

## REVIEW

### A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World

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*The Constitution of Risk*

Adrian Vermeule. Cambridge, 2013. 191 pages.

#### INTRODUCTION

When Isaiah Berlin wrote his famous 1953 book on Leo Tolstoy's view of history, he began with a line from the ancient Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing."<sup>1</sup> It is a line that captures two types of intellectuals: those who advance many insular and interstitial ideas, and those who advance big theories that bring a single unifying theme or idea to the world. These two types of thinkers come to mind when reading Harvard Law School professor Adrian Vermeule's fascinating new book, *The Constitution of Risk*.<sup>2</sup> Vermeule has said that his "mad ambition" is to offer a unifying constitutional theory to bring order to a field crowded with too many theories.<sup>3</sup> In doing so, he seeks to fulfill what

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<sup>1</sup> Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* 1 (Simon & Schuster 1953). I am not alone in thinking of this passage after reading Vermeule's work. Recently, I had the chance to listen to a panel discussion of the book at Harvard with Vermeule, and Professor Richard Fallon noted the same Berlin line in his comments on the book. See hlslib, *Book Talk: Adrian Vermeule on The Constitution of Risk* 41:51–43:20 (Apr 29, 2014), online at [https://www.youtube.com/watch?v=Ls3uclq6u\\_Q](https://www.youtube.com/watch?v=Ls3uclq6u_Q) (visited Feb 18, 2015) ("Book Talk").

<sup>2</sup> Vermeule initially published some of the core concepts in this book in a series of law review publications. See generally Adrian Vermeule, *Precautionary Principles in Constitutional Law*, 4 J Legal Analysis 181 (2012); Adrian Vermeule, *Introduction: Political Risk and Public Law*, 4 J Legal Analysis 1 (2012).

<sup>3</sup> Book Talk at 3:38 (cited in note 1).

Samuel Johnson once hoped for a new generation in 1770: “deliverance from unnecessary terrors, and exemption from false alarms.”<sup>4</sup> Deliverance in this case is from precautionary rules designed to combat risks that are unlikely to arise and rules that distort decisionmaking by government officials, judges, and other constitutional actors. Vermeule posits that emancipation from such “terrors” can come only with a fundamental shift away from traditional Madisonian concepts in favor of a more modern view of governmental realities. That certainly sounds very hedgehog-like, but on closer examination, Vermeule proves something of a fox in hedgehog garb. Vermeule’s single big idea is to avoid a single big idea in the context of constitutional analysis. In other words, the hedgehog’s advice is to be a fox.<sup>5</sup>

Vermeule’s book is impressive in its detail, and its synthesis of different theories offers a new perspective in approaching some long-standing problems. Regardless of how one views his ultimate conclusions, Vermeule’s unique view of constitutionalism is likely to leave a lasting impact on scholarship in this area. However, an appreciation for the book is found more in what it is than in what it is intended to be. Vermeule’s critique of past theories reveals a type of antitheory theory, or at least a rejection of a single overarching theory of constitutionalism. The considerable value of this book is found in its detail of risk regulation and not in the big theory advanced by Vermeule. That may not be enough for Vermeule’s “mad ambition,” but it should be enough for any reader interested in a penetrating analysis of the role of constitutions in the regulation of risk.

Vermeule’s book advances two distinct propositions.<sup>6</sup> The first (and the greatest contribution of the book) is that constitutions should be viewed as devices for regulating political risks. Those political risks are referred to as “second-order risks,” as opposed to “first-order risks” such as wars, diseases, and other social ills (p 3). Vermeule details how much of the Framers’ debate reflects a view of the Constitution as a regulation of risk in

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<sup>4</sup> Samuel Johnson, *The False Alarm* 3 (E. Lynch 1st ed 1770).

<sup>5</sup> See Book Talk at 54:32–54:55 (cited in note 1). Vermeule has expressed a dislike for Berlin’s dichotomy and has embraced the notion that a true hedgehog would want to be a fox. See *id.*

<sup>6</sup> The premise of the book is laid out simply and clearly in the very first line of the introduction: “I have two claims to offer. One is that constitutional rulemaking is best understood as a means to regulate and manage political risks. The other is that an approach I will call ‘optimizing constitutionalism’ is the best approach to constitutional risk management” (p 1).

governance (pp 52–87). Vermeule portrays many of these risks as “fat-tail risks” that are “exceedingly unlikely to materialize, but more likely than in a normal distribution, and [ ] are exceedingly damaging if they do materialize” (p 49). Under “maximin constitutional” approaches, Vermeule suggests that precautionary rules can overcompensate for the low-likelihood risks and even cause the very danger that they seek to prevent (pp 71–72). He offers the separation of powers as an example:

Consider the possibility . . . that the separation of executive and legislative powers, erected in part as a precaution against either executive dictatorship or legislative tyranny, is itself a risk factor for dictatorship or tyranny, perhaps because the separation of powers gridlocks the lawmaking system and thus created pent-up public demand for strong extraconstitutional action. (p 80)

While acknowledging that this is a “remote” possibility, it is a suggestion that Vermeule returns to repeatedly in the book in suggesting that limits on presidential power might trigger presidential abuses or the rise of counterrisks (p 80).<sup>7</sup> The suggestion captures Vermeule’s view of precautionary constitutionalism as myopic in its focus on certain risks. The notion of unappreciated or unaccommodated risks is central to Vermeule’s second proposition: the best way to regulate risk is to avoid obsessive views on risk avoidance or precautions and, instead, to allow greater flexibility in addressing the full array of risks inherent in government (p 52). This “optimizing constitutionalism” is an answer to those who frame their understanding of the Constitution along more-rigid precautionary principles (p 24). As will be discussed below, I remain highly skeptical of both propositions, but Vermeule’s nuanced treatment of constitutional risk regulation is an intriguing perspective. While I am unpersuaded by Vermeule’s proposed abandonment of precautionary constitutional rules, his arguments illuminate some of the core issues in this long-standing debate.

Vermeule maintains that his two propositions in *The Constitution of Risk* are “partially independent” (p 10). I certainly agree that it is possible to accept the first concept of the Constitution as an instrument to regulate political risks without

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<sup>7</sup> As discussed below, Vermeule has a long-standing criticism of separation of powers claims and the viability of checks and balances in modern government. See notes 136–48 and accompanying text.

accepting Vermeule's theory of optimizing constitutionalism. However, it would be more challenging to accept the theory of optimizing constitutionalism without adopting Vermeule's risk-centric vision of constitutional rulemaking. Indeed, for functionalists, the thrust of optimizing constitutionalism will be highly appealing. Thus, it is not surprising that academics like Professor Cass Sunstein describe the book as "one of the best constitutional law books in the last half-century."<sup>8</sup> One can disagree with Vermeule (as I do) on his big theory and still greatly value the book (as I also do). However, the second goal of the book in establishing this theory is more revealing for what it does not establish than for what it proposes. It does indeed come down to a question of risk and, as discussed below, what exactly that means. Vermeule divides his work into these two distinct propositions, which I will discuss (and critique) separately. I have also tried to use Vermeule's own words as much as possible to allow the reader to consider his arguments directly and thereby minimize translation bias.

Part I of this Review briefly discusses Vermeule's concept of risk regulation in constitutional rulemaking and his distinction between first-order and second-order risks—a subject that I return to at the end of the Review. In Part II, I address Vermeule's description of precautionary constitutionalism and his use of theories of futility, jeopardy, perversity, and ex post remedies to evaluate its success as a regulation of risk. Vermeule's discussion of past theories under the rubric of precautionary constitutionalism is a highlight of the book, offering a single conceptual framework running from David Hume to James Madison to contemporary theorists. His critique of precautionary constitutionalism, however, sometimes appears forced and artificial, even considering the largely abstract level of discussion in the work. By defining this prior work as focused on risk avoidance, Vermeule attempts to show how precautionary constitutionalism fails in this purpose, can prove futile in combating those risks that rulemakers "obsessively" fixate on, and can even create new collateral risks (p 187). Moreover, Vermeule engages in arguments that are classic examples of the "reaction rhetoric" described by Professor Albert Hirschman in his classic work on the futility, jeopardy, and perversity theses.<sup>9</sup> While Vermeule seeks

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<sup>8</sup> Book Talk at 21:01–21:10 (cited in note 1).

<sup>9</sup> See generally Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Belknap 1991). See also notes 33–34 and accompanying text.

to present precautionary constitutionalism “in charitable terms, in order to put them in their best possible light,” (p 28) his analysis reveals “little patience” for opposing constitutional theories that are presented as seeking to avoid a narrow range of risks.<sup>10</sup> Vermeule’s failure to make the best case of precautionary constitutionalism—and particularly the values that it seeks to protect—undermines the credibility of his later arguments in support of his theory of optimizing constitutionalism.

In Part III, I turn to Vermeule’s second proposition in favor of optimizing constitutionalism, including his ultimate description of “virtues” to guide rulemakers in the use of a “mature” optimizing position (p 187). While insular issues like agency decisionmaking may naturally favor the flexible and balanced approach that Vermeule advocates, there remain sweeping generalities even in the “applications” section of the book (see, for example, pp 176–85). The lack of concreteness no doubt fits with Vermeule’s desire to inspire “[c]onstitutional [r]ulemaking [w]ithout a [s]tyle” (p 186); however, it also lacks a certain substance in terms of how the theory can advance decisionmaking. The theory and the related Vermeulean virtues remain underdeveloped to the point that they are difficult to objectively evaluate. While questioning Vermeule’s optimizing position may appear a case for “immaturity,”<sup>11</sup> the vague quality of much of the analysis raises concerns over its viability as an applied theory and the danger of the neutral-sounding risk lexicon hiding inherent bias. Accordingly, I look most closely at Vermeule’s treatment of the recent controversy of recess appointments as a concrete context for evaluating the usefulness of this theory. That application magnifies the concerns over the lack of definition of some of the key terms in Vermeule’s analysis. Yet, his theory does achieve part of what Vermeule desires. For functionalists, it offers a new basis for an approach founded in risk theory. His big idea as no big idea is certainly novel and holds a certain “uncola” appeal in the context of old, labored theories. However, for those who harbor formalist tendencies, it will likely taste a lot like the old Coke of functionalism when you take it to its inevitable finish.

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<sup>10</sup> Book Talk at 5:35–5:52 (cited in note 1).

<sup>11</sup> Vermeule takes the “mature” position terminology from Hirschman, though the use of this and other Hirschmanian terms is a curious choice given their original use. See notes 33–42 and accompanying text.

In Part IV, I summarize the problems identified in the two propositions of Vermeule's work (particularly the second proposition of a unifying, risk-centric theory) into two basic critiques: the uncertain definition and weight given to different types of risks in trade-offs, and the failure to properly account for other constitutional values—particularly in the constitutional structure itself. What should be a compelling discussion of risk avoidance underlying constitutional rulemaking is undermined by the need to overextend this one dimension of government decisionmaking to support Vermeule's ultimate theory. Ironically, while criticizing those who obsess over theories like precautionary constitutionalism, Vermeule succumbs to the same seduction in trying to advance risk avoidance as the overriding purpose of the Constitution to the exclusion of other organizing concepts. This risk-centric analysis tends to devalue such positive conceptions as deliberative democracy and ordered liberty. Something is lost in the translation of such values into risks. When those risks are addressed, the analysis often seems subjective, if not outcome determinative. For example, Vermeule's treatment of risks such as aggrandizement reveals not only his own skeptical view of the real danger presented by the rise of a more powerful executive but also the relativistic quality of his risk analysis (p 60). In the end, I am not sold on Vermeule's elevation of risk as an all-encompassing purpose of constitutional design and rulemaking. Moreover, unless one adopts a more fungible notion of risk, I do not believe that the case is made that precautionary constitutionalism, as Vermeule calls it, is suboptimal for risk. It depends on how one weighs the risks involved in governing, even if one accepts risk analysis as the best measure for success of a constitutional system. Indeed, if one considers certain risks such as aggrandizement as existential threats to a constitutional system, Vermeule's optimizing constitutional approach hardly seems optimal in any sense, including as a mechanism of risk regulation.

To conclude, I discuss an alternative view of constitutional structure from a more deontological perspective. While the Framers clearly saw constitutional rules as avoiding particular risks, constitutional structure is also tied to normative values and cannot be accurately reduced to a purely instrumental

function.<sup>12</sup> Without delving too far into that alternative view, the concern is with the distortive effect of Vermeule's overarching threshold assumption as to the function of the system. In the end, the reader ends up where she began: trying to understand risk and, more importantly, what Vermeule understands as the risks (and purpose) of constitutional structure.

#### I. RISKS OF THE FIRST AND SECOND ORDER: THE ROLE OF RISK REGULATION IN CONSTITUTIONAL RULEMAKING

Vermeule seeks in this book to create what he views as a missing framework for addressing governmental conflicts and questions. In past theories, Vermeule sees a cacophony of different purposes for constitutions—ranging from protecting minority rights to preserving equality and human dignity (p 1). Each of these theories is viewed by Vermeule as focusing on a “good promoted by constitutionalism” (p 2) without an overarching analytic concept. Past efforts are criticized as “stock theories” showing “too little understanding of how the plural aims and values of constitutionalism relate to one another” (p 2). Vermeule sees constitutional conflicts as the manifestation of “risk-saturated tradeoffs among constitutional goods” (p 2). His alternative approach, he argues, supplies this missing framework by treating “constitutions, and public law generally, [as] best understood as devices for regulating and managing political risks” (p 2) (emphasis omitted). Through the lens of risk, Vermeule sees greater clarity and continuity in an otherwise-confusing world of constitutional conflicts:

Constitutions . . . may be justified and criticized as more or less successful devices for managing a range of risks that arise in and from politics, including tyranny and dictatorship, self-dealing by officials, akratic decision making by majorities, exploitative oppression of minorities, and various forms of bias or corruption in adjudication, regulation, and political decision making. (pp 2–3)

In a book on the role of constitutions in the regulation of risk, the obvious question is how to define the relevant risks. Vermeule answers this question by separating “first-order risks” from “second-order risks” (p 3) (emphasis omitted). First-order

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<sup>12</sup> See generally Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 *Geo Wash L Rev* (forthcoming 2015) (on file with author).

risks are those risks that are “dealt with by substantive governmental policies” (p 3). These are risks that “arise as the unintended consequence of human action”—ranging from financial crises to terrorism (p 3). Second-order risks are those risks that “arise from the design of institutions, from the allocation of power across institutions to make first-order decisions, and from the selection of officials to staff institutions” (pp 3–4). These are the risks that occupy most of Vermeule’s attention:

Constitutional law structures the power of government and allocates it in complex ways to a set of institutions, themselves constituted by the same law. Any such structure creates the chance of various good or bad political consequences, just as any policy for regulating nuclear power creates the chance of various good or bad environmental and economic consequences. Constitutional rulemakers will have to assess and then somehow compare and balance the goods and bads that might arise from various institutional designs and allocations of power across institutions—precisely the sort of decision that risk analysis addresses. (p 4)

That, however, still does not clearly define “risk” as opposed to the *order* of risk. Risk can be defined along lines of uncertainty or ignorance as to the possible or probable outcomes of different decisions. Vermeule declines to explicitly define risk and instead embraces what he calls a “colloquial” sense of the word, including concepts of risk, uncertainty, and ignorance under “one large umbrella” (p 6). Vermeule does make a critical choice in defining “political risk” (p 8). He acknowledges that political risk is commonly defined in economic legal analysis as “the risk that a government will expropriate property or violate a contract without providing adequate compensation” (p 8).<sup>13</sup> Vermeule rejects this definition as too narrow because it does not include nonproperty risks to liberty, equality, and democracy (p 9). It is a fair point. However, Vermeule’s definition of risk then becomes so broad as to distort the later analysis. All risks are not equal, or, at least in an analytical Animal Farm, some risks are more equal than others.

