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POPULAR CONSTITUTIONALISM 2.0: EXECUTIVE EDITION

James R. Stoner, Jr.*

ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (Oxford Univ. Press 2010). Pp. 256. Hardback. $29.95.

Eric Posner and Adrian Vermeule have taken an old thesis—that the demands of modern government necessarily enhance executive power—and have dressed it up to shock and soothe.[1] The shock comes from their unabashed invocation of the German political scientist Carl Schmitt, erstwhile theorist of Nazi power, which they balance with reassurance that modern America is so stable and secure that worries about dictatorship here amount to "tyrannophobia" a paranoia apparently cured by a jolt of rational analysis.[2] Against the earnest constitutionalists seeking to tie down the modern Gulliver with old-fashioned checks and balances, they propose a sort of ankle bracelet with GPS tracking. "The Executive Unbound," proclaims their title, but not to worry: Thanks to the bloggers and the modern news cycle, the giant moves to the people's will.

The target of Posner and Vermeule's fire is what they call "legal liberalism" or alternatively "the Madisonian republic," by which they mean a positivist proceduralism that employs the separation of powers to ensure the rule of law, by which in turn they seem to mean a system where prospective rules made by a legitimate legislature bind the executive in ways that can be vindicated in court should the executive transgress them.[3] Leaving aside for the moment whether it is fair to attribute this wooden framework to James Madison rather than to Hart & Wechsler,[4] much less their German predecessors in the nineteenth century, Posner and Vermeule explain that in the context of a complex modern economy, attempts at prospective rule-making inevitably are undercut or overrun by circumstances beyond the capacity of legislatures to circumscribe or anticipate. There is a need for "massive delegation" of power, and frequent crises tend to make all rules obsolete. Schmitt is called upon especially to theorize the latter point: Since all legislatures can anticipate is that the unanticipated will constantly happen, they are

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1. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).

2. *Id.* at 4, 32-34, 176-77; *See* CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., MIT Press 1988) (1923).

3. POSNER & VERMEULE, *supra* note 1, at 4, 18-31.

4. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009).

forced to leave wide discretion to the executive which they cannot really control. By "executive" the authors mean in the American context both the President at the top of the system and the huge bureaucracy, including the so-called independent agencies, which together form the government.

Posner and Vermeule nicely illustrate their point with the two great crises of the first decade of the twenty-first century: the terrorist attack on September 11, 2001, and the financial crisis of autumn 2008. In both instances, they remind us power flowed, even flooded, to the executive, enabling President Bush to initiate a world-wide war on terror that included detainment of captured suspected terrorists at Guantanamo, in response to September 11, and enabling his Secretary of the Treasury and the head of the Federal Reserve Bank to take unprecedented action to purchase troubled assets and make other deals to prevent numerous large firms and banks from failing, in response to the collapse of the housing market and the disintegration of a few big firms and banks in 2008.[5] Convincing as these cases are of the need for executive action in crisis, they hardly establish that crisis is the permanent state of modern affairs, that the crisis mentality ought to be welcomed rather than buffered, or that the American presidency was not designed with the occasional crises of human affairs in mind.

Leaving Madison aside for the moment, Alexander Hamilton, who wrote the papers on the presidency in *The Federalist*, famously said that "[e]nergy in the executive is a leading character in the definition of good government," that executive unity was "conducive" to "[d]ecision, activity, secrecy, and despatch," and that "[a] feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[6] Bizarrely, Posner and Vermeule, although they mention Madison in their title, never, as best I could tell, mention Hamilton in the course of the entire book. Even if they felt obliged to confine their research to the twentieth century, they surely would have encountered the adjective "Hamiltonian," not least in the discussion of the expansion of presidential power in the hands of Schmitt's contemporary in the White House, Franklin Roosevelt.[7]

They might have discovered more had they read Hamilton's papers themselves. They write, "[o]ur major claim is that, in the United States, executive power is undervalued for ideological reasons, while at the same time being essential to peace and prosperity."[8] Hamilton might have said it better, but he surely shared the sentiment. He wrote to an age that disdained a tyrant and saw the signs of despotic monarchy in a unitary, strong executive—his term was "republican jealousy" rather than "tyrannophobia" —but he made the case for an energetic presidency in the face of such fears. Indeed, he defended the need for energetic government with powers of national defense which "ought to exist without limitation; *because it is impossible to foresee or to*

5. POSNER & VERMEULE, *supra* note 1, at 34-61.

6. THE FEDERALIST NO. 70, at 362-63 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001). Hamilton had never seen the Weimar Republic nor read Carl Schmitt!

7. The term "Hamiltonian" was memorably used by Herbert Croly in *The Promise Of American Life*, in which he speaks of "Hamiltonian means to Jeffersonian ends." HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1909).

