DOCTRINE AND DEMOCRATIC DECONSOLIDATION: ON DAVID DRIESEN'S *SPECTER OF DICTATORSHIP*

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INTRODUCTION

For the last hundred years or so, Americans have been bullish on their presidents. At the turn of the 20th century, Progressive Era

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thinkers championed the empowered executive as the royal road to efficacious and accountable government.[1] Reformers in Congress agreed, granting the executive sweeping powers.[2] Over subsequent decades, the office of the president accrued ever greater authority.[3] And some are pushing for still more: respected scholars of public administration champion expanded executive empowerment today on the same good governance grounds mooted over a century ago.[4]

But it is getting harder to keep the faith.[5] Scholars of "democratic deconsolidation" have long highlighted the connection between the rise of strongmen and the decline of liberal democracy.[6] Their arguments have received renewed attention in light of recent events. Former President Trump's brazen lawbreaking, authoritarian tendencies, and evasion of accountability raised questions about the empowered executive for even the most avowed presidentialists. In response, some have become more circumspect; others have turned their attention to shoring up checks on executive power to make presidentialism safe—or at least safer—for democracy.[7]

1. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 33 (2022) [hereinafter Rosenblum, *Antifascist Roots*].

2. *See* JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 206–21 (2021) [hereinafter DEARBORN, POWER SHIFTS].

3. *Id.*

4. *See, e.g.*, WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY 176–77 (2020).

5. Of course, skepticism about presidential power is as old as the Republic. *See, e.g.*, An Old Whig V, *Philadelphia Independent Gazetteer*, Nov. 1, 1787, *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, eds) (2009) *available at* https://rotunda.upress.virginia.edu/founders/RNCN-03-13-02-0232. Recent expressions of opposition to presidential power seem connected with executive-led military adventurism. For the canonical modern anxiety, bound up with escalations in Vietnam, see ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY (1973). For a more recent statement, connected with the post 9/11 "Global War on Terror," *see* BRUCE ACKERMAN, THE DECLINE AND THE FALL OF THE AMERICAN REPUBLIC (2010). For a less alarmist take, which nevertheless recognizes "the rise in power of the executive as against the other branches" over "the past century," see Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692 (2011) (reviewing ACKERMAN).

6. *See, e.g.*, RUTH BEN-GHIAT, STRONGMEN (2021); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 211–12 (2018); *see also infra* note 135 and accompanying text.

7. *See* BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 357–70 (2020); HOWELL & MOE, *supra* note 4, at 180–93 (2020); *compare, e.g.*, SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015) *with* SAIKRISHNA

David Driesen's sobering new book joins this debate with soft-spoken alarm. Law, he argues, has not restrained presidential power recently, but expanded it. Moreover, he suggests that we are right to worry about the consequences of executive aggrandizement for democratic government. When we put the growth of US executive power in historical and international perspective, we see that American law is courting dictatorship. Without serious changes, it may bring it into being. To guard against that eventuality, Driesen proposes doctrinal changes that, he thinks, can bring the presidency back under court-enforced law and so keep it from threatening the integrity of the republic.

This Article offers a friendly critique of Driesen's analysis. Driesen is surely right to draw attention to a dangerous tendency in American law. But he overemphasizes doctrine in his account of presidential power. As a result, he puts the wrong kind of faith in doctrinal reforms to curb the executive and protect democracy. Presidential power and democratic decline owe more to institutional developments than legal decisions. If we want to use law to check the presidency and shore up democratic government, we should focus less on how law affects individual presidential powers and more on how it influences our democratic culture.

Part I seeks to reconcile Driesen's historical account of the growth of presidential power with the generally accepted narrative of the rise of the presidency. Driesen's account, it shows, fits relatively well (although not perfectly) with the story historians of the presidency tell about the growth of executive power. Still, there is one significant difference in emphasis: where Driesen privileges doctrine and decisional law, most legal historians focus on institutions.

Part II explores some of the limitations of Driesen's doctrine-first account. Driesen's analysis of decisional law, it shows, may be unduly catastrophist. Perhaps the cases are not quite as bad as he thinks they are. Moreover, case law may be less important for checking the president than Driesen believes. If the standard historical story of the rise of the presidency is correct, doctrinal changes, while potentially significant, have not been strongly causal.

BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020) [hereinafter PRAKASH, THE LIVING PRESIDENCY] *and* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 208–10 (2010) *with* ERIC POSNER, THE DEMAGOGUE'S PLAYBOOK: THE BATTLE FOR AMERICAN DEMOCRACY FROM THE FOUNDERS TO TRUMP (2020); *see also* Rosenblum, *Antifascist Roots*, *supra* note 1, at 75–85.

Most significantly, as scholars who work on democratic decline have argued, democratic backsliding seems driven more by the erosion of democratic norms than formal legal changes. Even executive-led democratic backsliding should be understood as a form that democratic deconsolidation takes rather than a root cause. To reform the decisional law that bounds the executive without addressing those root causes would, then, be to treat symptoms without addressing an underlying disease. Here, the underlying disease is the breakdown of democratic culture. Executive-led deconsolidation is itself a symptom.

This is not to say that law has no place in treating antidemocratic pathologies. Driesen's intuition that there is a role for law to play in curing our ailments is exactly right. Part III takes up the question of how law could be used to safeguard democracy and bound the executive. The root causes of the hypertrophic presidency seem to be related to congressional incapacity, partisanship, and changes in American culture. Law can exacerbate or curb these developments, as scholars have argued and as Driesen recognizes. Legal reforms, then, might be able to make our institutions, politics, and culture more conducive to promoting liberal democracy and less enamored of executive power. This would be to emphasize law's second-order, polity-shaping effects over its first-order effects on individual conduct.

In this way, law might be able to help protect democracy from unaccountable presidential power. It would do so by shaping a healthy democratic culture more than trying to impose court-ordered limits on presidential power. Its contribution might thus be different from what Driesen suggests.

I. THE RISE AND RISE OF PRESIDENTIAL POWER

At its heart, Driesen's is a story of decline. At the Founding, the Constitution's drafters shared a "dominating concern with avoiding tyranny."[8] From this, Driesen infers an "original intent" in the Constitution "to guard against 'tyranny.'"[9] Yet this principle seems far from the minds of most originalists today. Trump, whose White House Counsel heralded originalism as one of the administration's two juridical pillars, seemed oblivious to the notion that the

8. DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER 3 (2021) [hereinafter DRIESEN, THE SPECTER OF DICTATORSHIP].

9. *Id.* at 6.

Constitution placed any limits on one-man rule.[10] And the Supreme Court, despite its growing crop of self-proclaimed originalist judges, "has tended to erode the legal framework constraining presidential power."[11]

So what happened? How did the government fall away from the Founders' heights, landing at the precipice of tyranny, even as so many claimed to follow their designs?

Driesen's accident report unfolds in three parts. According to Driesen, for the first hundred years after the founding of the republic, the Framers' initial "anti-tyranny" principle held, despite occasional challenges. Only in the 20th century, and especially after the Second World War, did executive capacity grow substantial. Nevertheless, at that point, courts kept the presidency within bounds, at least in the domestic sphere.[12]

In the years since, however, the law has become untethered from the Founders' original concerns. This disconnect was not the outcome of a linear process or confined to a single strand of doctrine. Rather, as Driesen explains, in decisions involving a range of different presidential actions, the Supreme Court increasingly acquiesced to executive adventurism. As a result, even before the rise of the fabled unitary executive theory, the courts had elaborated doctrines that expanded presidential power and frustrated attempts to check executive overreach. The recent embrace, in *Seila Law LLC v. Consumer Financial Protection Bureau*,[13] *Collins v. Yellen*,[14] and *United States v. Arthrex Inc.*,[15] of unitarism and full-on presidential control of the administrative state is best read, then, as the consummation of the "judicial enabling of presidential power."[16]

10. *See* Emily Bazelon, *How Will Trump's Supreme Court Remake America?,* N.Y. TIMES (Feb. 27, 2020), https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html (quoting Donald F. McGahn II as stating that "The Trump vision of the judiciary can be summed up in two words: 'originalism' and 'textualism'"). On Trump's obliviousness to an originalist anti-tyranny principle, *see, e.g.*, President Donald J. Trump, Address to Turning Point USA Teen Action Summit (July 23, 2019) ("I have an Article 2, where I have the right to whatever I want as president.").

11. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 7.

12. *Id*. at 7 ("[A]lthough the office of the President became immensely powerful in the twentieth century, a robust legal framework largely constrained presidential power in the domestic sphere at least through the 1960s.").

13. 140 S. Ct. 2183 (2020).

14. 141 S. Ct. 1761 (2021).

15. 141 S. Ct. 1970 (2021).

16. The quotation is the subtitle of Driesen's book, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8.

Ironically, on Driesen's telling, it is recent Justices, reared in the era of "Founders' Chic," who loudly proclaim their allegiance to the Constitution as it was written and the great men who wrote it, who have delivered the final blows to the Framers' commitments.[17]

Driesen's account largely tracks the accepted historical narrative of the rise of executive power, with one important caveat. Where Driesen seems to suggest the importance of doctrine, legal historians would stress the role of institutions.

So, for example, even as historians might argue that Driesen overstates how accepted his alleged "anti-tyranny principle" was across the 19th century, they would agree with Driesen that the danger of one-man rule was largely kept in check. Crucially, for historians the limiting principle was less doctrine than institutional realities. The office of the president in the 19th century was weak. Anti-tyranny was a fact of life more than a commitment to be vindicated.

Similarly, legal historians would agree with Driesen that in the late 20th century and early 21st century, the presidency acquired tremendous new capacities. However, in explaining the shift, they would credit other institutional developments over changes in doctrine. As it happens, the federal courts have recently checked presidential power in some surprising ways. Yet these judicial interventions have not stopped the continuing and potentially dangerous growth of executive power.

