

**CONSTITUTIONAL CONSTRUCTION AND DEPARTMENTALISM:
A CASE STUDY OF THE DEMISE OF THE WHIG PRESIDENCY**

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INTRODUCTION

The book, *The Unitary Executive: Presidential Power from Washington to Bush*,¹ is one of a kind. I am proud to have been a part of the Symposium at which Steven Calabresi and Christopher Yoo initiated their systematic study of the history of the unitary theory of the executive that has culminated in the publication of this important, new book.² They have each been at the forefront, for more than decade, in illuminating the unitary theory of the executive—a theory that posits that the Constitution should be construed as vesting in the person of the President the complete control of the exercise of *all* executive power. *The Unitary Executive* stands alone as the only constitutional and political history of the ways in which each President from George Washington to George W. Bush implemented or exercised power upon the basis of the unitary theory of the executive. It is no overstatement to say that Chris Yoo and Steve Calabresi have done more than any other scholars to refine our understanding of the unitary theory of the executive. If there is an instance, prior to 2005, of a President's acting on the basis of the unitary theory of the executive, it is in this book.

But, my purpose in joining this Symposium is not simply to praise Chris and Steve for their outstanding work. My focus is less on what they discuss in their excellent book than on what is not discussed. To their credit, Calabresi and Yoo acknowledge that different Presidents have expressed varying degrees of commitment to the unitary theory of the executive. Nevertheless, their account is not, nor does it pur-

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1 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

2 See Symposium, *Presidential Power in the Twenty-First Century*, 47 CASE W. RES. L. REV. 1213 (1997).

port to be, a comprehensive survey of the interaction among the branches pertaining to the scope of presidential power. The overriding, singular focus of their book risks leading its readers to overestimate the extent to which the unitary theory of the executive has actually been implemented or followed in American history. Consequently, the book has the same strengths—and limitations, I dare say—of a book on congressional power that primarily focused on the instances in which Congress has claimed the primacy of its authority in particular realms of constitutional authority or of a book on judicial supremacy that focused primarily on the instances in which the Court struck down legislative or executive actions. I suspect that Steve and Chris would agree that these other books might have limited utility in elucidating the general scope of their respective subjects. I fear their book might be vulnerable to a similar critique: its limitations arise from its focus. It is a theory in search of a proof, and thus the book does not pause to consider all the times that Presidents did not follow, or the judiciary or Congress rejected, the unitary theory of the executive. While Professors Calabresi and Yoo presumably set forth all the possible support they have found within historical practices for the unitary theory of the executive, the readers of their book will have to look elsewhere for a more comprehensive analysis of how often (or rarely) this theory has been endorsed or implemented as compared to other conceptions of presidential or executive power. No doubt, their study will help us better understand presidential power and particularly the unitary theory of the executive; however, the understanding of presidential power cannot be based on this book or its account alone. To put this point slightly differently, the overriding concern of *The Unitary Executive* is departmentalism—“the notion that all three branches of the federal government are coequal interpreters of the Constitution”³—but it is departmentalism almost entirely from the perspective of only the President. Their spotlight on departmentalism is primarily focused on one end of Pennsylvania Avenue, even though comprehension of departmentalism, even as they have defined it, requires a bigger spotlight. To appreciate departmentalism in constitutional law we need a broader perspective, a more complete account, of presidential power.

The unitary theory of the executive has not been conceived or forged in a vacuum; it is a function, like every aspect of checks and balances, of the interaction of all three branches. The departments are shaped by and shape each other through their interaction—the

³ CALABRESI & YOO, *supra* note 1, at 382.

confluence of their efforts to govern the internal operations and decision making of themselves and to extend the boundaries or fend off encroachments from other constitutional authorities upon the boundaries of their respective powers. Departmentalism is shaped by the exercise of coordinate powers not only at particular times or periods but also over time. As demonstrated in their book, Professors Calabresi and Yoo recognize the need to demonstrate how this theory has fared in practice. But, a complete, positive account of this theory requires knowing more than they tell us; it ultimately requires knowing how all the different theories of presidential power have fared in practice and thus entails an analysis of all the times that the unitary theory of the executive was *not* followed and what alternative conceptions of presidential power were embraced instead.

In light of what I consider to be the importance of a more detailed analysis of the evolution of presidential power over time, my Essay consists of three Parts. In Part I, I discuss three concepts that I suggest are basic for illuminating the development of presidential power over time. The first of these is departmentalism, whose significance the authors clearly recognize. The second is constitutional construction, which is the dynamic process through which non-judicial branches influence or shape constitutional practices and understandings.⁴ If the unitary theory of the executive is to be implemented or established at all or when departments each assert or try to protect their particular prerogatives, it will be through this process; however, this process is a dynamic one in which powers are shaped not in a vacuum but rather through the give and take—the interaction—among the political branches. To appreciate how the unitary theory of the executive has fared in practice, we need to appreciate how the interaction between the branches and among Presidents has shaped the understanding of executive power over time. The third concept essential to the understanding of departmentalism, constitutional construction, and the development of presidential power, is non-judicial precedent.⁵ By the latter, I mean the past constitutional decisions or acts of non-judicial actors that public authorities seek, for whatever reason, to invest with normative authority. Constitutional construction produces non-judicial precedents, and presiden-

4 For perhaps the best work on constitutional construction, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

5 See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111–46 (2008); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 *VAND. L. REV.* 713 (2008) [hereinafter Gerhardt, *Non-Judicial Precedent*].

tial powers develop through the accretion of non-judicial precedents. In fact, the Court has been peripheral by and large on questions regarding separation of powers over the years. Judicial review will only tell us a little about the constitutional foundations of the unitary theory of the executive, while non-judicial precedent will tell us more.