The lack of a clear definition of the scope of risks—and their relative weight—will later undermine Vermeule’s argument

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<sup>13</sup> Vermeule draws this quote from Stephen J. Choi, Mitu Gulati, and Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 *J Legal Analysis* 131, 131 (2012).



when he moves to use those unaddressed, amorphous risks to skewer the premise of precautionary constitutionalism. For example, Vermeule notes that *Kelo v City of New London*<sup>14</sup> entails risks to goods that go beyond property or contractual rights (p 10). For those of us who have been critical of the *Kelo* decision,<sup>15</sup> that is certainly true. Yet, it is clear that Vermeule is not thinking of the risks to democracy and individual rights, but rather the countervailing risks that the government seeks to address by taking private property under eminent domain (p 63). The Court's capacious definition of "public use" embraces a broad array of risks to the public and thus represents an "approach [that] fits comfortably" with this theory of optimizing constitutionalism (p 10). The *Kelo* ruling seems to appeal to Vermeule because it gives greater flexibility to decisionmakers in defining public use, leaving most of these controversies to political, rather than constitutional, checks.<sup>16</sup> There are clearly many who support the decision, including those who elevate political remedies over legal remedies in such controversies.<sup>17</sup> However, it remains unclear how the risk of the broader definition of public use is balanced against the risks to private property interests.

Vermeule's relatively brief discussion of the meaning of risk is a telling and ultimately problematic part of his theory of constitutionalism. There is an obvious irony in the relative vagueness of the definition and comparative treatment of risk. Vermeule makes some compelling points about prior theories that often deal in generalities or target risks with little evidence that such risks are serious or likely to occur. Yet the same

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<sup>14</sup> 545 US 469 (2005).

<sup>15</sup> See, for example, *Kelo v City of New London US Supreme Court Decision and Strengthening the Ownership of Private Property Act of 2005, Hearing before the House Committee on Agriculture on HR 3405*, 109th Cong, 1st Sess 51 (2005) (statement of Professor Jonathan Turley); James W. Ely Jr, *Kelo: A Setback for Property Owners*, 23 *GPSolo* 22, 22–23 (Sept 2006). It is clear that there was Supreme Court precedent for *Kelo*, but there remains disagreement on the proper reading of the Takings Clause. See, for example, Richard A. Epstein, *Kelo: An American Original: Of Grubby Particulars and Grand Principles*, 8 *Green Bag* 2d 355, 356 (2005).

<sup>16</sup> Vermeule has argued in favor of such political checks over legal checks on government. See Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 201–02 (Oxford 2010).

<sup>17</sup> See, for example, Richard A. Posner, *Foreword: A Political Court*, 119 *Harv L Rev* 32, 98 (2005) (stating that, "[p]aradoxically, the strong adverse public and legislative reactions to the *Kelo* decision are evidence of its pragmatic soundness," because it will likely trigger a democratic movement to seek changes in the political system) (citation omitted).

complaint can be made with regard to his own discussion of risk. In a book that is premised on real-world risks, there is relatively little discussion of those risks or their relative importance in governance. The book consistently keeps the discussion on a largely theoretical, abstract level while making arguments about ignoring the real risks inherent in governing. While some risks are discussed in passing, the case is not made for the idea that certain risks (such as the abuse of power) are clearly less likely than the countervailing risks addressed by executive action. Yet, at various points in discussing specific controversies like recess appointments, Vermeule suggests that there are identifiably better and worse choices on constitutional rules based on the balancing of ill-defined risks (pp 77–78). The largely abstract discussion of risks undermines the argument that other theories fail to adequately deal with real versus phantom risks. Vermeule can certainly state that he is merely advocating the balancing of risks and not presupposing their relative strengths. However, relying on undefined risks invites more-subjective analysis or bias without offering a better notion of how this process actually works. When Vermeule does discuss risk, the result is more worrisome than helpful—suggesting the very selection bias that was so concerning in the definitional material.

Vermeule clearly distinguishes between risks and “normative question[s]” (p 79) but remains unclear on how to ultimately synthesize risks and values in constitutional rulemaking. In his later discussion on the “mature position” (p 79), he seems to shrug off that final stage of rulemaking:

Risk regulation, whether at the first-order or second-order level, is only a part of what societies might properly care about; once democratic decision makers have figured out what the optimal precautions are, there is a separate normative question about what to do, in light of that mature risk assessment. What the mature position does exclude, however, is a decision to depart from optimal precautions for the wrong sort of reasons, or on spurious grounds. Although democratic decision makers might adopt a suboptimal set of precautions, they should do so with their eyes open, after an evenhanded assessment of both target risks and countervailing risks, rather than in the misguided belief that a prudent approach to risk so requires. (p 79)

Whatever Vermeule might believe are the “wrong sort of reasons” (p 79), he clearly believes that the base analysis for the

decisionmakers ought to be the balancing of risks, which is then subject to a normative judgment on what to order. That base analysis still excludes what could be viewed as soft variables or at least positive values underlying such rules as the prohibition on takings. Moreover, Vermeule's "mature position" clearly does not exclude a decision that departs from "optimal precautions" (p 77) (emphasis omitted), which only returns the reader to the question of what risks can justify such a decision for the "right sort of reasons."

Second-order risks remain relatively undefined and unranked in Vermeule's work by design. However, the Constitution presents a wide array of protections addressing an equally wide array of risks. For example, the Bill of Rights is necessarily written to deter risks that would threaten due process, undermine federalism, and impede other rights. Yet these amendments were written to protect positive values like the free exercise of religion or free speech that seem exogenous in Vermeule's analysis. It was not the risks, but rather the rights, that shaped the language of the amendments. Of course, those risks are then addressed in the interpretation of the constitutional provisions. In those interpretations Vermeule occasionally tackles specific rules, like that in *Brandenburg v Ohio*,<sup>18</sup> in which the Court balanced free speech against the imminent threat of violence (p 42). While the case has been criticized for its dangerously undefined standard of criminal speech,<sup>19</sup> Vermeule sees it as a classic precautionary rule against the risk of politically motivated actions and "other worst-case political pathologies" (p 42). The obvious risks under the First Amendment include not just politically motivated actions but also the chilling effect that the regulation of speech has on individuals. The countervailing interests include the government's desire to combat disruptive, hateful, or incendiary speech.<sup>20</sup> Vermeule often treats such precautionary rules

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<sup>18</sup> 395 US 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action.").

<sup>19</sup> See, for example, Jonathan Turley, *When Is Violent Speech Still Free Speech?* (USA Today, May 2, 2005), archived at <http://perma.cc/2LWB-AJAN>; Jordan Strauss, *Context Is Everything: Towards a More Flexible Rule for Evaluating True Threats under the First Amendment*, 32 Sw U L Rev 231, 245 (2003) (noting that, as it stands, the *Brandenburg* test is unclear about what speech it protects).

<sup>20</sup> See generally Jonathan Turley, *Shut Up and Play Nice*, Wash Post B1 (Oct 14, 2012). Notably, despite the recent massive march in Paris to support free speech following the *Charlie Hebdo* massacre, France has led the rollback of free speech in the West

as based on unlikely or unrealized risks. Yet we have seen not only repeated governmental crackdowns on free speech and the free press but also recent examples of such efforts in the name of combating terrorism or hate speech. These are real risks that threaten core constitutional values. Indeed, history (including recent history) has reaffirmed the great and growing risks that are at the heart of these precautionary rules. That history would seem to reaffirm strict precautionary rules. The opposing risks cited by the government, by contrast, have been somewhat more elusive.<sup>21</sup> Without dealing directly with either the specific risks on both sides or their relative strengths, it is difficult to accept Vermeule's ultimate point—that precautionary rules are often based on phantom risks or that we can relax precautionary rules in the constitutional system. Given Vermeule's controversial work on trade-offs between national security and liberty, the uncertainty increases concerns over soft variables in the analysis.<sup>22</sup> It is not just the fact of trade-offs but how those trade-offs are made in Vermeule's vision of constitutional rulemaking.

## II. THE KNAVE AND PRECAUTIONARY CONSTITUTIONALISM

Vermeule's particular gift in addressing constitutional theories is his extraordinary ability to harmonize diverse sources and theories into a coherent approach to the regulation of risk in constitutions. His refashioning of prior constitutional theories into what he calls "precautionary constitutionalism" is a significant achievement for the book (p 10) (emphasis omitted). While he clearly seeks to achieve more than such a descriptive victory with this book, his descriptive insights into the role of risk are a significant contribution to the field. Vermeule offers a fascinating perspective of constitutional history and language as a dialogue over risk and its regulation.<sup>23</sup> He questions whether the

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on the basis of combating discriminatory and degrading speech. See Jonathan Turley, *The Threat to French Free Speech Isn't Terrorism. It's the French.*, Wash Post B1 (Jan 11, 2015).

<sup>21</sup> See Jonathan Turley, *Criminalizing Intolerance*, LA Times A23 (Dec 13, 2011); Jonathan Turley, *Undo the Stolen Valor Act to Protect Free Speech*, LA Times A19 (Oct 20, 2011).

<sup>22</sup> See notes 96–108 and accompanying text.

<sup>23</sup> Vermeule assembles both historical and contemporary sources that reflect his view of overcompensating for risk. The *Kelo* decision on takings holds an obvious appeal in this respect, and the opinion quotes Justice James Iredell:

It is not sufficient to urge, that the power may be abused, for, such is the nature of all power,—such is the tendency of every human institution: and, it

preoccupation with certain risks of the abuse of power is real or worth the structural protections created to combat those risks. Further, he seeks to dispatch the phantom risks in favor of a system allowing greater flexibility in addressing a broader array of risks.<sup>24</sup>

Any student of American constitutional history will attest to the Founders' concerns over the risks of concentrated authority in the form of tyranny and other threats to liberty. It is axiomatic that the US government's structure was designed in part to avoid certain political risks or ills. Indeed, some of the most influential writers at the time saw those risks as a structuring theme. For example, Hume famously maintained that, "in contriving any system of government, and and [sic] fixing the several checks and controuls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, but private interest."<sup>25</sup> Hume's statement clearly captures Vermeule's concept of precautionary constitutionalism and the "knavery principle" that motivates many constitutional rule-makers (p 30). Notably, Hume was speaking of structural elements to a government that are inherent in the separation of powers. Vermeule believes that the precautions against such knavery can not only radically inflate the likelihood of the actual risk but also create or ignore other risks.

Vermeule defines precautionary constitutionalism as a view "that constitutional rules should above all entrench precautions against the risks that official action will result in dictatorship or

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might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutatory confidence.

*Kelo*, 545 US at 487 n 19, quoting *Calder v Bull*, 3 US (3 Dallas) 386, 400 (1798) (Iredell concurring). This is an observation that certainly reflects the view that the mere potential for abuse should not be sufficient reason for maximal precautionary rules. However, the quotation is also a bit of a curiosity in the *Kelo* context, since many felt that a bright-line rule could be drawn at the use of eminent domain for this type of private enterprise. This was not some quibbling over the best use of taxes but rather, for many, a paradigmatic shift in takings jurisprudence. Indeed, the taking of this property confirmed for many the continuing and real danger of abusive takings.

<sup>24</sup> Borrowing from Samuel Johnson's *The False Alarm* (cited in note 4), Vermeule decries "libertarian panics" over "the phantom of lost liberty." Book Talk at 18:50–19:04 (cited in note 1).

<sup>25</sup> David Hume, *Of the Independency of Parliament*, in 1 *Essays and Treatises on Several Subjects* 71, 74 (A. Miller 1760) (emphasis omitted).

tyranny, corruption and official self-dealing, violations of the rights of minorities, or other political harms of equivalent severity” (p 11). Vermeule has ample historical support for showing that those who wrote the Constitution could be called risk averse, or at least averse to particular (and, in Vermeule’s view, overly narrow) risks. The greatest danger that the Framers sought to avoid is the concentration of power in any one branch of government or any one person.<sup>26</sup> Other risks, such as the corrosive effect of factions, occupied some of the Framers, including (most famously) Madison.<sup>27</sup> Vermeule sees in this record a system designed for risk regulation. Some sources certainly support that assessment. Robert Yates, writing as Brutus, captures the risk-averse mindset described by Vermeule in advancing his core “axiom” of constitutional drafting that “the people should never authorize their rulers to do any thing, which if done, would operate to their injury” (p 30).<sup>28</sup> Vermeule shows how this theme of risk avoidance runs through much of the discussion of the Framers and their contemporaries. However, he argues that these writings focus on a few overriding risks with little consideration of countervailing risks or their relative likelihood. He analogizes these risks to the concept in finance of “fat-tail risks” or “risks that are exceedingly unlikely to materialize, but more likely than in a normal distribution, and that are exceeding damaging if they do materialize” (p 49). Vermeule uses the fat-tail-risk concept to capture the mindset of constitutional structures designed to avoid low-risk dangers.

Under certain types of probability distributions (“fat tail distributions”), such risks will have an important role in the decision-making calculus; here the crucial mistake is to assume that the relevant risk is normally distributed, such that exceedingly damaging outcomes are effectively impossible.

In politics and law, by analogy, we might understand precautionary constitutionalists and maximin constitutionalists<sup>[29]</sup>

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<sup>26</sup> See Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 BU L Rev 1523, 1536 (2013) (“Both federalists and antifederalists alike referred to the separation of powers in similar, antiaggregation terms.”).

<sup>27</sup> See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 Duke L J 1, 109–17 (1999).

<sup>28</sup> Quoting *Essays of Brutus*, in Herbert J. Storing and Murray Dry, eds, 2 *The Complete Anti-Federalist* 358, 406 (Chicago 1981).

<sup>29</sup> Vermeule uses the term “constitutional maximin” to describe the position of Professor Vincent Blasi, who urges adopting a “pathological perspective” toward constitu-

as alert to the possibility of fat-tail distributions of political outcomes. The risk that a constitutional democracy might suddenly slide into dictatorship, for example, is exceedingly remote, but such an event might also be exceedingly harmful to constitutional values if it did occur. (p 49)

Past scholarship has discussed such risks in terms of “black swan” risks and uncertainty principles.<sup>30</sup> Black swans are rare events that tend to fall outside the bell-shaped curves of probabilities.<sup>31</sup> We have learned from painful experience, including the recent 2008 financial crisis, that the failure to prepare for black swans can be devastating.<sup>32</sup> However, Vermeule views fat-tail risks generally as distorting constitutional rulemaking.