Legal historians would thus agree with Driesen about the general outlines of his narrative, while expressing some disagreement about its drivers. This Part reconstructs that narrative, incorporating Driesen's doctrinal account into the framework offered by the institutional synthesis. The next Part explores how attending to the institutional side of this story exposes the limitations of Driesen's account and his proposed reforms.

A. The Founders' President and the Anti-Tyranny Principle

Driesen roots his account in a relatively traditional gloss on the Founding. As he sees it, the American Revolution was "animated" by "the goal of overthrowing tyranny."[18] The tyrant in question was the British king. While some colonists focused on Parliament as the agent of their oppression, Driesen sides decisively with those who see the

17. For the rise of Founder's Chic and its connection with self-proclaimed "original intent" originalist jurisprudence, *see* R.B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED, 164–65 (2009).

18. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 13.

War of Independence as a war against monarchy.[19] On his telling, the rebels charged the British crown with perpetuating all manner of injustice and held that kingship itself raised the danger of despotism.

This fear of monarchy informed early efforts at government design. The new country's first charter, the Articles of Confederation, famously included no provisions for an independent executive. And early state constitutions mostly reflected a similar suspicion of one-man rule. The "spirit of 1776," all agree, empowered legislatures and executive councils at the expense of individual governors.[20]

Driesen argues that this suspicion carried forward into the drafting of the Constitution.[21] Even as the Framers pushed for a stronger national government, they sought to guard against a return to monarchy.[22] They recognized that "a strong head of state might doom the entire constitutional project," by reviving the fear of despotism that "gave rise to the revolution" in the first place.[23] In putting the Constitution together, they therefore sought "to substitute the rule of law for the rule of arbitrary executive authority that many Americans saw in King George."[24]

Here is where Driesen locates his anti-tyranny principle: in the decision to guard against the arbitrary executive authority of monarchy. While it is often difficult to know what the Framers thought about specific questions, on this, he believes, there is clarity. There was a "consensus" at the Founding that "we wish to avoid tyranny."[25] This "was not just an arrangement that the Founders barely agreed upon, but one of the most widely agreed upon objects of the entire process of creating a Constitution, including its

19. *See id.* at 13–14.

20. On the hostility to one-man rule in most early state constitutions, *see* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–87, at 135–41 (1969).

21. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 15 (noting that the "fear of tyranny loomed so large at the founding that some delegates to the [constitutional convention] favored placing a council of several people at the head of the executive branch" rather than an individual). For a competing perspective, stressing the resurgence of "the Spirit of 1775" in the Constitution's drafting, *see* ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014). For an analysis of Nelson's arguments and their reception, *see* Noah A. Rosenblum, Book Note, *Of Kingship and Counselors: The Royalist Revolution in Legal History*, H-LAW (Oct. 11, 2016), https://networks.h-net.org/node/148069/pdf.

22. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 14.

23. *Id.*

24. *Id.*

25. *Id.* at 25.

ratification."[26] The "intent to avoid autocracy" was foundational, and deserves "primacy."[27]

That primacy for Driesen is legal, not historical. He does not claim that avoiding one-man rule was the only or the main goal of late 18th century constitutional design. Nor does he make the mistake of suggesting that all agreed that the danger of autocracy proceeded solely from the threat of one-man rule. Indeed, as he notes, some of the colonists involved in drafting and ratifying the Constitution feared legislative assemblies more than an individual ruler;[28] others worried about a corrupt partnership between the President and the Senate.[29] Driesen's historical argument is merely that enough of the Framers worried about the dangers of monarchy that we should see it as a major aim of the Constitution itself.

It is an old-fashioned point, as Driesen himself knows.[30] While he quotes occasional primary sources, his citations are clearly illustrative, not comprehensive. For ballast, his argument relies on canonical secondary sources, including the law-school based legal historian Michael Klarman's recent book on the Constitution and works from the Bailyn school of historians of the early republic by Gordon Wood, Jack Rakove, and Pauline Maier.[31]

Where Driesen hopes to break new ground is in the meaning he gives that history for law. Under the sway of originalism, some have come to "believe that there is only one way to understand presidential power": the unitary executive theory.[32] But the actual history belies this. At a minimum, "not all of the evidence is on one side of the debate."[33] The traditionalism of Driesen's historical position is, thus, a point in its favor. The widely accepted, storybook account of American constitutionalism is enough to provide an argument for

26. *Id.*

27. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8 at 25.

28. *Id.* at 12.

29. *Id.* at 22.

30. More recent historiography has moved away from the debate over the liberal or republican character of early American political thought and institutional design to stress themes of settler colonialism and political economy. *See, e.g.*, WOODY HOLTON, LIBERTY IS SWEET: THE HIDDEN HISTORY OF THE AMERICAN REVOLUTION (2021); ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750-1804 (2016); ROBERT G. PARKINSON, THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION (2016); *see also* Greg Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999 (2014).

31. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 178–79.

32. *Id.* at 11.

33. *Id.*

would-be originalists. They should worry not only about encroachment on the executive, as they have since Scalia's opinion in *Morrison v. Olson*,[34] but, following the Founders, about the dangers the executive might pose to republican government itself.[35]

B. The Bounded 19th Century Executive

According to Driesen, this insight was not lost on 19th century Americans. Of course, most of the time, the 19th century executive was not much to worry about. This was an era of "congressional dominance," in which Congress was closely involved in many aspects of what we now think of as executive administration.[36] The president did not have the tools to effectively supervise or direct the government's many officers.[37] Under those circumstances, he rarely posed a tyrannical threat.

Recent histories of the 19th century state further emphasize Driesen's observations about congressional supremacy.[38] At that time, the government's agents often enjoyed a closer relationship to Congress than to the president. Until the beginning of the 20th century, executive department heads could submit their budget requests directly to the relevant Congressional committees without presidential supervision.[39] And, in the early republic, a "customary constitutional norm" restrained presidents from firing officers of the United States who did not enjoy removal protection.[40] While the Jacksonian principle of rotation in office eroded this, many

34. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J. dissenting). On the opinion's influence, *see generally*, Ashraf Ahmed, Lev Menand & Noah Rosenblum, *The Tragedy of Presidential Administration* (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 21-39, 2021) (on file with author) [hereinafter Ahmed, Menand & Rosenblum, *Tragedy*].

35. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 25–26.

36. *Id*. at 30; *see also* DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION 1790-1870 (2021); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1538, 1547–50 (2018).

37. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 30.

38. *See, e.g.*, WILLIAM E. LEUCHTENBURG, THE AMERICAN PRESIDENT 15 (2015) ("Dwarfed by Congress, often denied respect, [19th century] presidents found elevation to the highest office in the land deeply disappointing.")

39. *See generally* JESSE TARBERT, WHEN GOOD GOVERNMENT MEANT BIG GOVERNMENT: THE QUEST TO EXPAND FEDERAL POWER, 1913–1933 (2022). On the rise of executive budgeting in the Progressive Era, *see* Peri E. Arnold, *Executive Reorganization & the Origins of the Managerial Presidency*, 13 Polity 568, 586–87 (1981).

40. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 30; *see also* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982).

government officers subsequently enjoyed removal protections under the Tenure of Office Act and other statutes after the Civil War. The party-patronage system of the 19th century had an important role for the president as a distributor of lucrative sinecures.[41] But the executive just did not generally have enough power to pose a threat to republican government.

Where circumstances brought would-be-strong presidents to office, Driesen argues that their actions occasioned powerful checks, testifying to the principle's vitality. Consider the two most noteworthy 19th century presidents, Andrew Jackson and Abraham Lincoln.

Jackson used his powers in ways then considered aggressive, including famously during his fight against the Second Bank of the United States.[42] The result was widespread condemnation: he earned the epithet "King Jackson," was censured by the Senate, and provoked fierce reactions including physical attacks on his person and the creation of a new opposition party.[43] Four years after Jackson stepped down, William Henry Harrison was elected president in 1840 over Jackson's ally, the incumbent Martin Van Buren. And, in his inaugural address, Harrison repudiated Jackson's overreaching, pledging "never to fire a Treasury Secretary" without communicating with Congress, to "limit his use of the veto," and to restrict himself to a single term in office.[44] Driesen reads these episodes as a sign that, where the president flirted with tyrannical power, other political actors channeled the Framers' anti-tyranny commitment.

41. For a discussion of the distinctive 19th century party-presidentialist vision of the executive, *see* Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-In-Chief: Myers and the Progressive Presidency* (unpublished manuscript) (on file with author) [hereinafter Katz & Rosenblum, *Progressive Presidency*].

42. For a new reading of the Bank War, which explores how and why the conflict became a flashpoint of partisan disagreement, see STEPHEN W. CAMPBELL, THE BANK WAR AND THE PARTISAN PRESS (2019). At least as notorious as the Bank War is Jackson's vicious campaign against the Cherokee, which again pitted him against Congress and the Supreme Court. The politics of his executive unilateralism, there, were colored in complicated ways by white settler land hunger, which Jackson encouraged even as he sought to control. For an important contribution to unpacking this complex history, see ALISON LACROIX, THE INTERBELLUM CONSTITUTION, chapters 7–8 (on file with author).

43. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 33.

44. *Id.* Harrison seems to have believed that no president should run for reelection and that it was a defect of the Constitution not to explicit limit the president to a single term. *See* Inaugural Address of William Henry Harrison (Mar. 4, 1841).