Part II is a case study of the demise of the Whig conception of the presidency—the notion that the President should be subservient to the will of Congress on all domestic policymaking.⁶ Professors Calabresi and Yoo talk about each of the Presidents who helped to bury the Whig conception of the presidency,⁷ but the case study provides a more detailed examination of departmentalism at work in an important, twelve year period of American history.

In the third and final Part, I consider more fully several lessons that can be derived from the case study in Part II. First, it shows how the Constitution actually matters. Contrary to the suggestion of many scholars (particularly those who focus on courts), the case study shows how several people who became President acted contrary to their political and even their self-interest once they took office. Second, the case study contradicts the conventional wisdom that, prior to the Civil War, the only Presidents who strongly defended, or asserted, presidential prerogatives from the 1820s to 1861 were Andrew Jackson and James Polk. In fact, this is wrong; the demise of the Whig conception of the presidency shows us that several other Presidents in the Antebellum era actually followed Jackson's and Polk's model of the presidency rather than the competing one advanced by the Whig Party. The fact that Presidents were unpopular or did not achieve all they wanted to achieve does not mean they were weak chief executives. Third, the case study underscores the significance of constitutional decision making outside the Court. The Whig conception of the presidency died as a result of the interaction of the political branches and without the involvement of the Court at all. It is thus, at the very least, a cautionary tale against overestimating the relevance of judicial review to the development of executive or legislative power over time. Fourth, the case study underscores the importance of the dynamic relationship between the Congress and the President in burying this notion of the presidency and in influencing the understandings and exercise of executive power. The case study shows how Congress pushed back almost every single time that the four

⁶ See *infra* Part II.

⁷ See CALABRESI & YOO, *supra* note 1, at 130–38, 144–51 (detailing the continuation of the unitary executive through the presidencies of William Henry Harrison, John Tyler, Zachary Taylor, and Millard Fillmore).

nominally Whig Presidents tried to advance their notions of the presidency in opposition to the dominant thinking in Congress. Presidential power advanced in those years, but so too did congressional power. Fifth, the case study is a reminder of the importance of not confusing a defense of presidential prerogatives with the unitary theory of the executive. Fuller accounts of departmentalism show that even as these Presidents were rebelling against the Whig conception of the presidency they were not seeking to implement the unitary theory of the executive. Last but not least, there are two normative consequences to my case study. The first is the practical impossibility of judicial supremacy; judicial supremacy is not a fact of constitutional life, nor has it ever been. The fact is that presidential power has largely developed on the basis of non-judicial precedent to which the courts generally defer. The second is that the unitary theory of the executive will never be fully implemented. This theory has never been fully implemented because it is in tension with substantial numbers of judicial and non-judicial precedents. Indeed, it could only be implemented if there were a complete abdication of congressional authority. If past is prologue, presidential power has never grown without the acquiescence or assistance of the Congress, and Congress has never abdicated so much of its authority as to allow full and complete presidential control of all executive action to take root in our constitutional order.

I. SOME FUNDAMENTAL CONCEPTS

In this Part, I discuss the significance of three concepts to understanding the development of presidential power. These concepts are departmentalism, constitutional construction, and non-judicial precedent. It is not a problem for *The Unitary Executive* that it only discusses the first of these, at least explicitly. The constitutional scheme of checks and balances does not depend on the players thinking of, or knowing about, these concepts, though they might help to illuminate how this scheme works over time.

A. *Departmentalism*

The concept of departmentalism is at the heart of *The Unitary Executive*. The concept refers to the efforts of each branch to claim and to act upon the unilateral authority to interpret the Constitution. There is no question that, as *The Unitary Executive* suggests, depart-

mentalism has long been an undeniable fact of constitutional life in the United States.⁸

To appreciate departmentalism, two clarifications, beyond those made in *The Unitary Executive*, are helpful. First, Calabresi and Yoo treat departmentalism as synonymous with “coordinate constitutional interpretation,”⁹ but it is important to know coordinate constitutional interpretation with respect to what. Not all coordinate constitutional interpretation is the same, even as a descriptive matter; different interpretations have different effects, and different interpretations may be advanced with greater intensity and success. When, for instance, Congress makes rules for its internal governance, it is acting upon a unilateral interpretation of the Constitution and, at the same time, helping to shape how it, as a department, looks. But, when Congress passes a law that seeks to strip the federal courts of virtually any jurisdiction over claims that might be raised against the conditions under which the American military, pursuant to presidential or congressional directives, may detain—or hold in custody—citizens or non-citizens,¹⁰ departmentalism hardly seems to capture all that is going on. On the one hand, the Supreme Court might be protecting its own unilateral authority by striking down the law. But, on the other hand, the Court might be protecting individual rights from being violated by the other branches. The difficulty is that the term departmentalism seems to insufficiently capture the nature and complexity of the constitutional interaction among the branches. The shapes of each department turn on at least some decisions of the authorities in all three branches, and while there are many instances in which the leaders of a branch are in agreement over the scope of their respective powers, they are not in agreement on everything. Recall, for example, the fundamentally different notions that Theodore Roosevelt and his successor William Howard Taft had of the presidency—Roosevelt construed all the gaps and ambiguities of the constitutional text in favor of presidential power while Taft took exactly the opposite position of restricting presidential authority solely to the express grants of power vested in the office in the Constitution.¹¹ The possibilities of different leaders of the branches favoring different concep-

⁸ See *id.* at 23 (referencing the acknowledgement of departmentalism in Chief Justice Marshall’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1807)).

⁹ CALABRESI & YOO, *supra* note 1, at 23.

¹⁰ Cf. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (striking down the Military Commissions Act of 2006 as an unconstitutional suspension of habeas corpus).

¹¹ See generally PAOLO E. COLETTA, *THE PRESIDENCY OF WILLIAM HOWARD TAFT* 11–12, 16 (1973) (contrasting Roosevelt’s and Taft’s conceptions of the presidency).

tions of their own powers as well as that of the other branches indicate the limitations of the descriptive power of departmentalism, standing alone or without further elaboration.