8. POSNER & VERMEULE, *supra* note 1, at 171.

define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."[9] Hamilton would have been sympathetic to Posner and Vermeule's complaint that statutes like the War Powers Act foolishly pretend to constrain the executive in ways that impede fulfilling his office; it is no accident of the moment that all the presidents since its passage have thought it inconsistent even with Hamilton's Constitution, much less their updated one.[10] But he would also help them explain what is misguided about the liberal legalists' effort: "[i]t is one thing to be subordinate to the laws, another to be dependent on the legislative body."[11] Posner and Vermeule understand this distinction no better than those who aim to limit the executive by complex procedures, and thus they think that rejecting the legalists' process mongering leaves no alternative but pure discretion. Once law has been defined as will, they intuit, the advantage goes to the most willful.

If Hamilton anticipates the presidency in crisis, what might he say about the modern need for delegation? It is important to note at the outset that he is not dogmatic about what is legislative and what is executive. In fact, in the papers on the presidency, he quotes Alexander Pope's couplet from the *Essay on Man*: "For forms of government, let fools contest — / That which is best administered, is best." Noting that the point is heretically overstated (remember that republican jealousy needs to be respected!), Hamilton quickly adds "the true test of a good government is, its aptitude and tendency to produce a good administration."[12] Granted, the differences between regulation in the eighteenth century and today, in particular the technical sophistication now required in areas like telecommunications or environmental management, themselves barely known at the time of the Founding, it is nevertheless difficult to imagine Hamilton—founder of the National Bank and the system for funding the national (and state) debt—would have difficulty abiding by Chief Justice Taft's "intelligible principle" rule in *Hampton v. United States*.[13]

If the business of government is not itself amorphous—if the roles of the federal government and the states are tolerably distinguished, and the things to be regulated can be recognized as falling into categories assigned to their proper agencies—then it seems hardly obvious that the definition of discretion and its limits in the Administrative Procedure Act is unworkable. The existence of administrative "black holes" (areas such as national security where courts are not permitted to second-guess agencies) no more undermines the lawfulness of most public administration than true black holes cause the implosion of the universe. Of course, where common sense meaning is abandoned—when carbon dioxide, present in every exhaled breath, gets labeled a pollutant, for

9. THE FEDERALIST NO. 23, *supra* note 6, at 113 (Alexander Hamilton) (emphasis in original).

10. *See War Powers*, THE LAW LIBRARY OF CONGRESS, http://www.loc.gov/law/help/war-powers.php (last updated Nov. 10, 2011) ("U.S. Presidents have consistently taken the position that the War Powers Resolution is an unconstitutional infringement upon the power of the executive branch. As a result, the Resolution has been the subject of controversy since its enactment, and is a recurring issue due to the ongoing worldwide commitment of U.S. armed forces. Presidents have submitted a total of over 120 reports to Congress pursuant to the Resolution.").

11. THE FEDERALIST NO. 71, *supra* note 6, at 371 (Alexander Hamilton).

12. THE FEDERALIST NO. 68, *supra* note 6, at 354 (Alexander Hamilton) (quoting ALEXANDER POPE, *An Essay on Man, in* 3/1 POEMS OF ALEXANDER POPE 123-24 (Maynard Mack ed., 1950)).

13. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

example[14]—it is no surprise that phrases like "good cause" seem nebulous (Posner and Vermeule follow the law journal literature and dub "grey holes" those areas of administrative law with standards that can be overridden "for good cause" or upon "determination of risk").[15] But precedents get established in every field of concern over time, and these define the general course of the law and make arbitrary action relatively easy to recognize. Again, if rule by law is only subordination of executive will to prior legislative will, administrative discretion is elusive or recursive, and judicial review would only add another layer of willfulness. However, if the different activities of human society have an intelligible relation to one another and a more or less stable order, then discretion need not be corrosive. For example, it may not be actionable in court to prove a Ph.D. involves original research, beyond the minimal sense of disproving plagiarism, but the standard of originality is meaningful among faculty who understand the canons of research in a particular field, and a legislature hardly seems involved in excessive delegation to establish at its universities the fields to be studied and the degrees to be granted, while leaving to the academics the judgments only they can rightly make. Of course controversies arise from time to time—the judgments related to climate change and its human causes are one instance—but occasional difficulties do not unravel the entire order. It is enough if the executive or the legislature, or maybe both, step in when administrative action needs outside guidance.

If Posner and Vermeule err in overlooking Hamilton, they do so as well in misunderstanding or perhaps just underestimating Madison. They express their confidence in electoral accountability without recognizing the role Madison played, first in the Philadelphia Convention, then in the politics of 1800, in establishing the popular basis of presidential election, even as it remained indirect.[16] Madison defends the separation of powers as an "auxiliary precaution[]," the primary reliance being the republican one of electoral responsibility.[17] Even Hamilton, who had notoriously (rumor broke the pledge of secrecy here) proposed a chief executive for life in Philadelphia, emphasizes republican responsibility in his *Federalist* papers on the presidency: unity is essential to responsibility, since that means there is always someone to blame.[18] Accepting the almost-plebiscitary character of the modern presidency, Posner and Vermeule go to great lengths to develop a "theory of credibility" to help the public distinguish ill-motivated from public-spirited executives and thus—without the separation of powers—to reduce the "agency costs" of the public's having to tolerate executive "rent-seeking," which they define as "adopting policies that [the executive] prefers and voters do not like."[19] While the mechanisms are familiar enough—independent commissions, bipartisan appointments, counterpartisan appointments,

14. In April 2009, the EPA reported that carbon dioxide, among five other greenhouse gases, endangers public health and welfare and can be classified as a "pollutant" under section 202(a) of the Clean Air Act. *See* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch.1).