Obviously, one has to accept Vermeule’s construct that it is risk that defines this approach and that risk regulation can be used to measure the success of precautionary constitutionalism. The suggestion that risk avoidance is at the heart of many statements of the Framers is hardly surprising. All governmental structures are designed to not only achieve positive outcomes but also avoid negative outcomes. However, Vermeule moves the conceptual ball in his application of risk theory to constitutional structure. He explores the manifestation of this approach in a variety of areas, including the unitary executive, separation of powers, standing armies, the Bill of Rights, and presidential power. He insists that, while there are precautionary rationales that are applicable throughout the development of constitutional rules, “framers, judges, and other actors have attempted to undermine the arguments for precaution” (p 53).

Vermeule presents these arguments along the categorical lines of Hirschman’s *The Rhetoric of Reaction* (p 52).<sup>33</sup> Vermeule attempts to show how precautionary constitutional systems are exposed as inherently flawed when seen through the lens of

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tional risk aversion in areas like the First Amendment (p 41), quoting Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L Rev 449, 449–50 (1985).

<sup>30</sup> Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* 272 (Random House 2007) (drawing a distinction between planning for “known unknowns” and “unknown unknowns”).

<sup>31</sup> *Id.* at xvii–xix.

<sup>32</sup> See David A. Skeel Jr, *States of Bankruptcy*, 79 U Chi L Rev 677, 704 (2012); Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 NYU J L & Bus 549, 549 (2009).

<sup>33</sup> Hirschman, *The Rhetoric of Reaction* at 7 (cited in note 9). This discussion appears in the chapter in which Vermeule describes his theory of optimizing constitutionalism but is directed primarily at showing the flaws in precautionary constitutionalism.

theories of futility, jeopardy, perversity, and ex post remedies. However, it is here that Vermeule's underdeveloped notion of risk takes its toll. Indeed, while making compelling points that the "pathological" approach to risk in areas like the First Amendment is poorly defined, Vermeule seems to offer little more definition in this description of countervailing risks, which are given passing reference and no sense of relative weight (or any notion of *how* to weigh such countervailing risks).

At the outset, the use of Hirschman's theses is a curious choice, since Hirschman identified these standard arguments as used by reactionary thinkers to fight reforms and redirect public debates. Hirschman then advanced more-progressive narratives, which Vermeule also incorporates in his Hirschmanian mature position (p 53).<sup>34</sup> In this way, Vermeule continues to reference arguments of perversity, futility, and jeopardy as flaws in precautionary systems while arguing for a mature position (his optimizing-constitutionalism theory) based on those narratives. Hirschman's point was that these arguments are common but unconvincing rhetorical devices used to oppose reform. Accordingly, for those who read Hirschman in this way, Vermeule's use of the categories reads like reactionary narratives (perversity, futility, and jeopardy) succeeding in proving a progressive narrative (the mature position). Vermeule does ultimately adopt the mature position, albeit with continued references to Hirschman's reactionary narratives.<sup>35</sup> In fairness to Vermeule,

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<sup>34</sup> This position was originally propounded by Hirschman in contrast to many of the reactionary narratives:

- (1) There are dangers and risks in both action and inaction. The risks of both should be canvassed, assessed, and guarded against to the extent possible.
- (2) The baneful consequences of either action or inaction can never be known with the certainty affected by the two types of alarm-sounding Cassandras with whom we have become acquainted. When it comes to forecasts of impending mishaps or disasters, it is well to remember the saying *Le pire n'est pas toujours sûr*—the worst is not always sure (to happen).

Id at 153–54. In Vermeule's book, the reference to the "two types of alarm-sounding Cassandras" is omitted, but it is notable that this is a reference in part to the jeopardy thesis. Thus, this and the other "reactionary" narratives are not reconciled with the mature position in Hirschman's work to the extent that they seem to be reconciled in Vermeule's work. Id at 149.

<sup>35</sup> In his later articulation of the virtues of optimizing constitutionalism, Vermeule allies himself with critics following these narratives:

[A]s I have [ ] tried to show, an equally venerable and impressive line of critics . . . have criticized precautionary constitutionalism root and branch. Three main lines of criticism stand out: arguments based on futility, jeopardy, and perversity. In some cases constitutional precautions will fail the test of



Hirschman himself acknowledged that “[t]hese arguments are not, of course, the exclusive property of ‘reactionaries.’ They can be invoked by any group that opposes or criticizes new policy proposals or newly enacted policies.”<sup>36</sup> In this case, Vermeule uses the arguments to oppose not a new idea but long-standing constitutional values.<sup>37</sup>

The more serious concern is that Vermeule’s arguments against precautionary constitutionalism contain some of the same flaws identified by Hirschman in the rhetoric against reform.<sup>38</sup> Vermeule’s arguments are often based on generalizations that take ideas like the uncertainty principle and elevate the possible to equal footing with the likely (as with the perversity narrative).<sup>39</sup> The value of these narratives is what Hirschman referred to as their “disarmingly simple” structure.<sup>40</sup> They are often used to contest limitations on government power, or even in some prior writings, democracy itself.<sup>41</sup> Hirschman’s critique is relevant to Vermeule’s work in the degree to which these arguments are presented with sweeping generalities and assumptions. This is not to say that Vermeule cannot convert these

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incentive-incompatibility, failing to stick when the risks they seek to prevent materialize, perhaps because those very risks have materialized. In some cases precautions, although sensible in themselves, will prove too costly on other margins, and thus fail a kind of rough calculus of costs and benefits. (pp 186–87)

<sup>36</sup> Hirschman, *Rhetoric of Reaction* at 7 (cited in note 9).

<sup>37</sup> This criticism is not meant to paint Vermeule as a reactionary. However, the use of these categories to challenge Madison’s precautionary rules is notable given Vermeule’s general acceptance of the rise of a type of überpresidency in the United States. His arguments in prior work that question the legal limits on presidential power (and his criticism of arguments concerning civil liberties during national emergencies) would likely have been seen as reactionary at the time, though he clearly would not have been alone in holding such views. See notes 103–06 and accompanying text. See also Hirschman, *Rhetoric of Reaction* at 12–14 (cited in note 9). Indeed, Benjamin Franklin’s famous warning bears out that such trade-offs were openly discussed at the time of the Founding: “They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.” Benjamin Franklin, 1 *Memoirs of the Life and Writings of Benjamin Franklin* 517 (Henry Colburn 1818).

<sup>38</sup> Indeed, these very arguments could well have been made at the Founding by those who resisted the executive powers of the English monarchy. Hirschman traced these arguments to contemporaries of the Framers in the French Revolution. See Hirschman, *Rhetoric of Reaction* at 12–13 (cited in note 9).

<sup>39</sup> Hirschman was particularly scathing with regard to the perversity thesis, which he described as having “a certain elementary sophistication and paradoxical quality that carry conviction for those who are in search of instant insights and utter certainties.” *Id.* at 43.

<sup>40</sup> *Id.* (referring to the futility thesis).

<sup>41</sup> See *id.* at 103–05 (discussing the jeopardy thesis).

categories into support for his mature position, but that case is not made in the course of his book.

### A. Futility

The first critique of precautionary constitutionalism is that it will simply fail to attain its end (p 54).<sup>42</sup> At the heart of this critique are what Vermeule characterizes as “parchment barriers” (pp 54–55)—a term that appears in Madison’s Federalist 48<sup>43</sup>—in his argument (extending to Federalist 47, 48, and 51) that tyranny requires the application of “auxiliary precautions.”<sup>44</sup> These include the checks and balances designed to allow “ambition . . . [to] counteract ambition.”<sup>45</sup> Vermeule, however, is more drawn to the prior use of the term by Alexander Hamilton in Federalist 25, in the context of the strong opposition to standing armies (p 55).<sup>46</sup> The Anti-Federalist opposition to standing armies (to which Hamilton had written his retort) proved “unnecessary” in Vermeule’s view because “standing armies did not become a regular feature of the federal establishment until after the Civil War” (p 55). It is an odd example, since the prohibition on standing armies was not adopted and Vermeule ignores earlier examples of abuses by the early Army under the Federalists, who seemed to realize the very risks that motivated the Anti-Federalist objections.<sup>47</sup> Certainly the argument can be characterized as a futility claim, but that recharacterization into risk terminology does not clearly counter precautionary arguments.

The second example of futility is drawn from what Vermeule discusses as the pathological approach to free speech and focuses on *Brandenburg*, another curious choice since the *Brandenburg* test has been criticized precisely because it is maddeningly fluid and seen by free speech advocates as more passive-aggressive

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<sup>42</sup> Hirschman described this futility narrative in the following way: “The appeal of the arguments rests largely on the remarkable feat of contradicting, often with obvious relish, the commonsense understanding of these events as replete with upheaval, change, or real reform.” Hirschman, *Rhetoric of Reaction* at 70 (cited in note 9).

<sup>43</sup> Federalist 48 (Madison), in *The Federalist* 332, 332–33 (Wesleyan 1961) (Jacob E. Cooke, ed) (“Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?”).

<sup>44</sup> Federalist 51 (Madison), in *The Federalist* 347, 349 (cited in note 43).

<sup>45</sup> *Id.*

<sup>46</sup> See Federalist 25 (Hamilton), in *The Federalist* 158, 163 (cited in note 43).

<sup>47</sup> See Jonathan Turley, *The Military Pocket Republic*, 97 *Nw U L Rev* 1, 28–30 (2002) (describing the scandals of the “New Army” established by the Constitution and the political pressure on President Thomas Jefferson to reduce its size).

than pathological. Yet Vermeule notes that “precautions will systematically tend to prove futile when they would prevent government from taking action against apparently dangerous threats” (p 57). But what are the “apparent” threats that Vermeule is referencing? Moreover, how do we evaluate the futility of the precautions without addressing the historical threat to free speech, as shown in cases like *Brandenburg*, or the ill-defined threats that occupy the universe of unaddressed countervailing risks?

While Vermeule raises the issue of the futility of some free speech protections, these questions seem lost in the ether of his theory that precautionary safeguards can prove futile. In this final example of clear-statement rules, we are left with the same uncertainty. Vermeule notes the requirement that presidential actions have “clear statutory authorization,” but he suggests that this precautionary rule commonly fails due to the unreliability of courts (p 57). He notes that the requirement can be “swept away by the sense of crisis,” and that “clear-statement restrictions on presidential emergency powers and war powers suffer from severe commitment problems” (p 57). Yet it is not clear how this is a failure of precautionary constitutionalism, since optimizing constitutionalism would run into the same commitment problems in limiting executive excess in times of crisis. I certainly agree that courts have a perfectly dismal record of maintaining a consistent or principled line of cases during wars and national crises. However, Vermeule seems to suggest that the failure of judicial integrity and consistency during such periods shows the futility of such rules. This assertion is akin to saying that the occurrence of impeachable conduct by presidents shows the futility of rules against such conduct. Under such an argument, any precautionary rule is challengeable as futile due to the frailty of human agents. It is not clear where the futility argument leaves the ultimate analysis. Futility arguments are compelling on narrow, insular risk-management questions. However, when applied more broadly to a constitutional context, it is difficult to extrapolate a wider meaning of a failure of clear-statement rules to constitutional rulemaking as a whole.

## B. Jeopardy

The second critique of precautionary constitutionalism is that a given precaution “will produce net costs in light of countervailing risks on other margins” (p 54). Vermeule explains that

past critics of rulemaking advanced classic jeopardy arguments against precautionary theories.<sup>48</sup> Again, Vermeule uses Hamilton's arguments opposing a prohibition on standing armies as illustrative. He notes that Hamilton suggested that the prohibition "would create a countervailing risk on a different margin—the seizure of property by foreign invaders—and that it would perversely create a risk to liberty itself, because a foreign invasion would destroy liberty as surely as would domestic despotism" (p 58).

Vermeule's use of recess appointments as an example of jeopardy is a bit more forced and less compelling—though there is no question that supporters of the appointment power did argue countervailing risks. Vermeule discusses the recent case of *Noel Canning v National Labor Relations Board*,<sup>49</sup> in which President Barack Obama was found to have violated the separation of powers by making recess appointments during an intrasession recess of Congress.<sup>50</sup> In the interest of full disclosure, Vermeule and I sharply differ on the merits of this case.<sup>51</sup> Vermeule's discussion focuses on the opinion of the DC Circuit since the book came out before the Supreme Court ruled unanimously to uphold the decision (and agreed that the president's

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<sup>48</sup> Again, Hirschman is illustrative in his description of the thesis from his work:

The jeopardy thesis draws considerable strength from its connections with [ ] various myths and stereotypes. The argument that a new advance will imperil an older one is somehow immediately plausible, as is the idea that an ancient liberty is bound to be more valuable or fundamental than a new ("newfangled") one.

Hirschman, *Rhetoric of Reaction* at 123 (cited in note 9).

<sup>49</sup> 705 F3d 490 (DC Cir 2013), affd, 134 S Ct 2550 (2014).

<sup>50</sup> *Noel Canning*, 705 F3d at 503–04. I testified in the congressional hearing held after the recess appointments and argued that the appointments were flagrantly unconstitutional—admittedly raising many precautionary themes that Vermeule identifies. See *Executive Overreach: The President's Unprecedented "Recess" Appointments, Hearing before the Committee on the Judiciary, House of Representatives*, 112th Cong, 2d Sess 35–57 (2012) (statement of Professor Jonathan Turley) ("Executive Overreach"). See generally *Confirmation Hearing for Attorney General Nominee Loretta Lynch before the Senate Committee on the Judiciary* (Jan 29, 2015) (statement of Professor Jonathan Turley) ("Lynch Hearing"), archived at <http://perma.cc/G2KU-96QP> (discussing the *Noel Canning* decision and the role of confirmation hearings to reinforce the separation of powers).

<sup>51</sup> Compare Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 Harv L Rev F 122 (2013), with Turley, 93 BU L Rev 1523 (cited in note 26). See also Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 Wis L Rev 965, 1016 n 308, 1029.

recess appointments had violated the Constitution).<sup>52</sup> Vermeule uses the argument raised (by himself and others) in favor of the appointments as an example of jeopardy reasoning.<sup>53</sup> Vermeule criticizes the exclusive focus on the “senatorial check on appointments” that relegates to the background the critical truth that “[a]ll provisions of the Constitution, and indeed the document’s very existence, implicitly presuppose that a functioning government is a worthy aim of constitutional interpretation” (p 60). The argument certainly captures the ever-present countervailing risks that can be made in a jeopardy argument, but it also highlights the subjectivity of such risks.