B. Constitutional Construction

A second concept that can help to clarify departmentalism in our constitutional order is constitutional construction. Political scientist Keith Whittington has given the most extensive explanation of the utility of the conception of constitutional construction.¹² According to Whittington, this concept captures the differences in how the political branches and the Supreme Court make constitutional law: in deciding the constitutional cases or controversies that come before it, the Court will have its chance to expound upon the meaning of the Constitution, but the political branches have opportunities as well, with the critical difference being that their decisions and the circumstances in which they make them are infused with political considerations.¹³ While the Justices are heavily discouraged, to say the least, from taking any political considerations into account in interpreting the Constitution, national political leaders are not. The point of constitutional construction is that Presidents and members of Congress make decisions or take actions with discernible constitutional ramifications apart from the fact that they are infused with politics. The political costs, benefits, incentives, or disincentives that particular Presidents or members of Congress might have had in time should not obscure the constitutional ramifications or significance of their decisions. Constitutional construction is a dynamic process in which the meaning of the Constitution can be and often is shaped as a result of, or through, the interaction of national political leaders on questions of constitutional meaning or consequence.

Obviously, constitutional construction is hardly the exclusive province of Congress. As Whittington notes, the Johnson impeachment trial had constitutional ramifications for both Congress and the President: it demonstrated the limits of using the impeachment and trial authorities of the Congress to remove a President based on his differences of opinion over the constitutionality of laws that he had ve-

¹² See *supra* note 4 and accompanying text.

¹³ See WHITTINGTON, *supra* note 4, at 1–19 (explaining the difference between jurisprudential interpretation and constitutional construction done by other governmental actors in an effort to assert power).

toed.¹⁴ But, Johnson's acquittal also effectively ratified the authority of the President to veto legislation on whatever ground he deemed appropriate, even one that was deplorable to the Congress. In addition, the Senate's acquittal of Justice Samuel Chase, which occurred several decades before Johnson's acquittal, had its own constitutional consequences, perhaps most importantly recognizing the limits of congressional authority to impeach and remove a Supreme Court justice on the basis of some of his decisions.¹⁵

The concept of constitutional construction reminds us that departments take their shape in pushing against and in being pushed against by the other branches. Indeed, the Chase and Johnson impeachment trials illustrate how this interaction is not strictly confined to the particular powers of each department to govern themselves. The constitutional consequences of presidential-congressional interaction are not found or defined in forms as neat and as easily readable as judicial opinions, but they are evident nonetheless. Indeed, they are most evident in the form of non-judicial precedent.

C. *Non-Judicial Precedent*

In both a recently published book and law review article, I examined at length the constitutional significance of non-judicial precedent.¹⁶ I will not reiterate here the arguments made in those works, but instead will review a few of the distinctive features of non-judicial precedent and their ramifications for developing a positive account of the scheme of checks and balances at work.

One of the most important contributions made by Calabresi and Yoo is to underscore the importance of constitutional activity outside the courts. Indeed, it is even more extensive than they suggest: the Constitution explicitly vests Congress with seventy-five powers, the President with fourteen, and the Vice President with five.¹⁷ Some of these are familiar to most people, while many of them are not. Nevertheless, they are all deployed, and in almost every instance in which they are being deployed these actors make judgments that either they

14 *Id.* at 113–57 (detailing the impeachment of Johnson and the outcomes which included a reaffirmation of the limits of the impeachment power coupled with the failure of Johnson to expand presidential authority).

15 *See id.* at 20–71 (recounting the failure of the impeachment trial of Justice Chase which, though the Justice was not without faults, was basically a partisan battle over political principles).

16 *See supra* note 5 and accompanying text.

17 Gerhardt, *Non-Judicial Precedent*, *supra* note 5, at 743.

or their successors have seen fit to try to invest with normative authority as precedents.

Moreover, most of these precedents are final or at least not overturned by the courts. To begin with, the Supreme Court may not take cases in which the lower courts have upheld non-judicial constitutional activity.¹⁸ Second, in most constitutional cases, the Court employs either deferential judicial review or defers to non-judicial precedents in such varied forms as historical practices, traditions, customs, and norms.¹⁹ Third, the Court's standing and political question doctrines have precluded many areas of non-judicial constitutional decision making.²⁰ Fourth, the courts uphold the vast majority of non-judicial constitutional decisions that they review.²¹

It is rare but admittedly not unprecedented for the Court to strike down presidential or congressional constitutional decisions. On these rare occasions,²² the presidential activity appears to directly threaten the courts or Congress, and the courts are (perceived at least) on the same side of the issue. Last but not least, there remain vast areas of constitutional decision making that have never been and are likely never to be subjected to searching judicial review.²³ Each department of the federal government has, in other words, extensive responsibilities and powers that are not going to be influenced by or even end up in a court of law.

Perhaps the most important ramification of these distinctive features of non-judicial precedents for the present Symposium is that they ought to dissuade us from giving into the temptation of looking to the courts for guidance or vindication of the unitary theory of the executive. Judicial review has often been peripheral, if not irrelevant, to the analysis of the unitary theory of the executive. To be sure, the Supreme Court has in a few cases addressed the theory or arguments related to it—but only a *few*.²⁴ The significance of these decisions should not be overstated, particularly when we recognize that both Presidents and members of Congress have confronted this theory—or

18 *Id.* at 745–46.

19 *Id.* at 748–49 (listing examples of the Court deferring to each of these non-judicial precedents).

20 *Id.* at 747–48 (giving examples such as the Court overturning a Ninth Circuit decision regarding the words “under God” in the Pledge of Allegiance based on standing).

21 *Id.* at 746.

22 *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down a decision of the President that was not within his vast constitutional authority).

23 *See* Gerhardt, *Non-Judicial Precedent*, *supra* note 5, at 751.