Lincoln's exceptional presidency is the proverbial exception that proves the rule. This is the not the place to rehearse the many arguments over Lincoln's norm-and law-breaking in his fight to save the Union. Driesen's own discussion of events is strikingly short.[45] The politics of the situation were complex and evolving. Lincoln was, notoriously, hemmed in by competing factions, caught between white supremacist Roger Taney's Supreme Court and a Congress that was at first divided by the presence of a large number of southerners and then, after their expulsion, controlled by Radical Republicans, who urged greater action than Lincoln may have wanted to take.

The facts can be read in a light sympathetic to Driesen's argument, however. Such an interpretation would note the extent to which Congress factored into even Lincoln's most extreme actions. So, for example, when Lincoln suspended the writ of Habeas Corpus without congressional approval in the name of military necessity, he both gave a subsequent account of himself to Congress and received from Congress an act granting him authority to suspend the writ for the remainder of the war—a power he subsequently used in place of his initially claimed authority.[46] Congress was deeply involved in many aspects of the war effort, from the laws it passed to expand the armed forces to the investigations it held through its standing Joint Committee on the Conduct of the War.[47] And the Radical Republicans in Congress often wanted even more aggressive action, second-guessing Lincoln's strategy and pressuring him over emancipation and Reconstruction.[48] On this read, Lincoln's presidency could be seen not as an example of unilateral executive aggrandizement, but rather as a bounded and active collaboration between the president and Congress to respond to an unprecedented national emergency.

This Congress-centered gloss on Lincoln helps explain developments after Lincoln's assassination. Famously, Lincoln's successor Andrew Johnson was out of step with the priorities of the Republican-controlled Congress. When Johnson tried to use his independent executive authority to chart an alternative course for Reconstruction, the congressional reaction was swift. Congress required that orders to military commanders flow through loyal

45. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 37–38.

46. *See* President Abraham Lincoln, Message to Congress (July 4, 1861); Habeas Corpus Suspension Act, 12 Stat. 755 (1863).

47. *See generally* BRUCE TAP, OVER LINCOLN'S SHOULDER (1998); PRAKASH, THE LIVING PRESIDENCY, supra note 7.

48. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

Republican General Ulysses Grant, whom it made it unremovable; forbade Johnson from firing members of his cabinet without Senate confirmation; and eventually impeached him for trying to dismiss Secretary of War and congressional ally Edwin Stanton.[49] Johnson survived conviction in the Senate by a single vote after he promised he would abandon his obstructionism.[50] He served out the remainder of his term cowed by Congress.

The comparative and absolute weakness of the executive meant that the presidency only rarely wound up in court. When it did, Driesen argues, judges hewed to the Framers' anti-tyranny principle by cabining the executive and empowering the legislature. Thus, in 1804, the Supreme Court was called upon to adjudicate the legality of the seizure of the Flying Fish, a ship coming from France. An act of Congress had empowered the President to order the seizure of ships going *to* France, but not *from* France. The President ordered the seizure of ships coming *from* France anyway. In *Little v. Barreme*[51] the Supreme Court declared the seizure illegal, "recogniz[ing] congressional supremacy even over military power in wartime and declin[ing] to defer to the executive branch's view of how to interpret a statute structuring the conduct of war."[52]

Driesen sees the same principle at work in the Court's conduct sixty years later, in the aftermath of the Civil War. During the war, the Lincoln administration had created military tribunals to handle war-related disputes even where the regular courts remained in operation. In *Ex Parte Milligan*[53], the Supreme Court held the tribunals invalid, "declining to defer to an esteemed President's view of what constitutes an emergency."[54] In his majority opinion, Justice Davis explicitly invoked the threat a powerful president could pose to the people's liberty as a ground for the Court's decision.[55]

In these ways the anti-tyranny principle may have operated effectively but quietly throughout the nineteenth century. As the government remained a creature of Congress, the president was usually too weak to threaten the republic in a way that might require the principle to be invoked. Occasional presidents did assert claims to strong executive power, but they remained checked by the legislative

49. *See id.* 333–36.
50. *See id.* at 336.
51. 6 U.S. 170 (1804).
52. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 36.
53. 71 U.S. 2 (1866).
54. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 39.
55. *See id.* at 38 (quoting *ex parte Milligan*, 71 U.S. 2, 119–21 (1866)).

branch, which was largely hostile to executive aggrandizement. And when the Supreme Court was called on to judge the legality of presidential actions, it scrutinized executive acts carefully, siding with Congress against the President, and generally embracing the Framers' constitutional commitment to guarding against tyranny.

C. The Growth of Presidential Power in the 20th Century

Things began to shift at the turn of the 20th century. The biggest change was institutional, although this is not Driesen's emphasis. The office of the president acquired the capacity to act with consequence. President Grover Cleveland earned plaudits for his muscular use of the veto, foreshadowing the rise of stronger presidents to come.[56] President William McKinley's unexpected death thrust a young Teddy Roosevelt into the White House, where his "stewardship" theory of the presidency inaugurated a whole new performance of the presidential role.[57] In the next decades, a combination of individual innovations and Congressional enactments, galvanized by the American experience of the Great War and the rise of big business, laid the institutional foundations for the modern American executive.[58]

Why American democracy became more presidency-centered during the 20th century remains a subject of ongoing debate. In my own work, I have emphasized intellectual changes, including a loss of faith in representative assemblies and the rise of more individual-centered theories of democratic leadership.[59] Others have highlighted Congress's acceptance of claims to presidential representation and its own interest in offloading responsibility to the executive branch.[60] Driesen, for his part, mentions technological changes which enabled greater connections between charismatic individuals and the people at large, changing expectations about the president's role.[61]

56. *See, e.g.*, JAMES BRYCE, I. THE AMERICAN COMMONWEALTH, 75-76 (1888). *See generally* Hon. Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791 (1986).

57. *See* Katz & Rosenblum, *Progressive Presidency*, *supra* note 41; *see also* PERI ARNOLD, REMAKING THE PRESIDENCY: ROOSEVELT, TAFT, AND WILSON, 1901-1916 (2009).

58. *See* DEARBORN, POWER SHIFTS, *supra* note 2; TARBERT, *supra* note 39; *see also id.*; Rosenblum, *Antifascist Roots*, *supra* note 1.

59. *See* Rosenblum, *Antifascist Roots*, *supra* note 1.

60. *See* DEARBORN, POWER SHIFTS, *supra* note 2.

61. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 40.

Whatever the combination of factors, by the early years of the 20th century, the presidency was on a new path. Starting with the Budget and Accounting Act of 1921,[62] the office began to acquire ever greater governance tools.[63] During the New Deal, the President's Committee on Administrative Management sketched plans for a powerful, policy-making president, who would command his own staffing, financial management, and planning facilities.[64] Over the next decades, Democratic and Republican administrations alike worked to realize the Committee's dream, creating what Peri Arnold has called "The Managerial Presidency."[65] By the middle decades of the 20th century, the president was something to behold: the head of a massive workforce, the custodian of nuclear launch codes, the self-proclaimed leader of the free world.

The Supreme Court at least accommodated—and sometimes encouraged—this vast expansion of presidential power. In *Myers v. United States*,[66] President-cum-Chief-Justice William Howard Taft embraced a vision of the presidency as the key representative organ of the nation while restricting Congress's ability to insert itself into executive branch removals.[67] In *United States v. Curtiss-Wright Export Corp.*, the Court proclaimed the president the nation's "sole organ . . . in the field of international relations" and gave the executive a wide berth to conduct foreign affairs.[68] And after a short adventure in policing the boundaries of separation of powers in *Panama Refining Company v. Ryan*[69] and *A.L.A. Schechter Poultry Corp. v. United States*[70], the Court allowed Congress to grant additional authority to

62. Budget and Accounting Act, ch. 18, 42 Stat. 20 (1921) (codified at 31 U.S.C. § 1).

63. *See* John Dearborn, *The "Proper Organs" for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921*, 31 J. POL'Y HIST. 1, 1 (2019).

64. *See* Rosenblum, *Antifascist Roots*, *supra* note 1.

65. PERI ARNOLD, MAKING THE MANAGERIAL PRESIDENCY (2d ed., 1998).

66. 272 U.S. 52, 60 (1926).

67. *See* Katz & Rosenblum, *Progressive Presidency*, *supra* note 41; *see also* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 43.

68. *See* 299 U.S. 304, 319 (1986); *see also* H. Jefferson Powell, *The Story of Curtiss-Wright, in* PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley eds., 2009); DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 47–48.

69. 293 U.S. 388 (1935).

70. 295 U.S. 495 (1935).

the president through statutory delegations, further encouraging the office's growth.[71]

Yet, Driesen argues, this account of the Court as willing handmaiden is too simple, at least before the 1980s. In fact, despite the presidency's increasing power, Driesen sees a Court enforcing meaningful legal limits on executive action. Thus, even though *Myers* raised questions about removal protections for executive branch officials, the Court validated Congress's ability to insulate administrative actors from presidential interference just nine years later, in *Humphrey's Executor v. United States*[72]—a ruling that held throughout the 20th century and has only recently come under challenge.[73] Similarly, despite the president's expansive foreign affairs powers, Congress enacted meaningful restrictions on presidential war powers, which the Court enforced.[74] And while the post-New Deal Court generally deferred to Congressional enactments of economic and social regulation, including delegations to the executive, Justice Jackson's concurrence in *Youngstown* provided a framework for "placing the Executive under the law."[75] The result of all this, for Driesen, is that even as executive power grew, "a robust rule of law continued to limit presidential power, at least domestically, through the 1970s."[76]

D. The Modern Presidency Unbound

With the Reagan Revolution, Driesen asserts that those limits broke down. An important strain of recent scholarship has emphasized the intellectual roots of this shift, tracing how ideas of presidentialism developed in elite Republican academic and political circles spread through the judiciary and the Office of Legal Counsel.[77]

71. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 310 (1999); *see also* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 41.

72. 295 U.S. 602 (1935).

73. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 43-44. For recent judicial criticism of *Humphrey's Executor*, see *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring in part and dissenting in part). On the history of the rejection of *Humphrey's*, *see* Ahmed, Menand & Rosenblum, *Tragedy*, *supra* note 34.

74. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 46–47.

75. *Id.* at 51 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (quotation marks and alterations omitted)).

76. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 41.

77. *See, e.g.*, STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 34 (2021) [hereinafter BELEAGUERED REPUBLIC]; JEFFREY CROUCH,

Driesen's approach is different. He focuses on how disparate decisions from the past four decades in seemingly separate fields of law made it difficult for anyone, including Congress, to check the presidency.

The core of Driesen's doctrinal argument rests on two claims. First, that the Court has developed doctrines to avoid having to rule on the limits of presidential power.[78] And second, that where the Court is called on to adjudicate claims of encroachment, it tends to rule against Congress, especially where the case pits the legislature against the executive.[79] Together, these two tendencies have led the modern Court to all but release the president from existing legal constraints while rendering in advance Congress's attempts to impose new ones ineffective.

1. The Court's Unwillingness to Adjudicate the Limits of Presidential Power

Driesen's first argument draws on developments in the Court's justiciability doctrines. As Alexander Bickel famously argued, federal courts often rely on arcane and opaque rules about ripeness, standing, and mootness to avoid reaching the merits on contentious cases.[80] The decision *not* to exercise judicial power can be more powerful than using it.

Driesen deploys Bickel's insight to illuminate recent foreign affairs and war powers cases. In those contexts, he observes how federal courts invoke problems with justiciability to avoid deciding hard questions. "Although the result is always the same, the rationales for declining to adjudicate . . . vary."[81] In case after case, the courts dodged saying whether the president may have overstepped, giving the executive an ever-greater sphere within which to act with impunity.

Clapper v. Amnesty International USA is, for Driesen, exemplary.[82] The case involved a challenge to the 2008 amendments to the Foreign Intelligence Surveillance Act, which authorized the

MARK J. ROZELL & MITCHEL A. SOLLENBERGER, THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT 19–22 (2020); Ahmed, Menand & Rosenblum, *Tragedy*, supra note 34.

78. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 56.

79. *Id.*; see also *id.* at 90.

80. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

81. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 59.

82. 568 U.S. 398 (2013).

executive branch to engage in expansive surveillance in the name of national security. Amnesty International sued, alleging that the law was facially unconstitutional.[83] The Court refused to reach the merits, however, holding that the plaintiffs could not establish standing.[84] Amnesty's main claim to harm rested on the assumption that some of its contacts were likely targets of U.S. surveillance.[85] The Supreme Court stated that this was speculative.[86] Amnesty had "no actual knowledge of the Government's . . . surveillance practices," and so did not have standing to bring the case.[87] The implication was chilling: only if the government's surveillance apparatus made a mistake and tipped Amnesty or its partners off that they were actually surveilled might they be able to challenge the government's behavior.

Amnesty argued that, unless it could bring suit, applications of the law would evade any form of judicial review.[88] But the Court was unmoved. "[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[89] And, in any case, it went on, private parties would have the opportunity to challenge the law when they were prosecuted using information obtained through the law's surveillance program, while telecommunications providers could challenge the law when asked by the government to assist in data gathering.[90]

We see here how a court's standing decision can expand the sphere of presidential action. What began as a challenge to a law that Congress passed ended by limiting the occasions in which the executive's use of its new surveillance power is subject to court review. Outside of a few unusual situations, such as a communications provider refusing a government order to cooperate, or affirmative disclosure of surveillance to a surveilled or third party,

83. *Id.* at 401.

84. *Id.* at 401–02.

85. *See Clapper*, 568 U.S. at 410. Amnesty's second claim to standing rested on the present costs incurred as a result of guarding against the fear of surveillance. *Id.* at 416. But, as the Court observed, such a chain could only establish standing if the underlying fear was fairly traceable to the law—that is, not "hypothetical future harm that is not certainly impending." *Id.* Amnesty's second standing theory was thus, in the Court's eyes, parasitic on its first.

86. *See id.* at 411.

87. *Id.*

88. *Clapper*, 568 U.S. at 420. Although note that the law did require the government to receive authorization from the Foreign Intelligence Surveillance Court (FISC), allowing for some review of individual acts of intelligence collection.

89. *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982)).

90. *Id.* at 421–22.

no private party would have standing to challenge the law's implementation. In other words, the court's decision allowed the president to execute the law largely without worrying about constraints imposed by Article III.[91]

The court's refusal to rule on questions of executive power is not limited to foreign affairs. As Driesen details, federal courts, including the Supreme Court, have relied on justiciability doctrines to avoid ruling on the president's exercise of powers in the domestic sphere too.[92] Sometimes, they have done this by limiting Congress's ability to claim standing to challenge presidential lawbreaking.[93] More recently, the Supreme Court has intimated that Article II's "take care" clause might limit Congress's ability to grant standing in general, including in particular standing to challenge executive non-enforcement.[94]

2. The Court's Eagerness to Adjudicate the Limits of Congressional Power

The Court's disinclination to adjudicate disputes involving presidential power is not universal, however. Where a case pits Congress against the president, and the president raises a claim of congressional encroachment, Driesen finds federal courts eager to intervene.[95] And the Court's resolution is usually the same: to rule in favor of the presidency and further cabin the legislature.

Driesen's doctrinal argument here contains two parts. The first has to do with justiciability. As we just saw, when it comes to challenges to presidential power, the Court is hesitant to grant standing. But when the claim is one of Congressional encroachment on executive power, the Court seems to overlook its earlier concerns about ripeness, mootness, concreteness, specificity, and traceability in a headlong rush to rule.[96]

91. The big exception being the FISA statute's own requirement to seek and obtain approval from FISC. There remains significant debate, however, about the extent to which FISC constrains the executive, since it rarely seems to modify or deny government surveillance requests. *See, e.g.*, Foreign Intelligence Surveillance Act Court Orders 1979-2017, Elec. Priv. Info. Ctr., https://epic.org/foreign-intelligence-surveillance-court-fisc/fisa-stats/ (last visited July 1, 2022).

92. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 61.

93. *See id.* at 62–63 (discussing restricted Congressional standing in *Raines* and the Border Wall case).

94. *See id.* at 64–65.

95. *See id.* at 66.

96. *See id.* at 67.

Driesen gathers a long list of cases to illustrate his point.[97] *Bowsher v. Synar* is, perhaps, the most striking. This well-known case involved a challenge to the Balanced Budget and Emergency Deficit Control Act of 1985, which empowered the Comptroller General to make sweeping budget cuts in limited circumstances.[98] The law was challenged in court right away, before any such cuts had been proposed.[99] At the time, the central alleged infirmity with the law—a provision in a much earlier statute that seemed to insulate the Comptroller General from direct presidential removal[100]—had not been tested; no one had sought to remove the Comptroller at all. In other words, the law was challenged on the basis of a harm that had yet to pass, based on eventualities that might not occur. These, of course, were the very ripeness concerns that would stall the litigation in *Clapper*.[101] But they did not stop the Court from ruling in *Bowsher*, despite the vigorous objections of Justice Blackmun.[102]

The Court's willingness to adjudicate is in part explained by its results. This is Driesen's second point. Where a case pits Congress against the president, the Court usually rules for the president. Driesen frames this as a story of implied powers. Where the Court is asked to consider whether the president or Congress can take certain action, "[t]he Necessary and Proper Clause," which ever since *McCulloch* has been read as a textual grant of implied power to Congress, "sometimes gets short shrift . . . [,] but the notion of judicially implied presidential power usually gets generous treatment."[103]

Driesen again collects a large number of modern cases to illustrate his point.[104] His analysis uncovers several different tools

97. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 67–70 (discussing, among other cases, INS v. Chadha, 462 U.S. 919 (1983); Zivotofsky v. Clinton, 566 U.S. 189 (2012); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Buckley v. Valeo, 424 U.S. 1 (1976); Free Enter. Fund v. Public Co. Accounting Oversight Board (PCAOB) 561 U.S. 477 (2010)).

98. *See* 478 U.S. 714, 718–19 (1986).

99. *See id.* at 719.

100. *See id.* at 718; Budget and Accounting Act, ch. 18, 42 Stat. 20 (1921) (codified at 31 U.S.C. § 1).

101. *Cf.* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 69.

102. *Bowsher*, 478 U.S. at 778 ("I cannot see the sense of invalidating legislation of this magnitude in order to preserve a . . . power that has never been exercised and appears to have been all but forgotten[.]").

103. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 78.

104. *See id*. at 78–89 (discussing, among other cases, *Medellin v. Texas*, 552 U.S. 491 (2008); *Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *U.S. v. Comstock*, 560 U.S. 126 (2010); *Shelby County v. Holder*, 570 U.S. 529 (2013)).

deployed by the Court. In some, like *Japan Whaling Association v. American Cetacean Society* and *Franklin v. Massachusetts*, it refused to take Congressional policy preferences, as realized in enacted statute, as seriously as contemporary presidential policy judgments.[105] In others, such as *INS v. Chadha*, the Court restricted Congress's ability to rely on historical practice in liquidating separation of powers arrangements.[106] Most recently, in cases like *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*[107], *Seila Law*, and now *Collins* and *Arthrex*, it has deployed a simplistic theory of plebiscitary presidentialism to justify expansive claims to executive control, while ignoring parallel claims about Congressional representation.[108]

Together, these tendencies lead to a modern "separation of powers jurisprudence [that] favor[s] the President over Congress."[109] Where parties claim the president may have overstepped his bounds, the Court rarely adjudicates the case, leaving the president with a free hand. But where the question is about congressional power, and especially Congress's attempt to restrict the executive, the Court overlooks its justiciability concerns and tends to rule against the legislature. The reasons it gives are disparate. And the tools it uses to reach its aims are varied, including the asymmetric weighing of evidence and the odd deployment of democratic theory. But the results are the same: the "erosion of the rule of law and [the] dismantling of any of the checks and balances that might constrain presidential power."[110]

105. *See id.* at 82 (discussing Japan Whaling, 478 U.S. 221 (1986)); *id.* at 83 (discussing Franklin v. Massachusetts, 505 U.S. 788 (1992)); *see also id.* at 84 ("The Court's failure to give credence to congressional views in presidential power cases has largely defeated the rule of law in foreign affairs. And it has unraveled many checks on the President's abuse of his authority domestically.").

106. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 85 (discussing INS v. Chadha, 462 U.S. 919 (1983)).

107. 561 U.S. 477 (2010)).

108. *See id.* at 88–89; *see also id.* at 89 (observing how the contemporary Court "sometimes employs *McCulloch*'s means/ends reasoning to create implied presidential power" but rarely uses it to "condone exercises of congressional power"). On the growing importance of democratic theory to recent Roberts Court decisions, *see* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L. J. 371 (2022).

109. *See* DRIESEN, *supra* note at 8, at 90.

110. *Id.*

II. THE DOCTRINE OF DEMOCRATIC DECONSOLIDATION

As Part I shows, Driesen's account is largely compatible with the standard story of the growth of the executive. Indeed, he enriches that narrative by showing how decisional law has apparently put formal bounds on the president in times when executive power was limited and given the executive a freer hand when the presidency has been powerful.

The place of causation in Driesen's narrative is not clear, however. Moreover, there are reasons to believe that, while doctrine helps constitute executive power and has contributed to its growth, other factors have been the main drivers of the development of the presidential office. To put it plainly: despite the doctrine, executive power was not constrained in the past because of Driesen's anti-tyranny principle; nor has the breakdown of the anti-tyranny principle caused the expansion of executive power. Institutions, culture, and politics played starring roles in bounding the president in the past and speeding its growth recently.

This Part explores the weaknesses in Driesen's narrative. It begins by suggesting the limits of an account focused on decisional law. Such a story has a hard time explaining key past developments in presidential power. And it may make current law look worse than it actually is.

Moreover, focusing on doctrine at the expense of other developments misses an important way law has contributed to the growth of presidential power: by shaping institutional relations, culture, and politics. Other scholars have emphasized the importance of these factors for preserving democracy in the United States and abroad. Attending to them suggests a different way that law may contribute to democratic breakdown—and so could potentially safeguard democracy.

A. The Pros and Cons of Doctrinal History

Driesen's book enriches the standard narrative of the growth of the presidency by bringing doctrine back into the story. But this enrichment comes at a price. Driesen's account risks overemphasizing the historical importance of case law. The result is to make doctrine seem more responsible for the dangers posed by an empowered executive than it actually is.

1. Pros: Bringing the Doctrine Back In

For generations now, scholars have lamented the way studies of the presidency have focused on the personality of individual executives.[111] Recently, presidential studies has taken an institutional turn, replacing chronicles of individual officeholders with research on the office itself.[112] These welcome developments have generated rich insights into the changing place of the presidency in American government.[113] And they have spurred productive debate over the growth of the office's capacities and attendant questions of periodization and contextualization.[114]

This work has mostly focused on executive branch institutions. Court decisions have remained largely secondary. Where the standard narrative has incorporated decisional law, its attention has usually been limited to canonical separation of powers cases.

Driesen takes a different tack. He shows how court decisions in a range of different fields track and even constitute changes in presidential power. So, for example, while the standard story recognizes the overall weakness of the 19th century presidency, it has not, to my knowledge, emphasized the way courts policed the president's war powers as a check on the office. Driesen does, showing how in some important court cases the 19th century judiciary cabined the president's war-making ability.

Similarly, emerging accounts of the post-Reagan presidency have discussed the office's new powers and connected them with the rise of unitary executive theory and some formalist separation of powers cases. But scholars have not, to my knowledge, emphasized the connection between these developments and the Supreme Court's evolving use of the passive virtues. Driesen corrects this oversight, showing how the Court has deployed greater solicitude towards the presidency and greater scrutiny of congressional actions to give the president a freer hand.

111. *See* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1392 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010)); *see also* RECAPTURING THE OVAL OFFICE (Brian Balogh & Bruce J. Schulman, eds., Cornell Univ. Press ed. 2015).

112. *See* RECAPTURING THE OVAL OFFICE, *supra* note 111. On distinguishing between the office holder and the office, *see generally* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

113. *See, e.g.*, DEARBORN, POWER SHIFTS, *supra* note 2.

114. For one account, see Katz & Rosenblum, *Progressive Presidency*, *supra* note 41.

In both these examples, the doctrines Driesen highlights simultaneously confirm extant understandings of the presidency and help constitute the powers of the office.

Legal historians have known that the 19th century presidency was weaker. Driesen confirms this by showing how it was cabined by the courts. And those court decisions limiting presidential war power help constitute the weakness of the 19th century presidency. The 19th century president had more limited war powers, in part because of court decisions.

Similarly, legal historians have known that the 21st century executive is more powerful—perhaps even, in one influential and provocative formulation, "unbound"[115]—especially in matters related to the "Global War on Terror." Driesen confirms this understanding through the court cases he analyzes. And those doctrines again help constitute the 21st century president's power. The contemporary executive is more powerful and free from constraint in part because of the Supreme Court's deference doctrines.

By drawing attention to decisional law, Driesen thus confirms and enriches the standard story of the development of the American presidency.

2. Cons: Lack of Explanatory Power

Driesen's focus on case law has some significant drawbacks, though. In particular, a judicial doctrine of "anti-tyranny," howsoever implicit, simply cannot account for some important developments in the office of the president.

So, for example, while institutional scholars of the executive have stressed the weakness of 19th century presidents, that weakness was not primarily a result of court decisions. Jackson's response to Marshall's ruling on Cherokee removal may be anecdotal, but the reality it points to is undisputed: the checks on Jacksonian presidentialism came not from the Supreme Court but politics.

Moreover, there is room to question whether Americans really were consistently committed to an "anti-tyranny" principle in their politics or the institutional relationships they designed. Citizens in the early republic were regularly infatuated with the appeal of the "man on horseback."[116] And while the extreme actions of Jackson and Lincoln were subsequently reigned in, the possibility of

115. POSNER & VERMEULE, *supra* note 7.

116. *See* DAVID A. BELL, MEN ON HORSEBACK: THE POWER OF CHARISMA IN THE AGE OF REVOLUTION (2020).

charismatically legitimated individual rule persisted as a threat to the party-based, Congress-controlled executives of the 19th century.[117]

Perhaps we should understand the rise of the Progressive Era presidents, who could sound awfully man-on-horseback-ish, as the belated triumph of this older tradition?[118] Certainly the empowered executive of the 20th century could flirt dangerously with one-man rule. The parallels between New Deal America, Fascist Italy, Nazi Germany, and the Stalinist USSR have been oft remarked on by scholars.[119] This is not to say Roosevelt was ever at risk of becoming a dictator, despite what his critics charged. But it was not the courts that stopped him.[120]

When, in the second half of the 20th century, the Supreme Court did apply itself to policing separation of powers in the name of protecting freedom, it did so quixotically, issuing opinions with a remarkable mismatch between rhetoric and reality.[121] In those cases, it seems to have been motivated more by Cold War and post-WWII "anti-totalitarian" anxieties than a Founding-era commitment to anti-tyranny.[122]

In other words, as a historical matter, it does not seem that Driesen's juridical anti-tyranny principle has done much work in the development of the American executive, at least through court-

117. For a still thrilling contemporaneous statement, see Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (January 27, 1838).

118. *See* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 68 (1908) ("When [the president] speaks in his true character, he speaks for no special interest. If he rightly interprets the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and caliber. Its instinct is for unified action, and it craves a single leader. It is for this reason that it will often prefer to choose a man rather than a party. A President whom it trusts can not only lead it, but form it to his own views.")

119. *See, e.g.*, WOLFGANG SCHIVELBUSCH, THREE NEW DEALS (2006); KIRAN KLAUS PATEL, THE NEW DEAL: A GLOBAL HISTORY (2016); JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017); James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747 (1991).

120. *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 58–95 (2013).

121. Note, for instance, the grand rhetoric about freedom deployed in INS v. Chadha, 462 U.S. 919 (1983) and Bowsher v. Synar, 478 U.S. 714 (1986).

122. *See* Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996) ("the desire to articulate principles that distinguished America from the Soviet Union and Nazi Germany contributed to a long line of liberal Supreme Court decisions from the Second World War through the Warren era.").

enforced doctrine. Where the president was weak, it seems to have been a matter of institutional factors more than doctrine. And where the presidency was strong, the causes were again more institutional than legal. Doctrine surely helps constitute executive power. But it is not driving developments. Meanwhile, where courts did check presidential power in the past, they do not seem to have been motivated by Driesen's notion of anti-tyranny.

B. The Problems with Doctrinal Fears Today

Driesen encourages contemporary judges to take up his anti-tyranny principle despite all this, as a way of checking presidentialism. But, supposing jurists were to follow Driesen's suggestion, it might not do much good. In any case, they have already checked presidentialism on occasion without it. And, while scholars may be right to worry about the trend of Article II doctrine today, the situation is not yet as bad as Driesen fears.

As a threshold matter, the maximal appeal of Driesen's principle is limited. Presumably Driesen's audience is originalist judges. Driesen's conceptual reconstruction could provide them with a resource to draw on to cabin executive power. But current originalist judges' principled commitment to originalism is suspect.[123] They have already ignored reams of scholarship on original meaning in many fields of law in favor of stylized history that enables them to reach their preferred political outcomes.[124] On the subject of presidential power, much scholarship has already sought to establish

123. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 103–21 (2018).

124. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224 (2020) (Kagan, J., concurring in part); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CON. L. 323 (2016); Jed Shugerman, *A Reply to the Unitary Executive Theorists on the Misuse of Historical Materials*, YALE J. ON REGUL. (Feb. 21, 2022) https://www.yalejreg.com/nc/a-reply-to-the-unitary-executive-theorists-on-the-misuse-of-historical-materials-by-jed-shugerman/; Eric Segall, *The Supreme Court Is About to Get a Lot Less Honest About Its Fake Originalism*, SLATE (July 16, 2018), https://slate.com/news-and-politics/2018/07/the-supreme-court-is-about-to-get-less-honest-about-fake-originalism.html. For arguably the most egregious example of this problem, Justice Scalia's opinion in *D.C. v. Heller*, see Nelson Lund, Symposium, *The Second Amendment and the Right to Bear Arms after* D.C. v. Heller: *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344–45 (2009). On the myriad historical problems with originalist interpretation, see JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (forthcoming) (manuscript in author's possession).

the historical, originalist *bonafides* of limits on executive power, to no avail.[125]

In any case, as was true in the post-WWII years, the contemporary judiciary has not needed Driesen's anti-tyranny principle to cabin executive power where it has wanted to. In some recent cases, the courts have sought to bound the presidency in the way Driesen would like. But they have done so without recourse to Driesen's concepts or his fears.

Thus, the Supreme Court relied on traditional principles of administrative law to prevent Trump from adding a question about citizenship to the 2020 census.[126] The decision was particularly striking from the perspective of fears about court-enabled anti-democratic executive action. A question about citizenship had previously been included on the census, and the Court recognized that the executive did indeed have the power to add such a question. Moreover, it was widely believed that adding the question would have helped entrench Trump's party in power. It was, then, just the kind of action an empowered executive might be expected to take to subvert democracy and that a passive Court should have ratified—the very danger Driesen feared. Yet the Supreme Court ruled against the Trump administration and cabined the executive. And it did so without invoking the Framers' commitment to fighting tyranny or Driesen's anti-tyranny principle.

Similarly, and more recently, the federal courts have shown a remarkable suspicion of presidential power in litigation related to emergency measures that the executive has pushed in response to the COVID-19 pandemic. Not long ago, the Supreme Court invalidated the Biden administration's attempt to impose an emergency mask-or-test requirement.[127] And a federal district court issued an injunction

125. See, in a very large and growing field, Christine Kexel Chabot, *Interring the Unitary Executive*, NOTRE DAME L. REV. (forthcoming); Blake Emerson, *The Departmental Structure of Executive Power*, 38 YALE J. ON REGUL. 90 (2021); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 1119 COLUM. L. REV. 1169 (2019); Shane, *supra* note 124.

126. *See* Dep't of Com. v. New York, 139 S. Ct. 2551 (2019); *see also*, Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L. J. 1748, 1785–88 (2021); *but see* Emerson, supra note 125, at 159-163 (arguing that the case did not follow traditional principles of administrative law). Driesen discusses the case very briefly. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 128.

127. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 736 (2021).

preventing the Biden administration from taking COVID-19 vaccination status into account in making military deployment decisions.[128] (The injunction survived an appeal to the Fifth Circuit,[129] and was only stayed by the Supreme Court, months later, over the objections of three Justices, with a fourth Justice writing a solo concurrence.[130]) These are executive actions at the heart of presidential power: the former is the kind of emergency action Driesen believes courts are loathe to second-guess; the latter is akin to the national security activities in which federal courts usually give the president tremendous deference. Yet, in both situations, federal courts interposed themselves, blocking the executive's actions. In other words, American courts are even now actively policing executive branch claims to sweeping emergency and military powers. And they are doing so without invoking anti-tyranny.

This suggests that Driesen's doctrinal narrative may be missing some important strands. Doctrine may not have left the president with as free a hand as he thinks. And the courts have not needed an anti-tyranny principle to invalidate presidential action with which they disagree.

Of course, these individual counter-examples do not give the lie to the dominant tendency Driesen has identified. In recent cases, especially *Seila Law*, *Collins*, and *Arthrex*, the Supreme Court has shown real eagerness to expand executive power. The Biden administration has taken advantage of the Court's license, relying on its decisions to exercise powers over government officers it did not previously claim, showing how here again doctrine both tracks and helps constitute expanding executive power.[131]

But the dreaded worst is yet to come and may not come at all. *Arthrex* assuredly raises the prospect of a unitary executive, with a president who exercises direct control over every non-legislative and non-judicial officer.[132] In the last days of his administration, Trump tried to realize this awful vision by executive order, taking action against the civil service that would have devastated the impartial

128. *See* U.S. Navy Seals 1-26 v. Biden, 2022 WL 3443 (Jan. 3, 2022).

129. *See* U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336 (5th Cir. 2022).

130. *See* Austin v. U.S. Navy Seals, 1-26, 142 S. Ct. 1301 (2022).

131. *See, e.g.*, Memorandum from Dawn Johnsen, Acting Assistant Att'y Gen., on the Constitutionality of the Commissioner of Social Security's Tenure Protection (July 8, 2021).

132. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). On the connection between unitary executive theory and assault on civil service, *see* BELEAGUERED REPUBLIC, *supra* note 77.

operation of the American state.[133] Perhaps it would have happened had he not been forced from power.

The cases so far have stopped short of catastrophe, though. Even *Myers v. United States*, a foundational opinion for unitary executive theorists, sought to protect the civil service, and the decisions in *Seila Law* and *Arthrex* have not fundamentally restructured the government any more than the Court's earlier decisions in *Free Enterprise Fund* and *Lucia v. Securities Exchange Commission (SEC)*[134] did. The Court's formalism has prepared the ground for something terrible. But the terrible has not yet occurred.

In the meantime, the executive may be less of a threat to democracy than Driesen fears. In her recent *Harvard Law Review* foreword, Cristina Rodríguez argues that concerted executive action is an important part of contemporary democratic government and that the modern law of executive power enhances democracy rather than undermines it.[135] "Regime change," led by shifts in the presidency, translate evolving preferences into state action and policy. While these changes depend on an energetic president, they involve the whole of the executive branch, and include many administrators who are not mere extensions of the personality of the chief executive. In this way, Rodríguez argues, contemporary presidentialism is both less presidency-centered and more democracy-promoting than its critics maintain.

Of course, some scholars—including my co-authors and I in forthcoming work—are less sanguine than Rodríguez about the realities of contemporary presidentialism.[136] Rodríguez's sophisticated argument updates then-professor Elena Kagan's pathbreaking article on *Presidential Administration* and resonates with now-Justice Kagan's points in dissent in *Seila Law* and *Arthrex*. But those arguments have, it seems to me, been rejected by a majority

133. *See* Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020) revoked by Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021) (Trump's Executive Order on civil service reform) (revoked by President Biden during his first days in office). Note that Trump has renewed his call to reform the civil service. *See* Donald J. Trump, Speech at Political Rally in South Carolina (Mar. 12, 2022) (calling for abolition of civil service protection).

134. 138 S.Ct. 736 (2018).

135. Cristina M. Rodríguez, *The Supreme Court 2020 Term: Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021).

136. *See* Ahmed, Menand & Rosenblum, *Tragedy*, *supra* note 34; s*ee also* Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39 (2021).

of the Court. They may represent the presidency we hope to have, rather than the one the law is building.

Nevertheless, Rodríguez's work suggests the possibility of a non-plebiscitary and pro-democracy defense of today's empowered executive.[137] It is a presidency that, despite its power, avoids courting dictatorship and uses its considerable authority to promote democracy instead of undermining it.[138]

The president, then, may not be quite as dangerous as Driesen fears. Contemporary doctrine may not be as bad as Driesen makes it out to be, at least not yet. And, if the president is dangerous, and contemporary doctrine is indeed bad, Driesen's anti-tyranny principle may not be necessary to address it.

C. The Causes of Democratic Decline

The biggest problem with Driesen's account is not his emphasis on doctrine, however. It is what flows from that emphasis. Even Rodríguez recognizes that the contemporary president can be a threat to democracy, under some circumstances. In this, she echoes worries that scholars of democratic decline have sounded for some time now. But the reasons the president can be dangerous are not simply about the absence of good doctrine keeping the president in check. Doctrinal solutions to presidential overreach are thus unlikely to protect democracy.

While democratic backsliding has been a subject of interest to some political scientists for many years, it has only recently attracted wider scholarly attention.[139] In the new literature, academics have refocused their attention away from military coups and *auto-golpes*, which have declined in incidence, towards the "deterioration of the qualities associated with democratic governance" even in formally democratic countries.[140] This includes decreases in the competitiveness of elections, restrictions on voting, and the erosion of accountability norms.[141]

Strong executives can contribute to this democratic backsliding in many different ways. Aziz Huq and Tom Ginsburg have stressed how executive centralization and politicization puts countries on the

137. *See* Rodríguez, *supra* note 135, at 73.

138. *See id.* at 10–11.

139. *See* David Waldner and Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 22 ANN. REV. POL. SCI. 93, 94 (2018); *see also id.* at 94–95.

140. *Id.* at 95.

