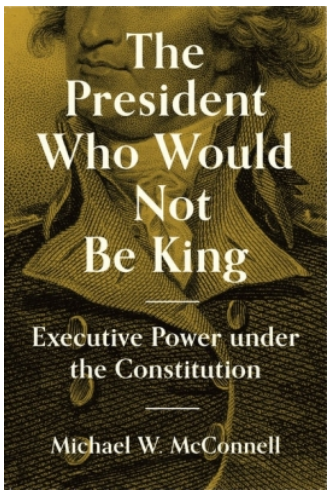
Book Review: The President Who Would Not Be King: Executive Power Under the Constitution by Michael McConnell

In **The President Who Would Not Be King: Executive Power Under the Constitution***, Michael McConnell explores presidential power and its limits under the Constitution.* **Jeffrey K. Tulis** *gives an overview of the book, and discusses the merits and serious defects of its legalistic approach to presidential power.*

The President Who Would Not Be King: Executive Power Under the Constitution. Michael McConnell. Princeton University Press. 2020.



Michael McConnell has published an important new book that should be of interest to readers of LSE USAPP. **The President Who Would Not Be King: Executive Power Under the Constitution (Princeton, 2020)** is a very timely contribution to the scholarly and political conversation at this moment in American history.

In November 2018 McConnell, now a professor of law at Stanford, formerly federal appellate Judge McConnell, presented the *Tanner Lectures* at Princeton. The lectures were drawn from his then-forthcoming book. Four Commentators gave extended remarks: political theorist Eric Nelson, law professors Gillian Metzger and Amanda Tyler, and me. You can view the lectures and commentary **here** and **here**. Because McConnell based his lectures on the manuscript for this book, the *Tanner Lectures and Commentary* have not been published. What follows is a lightly edited version of my remarks, offered here as a review essay.

It is fitting that Professor McConnell presents the major themes of his forthcoming book at Princeton, because his study is a twenty-first century update of a classic by one of the greatest professors in Princeton's long history, Edward Corwin.

Corwin's book, **The President: Office and Powers** was the leading study of the presidency for two decades beginning in 1940. As political scientists and historians turned their attention toward the actual behavior of presidents, finding little help to explain it in the Constitution itself, Corwin's work was supplanted by others, most notably the influential **book** on presidential power by political scientist and former White House advisor, Richard Neustadt.

Using the Constitution to assess presidential behavior

The legalistic approach was sidelined — but not for long. When presidents seemed to misbehave or push their powers seemingly beyond acceptable democratic limits, Corwin himself and the perspective he represented were rediscovered – in Arthur Schlesinger's **Imperial Presidency** in the Watergate years, for example, and very recently as scholars and citizens worry about a so-called new imperial presidency, evident not just in the behavior of Donald Trump but also in the long post-World War II expansion of the use of unilateral powers by Presidents.

Professor McConnell shows that the Constitution offers a more coherent and a richer set of resources with which to judge presidential power and its proper uses than has previously been recognized, indeed that Article II is more coherent and serviceable than Corwin understood. He makes two impressive and, in my view, successful claims: 1) that Article II on the presidency is not as elusive or opaque as most legal scholars assume, but that it is rather a coherent and rich rendition of legal sources for and limits upon presidential power; and 2) that the most authoritative statement among jurists about separation of powers, about the relationship of presidential to legislative power under the Constitution – a schema outlined in 1952 by Justice Robert Jackson in his concurring opinion in the Youngstown steel seizure case – can and should be replaced by a more helpful schema, a more legally workable schema, based on McConnell's new and more coherent understanding of Article II.

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McConnell shows the intelligibility of the four sections of Article II of the Constitution. The first section which includes the vesting clause and the mode of appointment is very different from the vesting clause of Article I on the legislature and McConnell agrees with those, like Hamilton, that argue it contains a substantive grant of executive power and is not just the naming of an office. He shows the powers listed in Sections 2 and 3 and those implied in the vesting clause to be of three varieties: prerogative powers that a legislature cannot alter or countermand; residual powers, which can be altered or rejected because an executive can't exercise them at will if the legislature chooses to circumscribe or countermand them; and delegated power, which an executive can only properly exercise if positively granted and directed by the legislature. McConnell derives these conclusions mainly from an account of the history of the drafting convention, and from the founders' and his own reading of Blackstone. In McConnell's telling, traditional royal prerogatives of kings were divided with some assigned to the legislature and some to the president. Impressive aspects of his argument are moments where he seriously entertains arguments against his own position. For example, he makes stronger arguments against a substantive interpretation of the vesting clause than I have seen by those who actually favor the non-substantive point of view. In these moments, one can see why Professor McConnell was admired as a judge.