24 *See, e.g.*, CALABRESI & YOO, *supra* note 1, at 192, 419 (discussing inconsistent treatment of the unitary executive by the Supreme Court in two landmark cases).

arguments related to it—on more occasions than the Court has. We need to look outside the courts to the constitutional decisions and practices of the other branches as they relate to presidential power. We need to look, in other words, at the non-judicial precedents on presidential power, particularly the unitary theory of the executive. Hence, in the next Part, I turn to a closer look at an important series of constitutional decisions made by Presidents and members of Congress over the course of twelve years on the critical question of whether the President should be subservient to the will of Congress on all matters of domestic policymaking.

II. THE DEMISE OF THE WHIG PRESIDENCY

In this Part, I examine the remarkably short life of the Whig conception of the presidency. This conception had been a fundamental tenet of the Whig Party, which had been formed in opposition to what its leaders believed was the usurpation of legislative power by President Andrew Jackson. The name of the party was no accident; it was taken to underscore its connection to the old, British “Whig” tradition that had heavily influenced the thinking of many of the leaders of the American Revolution and that followed the republican ideal of placing “the general good ahead of private interests.”²⁵ No doubt, another purpose of the party was to be a platform for Henry Clay, its most prominent founder, to mount a successful run for the presidency. In spite of Clay’s popularity and the venerable tradition on which the American Whig Party was based, it did not last long, and the Whig conception of the presidency never took hold. Its demise illustrates how departmentalism is a function of constitutional construction and non-judicial precedents, including those made by Presidents who were not very memorable.

A. *William Henry Harrison*

Although William Henry Harrison was President for only four weeks, his presidency was not constitutionally insignificant. If one looks at what he did (and the reactions to his decisions) in the six-month period between his election and his death, his presidency is significant at the very least because of the significant blows he struck against the Whig conception of the presidency.

²⁵ MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 3 (1999).

Since Harrison was the first Whig to be elected President, the nation and, particularly, the leadership of his party expected at least two things of him. The first was that he would not usurp legislative power or act as tyrannically as Whigs believed Jackson and his successor, Martin Van Buren, had done. The second was that he would be committed to legislative supremacy, particularly in domestic policy-making. The Whigs conceived the President as a weak minister whose principal responsibility was to submit to the will of the legislature.

But Harrison was not fully committed to either of these things. Indeed, his first blow against the Whig conception of the presidency was his steadfast refusal to accede to the demands of the leader of the Whig Party, Henry Clay. Over the course of six meetings that occurred between Harrison and Henry Clay, his Party's leader in Congress, Clay pressed Harrison in vain to accede to his leadership in shaping the administration and domestic policy; and Harrison had to remind Clay more than once that "you forget that I am President."²⁶ In the aftermath of their final meeting, which was held shortly after the inauguration, Harrison exploded at Clay's impertinence after Clay had sent him a letter with a proclamation directing Harrison to call a special session of Congress to address the nation's failing economy.²⁷ After the exchange, Clay left Washington in disgust, and so two weeks into his presidency, William Henry Harrison, the nation's first Whig President, was not speaking to the Whig leader in Congress. They were not speaking because Harrison had refused to follow Clay's dictates on the organization and the priorities of his administration.

Harrison's second blow to the Whig conception of the presidency was his rejection of the Whig Party's opposition to the principle of rotation in office of removing the political appointees of the prior administration and replacing them with loyal partisans. Six of Harrison's predecessors had staunchly opposed the practice—George Washington (in his second term), John Adams, James Madison, James Monroe, John Quincy Adams, and Martin Van Buren, while only two of Harrison's predecessors—Thomas Jefferson and Andrew Jackson—

26 MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 299 (1987); *see also* GEORGE RAWLINGS POAGE, *HENRY CLAY AND THE WHIG PARTY* 16–17 (reprint 1965) (1938) (discussing the tact with which Harrison handled Clay's suggestions regarding potential members of his Cabinet); GLYNDON G. VAN DEUSEN, *THE LIFE OF HENRY CLAY* 338–39 (1937) (discussing Clay's desperate attempts to influence Harrison's Cabinet appointments and Harrison's touchiness on the subject).

27 *See* NORMA LOIS PETERSON, *THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER* 38 (1989).

had actually embraced it.²⁸ Although he was the standard bearer of the party that opposed Jackson's implementation of the spoils system, Harrison compiled a mixed record in keeping the pledge he had made as the Whig candidate not to replace people solely for partisan reasons. On the one hand, he vowed to reform "the spoils system and opposed the wholesale removal of Democrats without cause."²⁹ Moreover, Harrison's Cabinet included Daniel Webster and Thomas Ewing, both of whom had opposed the practice of rotation of office when they were in the Senate.³⁰ Harrison requested reports detailing the activities and responsibilities of every office and "vowed to protect officeholders who were performing their duties well."³¹ On the other hand, the pressure from Whig leaders to remove Democrats to make way for their friends was enormous, and Harrison's Cabinet voted to make an extensive purge of Democrats. Postmaster General Francis Granger probably had the highest numbers of dismissals: as one historian found, Granger, during his six months in office, had removed

39 of the 133 presidential postmasters, and by September 1841 almost 2,500 postmasters had been appointed in the lesser offices to vacancies most of which were caused by removals. Granger later boasted that that he had removed 1,700 postmasters and had he remained [in the Cabinet] two or three weeks longer, would have removed 3,000 more.³²

Harrison's final blow against the Whig conception was the way in which he used his Cabinet. The Constitution provides that a President "may require the [o]pinion, in writing, of the principal [o]fficer in each of the executive [d]epartments, upon any [s]ubject relating to the [d]uties of their respective [o]ffices."³³ While Thomas Jefferson had construed this language as allowing his Cabinet to vote on the most important matters confronting the administration and vesting in him the power to overrule their decisions if he saw fit,³⁴ the seven other Presidents who preceded Harrison did not believe the Cabinet had any authority to bind them and differed only to the ex-