The suggestion that the risk avoided by such recess appointments is the very functioning of government, or even a component of government, is manifestly overblown. The actual number of appointments controversies remains relatively small among federal offices and, when such controversies arise, there are acting officials who carry out the work of the agencies. The NLRB vacancy at issue in *Noel Canning* did present an operational barrier since there was a need to satisfy a quorum rule, which is why the confirmation was withheld pending resolutions with Congress over the funding and function of the board.<sup>54</sup> However, the vast majority of recess appointments lead to the work being done by an acting official,<sup>55</sup> which, while hardly optimal, is hardly catastrophic for that agency or office. The treatment of the risks as commensurate exposes the limitations of risk analysis as the basis for a unified theory of constitutional rulemaking. To simply point out that there are countervailing

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<sup>52</sup> *National Labor Relations Board v Noel Canning*, 134 S Ct 2550, 2578 (2014).

<sup>53</sup> Vermeule also raises the filibuster rule as contributing to this danger and insists that “no problem would occur” if the Senate were to simply eliminate the rule (p 60). It is not clear why Vermeule thinks that there would be no problem on appointments with a majority-voting system. Various presidents have found themselves facing a hostile majority in the Senate when no filibuster was needed. They have used the recess appointment power to circumvent such majorities in the past. Moreover, the filibuster rule is simply a rule of the Senate passed by majority vote. It was recently curtailed by majority vote. Paul Kane, *Reid, Democrats Trigger “Nuclear” Option; Eliminate Most Filibusters on Nominees* (Wash Post, Nov 21, 2013), archived at <http://perma.cc/G55D-Y9VX>. An argument could be made in favor of filibuster rules in light of the shrinking influence of Congress over agencies and the use of appointments to seek information and changes on regulatory matters. See Turley, 93 BU L Rev at 1557–61 (cited in note 26).

<sup>54</sup> See Steven Greenhouse, *Labor Panel Is Stalled by Dispute on Nominee*, NY Times A16 (Jan 15, 2010).

<sup>55</sup> See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S Cal L Rev 913, 933 (2009) (“For the most critical positions, there is a default acting official.”).

risks is not enough. It is difficult to conclude that precautionary rules are vulnerable to the jeopardy argument without a firm understanding of the relative value of the risks and their ability to be addressed in other ways.

### C. Perversity

Vermeule's third critique of precautionary constitutionalism is that a given precaution can prove self-defeating by exacerbating "the very risk that the precaution attempts to prevent" (p 54). Again, Vermeule is able to show how critics of precautionary constitutionalism, including some from the Founding, at times referred to what would be called perversity arguments.<sup>56</sup> For example, Vermeule again cites Hamilton's views concerning limiting executive powers. The heavy reliance on Hamilton undermines the view that such arguments were common, but it does certainly offer an illustrative example of how such an argument can be made. Hamilton argued that placing significant limitations on executive power could produce the very danger that one was seeking to avoid by encouraging frustrated executives to simply break from all constitutional limitations.<sup>57</sup> It is a weak example of perversity since the danger is of an act against the Constitution as a whole and presumably is an impeachable offense. President Richard Nixon's actions were certainly the very risk that was sought to be avoided, but so are the acts of every felon that violate a standard of conduct. To suggest that limitations on an executive somehow force an unconstitutional act is unconvincing as an example.

The general weakness of the perversity arguments overall is further evident in Vermeule's resumption of the discussion of recess appointments. Vermeule's suggestion of a perverse incentive is remarkably forced in this context. In discussing the DC Circuit's ruling, which was designed to avoid presidential aggrandizement, Vermeule notes:

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<sup>56</sup> Hirschman identified the perversity thesis as a reactionary argument based on market economics—that "any public policy aiming to change market outcomes, such as prices or wages, automatically becomes noxious interference with beneficent equilibrating processes." Hirschman, *Rhetoric of Reaction* at 27 (cited in note 9).

<sup>57</sup> This specific paper was actually a collaboration between Madison and Hamilton. Federalist 20 (Madison and Hamilton), in *The Federalist* 124, 127 (cited in note 43) ("A weak constitution must necessarily terminate in dissolution, for want of proper powers, or the usurpation of powers requisite for the public safety.").

That holding might actually turn out to be *perverse*, making matters worse on the very same margin the court was worried about. In other words, the court's precaution against president aggrandizement might actually increase the overall risk of aggrandizement in the long run.

How would this occur? The main mechanism involves the risk of backlash. Suppose . . . the president offers some radical reinterpretation of the Constitution, one that gives him substantially increased discretion over appointments. . . . Should the new position stick as a political equilibrium, then—given the *Canning* court's own concern with safeguards against presidential power—the court might bitterly regret, *ex post*, that it threw up an obstruction that contributed to creating a backlash in the other direction. (p 67)

Again, the perversity risk is that a president will act in contravention of the Constitution. However, since the Court ruled on the most recent violation in this area, it would be free to address this risk of a “radical reinterpretation” in another such corrective decision without being paralyzed with “bitter[] regret” (p 67).

A third example in the free speech context is more compelling. Vermeule discusses Justice Robert Jackson's dissent in *Terminiello v Chicago*.<sup>58</sup> Jackson raises a classic perversity argument in challenging the majority's ruling to protect the speech of a defrocked Catholic priest against a breach of the peace charge.<sup>59</sup> Jackson advances a signature specter that too much freedom might lead to less freedom—a position left characteristically in highly generalized terms:

In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. We must not forget that it is the free democratic

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<sup>58</sup> 337 US 1 (1949).

<sup>59</sup> Vermeule cites Justices Jackson and Felix Frankfurter elsewhere in the book as leading voices against precautionary constitutionalism (p 20). They are telling choices for those of us who have long been highly critical of these jurists, particularly Frankfurter. Frankfurter's fluid and often inconsistent views on legal questions were matched only by his lack of ethics in cases like *Ex Parte Quirin*, 317 US 1 (1942). See Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo Wash L Rev 649, 737–45 (2002); Jonathan Turley, *Quirin Revisited: The Dark History of a Military Tribunal*, Natl L J A20 (Oct 28, 2002).

communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle [with Fascists and Communists] are not interested permanently in either.<sup>60</sup>

That is clearly an example of a perversity argument, and the question is why it should be given credence. Certainly it is not credited by Hirschman for the very reasons that are apparent here.<sup>61</sup> Jackson was making a sweeping and unsupported suggestion that allowing speech would ultimately threaten the very existence of the system. Vermeule refers to this as the danger created by “tolerating political speech and participation by groups who would repeal liberal protections if they came to power” (p 69). Of course, a “repeal” of such liberties would require changing the First Amendment itself. More importantly, history has shown that it is the denial, not the protection, of free speech that is the harbinger of authoritarianism.<sup>62</sup> Putting aside the merits of such long-standing debates, Vermeule does isolate a good example of a perversity argument, but the reader is left to question what, beyond classification, such an example achieves for constitutional analysis—a question that only grows with consideration of Vermeule’s optimizing-constitutionalism concept.

#### D. Ex Post Remedies

The final critique is that risks are best addressed not with a general ex ante precaution but with “an ex post remedy applied case-by-case, after the relevant risk has actually materialized” (p 54). Vermeule gives various examples of instances in which critics have charged that the availability of ex post remedies reduces the necessity of ex ante precautions. Vermeule quotes Justice Oliver Wendell Holmes’s dissent in *Panhandle Oil Co v Mississippi*,<sup>63</sup> in which he voted to uphold a state sales tax on oil sold to the United States (p 73). Holmes insisted that the danger raised by such taxes is addressed by the Court itself and that “the power to tax is not the power to destroy while this Court

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<sup>60</sup> *Terminiello*, 337 US at 36–37 (Jackson dissenting).

<sup>61</sup> See Hirschman, *Rhetoric of Reaction* at 36, 39–42 (cited in note 9) (“[I]t can be argued that the perverse effect, which appears to be a mere variant of the concept of unintended consequences, is in one important respect its denial and even betrayal.”).

<sup>62</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am Bar Found Rsrch J 521, 527 (describing how free speech can protect against abuses of official power).

<sup>63</sup> 277 US 218 (1928).



sits.”<sup>64</sup> It is a strong sentiment that a precautionary rule might not be needed given the availability of judicial review. Ironically, it is also the obvious answer to Vermeule’s perversity argument on recess appointments discussed above.

Vermeule uses Holmes’s famous line to highlight the champion of ex post remedies: Frankfurter. Frankfurter wrote the controversial majority opinion in *Beauharnais v Illinois*,<sup>65</sup> in which the Court upheld a clear constraint on free speech in the hope that such restrictions might reduce social tensions.<sup>66</sup> Frankfurter showed his classic disregard for precautionary values, casting them aside on the possibility that circumscribing free speech might succeed:

In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.<sup>67</sup>

In a telling passage, however, Frankfurter did not trouble himself with the relative weight of the threat of free speech or even the likely success of the constraint on free speech in curtailing unrest:

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the

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<sup>64</sup> Id at 223 (Holmes dissenting).

<sup>65</sup> 343 US 250 (1952).

<sup>66</sup> See id at 251–52, 266–67.

<sup>67</sup> Id at 261.

trial-and-error inherent in legislative efforts to deal with obstinate social issues.<sup>68</sup>

Thus, Frankfurter was not simply arguing for ex post remedies; he was articulating a largely undefined concept of—and a low level of protection for—free speech that requires only that restrictions not be “unrelated to the problem.”<sup>69</sup> This captures much of the problem with Vermeule’s analysis. The problem is not simply the relative weight of risks and counter risks, but the focus on risks as opposed to the inherent value of what is being protected. Frankfurter’s words reflect a minimalist understanding of the value of free speech itself and its role in society, a problem that will be discussed more fully below.

### III. THE PHANTOM AND OPTIMIZING CONSTITUTIONALISM

Despite my criticism of some of Vermeule’s assumptions, his examination of constitutional rulemaking through the lens of risk analysis is still fascinating and a clear contribution to the field. However, to achieve his second proposition of a new unifying theory of constitutional law, Vermeule has to use this risk concept as a foundation, not merely as a new descriptive element in constitutional analysis. In doing so, the problem of ill-defined risks becomes magnified. There remains a threshold question of the focus on the risk as opposed to the object of the risk, such as free speech or free exercise. It is with this new theory that the fox gets a bit hedgehog-like, but never really seems to stop being a fox that knows many things yet lacks that one viable big theory.

#### A. The Mature Position and the Vermeulean Virtues

Vermeule does not subscribe to all the risk critiques—or arguments against all precautionary measures—but rather adopts what he refers to as the “mature position” of constitutional risk regulation (p 76). This is another adoption from Hirschman’s work, which seeks to find a compromise between the “risks in both action and inaction.”<sup>70</sup> Central to Hirschman’s mature position is the saying *Le pire n’est pas toujours sûr*—the worst is not always sure to happen.<sup>71</sup> That saying captures the general

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<sup>68</sup> Id at 261–62 (citation omitted).

<sup>69</sup> *Beauharnais*, 343 US at 262.

<sup>70</sup> Hirschman, *Rhetoric of Reaction* at 153 (cited in note 9).

<sup>71</sup> See id at 154.

suspicion of bright-line precautionary rules, which is amplified by Vermeule:

The mature position is structurally parallel, in the domain of political risks, to the position advanced by critics of precautionary principles in health, safety, and environmental regulation. On this view, given the possibility of countervailing risks, the goal of the designer of a regulatory system should be *optimal* precautions rather than *maximal* precautions. The latter is an incoherent goal in any event, because precautions may themselves create risks, and thereby prove self-defeating. The mature calculus, then, posits that “[o]ptimal regulation in the face of a target risk (TR) and a countervailing risk (CR) would take both seriously and strive to maximize their difference ( $\Delta TR - \Delta CR$ ). Uncertainty is not the crucial problem—trade-offs are.” (p 77) (quotation marks omitted).

Vermeule warns of the costs that come with seeking to prevent phantom risks<sup>72</sup> since “precautions against unforeseen consequences can themselves bring about other unforeseen consequences” (p 105).<sup>73</sup> Such phantom risks are at the heart of what Vermeule calls the “self-defeating” precautions of the Framers (p 105). Indeed, he views some attempts to avoid risks as the very thing undermining the system as a whole: “Attempting to skew the constitutional rules to safeguard against the unforeseen may be precisely what brings the unforeseen about” (p 106). Vermeule argues that “optimal risk assessment” is preferable to the type of large-scale precautionary systems put into place by the Framers (p 106).

In application, optimizing constitutionalism proves highly fluid by design.<sup>74</sup> In what Vermeule would ultimately call

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<sup>72</sup> Book Talk at 19:02 (cited in note 1).

<sup>73</sup> This is part of two basic conclusions based on the work of James Bryce. See generally James Bryce, 1 *The American Commonwealth* (Liberty Fund 3d ed 1995); James Bryce, 2 *The American Commonwealth* (Liberty Fund 3d ed 1995).

<sup>74</sup> Vermeule’s view of applied theory is remarkably theoretical for those seeking a path through intractable contemporary controversies. For example, he applies this theory to such controversies as the risks associated with the goal of impartiality, in addition to challenging the legal maxim *nemo iudex in sua causa*—no man should be judge in his own case or cause (p 107). Vermeule argues that, despite the general acceptance of this principle, “as a normative matter, impartiality is a good to be optimized, not maximized; and as a positive matter, U.S. constitutional law surprisingly often abandons the ideal of impartiality in favor of other goods” (p 107). From legislator qualifications to questions of court jurisdiction, Vermeule spends considerable effort showing that this is not treated

“[c]onstitutional [r]ulemaking [w]ithout a [s]tyle,” he eschews robust precautionary rules in favor of a balancing approach that often deals with problems *ex post* (pp 186–87). He rejects the approach of writers like Hume and Madison in favor of the more fluid approach of people like Hamilton, Jackson, and Frankfurter. Those associations lead inexorably toward what most would recognize as a more functionalist approach to conflict, though it is based on Vermeule’s desire for optimal risk assessment. From Vermeule’s perspective, evidence of such optimizing compromises is already seen in many institutions. Rather than adopt, for example, the absolute expression of impartiality rules, Vermeule notes that the Constitution contains a series of trade-offs that give governmental entities some power over their own conditions, while checking that authority in other respects. It is evidence of optimizing compromises that Vermeule suggests can be applied more broadly in breaking away from some precautionary rules. Vermeule also applies these optimizing principles to the mechanisms for seeking “second opinions” that are based on a belief that such second looks allow for better policies and decisionmaking (p 161). However, Vermeule notes that “additional layers of deliberation and procedure are never costless or risk-free” (p 141). They require trade-offs and can create “jeopardy problems, if the direct costs and opportunity costs of additional opinion outweigh their benefits” (p 161).

Much of the application of optimizing principles to notions of impartiality and second-opinion rules is unlikely to be particularly surprising for many readers as examples of how political risks are managed. For that reason, chapter 6 seems a more promising context for applied theory when Vermeule turns to the administrative state. The rise of administrative agencies—often referred to as the “fourth branch” of government—has alarmed some of us in the field.<sup>75</sup> There is a growing concern

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as an absolute rule. It certainly shows a trade-off against institutional self-dealing, but it is also far removed from the central and defining issues that usually shape major constitutional theories. It is a return to the micro- (and, one might say, foxy) focus that characterizes the book as a whole.