141. *See id.*

slow road to democratic deconsolidation by undermining the institutions of liberal democracy.[142] Steve Levitsky and Daniel Ziblatt focus on how elected strongmen "captur[e] the referees, buy[] off or enfeebl[e] opponents, and rewrit[e] the rule of the game [to] establish a decisive—and permanent—advantage over their opponents."[143] Driesen, drawing from them and other work on democratic decline, worries about a strong executive "tilting the playing field through political control over prosecutions and partisan rigging of elections," shrinking the space for public debate, and perhaps, taking advantage of emergencies or engaging in military adventurism to justify restrictions on the rights necessary for liberal democracy to thrive.[144]

Importantly, the literature on democratic decline has stressed that these are merely mechanisms of backsliding, not its underlying causes. Democratic governments do not backslide because an authoritarian strongman comes in and undermines democracy. Rather, this is the way that a backsliding government backslides. Countries that suffer executive-led democratic decline are already in trouble by the time they elect a would-be strongman with anti-democratic tendencies. The executive's anti-democratic actions result from and further exacerbate a process of democratic backsliding that is already in motion—that, indeed, likely led to the would-be strongman's election in the first place.

The causes of that underlying democratic backsliding are diffuse and rooted in culture. As Jedediah Britton-Purdy has observed in a review of some leading works on democratic decline, "[t]he[ir] unifying idea is that liberal democracy is not self-sustaining" and that its current breakdown is attributable to the erosion of democratic norms.[145] Levitsky and Ziblatt highlight the norms of "mutual toleration" and "institutional forbearance"—respect for political rivals' "right to exist, compete for power, and govern," and restraint

142. *See* GINSBURG & HUQ, *supra* note 6, at 71–72.

143. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 92 (2018).

144. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 122.

145. Jedediah Britton-Purdy, *Normcore*, DISSENT, (2018), https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy. Britton-Purdy notes that this "crisis of democracy" literature champions the "principled political center against the extremes of left and right," sometimes described as "populist." *Id.* Not all works on populism traffic in the same norm-based analysis that the crisis of democracy literature Britton-Purdy analyzes. *See, e.g.*, JAN-WERNER MÜLLER, WHAT IS POPULISM? 7–9 (2016) (emphasizing populism's opposition to pluralism); NADIA URBINATI, DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE, 128-29 (2014) (highlighting populism's opposition to the institutions of liberal democracy).

in using the prerogatives of power when in charge[146]—which they believe constitute the "guardrails of democracy."[147] Other scholars have emphasized other features of democratic culture.[148] What these works share is more important than what differentiates them: a conviction that democracy rests on democratic culture more than the observance of a specific set of formal rules.

The erosion of democratic culture can eventually manifest itself in the breakdown of formal rules. But it does not have to. As Levitsky and Ziblatt note, many actions that lead to democratic backsliding can be undertaken piecemeal and with the appearance of formal legality.[149] Nancy Bermeo has noted the odd paradox that today democratic backsliding happens through the same formal legal mechanisms that were once promoted by pro-democracy advocates as ways to entrench democratic governance.[150] Democracy can backslide without the law changing.

By the same token, the drivers of anti-democratic pathology are not legal, but cultural and political. When it comes to the United States, most analysts agree that the underlying cause of norm erosion has been increased partisan polarization.[151] This in turn is connected to deep features in American political economy, including rising inequality, and specific political developments, including greater ideological sorting and the relative decline of party elites. Many commentators identify the rightward lurch of the Republican Party since the Gingrich Revolution of 1994 as a key development, which set in motion a cycle of escalating norm-breaking that profoundly eroded political elites' commitment to upholding the democratic guardrails.

If this literature's account of backsliding is correct, a narrow focus on doctrine is unlikely to fix things. Doctrine is a trailing indicator of cultural breakdown, not a leading indicator of democratic decline. Championing new formal limits on presidential power would

146. LEVITSKY & ZIBLATT, *supra* note 143, at 102, 106.

147. *Id.* at 97.

148. *See, e.g.*, YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER & HOW TO SAVE IT, 252 (2018) (noting that the "moral foundations of our political system are far more brittle than we realized" and flagging, among other things, the importance of "Civic Faith"); TIMOTHY SNYDER, THE ROAD TO UNFREEDOM, 278–79 (2018) (emphasizing the importance of truth-seeking, which Snyder sees as connected to economic and institutional realities).

149. *See* LEVITSKY & ZIBLATT, *supra* note 143, at 92.

150. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 7 (2016).

151. *See* LEVITSKY & ZIBLATT, *supra* note 143, at 220.

not address the underlying causes that made the president into a threat to democratic government in the first place.[152]

III. HOW TO USE THE LAW TO SAVE DEMOCRACY

Taking the insights of the literature on democratic decline seriously leads us to reconsider Driesen's proposals. Driesen fears that a powerful president will use his authority to destroy democracy and hopes that law will keep the president in check. But if the causes of democratic decline are ultimately extra-legal, then doctrine might not be efficacious at preventing democratic backsliding.

This does not mean that law has no role to play in protecting democracy, however. To protect democracy, we have to shore up democratic culture. Law can help protect the institutions, norms, and politics that produce a healthy democracy, as Driesen himself recognizes.

How law might do this remains, at this point, somewhat speculative. Defensively, legal reforms might discourage dangerous presidentialism by channeling political will away from the executive. It could do this by, for example, re-empowering Congress or embedding non-presidential forms of democratic responsiveness into the administrative state. Reformers might also explore laws that address the underlying causes of democratic decline, such as polarization. Such reforms, while apparently far afield from the president's immediate powers, might do more to address the dangers of executive power than ineffective doctrinal fixes.

A. The Limitations of Doctrinal Reform

To guard against the dangers of executive overreach, Driesen hopes to put new doctrinal checks on the executive. As we saw, the core of his account of the growth of presidential power is the loosening of doctrines that allowed for meaningful court review of executive action. Since, for Driesen, the president became a threat to democracy as a result of the dismantling of formal legal checks, new court-enforced legal checks should ensure that the president remains harmless.

Thus, for example, to counter the risk that the President might use the supervision of prosecutors to pursue improper ends, the Department of Justice could be given some degree of insulation or

152. *Accord id.* at 99 ("[e]ven well-designed constitutions cannot, by themselves, guarantee democracy.").

even independence.[153] Or, as Driesen frames it in more general terms, to counter an autocratic president's urge to "tilt the electoral playing field and shrink the public space," we could ensure that "the President and the rest of the executive branch remain subservient to law."[154]

Driesen's proposed reforms extend to a host of doctrinal suggestions.[155] These include broad principles, such as encouraging judges to "tak[e] democratic decline seriously," and specific recommendations, including worrying less about error costs and more about presidential bad faith.[156] Acting on such guidance, he believes, will lead courts to democracy-enhancing and presidency-constraining outcomes by "limiting the advance of the unitary executive theory, improving presidential accountability, and limiting justiciability doctrines' tendency to aggressively protect the President from judicial review."[157]

The literature on democratic decline explored in Part II suggests that this approach will be inadequate. That literature rejects the premise on which Driesen's reform proposal rests. Law is not the reason American democracy is in decline. While the legal doctrines Driesen identifies, along with others, such as the Supreme Court's gutting of the Voting Rights Act in *Shelby County v. Holder*[158] and federal courts' increasingly unprincipled interventions (and non-interventions) in partisan gerrymandering cases,[159] may have speeded some aspects of democratic backsliding, they are not its cause. The causes are increases in partisanship, inequality, and further exacerbation of "constitutional hardball," among other factors.[160] These and other developments are the underlying reasons that we have

153. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 157–58; a*ccord.* BAUER & GOLDSMITH, *supra* note 7.

154. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 139.

155. *See id.* at 140.

156. *Id.* at 140, 156.

157. *Id.* at 156.

158. 568 U.S. 1006 (2012).

159. See e.g., Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Moore v. Harper, 142 S. C.t 1089 (2022); Merril v. Caster, 142 S. Ct. 1105 (2022); Singleton v. Merril, No. 2:21-cv-1291-AMM (N.D. Ala. Jan. 24, 2022); Robinson v. Ardoin, No. 22-211-SDD-SDJ (M.D. La. June 6, 2022).

160. *See* Mark V. Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). Of course, these causes can be traced back further, to even deeper causes, such as, perhaps, the failure to plan for rust-belt deindustrialization and adequately support private-sector unionization. For an evocative, impressionistic, journalistic account along these lines see GEORGE PACKER, THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA (2014).

had democratic decline—and so now face a democracy-threatening growth in presidential power—not changes to doctrine.

B. Law and the Creation of Democratic Culture

Law has played a role in creating the underlying conditions for democratic backsliding, however. That is to say, law has been implicated in creating the culture that has led to democratic decline now and, in the past, sustained a culture that perpetuated democracy. To protect democracy, then, legal reforms could target the underlying culture, rather than focus narrowly on presidential power.

Admittedly, a leading strand of analysis has actively marginalized the importance of the law to this whole debate. Levitsky and Ziblatt, whose book *How Democracies Die* was an international best-seller, expressed serious skepticism that law would have any significant role to play in protecting democracy.[161] For them, the process of norm-creation which sustains democracy owes more to agreements among elites, party-behavior, and society-wide collaborations, than to law.

An older tradition of scholarship, however, has recognized law's centrality to creating democratic institutions and preserving democratic culture. Scholars such as Carl Friedrich, Karl Loewenstein, and Gerhard Leibholz, writing against the backdrop of the collapse of the Weimar Republic, tended to foreground legal issues in explaining democratic deconsolidation.[162] And they turned to law to strengthen democracy, particularly the idea of a "militant democracy" that would have laws enabling it to resist internal breakdown.[163] That tradition remains alive today in the work of some

161. See LEVITSKY & ZIBLATT, *supra* note 143, at 222 (recognizing that while some changes to election law "might mitigate partisan enmity," "[t]he evidence of their effectiveness . . . is far from clear").