28 See generally LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861*, at 300-46 (1954).

29 PETERSON, *supra* note 27, at 39.

30 WHITE, *supra* note 28, at 310 (describing Webster's and Ewing's opposition to rotation during the debate of 1835).

31 PETERSON, *supra* note 27, at 39.

32 WHITE, *supra* note 28, at 311.

33 U.S. CONST. art. II, § 2.

34 See 2 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON AND THE RIGHTS OF MAN* 269-79 (1951) (discussing Jefferson's delegation of duties to different departments).

tent to which they consulted their respective Cabinets.³⁵ Nevertheless, the six members of Harrison's Cabinet believed in the Whig orthodoxy that *they* should guide and direct *all* of the President's actions. This belief derived from the Whigs' conception that the presidency should be subservient not just to Congress but to the Cabinet, which existed, in their view, as an important check on executive usurpation of legislative authority.³⁶ While Harrison's Cabinet allowed him to preside over their meetings, they dictated that decisions should be made by majority rule, with each cabinet member having a single vote and allowing Harrison to cast a tie-breaking vote if the Cabinet was deadlocked.³⁷

Though Harrison initially followed his Cabinet's preferred method of decision making, he began to disagree. The most dramatic confrontation arose when Webster informed Harrison that the Cabinet had decided to reject his preferred candidate and instead to appoint James Wilson as the Governor of Iowa. After a prolonged silence, Harrison wrote a few words on a slip of paper which he asked Webster to read to the Cabinet. The message was succinct: "William Henry Harrison, President of the United States."³⁸ Harrison then rose to his feet and angrily told the Cabinet: "William Henry Harrison, President of the United States, tells you, gentlemen, that by _____, John Chambers shall be Governor of Iowa."³⁹ The aggregation and consistent pattern of Harrison's protestations against being pressured into following the Whig conception of the presidency leads to the conclusion that once in office (and freed from the need to run for reelection), Harrison seems to have recognized the need to protect the prerogatives and institutional needs of the presidency. His rebukes reflect his growing resistance to the Whig conception of the presidency.

B. John Tyler

Initially, Whig leaders hoped that Harrison's Vice President and successor in office, John Tyler, would not be as resistant as Harrison had become to the Whig conception of the presidency. Tyler had left

³⁵ See, e.g., WHITE, *supra* note 28, at 93 (discussing the tendency of some Presidents to depend heavily on the Cabinet).

³⁶ PETERSON, *supra* note 27, at 40 (describing the Whig strategy of appointing a Cabinet to direct the President in order to eliminate executive usurpation).

³⁷ See WHITE, *supra* note 28, at 93 (explaining that Harrison's heavy dependence on his Cabinet led to the Cabinet's exercising of authority for him).

³⁸ *Recollections of an Old Stager*, HARPER'S NEW MONTHLY MAG., June-Nov. 1873, at 753, 754.

³⁹ PETERSON, *supra* note 27, at 41 (underscored omission in original).

the Democratic Party to protest Andrew Jackson's usurpation and consolidation of executive power and voted to censure Jackson in 1834.⁴⁰ Whig leaders did not believe Tyler would have the temerity to challenge their orthodoxy in light of his longstanding friendship with Clay, his having not been elected President in his own right, and his being the youngest person up until that time to serve as President.

But, Whig leaders failed to appreciate Tyler's longstanding fidelity to the principles of the Democratic Party, including his support for Jackson's election in 1828 and reelection in 1832. Indeed, the first thing Tyler did, upon learning of Harrison's death, was to reject the Whig position on his status. Although the Whigs, including those in his Cabinet, believed that the powers but not the office of the presidency had devolved upon Tyler, Tyler informed the six members of the Cabinet in his first meeting with them and then the nation in a short address⁴¹ afterwards that he construed the Constitution as authorizing the Vice President to succeed automatically to the office of the presidency upon the President's death. In spite of the fact that the Whigs controlled the Congress, the House and the Senate, each with a few dissenters, quickly approved of Tyler's reading of the Constitution in separate resolutions.⁴²

Second, John Tyler broke dramatically with Whig orthodoxy with his exercises of the President's veto authority. Whig leaders had long

40 For a recent, thorough biography of John Tyler, see EDWARD P. CRAPOL, *JOHN TYLER: THE ACCIDENTAL PRESIDENT* (2006).

41 President John Tyler, Inaugural Address (April 9, 1841), in 4 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 36 (1897) (delivering his inaugural address upon assuming office).

42 The pertinent constitutional language was ambiguous: "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress . . . [shall declare] what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." U.S. CONST. art. II, § 1, cl. 6. The question was whether "the same" refers to the office or the presidency's powers and duties. Prominent authorities had divided over whether "the same" meant that a Vice President should automatically become President in his own right and continue therein until the expiration of the term, or that a Vice President could only *act* as President upon a sitting President's death and had no entitlement to claim the office for himself since he had not been formally elected President. Tyler opted for the first reading, while Whig leaders opted for the latter. The seven other Vice Presidents who succeeded to the presidency are Millard Fillmore (1850), Andrew Johnson (1865), Chester Arthur (1881), Theodore Roosevelt (1901), Calvin Coolidge (1923), Harry Truman (1945), and Lyndon Johnson (1963). The repetition reinforced Tyler's succession as a significant constitutional precedent. In 1967, Tyler's precedent was officially codified with the adoption of the Twenty-Fifth Amendment. In the only application of this Amendment, Gerald Ford became President when Richard Nixon resigned from office in 1974.

objected to both vetoes and pocket vetoes, claiming that the former should be restricted only to bills that were plainly unconstitutional and the latter were just plainly unconstitutional.⁴³ Whigs believed that a President was constitutionally obliged to sign a bill or to veto it and that exercising vetoes on the basis of a President's own, separate constitutional constructions, as Jackson had done, was nothing more than an illegitimate usurpation of legislative authority. Nevertheless, Tyler cast six vetoes—the largest number cast by any antebellum President, including Jackson;⁴⁴ and his four pocket vetoes were the second most cast by an antebellum President. But, the constitutional significance of Tyler's vetoes depends less on their number than on the fact that he claimed a broad basis for them, including constitutional, policy, and even moral objections to the legislation he was vetoing.⁴⁵ In exercising vetoes on whatever grounds he deemed appropriate, Tyler was following Jackson's example rather than the Whig orthodoxy that the veto only be used on plainly unconstitutional legislation.