<sup>75</sup> See, for example, Jonathan Turley, *The Rise of the Fourth Branch*, Wash Post B1 (May 26, 2013). See also Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L Rev 1, 2–4 (1994) (acknowledging that “[t]here is no room for a fourth branch [constitutionally],” but advocating a modified formalist approach as a “second best” option); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum L Rev 573, 574–81 (1984); *Lynch Hearing* (cited in note 50) (discussing the threat of the fourth branch of government to the system of the separation of

that the center of gravity within the tripartite system has shifted due to the rise of federal agencies—allowing the circumvention of political processes designed to forge majoritarian compromises and democratic accountability.<sup>76</sup> Vermeule briefly describes this controversy over the administrative state since the enactment of the Administrative Procedure Act<sup>77</sup> as the “perpetual conflict structured by congressional statutes and the oversight of congressional committees, on the one hand, and presidential policies and White House oversight, on the other” (p 163). This is a particularly useful context for understanding Vermeule’s approach since it deals more broadly with the constitutional structure and values underlying the separation of powers—the very type of large-scale precautionary questions that occupy many big theories. However, the fox again appears in the hedges as Vermeule turns the analysis to a more insular question of the conflict between agency decisionmaking and expert opinions or consensus (p 165). While the discussion of first-order and second-order reasons is an interesting debate over administrative decisionmaking, the discussion again leaves the reader straining to see the forest around the carefully analyzed, detailed texture of this tree.

In the end, the reader is left with a list of three “virtues” as guides for Vermeule’s “[c]onstitutional [r]ulemaking [w]ithout a [s]tyle” (p 186). While he is again clear in his rejection of precautionary rulemaking and its “redundant and robust safeguards against the risks [of abuse of power]” (p 186), one virtue that Vermeule does not advance is clarity for the application of his optimizing constitutionalism. Consider the three virtues that he does advance:

*Avoidance of political obsession.* Vermeule admits that his first Vermeulean “virtue” “verges on the banal”: “constitutional rulemakers should have no obsessions” (p 188) (emphasis omitted). In other words, rulemakers should not be obsessed with the risks underlying classic precautionary rules and should instead “assess all political risks for what they are worth, no more and no less” (p 188).

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powers); *The President’s Constitutional Duty to Faithfully Execute the Laws*, House Committee on the Judiciary (Dec 2, 2013) (statement of Jonathan Turley), archived at <http://perma.cc/Z26Z-R38E> (discussing nonenforcement issues and the rise of the fourth branch).

<sup>76</sup> See, for example, McCutchen, 80 Cornell L Rev at 2 (cited in note 75).

<sup>77</sup> Pub L No 79-404, 60 Stat 237 (1946), codified at 5 USC §§ 551–59.

*Avoidance of extremes.* The next virtue that Vermeule identifies is that “it is generally a good idea to avoid extreme solutions” (p 188). Again, the importance or applicability of this virtue is hard to track in Vermeule’s analysis, which stresses that “[t]his is not a conceptual point, nor is it a systematic commitment; instead it is an entirely pragmatic observation that will sometimes hold, and sometimes not, and that is based entirely on a rough empirical judgment about the recurring circumstances of constitution-making” (p 189).

*Flexibility.* The final Vermeulean virtue is that rulemakers must embrace “a wide range of commitments and allocations of institutional authority” (p 189). Vermeule calls for balance and maturity in decisionmaking such that rulemakers “approach their task, to the extent possible, without preconceptions and without biases in favor of particular institutional arrangements” (p 190).

For many, such virtues are likely to appear as little more than truisms. They seem to flow from Vermeule’s uncola cache as a theorist. In the end, it is not clear whether such virtues are the demonstration of a “constitutional theory without style” or a “style without constitutional theory.” The applied material remains mostly on a very theoretical level for those readers interested in seeing how a risk-based theory would be manifested in actual interpretative decisions. The discussion of recess appointments (at the end of Part I), however, offers such a concrete example—the Supreme Court’s decision could be viewed as supporting one aspect of Vermeule’s mature-position approach to risk.

## B. The Mature Position Applied

The tension seen in recent years over the lines of separation of powers in our system naturally pulls a reader to those parts of the book that address the application of Vermeule’s virtues. There is a particular interest in seeing this approach played out in the context of higher-order risks than the prior discussion of the costs and benefits associated with “second opinions” or “impartiality” rules. Vermeule illustrates this mature position by returning to recess appointments and the *Noel Canning* decision. Vermeule takes as self-evident that his prior discussion demonstrated that the ruling “created countervailing risks and harms” (p 77). That result was less than evident to this reader since those risks and harms seemed entirely undefined, unlikely,

and unquantifiable (such as the risk of a president adopting some novel aggrandizing theory of the Constitution). Since the Supreme Court's decision partially supports the outcome advocated by the mature position that Vermeule articulates, the decision offers a useful context in which to explore the theory. In application, the Vermeulean virtues seem to have the same effect as Professor Alexander Bickel's "passive virtues": to support a more minimalist role for the courts in major constitutional conflicts.<sup>78</sup> Recess appointments present a microcosm not only of the ascension of such virtues, but also of an examination of the foundation for a broader theory from Vermeule's risk-regulation perspective.

As noted earlier, Vermeule is a critic of the DC Circuit decision in *Noel Canning* as shaped by the type of precautionary rules that he critiques in the book. Vermeule, however, offers an application of his theory on constitutionalism in anticipation of the Supreme Court decision, which ultimately upheld the DC Circuit's ruling but adopted a narrower basis for determining that President Obama had violated the separation of powers. The case involved Noel Canning, a bottler and distributor of soda products, which was subject to the regulations governing employers under the National Labor Relations Act.<sup>79</sup> Noel Canning challenged a negative National Labor Relations Board (NLRB) ruling issued by officials who had been appointed by Obama during a brief break of Congress of only a few days.<sup>80</sup> The DC Circuit held that the appointments violated the separation of powers and sought to blur the lines of authority in this critical area of checks and balances: "To adopt the [government's] proffered intrasession interpretation of 'the Recess' would wholly defeat the purpose of the Framers in the careful separation of powers structure . . . . Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers."<sup>81</sup>

For Vermeule, the case represents a classic opportunity to apply optimizing constitutionalism to balance all risks from both the appointments as well as the failure of the Senate to approve nominees for federal offices. Vermeule charges that the DC

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<sup>78</sup> Alexander M. Bickel, *The Least Dangerous Branch* 199–200 (Yale 1962).

<sup>79</sup> Pub L No 74-198, 49 Stat 449 (1935), codified at 29 USC §§ 151–69. See also *Noel Canning*, 705 F3d at 498.

<sup>80</sup> *Noel Canning*, 705 F3d at 499.

<sup>81</sup> *Id* at 503–04.

Circuit “barred all intrasession recess appointments as a precaution against presidential aggrandizement, but we have seen that the holding created countervailing risks and harms—both risks of collateral harm to the orderly functioning of government, and the perverse consequence of possibly increasing the long-term risk of presidential aggrandizement itself” (p 77).<sup>82</sup>

Vermeule states that these countervailing risks are self-evident but fails to show how such vacancies endanger the orderly functioning of the government, especially given that, in most cases, acting officials assume these roles. In this case, the vacancies did present a problem to the functioning of the new board. However, *Noel Canning* arose out of a broader disagreement in Congress over the function and funding of the NLRB. The need for a quorum added to the pressure for compromise with Congress, but ultimately it led to the president’s circumvention of Congress.

Additionally, it is hard to see how a decision of this kind really creates a perverse incentive for presidential aggrandizement. These ill-defined counterrisks are treated as simply commensurate with the circumvention of the Senate in its role of confirmation. Clearly a president could respond to a negative court decision in a fit of rage and flood the system with unconstitutional recess appointments. Indeed, she could take the same bizarre step after negative rulings on free speech or free exercise or federalism. However, the system has checks in place for such abuses, particularly with the very judicial review process that triggered this hypothetical bout of distemper.

In a work based on the proper understanding of risk and countervailing risk, the discussion of recess appointments at various points of the book is illustrative not only of the ill-defined counterrisks, but also of the dismissive treatment of the risks that are the subject of precautionary rulemaking. Regarding recess appointments, Vermeule virtually mocks the notion of any real risk: “Recess appointments are hardly the stuff of which tyranny is made, because of their inherently limited duration, expiring at the end of the next congressional session” (p 40). He previously dismissed *Noel Canning*’s consideration of the risks of

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<sup>82</sup> While Vermeule sees the DC Circuit’s decision as an example of runaway precautionary principles, I have criticized the opinion as a missed opportunity for establishing a clearer nexus between the Recess Appointments Clause and the anti-aggrandizement (or anti-aggregation) principles of the Constitution. See Turley, 93 BU L Rev at 1590–95 (cited in note 26).



recess appointments as “a myopic approach to the regulation of constitutional risks.”<sup>83</sup> Such a view is maintained only by discarding not just the risk of the aggrandizement of executive power but also the countervailing value of the Senate’s role in federal appointments. In this case, confirmation of Richard Cordray, the president’s nominee to serve as the first director of the Consumer Financial Protection Bureau, was blocked by forty-five senators over a disagreement with the president on the accountability and funding of the bureau.<sup>84</sup> Obama also appointed three individuals to the NLRB. The Senate used the confirmations to address those significant disagreements with the White House.

The use of appointments in this fashion has become more important with the rise of federal agencies.<sup>85</sup> With the decreasing role of Congress in the regulations affecting most citizens and the increasing power of the executive branch in our federal system,<sup>86</sup> appointments have become a key vehicle for Congress to force answers from the executive branch and forge compromises in policy disputes. Putting aside the increasingly important role of confirmations as a check on the administrative state, there is also the original purpose of guaranteeing that high-ranking federal officials are placed in office with the consent of Congress to not only guarantee their qualifications but also to reaffirm their authority and legitimacy. Finally, Vermeule does not address the dangers of unilateral action and the rise of a type of überpresidency—the subject of years of litigation and controversy.<sup>87</sup> While Vermeule scoffs at the notion of

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<sup>83</sup> Vermeule, 126 Harv L Rev F at 122 (cited in note 50).

<sup>84</sup> Ylan Q. Mui, *Sides Entrenched in Lead-Up to Vote on Consumer Agency*, Wash Post A15 (Dec 8, 2011).

<sup>85</sup> See Turley, 93 BU L Rev at 1542–62 (cited in note 26).

<sup>86</sup> It is striking that in a hearing concerning the planned House lawsuit against Obama, even the Democratic witness agreed that there had been a worrisome rise in executive power at the expense of Congress. See *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties under the Constitution of the United States*, Hearing before the House Committee on Rules, 113th Cong, 2d Sess \*5–6 (2014) (statement of Simon Lazarus, Senior Counsel, Constitutional Accountability Center), archived at <http://perma.cc/Z5SH-4BGW>.

<sup>87</sup> See, for example, *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 593–94 (1952) (Frankfurter concurring) (discussing the possibility of the executive gaining “dangerous power”); *Zivotofsky v Clinton*, 132 S Ct 1421, 1428 (2012) (discussing whether the executive branch is “aggrandizing its power at the expense of another branch”). See also Terry M. Moe and William G. Howell, *The Presidential Power of Unilateral Action*, 15 J L, Econ & Org 132, 154 (1999) (noting Jefferson’s Louisiana Purchase, Lincoln’s

the dangers of such actions given their limited temporal impact, he does not consider the context of increased presidential power overall—a curiously abridged view given his expansive analysis of countervailing risks. We are living in a time of tremendous controversy over massive surveillance, kill lists, and other unilateral actions ordered under sweeping claims of executive power. Presumably all these orders could be discarded as lasting for only the term of a president, like recess appointments, which themselves can last for years.<sup>88</sup> Despite his criticism of precautionary constitutionalists for ignoring countervailing risks, Vermeule does precisely that in discussing the very risks that motivate precautionary rulemaking.

Vermeule does offer what he considers a mature interpretation of the Recess Appointments Clause. He first suggests that the DC Circuit could have simply ruled that “historical practice has liquidated and fixed, within a range, the duration of intrasession recesses within which an appointment may be made” (p 78). This use of historical practice is a classic functionalist position and one that I have criticized as a type of “constitutional adverse possession.”<sup>89</sup> Under this approach, long-standing unconstitutional acts can alter the meaning of constitutional provisions like the Recess Appointments Clause. It is a position that the DC Circuit—and, later, four members of the Supreme Court—rejected.<sup>90</sup> In his concurrence, Justice Antonin Scalia amplified this criticism in regard to the majority’s use of historical practice:

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a *consistent* and *unchallenged* practice over a long period of time, the

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Emancipation Proclamation, Truman’s desegregation of the military, and Johnson’s affirmative action program as consequential unilateral actions taken by presidents).

<sup>88</sup> See Turley, 93 BU L Rev at 1579 (cited in note 26).

<sup>89</sup> Turley, 2013 Wis L Rev at 971 (cited in note 51).

<sup>90</sup> Even before *Noel Canning*, the Supreme Court stressed in *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477 (2010), that “the separation of powers does not depend on the views of individual Presidents, nor on whether ‘the encroached-upon branch approves the encroachment.’” Id at 497, quoting *New York v United States*, 505 US 144, 182 (1992) (citations omitted).

oft-disputed practices at issue here would not meet that standard.<sup>91</sup>

Vermeule, however, offers an alternative optimizing interpretation in the event that simple historical-practice arguments are not persuasive enough for those who are discomforted by the inherent vagueness or elasticity therein. He argues that the DC Circuit could have simply adopted a less textual and more pragmatic approach based on a three-day rule founded in the Adjournments Clause, which bars either house from adjourning for more than three days during a congressional session without the other's consent.<sup>92</sup> Thus, Vermeule concludes:

The three-day line offers exactly that, but with reduced countervailing harms and risks, compared to the court's rule. Even granting the concern with presidential aggrandizement, the court's highly precautionary holding represents a poor overall treatment of the relevant risks, in light of the problems of jeopardy and perversity that the holding created. (p 78)

Again, putting aside the less-than-self-evident (and undefined) "problems of jeopardy and perversity" that the DC Circuit's decision created, Vermeule somehow views a small window for possible intrasession recess appointments as resolving or at least reducing those countervailing risks.

In fairness, however, it is a conclusion that the Supreme Court's *Noel Canning* decision partially supports. While the Court was unanimous in rejecting the recess appointments (and supporting argument) by the Obama administration, five justices did use the Adjournments Clause as a guidepost,<sup>93</sup> while, as previously noted, four justices rejected the historical-practice arguments underlying this theory. The majority issued a decision that was striking in its fluidity or, as Vermeule might prefer, its maturity. Using a mix of the Adjournments Clause and historical practice, the majority simply came up with a new presumptive range for recess appointments. It held that a recess of less than ten days was presumptively too short. As if the basis for this new constitutional standard was not ambiguous enough, Justice Stephen Breyer added that this presumption could be overcome in "some very unusual circumstance" but "[i]t should

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<sup>91</sup> *Noel Canning*, 134 S Ct at 2617 (Scalia concurring).