162. *See* Augustin Simard, *La Raison D'État Constitutionelle*, 45 CAN. J. POL. SCI. 163 (2012). Friedrich and Loewenstein both became respected professors of political theory in the United States—Friederich at Harvard, Loewenstein at Amherst. *See id.* at 175–76, 169. Leibholz may be less well known to American audiences; on him, *see* Manfred H. Wiegandt, *Gerhard Leibholz*, *in* JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH CENTURY BRITAIN (Jack Beatson & Reinhard Zimmermann, eds., 2004).

163. *See* Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 430–31 (1937); *cf.* Carlo Invernizzi Accetti & Ian Zuckerman, *What's Wrong with Militant Democracy?,* 65 POL. STUDS. 182, 184–85 (2017) (crediting Loewenstein with coining the theory's name but observing that it was already elaborated in the work of his predecessor Carl Schmitt); Simard, *supra* note 162, at 169 (observing that Loewenstein's "militant democracy" is in fact quite different from the "streitbare Demokratie" that helped re-found the postwar German Bundesrepublik).

legal scholars focused on democratic decline, such as my colleague Samuel Issacharoff.[164] In his book *Fragile Democracies*, he indicts "[t]he lodestars of scholarly literature" for "either fail[ing] to predict, or severely underestimat[ing], the rise of constitutionalism and independent judiciaries" as tools for institutionalizing democratic governance.[165]

In this tradition, the law does not protect democracy by simplistically imposing limits on presidential power. Rather, it seeks to institutionalize democratic culture. It does this by protecting the institutions of democratic governance and by helping create norms and politics conducive to a healthy democratic society.

Intriguingly, in the last substantial section of his book, Driesen seems to recognize this culture-shaping aspect of law. There, he engages directly with Eric Posner and Adrian Vermeule's provocative argument that we should abandon our "tyrranophobic" legal impulse.[166] Their counsel, he observes, ignores an important function of law: the way it "helps shape politics."[167] We need to consider the role of law not simply in creating executive accountability but in shaping the political arena.

Driesen sees this as a matter of information forcing. "Judicial decisions . . . can help check autocracy" by providing "reasonably objective information about the legitimacy of presidential action."[168] This in turn can inform voters and political elites about the president.[169] Given America's "legalistic culture," judicial pronouncements on executive conduct could have significant ramifications for the political legitimacy of executive action.[170] The law can thus help get important information to the public in a way that affects politics.

This is one way that the law has an influence on political culture. But it is not the only one. To use law to save democracy, we should focus on ways, like this, in which law can contribute to creating a healthy democratic culture.

164. *See* Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1408–09 (2007).

165. SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 9 (2015).

166. *See* POSNER & VERMEULE, *supra* note 7.

167. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 171.

168. *Id.* at 171–72.

169. *See id.* at 172.

170. *See id.* (discussing Rick Pildes' finding that perceptions of illegality influenced the elections of 2006 and 2008).

C. Towards a Legal Reconstruction

Just as there is no single, extra-legal cause to democratic backsliding in the United States, there is unlikely to be one single legal reform that would restore (or, better, create) a healthy American democratic culture. In light of Driesen's emphasis on the dangers of presidential power, this Article concludes by looking to the extra-legal factors that made the president into a potential threat to democracy and looks to legal changes that might address those underlying factors.

The standard story of the growth of presidential power canvassed in Part I, enriched by Driesen's doctrinal interventions, provides a focus for analysis. The Court, like American legal elites in the post-Reagan era, has been highly suspicious of Congress's capacity to govern.[171] It has followed law professors on the left and right in embracing a thinned out conception of democratic legitimacy rooted in plebiscitary presidentialism.[172] The tendencies that led American government to become more presidency-centered over the course of the 19th and 20th centuries have only accelerated, as a partisan political environment and polarized Congress leave presidents who had promised far-reaching policy programs with few tools to implement them besides their supervision of administrative actors. This is the emerging governance reality that the Court's executive-enhancing decisions have accommodated and helped further.[173]

Recognizing law's culture-shaping role leads us to ask: what role has law played here, in creating this world? The answer is not simply, at the first order, that it has made the president less accountable. Rather, at the second order, it has made the president an especially effective vector for governance in an era when other institutions—especially Congress—have been less efficacious. Law has made presidentialism a successful governance strategy.

The first-order and second-order effects of law here are of course related. A hard-to-check president is an attractive agent for realizing policy, especially when other policy vectors are clogged with veto gates, captured by industry, hampered by court review, or gridlocked

171. *See* Ahmed, Menand, & Rosenblum, *Tragedy*, *supra* note 34; Beau J. Beauman, *Americana Administrative Law*, 111 GEO L.J. (forthcoming 2023).

172. *Compare* Emerson, *supra* note 125, *with* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 8, at 172 (noting that elections alone are not enough to constrain presidential power or realize democracy). This is part of what makes me worry that Rodríguez's work may be more hopeful than realist.

173. For separation of powers law as the accommodation of emerging governance relations, *see* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020).

by entrenched interests. Making policy through the president is "cheap" when the law has aggrandized executive power. This, in turn, encourages would-be policy makers to focus their attention on the president, reinforcing presidentialism.

But law encourages presidentialism in other ways too. Administrative law has privileged forms of top-down control over community-engaged decision-making, reinforcing hierarchical conceptions of government action.[174] The law of the political process and campaign finance law have exacerbated the extremism and partisanship that has led many of our institutions into gridlock.[175] The absence of legal reforms contributes to cramping Congress's governance capacity and allowing the judiciary to further extend itself.[176] In these and other ways, the law helps form a polity predisposed to presidentialism and makes governance by the executive an obvious choice.

To counter presidential aggrandizement through the law, we need to use the law to transform this underlying reality. We need to take a page from the democratic theorists of yore and think about the way the law shapes mores and habits, both directly and through the institutions it sets up.

Some scholars have already taken up this challenge, although rarely in these exact words. For example, in their recent article on the history of separation of powers law, Niko Bowie and Daphna Renan call for rejecting the juristocratic regime we live in now and returning to an older, more democratic "republican" conception.[177] Similarly, Jon D. Michaels and Blake Emerson have recently urged progressives to "abandon[] presidential administration" and disperse power

174. *See* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L. J. 1213 (2020); Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT L. REV. 1 (2020).

175. *See* Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341 (2020); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L. J. 804 (2014).

176. *See* reforms proposed by PRAKASH, THE LIVING PRESIDENCY, *supra* note 7; Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

177. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2025 (2021). On this conception of "Political Constitutionalism," see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (2007).

throughout the government instead.[178] We need to recognize the many weaknesses of presidential unilateralism, they note, including its dangerous potentialities.[179]

Bowie & Renan and Michaels & Emerson each have their own prescriptions for how to do this. The former look to a "political constitutionalism" to reclaim self-government; the latter champion "civic governance" as the key to building a responsive democratic state.[180] Notably, both sets of authors seek to craft laws to realize governance in more authentically democratic and less dangerous ways than the regime we have now.

This project might take us far afield from laws that deal directly with executive power. My colleague Rick Pildes, who noted the importance of the culture- and politics-shaping aspects of law in thinking about presidential power over a decade ago already, has focused his attention more recently on laws that might reduce partisanship.[181] If, for example, our Congressional primaries produced less partisan candidates, they would lead to less divided legislatures, which might in turn be more functional bodies.[182] This would tend to make the president less attractive, in relative terms, as an agent of governance, thus changing our culture of presidentialism. In this way, the law of something seemingly far away from presidential power—how we select representatives in Congressional primaries—might turn out to have important consequences for bounding presidential power and creating a healthy democratic culture.

Such reforms hold the promise of a democratic legal reconstruction: law not to check the president, but to discourage presidentialism. Driesen's account points the way and helps us

178. Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104 (2021).

179. *See id.* at 115 ("This brings us to our fifth objection: Presidential administration is downright dangerous.").

180. Bowie & Renan, *supra* note 177; Emerson & Michaels, supra note 178, at 105.

181. *See* Richard H. Pildes, *How to Keep Extremists Out of Power*, N.Y. TIMES (Feb. 25, 2021) https://www.nytimes.com/2021/02/25/opinion/elections-politics-extremists.html.

182. For an example of how this might be done, see Richard H. Pildes, *More States Should Do What Alaska Did to Its Elections*, N.Y. TIMES (Feb. 15, 2022) https://www.nytimes.com/2022/02/15/opinion/alaska-elections-ranked-choice.html.

appreciate how significant the stakes may be. Nothing less than the future of liberal democracy is in the balance.

CONCLUSION

Driesen's *Specter of Dictatorship* makes a valuable contribution to the literature on the growth of presidential power. The main trend in that scholarship has emphasized institutions at the expense of doctrine. Driesen brings doctrine back in, highlighting less appreciated connections and showing how law helped constitute the presidency's evolving powers. But Driesen's account has some limits. His privileging of doctrine at the expense of institutions makes it difficult to explain some of the developments he notes.

It also leads him to champion reform proposals that may be ineffective. Most of Driesen's recommendations for saving democracy revolve around reversing doctrinal shifts that he believes led to executive aggrandizement. Since changes in doctrine helped unleash the president, it seems, changes in doctrine might cabin the executive anew. The literature on democratic decline, however, suggests that cultural, political, and institutional factors matter more than law in preserving democracy. If the real drivers of historical change have been norms and institutions, doctrine on its own is unlikely to be efficacious.

This does not mean law has no place in protecting democratic government from the dangers of an overreaching president, however. Rather than look to law for its first-order, conduct-shaping prescriptions, we need to appreciate its second-order norm-shaping and institution-building effects. Taking this lesson to heart, we should embrace legal reforms that go beyond cabining the executive to discouraging executive government.

Driesen's work anticipates this direction for reform in its suggestion we attend to the role of law in shaping politics. And it exposes the stakes at play through its attention to the dangers presidential government poses to democracy. We do well to heed his alarm, even as we take up his invitation.