When I first read McConnell's lecture I was inclined to offer a few criticisms or suggestions to further the legalistic project on his own terms. For example, in the lecture Professor McConnell barely mentions that Section 3 of Article II is not really about powers but is rather about duties. Indeed, Article II begins with a comprehensive statement of *power*, the vesting clause (in Section 1), and closes with a comprehensive statement of *duty*, the take care clause (in Section 3) which itself is followed by the provision for impeachment and conviction for gross failures of duty (in Section 4). There is not much talk about duty in McConnell's lecture, though it is arguably more important than power, and is indeed a kind of source for power as well as a limit upon it. Although McConnell does discuss duty in his book, he does not give it much attention. While he does not ignore the topic, his neglect of it in these lectures fairly captures its significance for him in the book as well. McConnell's argument would be stronger if he had noticed and elaborated the path-breaking work on the structure of Article II by Gary Schmitt and Joe Bessette, especially **their account** of duties.

However, rather than getting into the details of his legalistic argument, let me just assert that it is a very good argument, that if Courts pondered and deployed it, we may well have better decisions and better opinions than we currently do on separation of powers matters, and that a more robust judiciary could mitigate many of the very serious problems of executive power today.

Legalism as a Cause of the Problem it Attempts to Solve

Since World War II, Presidents have not only exercised more power unilaterally, without the authorization of Congress, disputes about such uses of power have been increasingly taken to Courts. Courts have entertained separation of powers disputes that in previous centuries were not considered by the judiciary nor even brought to them by the political branches. In short, along with an allegedly growing imperial presidency, we have had an increasingly legalistic separation of powers system. In today's political world, the best we may be able to achieve is a better legalism. I think McConnell's overall approach is better than the extant overall legalistic approaches such as those based on Justice Jackson's schema. One should certainly welcome Professor McConnell's approach and argument as a way to *mitigate* the ill effects of presidential overreach and congressional abdication.

However, *the very same argument that may well mitigate the most serious political pathologies of our time is also a symptom of those same pathologies.* Legalism is not just a response to separation of powers disputes, it also represents a misunderstanding of the architecture of the constitutional order it is meant to arbitrate and it perpetuates the decay of Congress's own constitutional powers and resources. Because Courts have increasingly taken on disputes that previously were resolved between the branches themselves, congressional abdication can be understood as a by-product of judicial resolution as much as, or possibly more, than a result of presidential aggrandizement.

In the nineteenth century and well into the twentieth century, the Congress had a rich tradition of constitutional argumentation with Presidents over matters of dispute between them. Most Members of Congress are ignorant of this history and the whole legislature manifests a kind of collective amnesia about its own constitutional resources for its powers and its duties.

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One can see the outline of the formerly vibrant political understanding of separation of powers in *The Federalist*. The nineteenth century constitutional order was not just a different way of doing politics than we do it today – it was a different way generated from an innovative and sophisticated constitutional invention. That political order was consistent with a Constitution understood as a work of political architecture. It is very surprising that Professor McConnell gives very little attention to *The Federalist* in his lectures or in his book. He makes mention of selected passages to illustrate some of his points but he does not assess or respond to the basic argument of *The Federalist*.

The Federalist and the architecture of the Constitution

McConnell does highlight *one* very important observation by Madison in *The Federalist* that I revisit now as an introduction to a depiction of the architecture of agonism – the importance of conflict to politics – that Professor McConnell misses. About two thirds through today's lecture, Professor McConnell refers to a key passage in Federalist 37: Here is a slightly longer excerpt of the passage he mentions: "Experience has instructed us that no skill in the science of government has yet been able to discriminate and discern with sufficient certainty, its three great provinces—the legislative, executive, and judiciary. . . Questions daily occur in the course of practice which prove the obscurity that reigns in these subjects, and which puzzle the greatest adepts in political science." Madison is suggesting that there is a fundamental indeterminacy that attends the project of defining the natures of executive, legislative and judicial power. McConnell's response to this profound observation is to point out, rightly, that indeterminacy does not imply or entail that no distinctions can be made between legislative, executive, and judicial power. That is certainly true, and I am sure Madison would not disagree. But this is not the point that Madison wants us to take from his observations.