<sup>92</sup> US Const Art I, § 5, cl 4.

<sup>93</sup> *Noel Canning*, 134 S Ct at 2566.

go without saying . . . that political opposition in the Senate would not qualify as an unusual circumstance.”<sup>94</sup> Such a mature position is perfectly maddening for formalists and others who support a strong separation of powers doctrine. Notably, the Court itself does no more than Vermeule in showing the compelling countervailing dangers of a president being limited to intersession recesses in the use of this power. Even in introducing an exception for “very unusual” circumstances (as opposed, presumably, to garden-variety unusual circumstances), Breyer does not explain what those dangers might be that could motivate such a departure from his new judicially fashioned rule.

The divergent lines of reasoning in *Noel Canning* will likely prove to be another example of academics seeing the same object and reaching diametrically opposite views as to its meaning. For Vermeule, the justices in the majority largely succeeded in shedding “themselves of standing commitments, fears, and obsessions” (p 190). For others, including formalists and me, what the Court shed was the clarity of a constitutional structure that serves to harness and direct the pressures of the political system and prevent the concentration of authority in any given branch. The lack of a defined risk—other than political gridlock (which is a manifestation of a divided Congress and country)—did not prevent the Court from claiming a balancing rationale for allowing appointments during a congressional session.

If one likes the reasoning and logic of *Noel Canning*, *The Constitution of Risk* is likely a welcomed read. However, the *Noel Canning* Court ultimately used the wrong means (in the incorporation of ill-defined risk analysis) to reach the correct end (in finding the appointments unconstitutional). The appointment process is part of a constitutional superstructure that was effectively altered by Breyer in reaching a compromise on this shared space between the branches. It is precisely the type of modification that ignores the distinct role of structure in constitutional law, which is discussed below.

#### IV. CONSTITUTIONAL SOFT VALUES AND THE NORMATIVE VALUE OF STRUCTURE

The relative weight accorded to constitutional values and risks in trade-offs remains a troubling uncertainty in Vermeule’s analysis. Even in more limited contexts like environmental

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<sup>94</sup> Id at 2567.

regulation, risk analysis is often criticized due to the different meaning or weight that people assign to given risks, as well as the problem of imperfect information in assessing relative risks.<sup>95</sup> Applying risk analysis to constitutional rulemaking magnifies those problems when the risks are found in the context of free speech or other public policy areas.

Part of the difficulty in adopting Vermeule's analysis is that these countervailing risks are not only poorly defined, but there is also little insight into how to compare parts of the universe of risks. For example, governmental regulation of speech combats the countervailing risk of social discord and potential violence. However, that risk can also be addressed by a host of measures other than speech regulation. It is not just the risk, but also the various means of achieving the reduction of the risk that must be considered in any comparative analysis. For free speech, governmental regulation destroys its core value by both limiting speech and creating a chilling effect. Yet the government can combat the countervailing risk through regulation of the manifestation of discord or any violent response to speech. When Vermeule insists that a better balance can be found in *ex post* measures, he fails to recognize the impact of such uncertainty on free speech by citizens, much like Justice Frankfurter. Indeed, for Vermeule, such arguments seem ineffective (p 19). They also constitute the very values that are outliers in Vermeule's risk-centric focus. These suggested gaps in Vermeule's theory can be distilled into two central problems: the measurement of risk versus positive values and the normative value of structure.

#### A. Weighing Virtues and Vices

The Vermeulean virtues laid out at the end of the book are revealing in their indeterminacy. Vermeule argues for a break with constitutional precautionary rules and structures based on a loose discussion of risks, and he offers a list of highly generalized principles including, for example, maintaining flexibility. These virtues are no more developed than the risks in the book and, without such development, they seem more compelling as the basis for an agency-level seminar than a new constitutional theory. As hard as it is to argue with such aphoristic statements like "constitutional rulemakers should have no

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<sup>95</sup> See generally Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 Colum L Rev 941 (1999).

obsessions” (p 188) (emphasis omitted), it is harder to embrace a set of virtues when you are not entirely sold on the vices that they are meant to combat.

Vermeule raises an interesting descriptive point about the Constitution being viewed as a system of precautionary rules. However, that observation is tied to an assertion that the precautionary constitutional approach does poorly in risk avoidance and, conversely, that his theory of optimized constitutionalism is a risk-optimal approach. Neither claim is persuasively made. First, Vermeule expands the world of risks to challenge precautionary constitutionalism but, in so doing, he leaves risk as an irrefutable and immeasurable tautology. Some risks, like aggrandizement, seem far more serious than Vermeule is willing to concede despite the recent concern over the rise of an überpresidency in the United States. The Framers made a choice on issues like aggrandizement. Vermeule can call it a risk rather than a normative position, but it was a choice. Vermeule does not seem to make such choices and instead argues that the world will be inundated with risks that must be balanced and addressed, often on a post hoc basis. This relativistic view of risk leads to the second concern that, even if Vermeule were able to better weigh and rank risks, his risk-based theory would be either more successful or more appealing than precautionary constitutionalism. If you view such risks as aggrandizement as existential threats to a democratic system, optimized constitutionalism hardly appears risk-optimal.

The books’ lack of discussion of the relative seriousness of different risks (and the positive values protected by precautionary rules) raises many concerns in the long-standing debate over “soft variables” in economics.<sup>96</sup> While many economists challenge the criticism, economic analysis in law is often seen as favoring those elements that can be quantified to the disadvantage of values in areas like environmental law. Indeed, there is often a sense that law and economics can produce outcome-determinative results and mask an agenda that opposes regulations and public welfare programs. Even those who reject this

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<sup>96</sup> See Frank Ackerman and Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U Pa L Rev 1553, 1578–80 (2002); Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U Pa L Rev 1419, 1419 nn 1–2 (1998) (citing authors who present such views); Matthew Adler, *Law and Incommensurability: Introduction*, 146 U Pa L Rev 1169, 1169–70 (1998); Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 Phil & Pub Affairs 66, 94–97 (1972).

view acknowledge that it is important to find accurate measurements for values in any economic analysis. The same may be true of a risk-based constitutional theory. Like many economic values, risks and counterrisks are often not commensurate or easily weighed.

Consider the risks in *United States v Alvarez*,<sup>97</sup> in which the Court struck down the Stolen Valor Act.<sup>98</sup> Under this popular act, Congress effectively criminalized lying about military honors. The law was needed to address cases in which the liar did not actually benefit financially from his or her false claims (since such cases are routinely prosecuted as matters of fraud). On the one hand, civil libertarians objected to the threat of criminalizing lies and the slippery slope risk to free speech values, including the chilling effect of such prosecutions.<sup>99</sup> On the other hand, advocates of the law suggested, to borrow a quote from Vermeule on recess appointments, that “the slope is not so very slippery after all” and that it was highly unlikely that the government would want to prosecute other types of alleged lies in the future (p 78).<sup>100</sup> More importantly, advocates pointed to specific cases of especially egregious claims, even though these cases were relatively few in number and these claimants were demonstrably mentally unstable.

How does one measure the risk of governmental censorship (or even the more difficult notion of a chilling effect on speech)? As with the risk of aggrandizement, there is a suspicion that Vermeule would likely weigh the risk of abuse (as he did the risk of aggrandizement) relatively low. Even adopting loose historical points of reference, our history is replete with government prosecutions of free speech and many more efforts at the state and federal levels to curtail speech.<sup>101</sup> Indeed, we are living through a

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<sup>97</sup> 132 S Ct 2537 (2012).

<sup>98</sup> Stolen Valor Act of 2005, Pub L No 109-437, 120 Stat 3266 (2006), declared unconstitutional by *Alvarez*, 132 S Ct 2537. I have been a longtime critic of the Act. See, for example, Turley, *Undo the Stolen Valor Act*, LA Times at A19 (cited in note 21).

<sup>99</sup> See, for example, Jonathan Turley, *Stolen Valor Offensive, but Is It Criminal?*, (NPR, Mar 9, 2010), archived at <http://perma.cc/L58Z-DQ9L>; Ramya Kasturi, Note, *Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations*, 29 Yale J Reg 419, 435 (2012).

<sup>100</sup> Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner, *United States v Alvarez*, No 11-210, \*2 (US filed Dec 7, 2011) (available on Westlaw at 2011 WL 6179424).

<sup>101</sup> Vermeule has long criticized civil libertarian arguments against executive power, and he steadfastly contests the premise of historical abuses of civil liberties during periods of national crisis:

period in which many, including me, view free speech as under attack in the West from laws designed to combat hate speech, discriminatory speech, and other social ills.<sup>102</sup> For a constitutional rulemaker, Vermeule suggests that all such risks must be considered and that the rulemaker must retain flexibility. However, there is no indication of how to balance the incommensurate risks that are common to constitutional controversies. Indeed, constitutional risks present a far greater challenge than do soft variables that must be weighted in economics, since constitutional risks are spread over myriad areas in a large society.

When Vermeule applies the type of balancing and flexible approach that he advocates, it proves no more illuminating in the context of controversies like recess appointments. Indeed, just as many environmentalists often object to the translation of nature and animal welfare under economic analysis as inherently devaluing, many constitutionalists are likely to react the same way about converting constitutional values into constitutional risks. Vermeule's focus on risk as a comparative measure requires a similar degree of translation. It is not the value of free speech but the risk of the denial of free speech. The idea of transliterating a value to a risk is not like converting Cyrillic to

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There just are no systematic trends in the history of civil liberties, no important ratchet-like mechanisms that cause repeated wars or emergencies to push civil liberties in one direction or another in any sustained fashion. Wars, crises, and emergencies come in a range of shapes and sizes; the categories themselves are just methodological conveniences, dichotomous cuts in continuous phenomena. It is unclear, given the current state of the empirical work, whether wars and emergencies have any effect on civil liberties; if they do, the effects may be complex and multiple, not simple and unidirectional. Especially absent is any convincing reason to think that any political, social, or psychological ratchet, under which wars and emergencies have irreversible effects on future policies, operates. The best available empirical work finds no ratchet effects, in either direction, and the mechanisms said to create a ratchet are implausible or underspecified.

Eric A. Posner and Adrian Vermeule, *Accommodating Emergencies*, 56 *Stan L Rev* 605, 625 (2003) (citation omitted).

<sup>102</sup> See, for example, Turley, *Shut Up and Play Nice*, *Wash Post* at B1 (cited in note 20); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 *Vand L Rev* 349, 352–53 (1995) (questioning the position that the government can ban hate speech without violating First Amendment values); Ronald J. Krotoszynski Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 *Tulane L Rev* 1549, 1550–51 (2004), quoting Jean Stefancic and Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 *Iowa L Rev* 737, 742 (1993) (explaining that, looking at the case of Germany, “it is very difficult to claim plausibly that limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech”) (quotation marks omitted).



Latin. The value of free speech presumptively exceeds the risk of its denial, but it is not clear how such “lost in translation” problems are addressed in Vermeule’s approach. Judging from his applied examples, rights like free speech seem devalued once balanced against other “risks.” Likewise, absent some idea of how relative risks are balanced or valued, the mature position of Vermeule inevitably pulls away from a more structured approach, particularly formalism, in the maintenance of separation of powers.

Vermeule spends comparatively little time on these nuances of risk regulation. He notes that “[t]he term ‘risk’ has a colloquial sense that includes, under one large umbrella, well-defined decision-theoretic concepts such as risk, uncertainty, and ignorance” (p 6). Vermeule further states that he “generally mean[s] to use [the term risk in] the colloquial sense, except where the context of particular problems otherwise requires” (p 6). The page on risk and uncertainty does not offer much definitional clarity on this core term for the work, or even on an understanding of what the “colloquial sense” of the word may be in Vermeule’s view. A vague notion of risk and corresponding trade-off is a recurring theme in Vermeule’s work.<sup>103</sup> In *Security and Liberty: Critiques of the Tradeoff Thesis*, Vermeule argues for liberty-security trade-offs, insisting that this “tradeoff thesis” between liberty and security “ought to be uncontroversial.”<sup>104</sup> Vermeule reduces security and liberty to goods that can be charted like the production and allocation of any two goods in a toy model economy.<sup>105</sup> This creates a “security-liberty possibility frontier,” showing that, at some point, “security cannot be increased without corresponding decreases in liberty, and

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<sup>103</sup> For example, in his book, *Terror in the Balance: Security, Liberty and the Courts*, Vermeule criticizes civil libertarians as being virtually hysterical about fears of governmental abuse and insists that “[c]ivil liberties are compromised because civil liberties interfere with effective response to the threat.” Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* 4 (Oxford 2007) (emphasis added). In a direct example of the risk of quantifying constitutional values discussed above, Vermeule advocates a balancing of liberties against national security that seems inevitably to favor the expansion of executive powers. See *id.* at 16 (“The reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power . . . are justified by the national security *benefits*.”) (emphasis added).

<sup>104</sup> Adrian Vermeule, *Security and Liberty: Critiques of the Tradeoff Thesis* \*4 (Harvard Public Law Working Paper No 11-19, 2011), archived at <http://perma.cc/JV84-HE2X>.

<sup>105</sup> See *id.* at \*2.

vice-versa.”<sup>106</sup> The conversion into a chart of binary goods with a possibility frontier hardly captures the relative values (and necessity) of either liberty or security. It also treats liberty and security as inherently distinct values.<sup>107</sup> The same concern is present in seeking to remove precautionary rules in favor of a balancing of risks by rulemakers under optimizing constitutionalism. Vermeule offers little guidance on how to compare such values (if at all) or their countervailing risks.

This uncertainty in Vermeule’s view of risk is heightened in his discussion of cases like *Kelo* (p 63). Vermeule’s portrayal of the universe of risks from the broad definition of public use in *Kelo* is tellingly narrow. While heralding the expansive definition of public use (and by extension the risk of preventing high-value public projects), Vermeule dismisses critics as concerned with the “myopic[ ]” fear that “interest groups might cause legislatures to abuse the power of eminent domain” (p 63). However, many (including many Framers) have viewed the Takings Clause as protecting the positive value of private ownership and individual rights generally. It is not simply the role of interest groups but the overall guarantee of property rights to citizens at risk. By reducing the risk of special dealing (which is clearly part of the concern motivating the Takings Clause), Vermeule more easily balances the counterrisk to New London in not being able to maximize public use in the land. Even if the town did not succumb to the lobbyists of the pharmaceutical giant Pfizer, the action would still have violated the core property protections and rationales that existed before the Founding.<sup>108</sup>

The concern over how to weigh risks—and positive values—increases when one tries to elevate Vermeule’s more insular points to the level of a broader approach to constitutional theory. Indeed, political risks are not the only risks that the Constitution was designed to avoid, unless one so broadly defines political risks to mean anything short of disasters, invasions, and

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<sup>106</sup> *Id.* at \*3.

