* note 140, at 523–29.

241. See *supra* note 131 and accompanying text; see, e.g., Grunwald, *supra* note 130.

understanding of most ordinary citizens?<sup>242</sup> And how do we assess a constitutional system in which presidents can repeatedly take unilateral military action without any meaningful check?<sup>243</sup>

One common answer has been that we must endure the Constitution's inefficiencies to stave off authoritarianism. But legislative inefficiency and gridlock have worsened, and the executive branch's power has grown.<sup>244</sup> Now we have a President whom many fear has authoritarian impulses.<sup>245</sup> Perhaps these fears are overblown, but, if they are not, this is where the Constitution must prove its worth. We may tolerate governmental dysfunction if we know that it is the price we pay to keep despotism in check. In reality, though, by funneling so much power to the Executive Branch, the Constitution might enable, rather than prevent, despotism. What if the Constitution creates dysfunction and fails to check authoritarianism?

This question is hardly academic. The traditional view is that public institutions and popular opinion check presidential ambitions.<sup>246</sup> Trump has already demonstrated his disdain for institutions, for instance, by firing an FBI Director conducting an investigation the President deemed threatening.<sup>247</sup> Perhaps other public institutions can check the President, but as this piece goes to press, it is unclear whether or how they will.

It's also unclear whether popular opinion today offers a meaningful check. Though Trump's approval ratings are historically low for a new

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242. See POSNER & VERMEULE, *supra* note 19, at 11–12.

243. To the extent many military decisions occur mostly in secret, even public opinion cannot offer much check. Cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (discussing legal “black holes” explicitly exempting administrative agencies from administrative law and “grey holes” providing “constraints . . . so insubstantial that they pretty well permit government to do as it pleases”).

244. Dana Nelson, *The Growth of Executive Power Has Turned Politics into War*, WASH. POST (Mar. 8, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/03/08/the-growth-of-executive-power-has-turned-politics-into-war/?utm\\_term=.b4c581e95985](https://www.washingtonpost.com/news/in-theory/wp/2016/03/08/the-growth-of-executive-power-has-turned-politics-into-war/?utm_term=.b4c581e95985).

245. See, e.g., David Frum, *How to Build an Autocracy*, ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/>; The Times Editorial Board, *Trump's Authoritarian Vision*, L.A. TIMES (Apr. 4, 2017), <http://www.latimes.com/projects/la-ed-trumps-authoritarian-vision/>.

246. See generally BRUCE A. ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 32–33 (2010) (discussing the president's relationship with the “polity” and “a vast bureaucratic machine”).

247. See *supra* Part IV.

president,<sup>248</sup> he can claim that he won the election (albeit not the popular vote) and therefore enjoys a popular mandate to carry out his agenda. While opposition to Trump is high, there remains a significant segment of the population that approves of him or at least strongly prefers him to any alternative from the Democratic Party. This segment of the population will likely give President Trump a long leash, and the President knows it. Similarly, while Trump's behavior clearly makes congressional Republicans nervous, for at least the time being, they know they must stay on good terms with him to advance their own legislative goals. Perhaps Trump will someday cross some line to alienate fellow Republicans, but opponents should not hold their breath. After all, most Republicans have stuck with Trump so far.

These are good reasons for pessimism, but it is important to remember that just because the Constitution has contributed to these problems does not mean that it is a failure. Our institutions have not functioned well in recent years, but the Constitution's shortcomings are only one reason. Contemporary cultural phenomena—such as intensely fought culture wars, surging populism, a viciously partisan media, easily exploited social media, uninformed voters, and voter clumping—play substantial roles as well.<sup>249</sup>

Before turning to a new constitutional convention, we would also be wise to remember that it has endured for well over two centuries, and the nation, for all its problems, has prospered. Admittedly, the Constitution bears substantial blame for the Civil War that almost destroyed the Union, but the fact remains that our constitutional democracy has been more stable for longer than most. To the extent we still have some meaningful checks on governmental power, they exist in large part because Americans accept the legitimacy of the Constitution that imposes those limitations. Any new system would have to earn that presumptive respect, and the early years would be uncertain. Furthermore, it is not clear that alternative structures are better; all governmental systems contain their own problematic pathologies.<sup>250</sup>

Perhaps most importantly, in our poisoned political climate we would

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248. See Karen Yourish & Paul Murray, *President Trump's 100 Days of Record-Low Approval Ratings*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/interactive/2017/02/28/us/politics/the-highs-and-lows-of-trumps-approval.html>.

249. See generally SUSAN HERBST, RUDE DEMOCRACY: CIVILITY AND INCIVILITY IN AMERICAN POLITICS 22–26 (2010); KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT 191–205 (2008); WOLFE, *supra* note 232, at 4–13, 24–25.

250. See Akhil Reed Amar & Sanford Levinson, *What Do We Talk About When We Talk About the Constitution?*, 91 TEX. L. REV. 1119, 1132 (2013).

have a very difficult time agreeing on something better. Article V provides no guidance about the ground rules for a constitutional convention, so political parties and figures would each try to use the process to game the system in their favor. Such political wrangling would be more likely to further inflame partisan animosities than to produce thoughtful improvements to the Constitution.

Indeed, given that a constitutional convention would have high stakes and no clear initial procedural rules, the “losers” of such a gathering may well seek to deepen the nation’s discord. One highly educated friend of mine told me that he would “take up arms” if a new constitutional convention agreed to abandon equal representation in the Senate. There are, of course, serious arguments both for and against the Senate as currently constituted. The evident rage this and other constitutional issues can provoke, however, should caution us against a convention that could add even more fuel to the nation’s already-partisan fires.

Nevertheless, while a constitutional convention today would be a bad idea, we do need to have a serious national conversation about our Constitution and failing political system. Instead of mindlessly declaring their devotion to the Constitution, Americans should have candid discussions about how it serves us well and how it fails us. Instead of conveniently blaming political opponents for all our ills, Americans should ask how institutional structures and incentives contribute to the problem—and what citizens and various public actors can do to improve things, short of scrapping the Constitution altogether.<sup>251</sup>

The Obama and Trump Administrations share little in common, but both should force us to ask these questions. Indeed, if there is a lasting constitutional legacy from the Obama presidency, perhaps it should be newfound attention to the Constitution’s shortcomings. These are not the Republic’s finest days, but if we can use today’s difficulties to address such fundamental issues, some good might come out of them yet.

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251. See, e.g., LESSIG, *supra* note 174, at 264–307 (discussing strategies to reform the corrupting influence of money in politics); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 884–99 (2015) (proposing a doctrinal test for partisan gerrymandering); Watts, *supra* note 199, at 687, 726–45 (proposing “a legal framework for how a variety of nonconstitutional administrative law doctrines can be coordinated to enhance the positive *and* restrain the negative aspects of presidential control” of the administrative state (emphasis in original)).