The strategy for defending the proposed Constitution, for Madison, is to turn defects or problems into instruments of solution. So, for example, if factions are a problem, he solves it by making more of them. If large size has historically made the establishment of democracy impossible, he makes a large commercial republic combined with the proliferations of factions a new, more ideal, setting for democracy.

Returning to our subject: *If theoretical or juridical definition of power is a problem because such definitions are contestable, Madison makes contest itself the solution.* The Anti-Federalists were confused and befuddled by this strategy. They complained that the Constitution followed no known model of separation of powers, wherein power was more clearly defined by its nature, separated, and assigned to appropriate institutions.

Instead, *The Federalist* defends a new kind of political architecture, one that we still call separation of powers but is actually something unprecedented, just as the Antifederalists asserted. If the traditional separation of powers model gives pride of place to powers and their definitions, and gives a supporting role to the institutions that would house those powers, the American invention reverses this. As defended and so well described in *The Federalist*, the Constitution gives pride of place to structures and gives overlapping and competing powers the supporting role. The interpretation of the meaning of specific clauses, including clauses about powers, should not be detached from the complex structural design in which they are embedded.

At the outset of his lecture, Professor McConnell points to a moment in the Federal Convention that highlights this – a famous pause when the national executive is proposed. The pause that ensued was prompted by a structural proposal – that the executive be one person, not two, or a few. A structural question, not a proposition about Blackstone, or about royal prerogatives, called the convention to attention and reflection.

The need for an energetic executive and for ambition to counteract ambition

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As described in *The Federalist*, the task was to supply energy to a government that lacked it under the Articles of Confederation. The Federalists described legislatures as a greater threat to an executive than a powerful executive would be to the legislature. One could say they sought to infuse a republic with attributes of monarchies more than they feared the prospect of monarchy. When the Antifederalists protested that an energetic executive was inconsistent with the genius of republican government, Hamilton responded that they better hope that were not true because an energetic executive is indispensable to the success of any republic. I want to stress here that *The Federalist* does not focus one's attention on the assignment and definition of power as the main source of this energy. Rather a more complex picture is depicted — an architecture of structures, dispositions, and powers – with more emphasis on structure than power. "The ingredients which constitute energy in the executive are unity; duration; adequate provision for its support, and competent powers" says *The Federalist*. The emphasis is on structure, the first three items of that list.

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Competing constellations of structures and powers make possible that the same policy or issue will be approached differently by institutions designed to vindicate different goals of democracy: popular will through deliberation for the legislature, security and steady administration through energy for the executive; and protection of rights through judgment, not will, by the judiciary. As Lincoln and numerous other smart students of American politics have pointed out, this tension-filled agonism means that the same issue will and should be looked at differently from each institutional perspective. In the famous words of the Federalist: "Ambition must be made to counteract ambition. The interest of the man must be connected to the rights of the place." Just as he would have improved his legalistic account if he had pondered the work of political scientists Gary Schmitt, Joe Bessette and others, McConnell might have seen it limits had he consulted the best new work on separation of powers now shaping debates in legally informed *political science* – including, for examples, the recent books by **Josh Chafetz** and **Mariah Zeisberg**.

Unlike the judicial resolution of legal disputes, political resolution of constitutional contests means that the same issue might legitimately be resolved differently at different moments of political history. The legalist understanding of the Constitution presupposes that the same or similar issues should be resolved the same way in every instance – if the initial settlement of the case or controversy was done properly. That is not the case with respect to those issues that should be resolved through political contestations rather than judicial arbitration.

More problems with a legalistic approach to presidential power

Two other moments in Professor McConnell's lecture further reveal the limits of a legalistic approach and show why it can be mitigating in current circumstances but also a symptom and cause of this contemporary political condition.

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First, Professor McConnell equates the use of royal prerogatives with John Locke's understanding of prerogative and with other later understandings of emergency power. I understand and agree with his point that some powers, powers that he calls prerogative powers, are indefeasible, meaning that the legislature cannot redefine them –they are given by the Constitution itself and can't be taken away or altered by the legislature. One of the very helpful mitigating aspects of McConnell's approach is that he shows these legitimate claims to constitutional authority to be far fewer than those argued by recent presidents and by scholars who advance a so-called unitary executive theory of the presidency.