<sup>107</sup> Vermeule insists that he understands the objection to such trade-offs: “It is *not* a normative argument that, somehow, it is a good thing to trade off security and liberty (a bizarre sort of argument to make); of course more of both is better when possible. But we cannot always have more of both.” *Id.*

<sup>108</sup> The special-dealing concerns were obviously present, particularly when the town blissfully handed over its power of eminent domain—the ability to take private property for public use—to the private New London Development Corporation (NLDC). See *Kelo*, 545 US at 495 (O’Connor dissenting) (noting that the NLDC “is not elected by popular vote, and its directors and employees are privately appointed”).

other public threats. Vermeule at times seems to adopt such a broad notion of second-order risks (pp 7–9). The risks to liberty, however, would not be viewed by the Framers, or many academics, as solely political risks. Likewise, entanglement with religion (while certainly motivated by politics) would not have been viewed as a second-order risk, let alone a political risk. Vermeule again is rather opaque in his definition of these terms. First-order risks are described as risks that are “dealt with by substantive governmental policies” (p 3). He describes those risks as including “unintended consequence[s] of human action” such as terrorism or market failures (p 3). Such risks might also include forces of nature like flooding (p 3). Those risks are contrasted with second-order risks, which “arise from the design of institutions, from the allocation of power across institutions to make first-order decisions, and from the selection of officials of staff institutions” (pp 3–4). Once again, it is a division that leaves the principal concerns of the Framers regarding liberty dangerously unaccounted for on the risk spectrum. The Framers did not focus on first-order risks such as flooding but instead were concerned primarily with tyranny in various forms as well as with censorship, religious entanglements, and other threats to liberty. Indeed, the Framers more often spoke of the Constitution’s design in terms of positive values like free speech than the negative expression of risk.

The ill-defined risks add to the later uncertainty of how to actually apply Vermeule’s theory, as well as to uncertainty regarding the level of rulemaking that is best subjected to its risk-regulation approach. Vermeule’s “mad ambition” will remain an apt description absent a better idea of how this theory would actually apply to constitutional questions beyond recommendations of flexibility and avoiding obsessions. Discussions of first-order and second-order concerns in agency decisionmaking are interesting but far more limited in their use to decisionmakers. It is an insightful perspective for administrative law, but such rulemaking decisions do not speak to a broader application in constitutional analysis.

#### B. Madisonian Tectonics and the Normative Value of Structure

The second (and related) problem concerns the value of constitutional structure in such a theory. As Vermeule acknowledges, Madison saw value in precautionary mechanisms. However, viewing the Madisonian system through the lens of risk tends to

focus attention on the manifestation of certain types of conduct or abuse. It also tends to evaluate the system by examining outcomes or consequences. The consequentialist perspective treats the tripartite structure as merely the framework within which certain powers play out in the political arena. Such a view favors a functionalist approach to conflicts, in which judicial interventions are discouraged and precautionary rules tend to be minimized. It also tends to convert conceptions like democratic legitimacy and ordered liberty into the more limiting framework of risks like bias, partiality, or corruption in government. The value of foundational principles is then lost in translation, as discussed earlier. The risk-centric analysis presents the same problem in dealing with the constitutional structure itself as a distinct conception of the Framers with its own inherent value.

Past theories, including Vermeule's work, tend to reduce structure to an instrumentalist vehicle for achieving certain insular functions. Those functions are then compared by Vermeule to the risks avoided and not avoided as a result of constitutional rulemaking. This approach does not allow for the structure itself to constitute more than just a precautionary system of checks and balances. The Framers did not solely speak of the risks that Vermeule isolates in his work. They also spoke of directing interests and factions in a transformative political system. They spoke of values linking democratic process to the inherent rights of the governed. The structure was not simply a general framework for human action but an organic system of human interaction that shapes political exchanges.

Vermeule is by no means unique in disregarding the inherent value of structure or viewing separation conflicts largely in terms of outcomes. Indeed, the role and function of structure has attracted relatively little attention in constitutional theory, at least in the sense of normative—or at least deontological—value to structure. In a forthcoming article, I explore the synergies between architectural and constitutional theory in looking at the role of structure.<sup>109</sup> The concept of the formal and the functional pervades both architectural and legal interpretations in ways that are strikingly similar, including the reliance on many of the same ideas of human expression and experiences. Indeed, modern architectural theory has long focused on the concepts of

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<sup>109</sup> See generally Turley, 83 *Geo Wash L Rev* (cited in note 12).

structure and space in a way that should resonate with legal scholars.

A “conarchitectural” perspective focuses on the role of structure and whether there is central truth to structural principles shared by both physical and organizational space. “Form follows function” is a virtual mantra of modern architectural thought, a view most associated with modernist Ludwig Mies van der Rohe.<sup>110</sup> Mies called these values “tectonics,” the inherent truth of a structure found in its supportive forms and the material construction.<sup>111</sup> Mies’s structural innovations allowed the superstructure and cruciform columns, rather than interior load-bearing walls, to carry load.<sup>112</sup> This allowed for a “free plan” in which non-load-bearing walls could be used for interior partitions and greater flexibility of space. While the free plan suggests a more fluid understanding of interior form, it also reflects two countervailing principles. First is the importance of the superstructure. Mies insisted that “the structure is the backbone of the whole and makes the free plan possible. Without that backbone the plan would not be free, but chaotic and therefore constipated.”<sup>113</sup> Second, the partitions within a structure are not load bearing but are designed to partition space in optimal ways. They control the perspective and movement of those inside the superstructure. Unlike modernists like Le Corbusier, Mies tended to avoid free open space in favor of the use of walls to demark interior spaces while emphasizing flow.<sup>114</sup> The walls defined space as a visual aspect. Both these exterior and interior structures allowed for a design to reflect the truth of building as vividly demonstrated by the Barcelona Pavilion.<sup>115</sup>

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<sup>110</sup> This widely cited theory is associated with Mies and his designs, but it is more fairly attributed to Louis Sullivan. See id at \*6.

<sup>111</sup> Id at \*8.

<sup>112</sup> See Bjørn N. Sandaker, Arne P. Eggen, and Mark R. Cruvellier, *The Structural Basis of Architecture* 199 (Routledge 2d ed 2011).

<sup>113</sup> Christian Norberg-Schulz, *Talks with Mies van der Rohe*, *L’Architecture d’Aujourd’hui* (Architecture Today) 79 (Sept 1958).

<sup>114</sup> The main interest in Mies is to explore the concept of form and his view of an inherent truth in tectonics. When it came to interior design, Mies emphasized free flowing space while using non-load-bearing walls in delineating space. Of course, when it suited the function of the structure, Mies could design a largely open space such as in his design for Crown Hall at the Illinois Institute of Technology—one of his most minimalist conceptions. See Robert Berenson, *Responding to Art: Form, Content, and Context* 296–97 (McGraw-Hill 2004).

<sup>115</sup> See Turley, 83 Geo Wash L Rev at \*33 (cited in note 12).

Mies saw structure as a reflection not just of the physical elements of a building but also of an understanding of human nature. Just as writers like Madison explored aspects of human nature within a governmental structure, Mies explored how structure affects and represents those within it. Indeed, both Madison and Mies discussed many of the same philosophical ideas in their writings on constitutional and architectural structures.<sup>116</sup> The importance of the modernist notions of structure is not to pretend that they can be directly applied to the law, but rather that they offer a different way of viewing form and structure. While the theory that “form follows function” might be seen as favoring a consequentialist view or at least a functionalist view, it actually suggests something quite different: structure has a normative value and there is an essential truth to certain types of structure or tectonics.

The same may be true about constitutional structure. The “truth” in constitutional form lies in its reflection of normative values linking democratic processes to individual liberty and participatory expression. “[T]he participatory process ensures that although no man, or group, is master of another, all are equally dependent on each other and equally subject to the law.”<sup>117</sup> The constitutional structure was tied to the ideals of self-government and individual liberty that emerged in the eighteenth century. The Framers would have understood the sentiment expressed by Mies when he said, “Architecture is the will of an epoch translated into space.”<sup>118</sup> The Constitution was the will of the Framers’ epoch translated into constitutional form. The constitutional structure was designed to achieve a form of government that reflects the values of self-government and deliberative democracy. In this sense, for Madison and others, the line between form and function was blurred. The form was the function that they were describing in their writings. To borrow from the Dworkian distinction, it was both the concept and conception itself for some Framers.<sup>119</sup>

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<sup>116</sup> See *id.* at \*51–52.

<sup>117</sup> Carole Pateman, *Participation and Democratic Theory* 27 (Cambridge 1970).

<sup>118</sup> David Watkin, *Morality and Architecture Revisited* 44 (John Murray 2001).

<sup>119</sup> See Ronald Dworkin, *Taking Rights Seriously* 134 (Harvard 1977). Dworkin argued that the general “concepts,” and not the specific “conceptions,” of the Framers should guide constitutional interpretation. *Id.* at 135–36. When it comes to the separation of powers and structural questions discussed above, however, the concept and the conception are indistinguishable. It is the conception (the structural norm) that should guide the interpretation.

Structure clearly has a more dynamic meaning in architectural theory. However, some political figures have recognized the impact of structure on the choices and perspectives of individuals. Winston Churchill once said that “[t]here is no doubt whatever about the influence of architecture and structure upon human character and action. We make our buildings and afterwards they make us.”<sup>120</sup> Modernists in architecture understood that structures not only represent human values, but that they can also shape human values and choices. Indeed, some of the observations regarding the role of structure seem almost Madisonian, such as Mies’s view that structure is designed to “create order” by “allocating to each thing its proper place and giving to each thing its due according to its nature.”<sup>121</sup> Both Mies and Madison saw structure as resisting a human tendency toward chaos or factional instability. It does not merely reflect functions; it also shapes human behavior.<sup>122</sup> The demarcation of space within a structure directs the view and the interaction of the occupants.

Indeed, structures often reflect varying degrees of what are called deterministic designs—that is, spaces designed to direct or influence the occupants in making choices.<sup>123</sup> The Framers seemed to have envisioned a similar type of constitutional-deterministic architecture in shaping the choices of decisionmakers and actors within the system. The constitutional structure limits the horizon for actors and labels certain types of conduct as inimical to the values underlying the system, particularly the anti-aggrandizement values. The separation of powers is not simply some giant precautionary mechanism, as one might conclude in a Vermeulean world, but an organic space that is designed to convert or direct energy and movement. The form shapes the functioning of the system and sets the behavior horizons for the occupants. Structure and space in the physical

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<sup>120</sup> Paul Goldberger, *Why Architecture Matters* 1 (Yale 2009) (quoting Churchill’s address to the English Architectural Association in 1924).

<sup>121</sup> Nancy B. Solomon, ed, *Architecture: Celebrating the Past, Designing the Future* 152 (Visual Reference 2008).

<sup>122</sup> Mies insisted: “The long path from material through function to creative work has only one goal: to create order out of the desperate confusion of our time. We must have order, allocating to each thing its proper place and giving to each thing its due according to its nature.” Turley, 83 *Geo Wash L Rev* at \*6 (cited in note 12).

<sup>123</sup> See Alexi Marmot, *Architectural Determinism: Does Design Change Behaviour?*, 52 *Brit J Gen Prac* 252, 252–53 (Mar 2002).

world has long been recognized as influencing human perception and conduct.<sup>124</sup> The same seems true of constitutional structure.

Part of the tripartite structure is clearly designed to avoid risks or negative conduct by subjecting decisions to the interplay of different constituencies and institutional interests. These successive encounters tend to winnow out more divisive proposals and ideas. However, it would be inaccurate to describe these divisional rules as purely precautionary and concerned with the risks of governance.<sup>125</sup> The process of deliberation and approval is tied to obvious democratic values and the core principle of limiting the authority of any given individual or institution in the political process. The consequentialist view of structure artificially marginalizes its role in shaping and labeling actions. By directing certain types of activities into optimal “rooms” or “spaces,” the Framers sought to roughly shape the types or forms of decisions that would be made within the system. The structure has a behavioral dimension connected to a determinative design.

“Optimization” takes on a different meaning for those who study human behavior. While economists often speak of human efforts to maximize utility, other disciplines question the predictability of human actions without more complex considerations of the context or environment in which those actions occur. In his work on variants of human behavior, psychologist Herbert Simon put it simply:

If we wish to know what form gelatin will take when it solidifies, we do not study the gelatin; we study the shape of the mold in which we are going to pour it. In the same way, the economist who wishes to predict behavior studies the environment in which the behavior takes place, for the rational economic actor will behave in whatever way is appropriate to maximize utility in that environment. Hence (assuming the utility function to be given in advance), this

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<sup>124</sup> See Yannick Joye, *Architectural Lessons from Environmental Psychology: The Case of Biophilic Architecture*, 11 *Rev Gen Psychology* 305, 305–06 (2007) (describing the influence that space aesthetics in architecture and nature can have on the human psyche).

<sup>125</sup> Indeed, in the public-choice scholarship, the legislative process has been criticized as failing to achieve true majoritarian results. See Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 *BU L Rev* 339, 354–58 (1990); William N. Eskridge Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *Va L Rev* 275, 280–83 (1988).



maximizing behavior is purely a function of the environment, and quite independent of the actor.

The same strategy can be used to construct a psychology of thinking. If we wish to know how an intelligent person will behave in the face of a particular problem, we can investigate the requirements of the problem. Intelligence consists precisely in responding to these requirements.<sup>126</sup>

Simon explores “bounded rationality” and considers such human conduct and choices in a given environment.<sup>127</sup> Economic and public policy works often struggle to predict the impact of bounded-rationality problems and their negative impact on social or market outcomes. My point is not to say that bounded-rationality elements are necessarily positive in a constitutional context any more than they are viewed as positive in behavior economics. However, this literature shows that environment and structures can influence how choices are viewed and made. Constitutional structure can be thought of in a similar sense as shaping how rulemakers perceive their roles and actions—and how citizens view those choices. To use Simon’s example, the Framers sought to pour the gelatin of politics into a mold that would optimize results and structure decisionmaking. It is that very structure that is undermined by Vermeule’s optimizing constitutionalism in the removal of precautionary mechanisms. More importantly, the structure of the constitutional system can be viewed more organically as reflecting a view of the Framers as not just combatting particular risks but also confining and directing choices in a deliberative process of government.

In addition to the writings referencing structure and human nature by writers like Madison and Mies, there are other useful comparisons that can be drawn from a conarchitectural perspective. “Choice architecture,” discussed in legal literature, is another crossover analogy, particularly with deterministic architecture.<sup>128</sup> Libertarian paternalists seek to address the problems

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<sup>126</sup> Herbert A. Simon, *Invariants of Human Behavior*, 41 *Ann Rev Psychology* 1, 6 (1990).