Third, Tyler rejected the Whig orthodoxy on the role of the Cabinet. In his first meeting with his Cabinet, Tyler not only rejected its view on presidential succession but also its entitlement to make decisions for the administration based on a majority vote. Tyler immediately objected that he did not believe that cabinet members were co-equal with the President and that

I can never consent to being dictated to act as to what I shall or shall not do. I, as President, shall be responsible for my administration. I hope to have your hearty co-operation in carrying out its measures. So long as you see fit to do this, I shall be glad to have you with me. When you think otherwise, your resignations will be accepted.⁴⁶

⁴³ See generally WHITE, *supra* note 28, at 30–33 (describing the Whigs' criticism of the veto power).

⁴⁴ See 4 RICHARDSON, *supra* note 41, at 63 (relaying President John Tyler's Veto Message to the Senate on August 16, 1841, vetoing a bill to incorporate the Fiscal Bank of the United States); *id.* at 68 (relaying John Tyler's Veto Message to the House of Representatives on September 9, 1841, vetoing the Fiscal Incorporation Bill); *id.* at 180 (relaying Veto Message of June 29, 1842, vetoing a bill to extend for a limited time the present laws for laying and collecting duties on imports); *id.* at 183 (relaying Veto Message of August 9, 1842, vetoing a bill to provide revenue from imports); *id.* at 366 (relaying Veto Message of February 20, 1845, vetoing a bill relating to revenue cutters and steamers); 39 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 140–43 (D.C., Blair & Rives 1844) (relaying Veto Message of June 11, 1844, vetoing a bill to make improvements of harbors and rivers). Congress's subsequent override of the latter veto was the first time that it had overridden a presidential veto.

⁴⁵ See *supra* text accompanying note 43.

⁴⁶ WHITE, *supra* note 28, at 86 (quoting Frank G. Carpenter, *A Talk with a President's Son*, 41 LIPPINCOTT'S MONTHLY MAG. 416, 418 (1888)) (relating John Tyler's informing his Cabinet members that he will accept their resignations if they choose not to carry out his prescribed measures).

Thus, in the first meeting with his Cabinet, Tyler twice rejected following the Whigs' preferred practices of a President's deferring to his Cabinet and acquiescing to its views. Moreover, he not only rejected the Cabinet's advice that he sign the Fiscal Corporation bill but also gladly accepted the mass resignation of the Cabinet (except for Webster) to protest his veto of that bill.⁴⁷ Tyler quickly nominated five people who would be loyal to him, not to the Whig elite.⁴⁸ Although Clay hoped to stall the nominations because Tyler had not consulted with him, the Senate confirmed them all in record time. While there were subsequent shifts in the Cabinet's composition, Tyler never wavered on his conception of the Cabinet. He only consulted it when he saw fit and only followed its counsel when it accorded with his own views.

Tyler's refusal to consult with congressional leadership on his cabinet nominations was not unique. Throughout his presidency, Tyler rejected the Whig principle that he should consult with the congressional leadership on all his nominations, and instead strongly defended his prerogative as President to exercise his nominating authority as he saw fit. In spite of fierce, persistent opposition in the Senate, Tyler established several significant precedents bolstering the President's independent, unilateral authority to make nominations to confirmable offices as he saw fit.

First, Tyler made the significant decision, after his expulsion from the Whig Party, to use patronage to ensure loyalty to his policies throughout his administration and to build support for a run for the presidency in 1844. Indeed, in his nearly four years in office, Tyler remade his Cabinet more than once, and his efforts to reconstruct a Cabinet to meet his shifting political fortunes and needs were historic: twenty-one different people filled the six different posts during Tyler's presidency, the largest number of cabinet appointments made by a single President until Ulysses Grant (who made twenty-five cabinet appointments over the course of two full terms to fill seven cabinet offices). Including the cabinet secretaries that Tyler had inherited from Harrison, there were three Secretaries of State (including Daniel Webster at the beginning and John Calhoun at the end of his administration), four Secretaries of War, four Treasury Secretaries,

47 See PETERSON, *supra* note 27, at 72–86 (describing the turmoil within Tyler's Cabinet following his vetoes, and the subsequent resignation of many cabinet members).

48 *Id.* at 87 (describing Tyler's quick nomination of cabinet members who would be loyal to him).

three Attorneys General, two Postmasters General, and five Navy Secretaries.⁴⁹

In response to Senate opposition to his efforts to assert his nominating authority independently, Tyler turned to his recess appointment authority. With the counsel of Hugh Legare, his widely respected, second Attorney General, Tyler asserted that he could use his recess appointment authority to make recess appointments *at any time* because of the “overruling necessity” of the President’s constitutional responsibility of exercising “the whole executive power” “perpetual[ly]” and with “no interruption” by the Congress.⁵⁰ Hence, Tyler justified his making recourse to his recess appointment authority whenever, in his judgment, Congress had gone too far (and too long) in obstructing his efforts to fill a vacancy.