But Locke's argument about prerogative is not about that. Locke shows prerogative to be executive discretion arising from the nature of law itself. Sometimes, Locke says, legislatures do not specify all the cases to which their law applies (they could do so, but they fail to) and the executive fills in the details, makes the application with an exercise of interpretative discretion. That is a completely defeasible exercise of power. In other cases, legislatures choose not make a law because the nature of the subject – say unforeseen contingencies – preclude a sound law being made. Here executives meet the contingency in the absence of legislative guidance. Finally, and most famously, sometimes following the law actually undermines or thwarts the common good. In these cases of emergency power, the executive goes outside the law to meet the necessity perhaps against the law itself. This is emergency power.

Locke wrote before the American Constitution or even American-style constitutions were invented. Now that we have such a Constitution the question prerogative as emergency power poses is this: Is emergency power available from the Constitution itself? Is it in there when we need it, when necessity demands it? Or following Locke, does one need to go outside all of the law including outside of the Constitution to address threats to it or to the existential integrity of the polity? Hamilton and Lincoln and every President except Jefferson's answer was the first and that is the dominant American view — the Constitution supplies power for emergencies that is not available in normal circumstances. The Constitution stretches to meet the emergency and un-stretches back afterward. Jefferson, and later Justice Jackson in his Korematsu dissent, reject this understanding. The President does need to address the emergency, they say – executives may have something like emergency power — but not from the Constitution. In emergency presidents need to openly suspend or go outside of the Constitution to meet the emergency, in their interpretation. Professor McConnell does not address this most fundamental issue and debate. Instead, he legalizes the term prerogative and avoids the most fundamental political conundrum.

Both of these themes, separation of powers as designed congeries of structures, powers and perspectives, and constitutionalizing prerogative come together in the **Youngstown Steel seizure case** that plays such a central role in McConnell's lecture. But it is the dissent by Vinson rather than the concurrence by Jackson that captures these ideas. Because then-president Truman explained his justification for emergency power in two messages to Congress and also pledged to follow whatever policy the Congress preferred, a good case can be made that the Supreme Court's intervention in this case is a formative moment in the modern legalization of separation of powers disputes and the consequent abdication of a more robust and constitutionally engaged legislature. As Vinson argued, the Court did not need to intervene. The Congress had all the power needed to accomplish its will and the President indicated he would follow it. By intervening the Court set in motion and legitimized the modern practice of turning to the Court to resolve disputes previously worked out, politically, by the Congress and President.

Demagoguery and Statesmanship

Finally, I want to call your attention to a remark Professor McConnell made at the beginning of his lecture that may have seemed unimportant or minor, but is not. In announcing his legalistic project to us, he distinguished it from a partisan one, rightly pointing out that if a constitutional argument was sound regarding an action by a Republican president, it should also be sound for a Democrat with very different policy preferences – and vice versa. No one can quarrel with that. But Professor McConnell went on to also say that just as it does not matter whether one is a Republican or Democrat for the soundness of ones position, so too it does not matter if one is a demagogue or statesman. The partisan binary is analogized to the contrast between demagoguery and statesmanship.

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These binaries are not equivalent. It does not follow that demagogue is to statesman as one party is to the other because the very definition of a demagogue is one who makes a bad argument, one who substitutes passion for reason while a statesman, by definition, is one who serves the public good with reason, even at the expense of partisan interest and passion. Professor McConnell spoke as if demagoguery and statesmanship were mere preferences or tastes. As it happens, *The Federalist* begins and ends with the problem of demagoguery, which is depicted as the most worrisome pathology to fear in a democracy. Later in those profound essays, it is also noted that enlightened statesmen will seldom be at the helm. The complex design of separation of powers is depicted as an architecture that might preclude demagoguery on the one hand, and induces institutional substitutes for individual statesmanship on the other hand.

Thus, for Madison and for Hamilton the Constitution generally, and the design of the Presidency more specifically, were not primarily animated by a fear of monarchy. The real danger and their real fear was the prospect of demagoguery. We are now living in a political world in which their fear has come true. I hope that Professor McConnell's work will help mitigate the crisis that we now face at the same time that it points thoughtful readers to the deeper sources of this present and profound political pathology.

- *This article originally appeared at* The Constitutionalist.

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About the reviewer

Jeffrey K. Tulis – *The University of Texas at Austin*
Jeffrey K. Tulis is Professor of Government at The University of Texas at Austin, author of The Rhetorical Presidency, and co-author of Legacies of Losing in American Politics.

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