15. POSNER & VERMEULE, *supra* note 1, at 93-101.

16. *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC (1995).

17. THE FEDERALIST NO. 51, *supra* note 6, at 269 (James Madison).

18. THE FEDERALIST NO. 70, *supra* note 6, at 366 (Alexander Hamilton).

19. POSNER & VERMEULE, *supra* note 1, at 117.

transparency, and so forth—the fetching innocence in distinguishing the ill-motivated from the public-spirited must be dictated by the logic of rational choice, for surely they are aware that in the world of real partisan competition, each party considers its own advocates to be public-spirited and its opponents to be ill-motivated. If they are not so aware, (here I go again), they need to drop whatever they are doing and read *Federalist* No. 1.[20]

The whole key to *The Federalist* and maybe to American constitutionalism simply is in recognizing the inevitably partisan character of political competition and building upon it, even while preserving the idea—for example in the definition of "faction" in *Federalist* No. 10—there is something potentially unjust about partisanship, however necessary it is to engage in it in practice.[21] In the organization of *The Federalist*, the republican remedy for faction or partisanship is more factions or more complex parties, and this can be achieved principally by extending the sphere of territory; hence faction will be better tamed at the federal level than in the states.[22] The separation of powers addresses a slightly different concern, ambition, but the solution is also complicated. Hamilton writes that "the love of fame [is] the ruling passion of the noblest minds," and that would seem to praise ambition; but ambition also seeks to encroach, and that usually means to oppress, so "[a]mbition must be made to counteract ambition" in that scheme of auxiliary precautions alternately called the separation of powers and the system of checks and balances.[23] Whether Posner and Vermeule consider ambition so rational that it counts as just another interest a rational actor would maximize, or so irrational that it does not fit the model, is unclear. Either way they overlook it as a distinctively political passion, and so they cannot see how the equilibrium of honor in the system of separate institutions is a kind of parallel to the price system in markets.[24] Honor is at least as contestable as value, so perhaps the equilibrium is inevitably unstable. But for the most part, the love of honor remains balanced and seems to serve the regime more than it impairs it. At least that was the plan, and whatever our authors' complaints about the Constitution, its giving too much or too little scope to ambition is not among them.

In the end, Posner and Vermeule advance the superiority of parliamentary democracy to presidential republicanism: The "theory of credibility" is really a theory of accountability, and it promotes many things that the American people, or at least many of them, have long resisted: the wholesale priority of national governance, the triviality of most activities of the states, the fundamental character of partisan disagreement, the rationality of policy-making by electorally supported party competitions, and the like. Although I would concede that Madison and Hamilton writing as Publius did not yet conceive of national political parties, they soon, independently and in opposition to one another, played critical roles in building the first national parties, and in giving them their distinctive stamps, and if they saw this as a serious change, they did not amend the

20. THE FEDERALIST NO. 1, *supra* note 6, at 1-4 (Alexander Hamilton).

21. THE FEDERALIST NO. 10, *supra* note 6, at 43 (James Madison).

22. THE FEDERALIST NO. 10, *supra* note 6, at 47-48 (James Madison); THE FEDERALIST NO. 51, *supra* note 6, at 270-72 (James Madison).

23. THE FEDERALIST NO. 51, *supra* note 6, at 267-72 (James Madison); THE FEDERALIST NO. 72, *supra* note 6, at 374-78 (Alexander Hamilton).

24. POSNER & VERMEULE, *supra* note 1, at 23.

Constitution to suppress the parties, only, by rationalizing the electoral college procedure, to accommodate them.[25] The most successful chapter in *The Executive Unbound*, to my mind, is chapter 2 on "constitutional change," in which the authors develop an account of "constitutional showdowns," crises or potential crises out of which are established the precedents by which constitutionalism develops or evolves.[26] These take place when disagreements about policy correspond to disagreements about constitutional authority, and the public serves as ultimate referee when politicians raise their issue to constitutional status and square off. Their recognition of this essential public role—essential because it allows the people really to claim continued ownership of the Constitution, as the opening sentence of the document asserted—should be folded in with Keith Whittington's more historical account of "constitutional construction" and with Publius's remarks at the beginning of *Federalist* No. 82 that "[t]ime only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE."[27] Posner and Vermeule, write by contrast: "our constitution is plebiscitary, a phenomenon antithetical to the aspirations of legal liberalism."[28] Both thesis and antithesis overlook the depth of lawfulness in our constitutionalism; or do they illustrate what happens when the search for depth or foundations is abandoned, and the play of the surface seems to be all there is?

25. U.S. CONST. amend. XII.

26. POSNER & VERMEULE, *supra* note 1, at 62-83.

27. THE FEDERALIST NO. 82, *supra* note 6, at 426 (Alexander Hamilton); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

28. POSNER & VERMEULE, *supra* note 1, at 75.