Tyler’s broad construction of his power to nominate whom he pleased and to make recess appointments when he felt necessary included his resistance (and vigorous protests) against efforts by the House to encroach upon his appointment power. On March 16, 1842, the House approved a resolution requesting that

[T]he President of the United States and the heads of the several Departments be requested to communicate to the House of Representatives the names of such of the members (if any) of the Twenty-sixth and Twenty-seventh Congress who have been applicants for office, and for what offices, distinguishing between those who have applied in person, and those whose applications were made by friends, whether in person or by writing.⁵¹

A week later, Tyler submitted to the House a formal Protest in which he explained that his refusal to comply with the resolution on the grounds that, among other things, “compliance with the resolution . . . would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive.”⁵² He explained that

49 *See generally id.* at 146. Of the twenty-one different people who served in Tyler’s Cabinet, thirteen were Whigs and eight were Democrats. But, at least some turnover was not the fault of either Tyler or the Congress. In February 1844, Tyler and several dignitaries were present at a demonstration of the unveiling of the U.S.S. Princeton’s new weapon, which was then supposed to be the largest naval gun. On the third discharge, the weapon exploded at the breech and killed several of the spectators, including Tyler’s Secretary of State and Navy Secretary.

50 Power of President to Fill Vacancies, 3 Op. Att’y Gen. 673, 675–76 (1841) (describing the power of the President to fill vacancies that may happen during the recess of Senate).

51 *See* 4 RICHARDSON, *supra* note 41, at 105 (describing John Tyler’s refusal to comply with the House of Representatives’ request that the President provide correspondence with the House regarding members of the 26th and 27th Congresses).

52 *Id.* at 106.

The appointing power, so far as it is bestowed on the President by the Constitution, is conferred without reserve or qualification. The reason for the appointment and the responsibility of the appointment, rest with [the President] alone. I can not perceive anywhere in the Constitution . . . any right conferred on the House . . . to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House . . . by which it may become responsible for any such appointment.⁵³

Tyler's defense of the President's authority to keep the House from encroaching upon (or even inquiring into) the domain of his appointment authority was no different than Jackson's before him or Polk's afterwards.

Tyler's next assault on the Whig conception of the presidency was his decision, like that of Harrison before him, to support rather than to oppose the principle of rotation in office. Indeed, Tyler moved quickly, once he became President, to replace disloyal officials with those who were personally loyal to him; this practice merely intensified—rather than initiated—once he was expelled from the Whig Party. In 1841 alone, Tyler and Harrison removed over 300 officials—the most in any single year in the Antebellum era except for Jackson's first year in office.⁵⁴ Bolstering Tyler's construction of his removal authority were several official opinions of Attorney General Legare that would influence subsequent thinking and practice pertaining to the President's removal power.⁵⁵

Tyler struck yet another blow to the Whig orthodoxy on the presidency when he rejected the party's basic tenet that a President should serve for only a single term. Once Tyler came into office, he pointedly did not pledge, as Whig leaders believed a President should, to serve only a single term in office. His silence, coupled with the fact that by 1842 Tyler was plainly employing his appointment and removal powers to support a run for the presidency in 1844,⁵⁶ ended

53 *Id.*

54 CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 150 (1904) (describing the sweep of removals from office that occurred in 1841).

55 *See* Power of President to Fill Vacancies, *supra* note 50 (describing the power of the President to fill vacancies that may happen during the recess of Senate); 4 Op. Att'y Gen. 1, 1–2 (1842) (opining on the military power of the President to dismiss from service); *see also* Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 165, 166 (1843) (suggesting that “in a proper case” a cabinet secretary “has the authority and discretion [to reject any officer without the consent of the collector] until his power in this particular be expressly restrained by act of Congress”).

56 *See* PETERSON, *supra* note 27, at 168, 174–76 (describing Tyler's strategic cabinet staffing to support his future presidential run).

any doubt about Tyler's refusal to abide by the Whig commitment to a limited presidential term.

Tyler's final blow to the Whig conception of the presidency was his refusal to defer, at least routinely, to resolutions passed by the House and the Senate throughout his presidency that demanded that he turn over to one or the other particular documents or information that were in either his or the executive branch's possession. More often than not, he complied with the resolutions,⁵⁷ but on three occasions he submitted for publication in the congressional record his reasons for refusing to comply with particular document requests from the House.⁵⁸

It is, however, significant that Congress attempted to retaliate against each of the blows that Tyler struck against the Whig conception of the presidency. First, in response to Tyler's vetoes of legislation in June and August of 1842, the House appointed a special committee to investigate whether President Tyler had committed an impeachable offense.⁵⁹ The resolution to appoint the committee was in fact the first request to initiate a presidential impeachment to be formally introduced in the House. In early August, the House referred Tyler's message to the special committee that Clay's close friend, the Speaker of the House, John White, appointed, and whose members included not only John Quincy Adams as chair but also the man who had introduced the impeachment resolution against Tyler, John Botts. A week later, the select committee issued a report that harshly criticized Tyler's actions, particularly his vetoes of the two bills attempting to re-charter a national bank, for the "gross abuse of constitutional power, and bold assumptions of powers never vested in him by any law"; for "depriv[ing] the people of self-government"; for

57 Two examples are the House's and Senate's respective resolutions requesting Tyler to identify the officials whom he had removed from office. Notably, then-Senator James Buchanan sponsored the resolution that the Senate approved, while the House approved an identical resolution on July 16, 1841. Tyler did not resist either of these resolutions, since he construed them as merely requesting information that was already public—namely, the names of officials who had been removed and were no longer in office.

58 See Letter from President John Tyler to the House of Representatives (Feb. 26, 1842), in 37 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 447 (D.C., Gales & Seaton 1841) (detailing the Blair & Rives legislation); President John Tyler, Protest to the House of Representatives (Mar. 23, 1842), in 4 RICHARDSON, *supra* note 41, at 105 (describing his refusal to comply with the House of Representatives' request that the President provide correspondence with the House regarding members of the 26th and 27th Congresses); President John Tyler, Special Message (Jan. 31, 1843), in 4 RICHARDSON, *supra* note 41, at 220 (submitting a report from the War Department in compliance with the House resolution requesting communication to certain queries).