<sup>127</sup> Herbert A. Simon, 1 *Models of Thought* 3 (Yale 1979).

<sup>128</sup> Choice architecture often focuses on incentives and structures that encourage efficient or “right” decisionmaking. See, for example, Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* 81–100 (Yale 2008). The discussion of choice architecture in areas like consumer decisionmaking is obviously different from this context of actual structural forms. This scholarship prefers choice architecture rather than paternalistic lawmaking in some markets and regulations. See *id.*

of heuristics and biases in individual decisionmaking through the creation of environments that “nudge” individuals into the right or most efficient choices.<sup>129</sup> Like the Framers, libertarian paternalists maintain the right to make choices, even bad choices, but seek to create structures that encourage individuals to make the right choices. This role of the government as choice architect in “organizing the context in which people make decisions”<sup>130</sup> is not unlike the role of constitutional architects. What is particularly striking about choice-architecture literature is how even negative manifestations of bounded rationality are sometimes used to direct choices or actions.<sup>131</sup> Choice architecture does not approve of such bias any more than the Framers approved of self-dealing or self-aggrandizing conduct. However, one can create a structure in which such motives or biases are directed in a positive direction or used to shape outcomes. The desire is to allow people the freedom of choice while creating a structure that funnels certain types of decisions. That influence derives not just from the structural limitations themselves but also from labeling certain types of conduct as inherently bad or dangerous, as with the use of unilateral or aggregated power. For example, one common manifestation of bounded rationality is the anchoring heuristic—the idea that individuals retain an initial pricing or view of an object or option.<sup>132</sup> Constitutional structure creates an anchoring effect for citizens in perceiving and labeling the actions of public officials. The circumvention of vested powers runs counter to anchored values instilled in the structure and language of the Constitution. Likewise, there is an “extremeness aversion” factor that can influence decisions.<sup>133</sup> By maintaining strong structural principles, efforts to circumvent or exceed power limitations are anchored in meaning as extreme and disfavored behavior. Problems of bounded rationality and biases such as anchoring are negative responses that behavioral economists struggle to overcome. However, these responses can reflect how people establish values and assumptions that can be

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<sup>129</sup> *Id.* at 6.

<sup>130</sup> *Id.* at 3.

<sup>131</sup> See On Amir and Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 *Colum L Rev* 2098, 2116 (2008) (noting that some choice-architecture proposals “rely on biases to generate a better outcome”).

<sup>132</sup> See Cass R. Sunstein, ed, *Behavioral Law and Economics* 5 (Cambridge 2000).

<sup>133</sup> *Id.* at 3 (“People are averse to extremes. Whether an option is extreme depends on the stated alternatives . . . . As between given alternatives, most people seek a compromise.”).

used in a positive way.<sup>134</sup> In constitutional architecture, the structure is both deterministic in part and persuasive in part in advancing constitutional values like deliberative democracy.

The normative role of structure is lost in Vermeule's narrow, risk-centric vision. Consider again Vermeule's discussion of recess appointments (pp 39–41). From a risk-centric standpoint, the division of authority between the legislative and executive branches is simply the manifestation of risk regulation to prevent presidential aggrandizement on one side and administrative occlusion on the other. However, from a conarchitectural viewpoint, the structure is designed to funnel not just different constituencies but also different interests into the decisional mix. The Senate brings a different inquiry and produces a different dynamic for federal appointments. A president is primarily interested in selecting a nominee who will carry out executive policies in a competent and faithful way. The president is also interested in selecting an individual who is popular or at least sufficiently noncontroversial to secure confirmation and public support. The Senate, in contrast, is often interested more in understanding the nominee's policy preferences when questioning a nominee about his or her intentions and credentials.<sup>135</sup> This mixing of different interests and perspectives tends to winnow out extreme choices and also tends to address divisive issues concerning the management of federal offices upfront. The threat of a vacancy is precisely the incentive that a president needs to engage in such a dialogic process with Congress.

As with many functionalist theories, Vermeule's risk-based theory tends to treat structure as merely a series of rules or an inert framing for constitutional decisionmaking. The consequentialist focus of his work dismisses or ignores the aspect of

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<sup>134</sup> See Anuj C. Desai, *Libertarian Paternalism, Externalities, and the "Spirit of Liberty": How Thaler and Sunstein Are Nudging Us toward an "Overlapping Consensus"*, 36 *L & Soc Inquiry* 263, 273 (2011) (describing how choice architecture can be "a form of 'rebiasing,' [that is,] the use of one bias to respond to another") (citation omitted).

<sup>135</sup> The different interests in confirmation hearings were on open display in the Senate's consideration of the nomination of Loretta Lynch for attorney general. See generally *Lynch Hearing* (discussing the role of confirmation hearings during periods of inter-branch conflicts). The Justice Department has been at the center of a series of conflicts between the legislative and executive branches. This has included litigation between the branches, including a case in which the House of Representative voted to sue President Obama over unilateral changes to the federal health care law. The author is the lead counsel in that case, *United States House of Representative v Burwell*. Michael R. Crittenden, *House Republicans Hire Jonathan Turley to Pursue Obama Lawsuit* (Wall St J, Nov 18, 2014), archived at <http://perma.cc/49MN-GZFC>.

structure and space as having a normative value in itself. Indeed, in his earlier book with Professor Eric Posner on the rise of the “imperial presidency,” *The Executive Unbound: After the Madisonian Republic*, Vermeule argues that people should simply shed their inhibitions regarding the rise of presidential power as an inevitable trend.<sup>136</sup> Ironically, this argument is the very type of futility argument that Hirschman criticized in his work on reactionary rhetoric.<sup>137</sup> The ascension of presidential power is treated as unavoidable, and resistance (at least legal resistance) is treated as futile. Vermeule’s negative view of the separation of powers,<sup>138</sup> which he and Posner refer to as “suffering through an enfeebled old age,” is expressed even more directly in that earlier book.<sup>139</sup> The book dismisses the Madisonian perspective and the viability of the system of checks and balances in combating such concentrated authority.<sup>140</sup> Instead, Vermeule and Posner assure readers that the new executive-centered state can generate its own effective political checks that can substitute for constitutional checks.<sup>141</sup> They argue that “[w]e live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.”<sup>142</sup> Putting aside the merits of that easily challenged theory, it ignores the role of constitutional structure in forcing governmental actors into beneficial interactions and dialogue. Moreover, the authors’ faith in political over legal constraints is

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<sup>136</sup> Posner and Vermeule, *Executive Unbound* at 11–12 (cited in note 16).

<sup>137</sup> Indeed, Hirschman likened this type of argument to the following statement from *Alice in Wonderland*: “Here it takes all the running you can do, to keep in the same place.” Hirschman, *Rhetoric of Reaction* at 44 (cited in note 9). Hirschman described the futility argument as a “disarmingly simple” form of rhetoric that posits:

[T]hat the attempt at change is abortive, that in one way or another any alleged change is, was, or will be largely surface, facade, cosmetic, hence illusory

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All these spirited statements deride or deny efforts at, and possibilities of, change while underlining and perhaps celebrating the resilience of the status quo.

*Id.* at 43–44.

<sup>138</sup> This view of the failure of the Madisonian argument for checks and balances is repeated in not only this book (p 130) but also his prior work. See Adrian Vermeule, *The System of the Constitution* 39–43 (Oxford 2011).

<sup>139</sup> Posner and Vermeule, *Executive Unbound* at 208 (cited in note 16).

<sup>140</sup> Indeed, for a Madisonian scholar, the book takes on a certain Strangelove-ian aspect and could be more aptly entitled “How I Learned to Stop Worrying and Love the Imperial Presidency.”

<sup>141</sup> They further argue that “a wealthy and highly educated population” is a strong safeguard of democracy. Posner and Vermeule, *Executive Unbound* at 14 (cited in note 16).

<sup>142</sup> *Id.* at 4.

based on the same use of generalized analysis criticized above. For example, they point to the area of war powers to show that legal limitations have little influence on presidents and that decisions like *Hamdi v Rumsfeld*,<sup>143</sup> *Hamdan v Rumsfeld*,<sup>144</sup> and *Boumediene v Bush*<sup>145</sup> did not materially alter the Bush administration's policies as much as a change in the political environment did.<sup>146</sup> This mirrors Vermeule's analysis discussed above of the unreliability of judges who have shown a tendency to be "swept away" during periods of crisis (p 57). The failure of the courts to fulfill their constitutional function in the area of war powers is certainly mirrored by the historical failure of Congress to assert its own powers. Most academics hold no briefs for either the judicial or legislative branches in their exercise of inherent authority and independence during crises. However, the lack of integrity and independence shown by members of both branches in the face of the rise of an überpresidency hardly serves to reassure citizens of the viability of political checks. It was the political influence on these officials that led to the internment of Japanese Americans and the more recent failure to stop the Bush torture program. Humans are flawed, a reality that writers from Montesquieu to Madison incorporated into their views on the structure of government.<sup>147</sup> Yet embracing political over legal checks is to heal the patient by simply calling the illness the cure.

Vermeule's preference for informal political and often ex post remedies has been a consistent feature in his work—as has the consequentialist perspective of constitutional issues. A risk-centric theory plays well to that inclination as does its more functionalist approach to resolving issues. Yet the use of risk as the touchstone for a new theory can mask its own subjectivity and assumptions. Vermeule's admiration for Frankfurter is telling in this respect given Frankfurter's own consequentialist tendency and rather fluid legal principles.<sup>148</sup> As with quantifying values in economics, a risk-based theory offers little if risk is ill defined and the test is one that simply professes flexibility or nonobsessive analysis. It tends, as does Vermeule's earlier work,

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<sup>143</sup> 542 US 507 (2004).

<sup>144</sup> 548 US 557 (2006).

<sup>145</sup> 553 US 723 (2008).

<sup>146</sup> See Posner and Vermeule, *Executive Unbound* at 34–37 (cited in note 16).

<sup>147</sup> See Turley, 83 *Geo Wash L Rev* at \*20–23 (cited in note 12).

<sup>148</sup> See Turley, 70 *Geo Wash L Rev* at 742 (cited in note 59).

to free the system of its constitutional moorings and leave it adrift on a sea of politics. Indeed, during decades of fluid understanding of recess appointments, the result was endless forms of brinkmanship and dysfunctional tit-for-tat politics. The reinforcement of the structure for such appointment will likely reduce those fights fueled by the uncertainty of the relative authority of the branches. While the Supreme Court diminished the value of that corrective measure with its ad hoc test, the *Noel Canning* decision will still benefit the political system by reaffirming the checks and balances of that system.

### CONCLUSION

Berlin's famous observation of the fox and the hedgehog is derived from old fables that refer to a fox and a cat.<sup>149</sup> In the most common version, the fox boasts to the cat that he has many tricks to elude a hunter, while the cat says that she has only one: to climb a tree. When a hunter and his dogs suddenly appear, the cat quickly climbs a tree while the fox hesitates in deciding which trick to use—only to be eaten.<sup>150</sup> As someone who would be viewed by Vermeule as a one-trick, precautionary academic, I must admit that I am drawn to the fact that the cat used the most reliable structure, in this case a tree, to save its life. However, the point is made that many small tricks may not save you when confronted with an existential risk. This is precisely how many view the current rise of presidential power.

Vermeule is quite nimble in describing different political influences on presidents as well as an array of mechanisms (including some precautionary ones) to deal with risks. As with his earlier work, one is left skeptical of his ability to eventually avoid the insatiable appetite of an überpresident. Moreover, as Vermeule unloads his many tricks in dealing with risk, there is a loss of clarity for the branches and decisionmakers in their expected dealings with one another. While Vermeule promises more flexibility, he loses the predictability sought by the Framers in structuring political discourse and decisionmaking. Thus, when Vermeule calls for the removal of precautionary rules against self-dealing as part of his impartiality discussion, he offers this approach as a substitute: "Where other precautions

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<sup>149</sup> See D.L. Ashliman, *The Fox and the Cat or the Fox and the Hedgehog*, archived at <http://perma.cc/5A9Q-CUZ3>.

<sup>150</sup> In some versions, the fox has an actual bag of tricks that weighs him down, but he refuses the advice of the cat to drop the bag. See *id.*

or remedies are indeed available, the rulemaker faces a choice and should adopt the solution that produces greatest net benefits, not necessarily the solution that strictly minimizes the risk of self-dealing” (p 139). This is a small example of the fluidity and indeterminacy of Vermeule’s approach. It denies the system of clear lines that not only guard against self-dealing but also contribute to the broader reinforcement of the system as a whole for all participants. These clear lines in the Madisonian system were encouraged in light of a view of human nature and the need for reinforcement. In a word: structure.

It would be unfair to view Vermeule’s work as the confessions of a fox that wanted to be a hedgehog. Vermeule contests the very viability of the hedgehog view of constitutionalism.<sup>151</sup> He unabashedly sells his theory as a rejection of the concept of the type of overarching big theories of constitutional law. Indeed, Vermeule insists that his is a theory of constitutional argumentation and that “the set of constitutional rules that will result is not my concern here” (p 53). That is certainly true of the first proposition of the book (the best part of the book), which suggests a new way of looking at constitutions with first-order and second-order risks. However, Vermeule’s admitted mad ambition transcends that purpose in his desire to offer a single, unified theory of constitutionalism. Vermeule complains that we simply have too many different theories of constitutionalism that find what he has called an “irreducible plurality” of constitutional goods.<sup>152</sup> He offers his risk perspective as a way to produce a “common coin” among these theories.<sup>153</sup> However, the common coin that Vermeule suggests as the basis for his theory is openly consequentialist, and the inevitable outcome in many cases is clearly functionalist.

In the end, the second objective of the book falls short of its greater ambition in its failure to address the soft variables or constitutional values that can be lost in risk analysis, as well as the largely undefined relationship of different types of risk in the calculus of risk. Vermeule asks too much in seeking to strip away precautionary mechanisms—and indeed the core assumptions of the separation of powers—without a better articulation of the trade-offs that he anticipates in his brave new world of risk regulation.

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<sup>151</sup> See Book Talk at 54:32–54:55 (cited in note 1).

<sup>152</sup> Id at 3:52–4:14.

<sup>153</sup> Id at 5:06–5:12.

My criticism of Vermeule's analysis ultimately does not take away from my view that this book makes a valuable contribution: his interesting observations concerning precautionary constitutionalism and risk regulation. However, Vermeule is simply a far better fox than hedgehog. In the end, the concerns about weighing risks and valuing structure remain largely unanswered. Instead, Vermeule responds to those who cringe at precautionary principles as failing to consider a better constitutional rule. With a witty twist on Voltaire's warning of the best being the enemy of the good, Vermeule insists that precautionary critics show that the "good may be the enemy of the still better" (p 98). Yet the risk-centric approach that Vermeule describes is hardly an improvement in light of its ill-defined risks and troubling indeterminacy of power. It is certainly not inviting for those who subscribe to a less consequentialist perspective of the Constitution. For those readers, one thing is clear: *The Constitution of Risk* is not for the risk averse.