59 See generally PETERSON, *supra* note 27, at 101–07 (describing the events leading to the formation of the House special committee and its report criticizing President Tyler).

“assum[ing] . . . the whole legislative power to himself, and . . . levying millions of money upon the people, without any authority of law”; and for the “abusive exercise of the constitutional power of the President to arrest the actions of Congress upon measures vital to the welfare of the people.”⁶⁰ Significantly, the report found that although Tyler’s actions justified the invocation of the federal impeachment process, it did not recommend impeachment because “in the present condition of public affairs, [it would] prove abortive.”⁶¹ Furthermore, the report was not unanimous: Representatives Charles Ingersoll of Pennsylvania and James Roosevelt of New York, both Democrats, issued a minority report that defended Tyler, and Thomas Gilmer, a Virginia Whig who remained loyal to Tyler, went further to submit a counter-report.⁶² Ingersoll and Roosevelt defended the President’s authority to veto bills on any ground he deemed appropriate, while Gilmer accused the House of violating tradition and the spirit of the Constitution by referring Tyler’s veto to a committee, instead of, as the Constitution specified, entering “the objections at large on their journal, and proceed to reconsider [the bill].”⁶³ Gilmer told the House that the Constitution did not make the President’s veto absolute but specified that it could be overridden if there was adequate support in the House and Senate.⁶⁴ Meanwhile, Senator James Buchanan took to the floor of the Senate to defend the legality of Tyler’s actions. After virtually no discussion, the House, on August 17, 1842, approved and adopted the report by a vote of 100-80.⁶⁵ This vote marked the first time that the House had censured—or formally approved a resolution that was critical of—a President. On August 30, 1842, Tyler delivered a formal Protest to

60 CONG. GLOBE, 27th Cong., 2d Sess. 894-96 (1842) (quoting the select committee’s report).

61 *Id.* at 896.

62 Near the end of his administration, Tyler selected Gilmer, a former Virginia Governor, to serve as Secretary of the Navy. Shortly after receiving the appointment, Gilmer was killed in the tragic misfiring of a new cannon on the U.S.S. Princeton. See *supra* note 49 and accompanying text.

63 CONG. GLOBE, 27th Cong., 2d Sess. 896 (1842).

64 See *id.* at 896-99 (quoting Gilmer’s report discussing how Congress could proceed in overriding the President’s veto); see also CARLTON JACKSON, PRESIDENTIAL VETOES 1792-1945, at 71-72 (1967) (describing Gilmer’s protest and counter report).

65 See House Vote on the Report of the Select Committee (Aug. 17, 1842), in 37 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, *supra* note 58, at 1343, 1346-52 (detailing the House vote on the Select Committee’s report criticizing President Tyler’s veto).

the House;⁶⁶ however, citing the Senate's refusal to publish Jackson's Protest of his censure by the Senate in 1834, the House refused to publish Tyler's protest, which was grounded in the same reasoning Jackson had cited in his earlier Protest.⁶⁷

Although the House censured Tyler through its adoption of the special committee's critical report of Tyler, the House did not approve its recommendation of a constitutional amendment to enable Congress to override a presidential veto by a simple majority and in 1843 voted 127-83 to reject the impeachment resolution introduced against Tyler.⁶⁸ The House's failures to impeach Tyler and to approve amending the President's veto authority constitute significant precedents that seem to validate Tyler's construction of presidential prerogatives.

Second, the Senate used its Advice and Consent power to retaliate against Tyler's exercises of his appointment authorities. In Tyler's nearly four years as the President, the Senate rejected seven of his twenty cabinet nominations—the largest number of cabinet nominations ever made by a single President to be rejected by the Senate.⁶⁹ In Tyler's last two years in office, the Senate blocked a majority of his nominations (including four cabinet and two minister nominations), rejected each of his three nominations of Henry Wise to be Minister to France each time by an increasing margin, rejected by increasing margins each of the three times that Tyler nominated Caleb Cushing as Treasury Secretary,⁷⁰ and rejected eight of Tyler's nine nominations to fill two vacancies on the Supreme Court⁷¹—the largest number of unsuccessful Supreme Court nominations ever made by a single President.⁷²

66 See President Tyler, Protest to the House of Representatives, (Aug. 30, 1842), in 4 RICHARDSON, *supra* note 41, at 190–93 (delivering a Protest in response to the August 17, 1842 bill).

67 See ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833–1845, at 152–59 (1984) (describing Andrew Jackson's Protest to the Senate and subsequent reactions).

68 See PETERSON, *supra* note 27, at 106, 109 (noting that the House's vote to override Tyler's veto failed).

69 See MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A HISTORICAL AND CONSTITUTIONAL ANALYSIS 56, 106 (rev. ed. 2003).

70 *Id.* at 163, 164.

71 *Id.* at 56, 106.

72 In fact, Tyler nominated five different people to fill the two vacancies, only one of whom the Senate confirmed. But, because he nominated several of the people more than once, he ultimately made nine nominations, only one of which the Senate approved.

None of the rejections had anything to do with the nominees' credentials, which were generally quite good.⁷³ Instead, the opposition arose primarily to keep one if not both vacancies unfilled so that the incoming President, James Polk, could fill them. Mindful of the reasons for the opposition, Tyler shrewdly chose as his last nominee to fill one of the vacancies the universally respected Samuel Nelson, the Democratic Chief Justice of the New York Supreme Court. Democrats in the Senate figured the new President could do no better, while Whigs quickly figured that Nelson was bound to be much more agreeable to them than any of the people whom they thought Polk was likely to nominate. On February 14, 1845, the Senate approved the nomination by voice vote. Although the Senate's obstruction of Tyler's efforts to fill both seats during the lame duck session of Congress in 1844–1845 is one of the first, clearest instances of the practice, now well-established, to stall such nominations in an election year, Tyler's successful nomination of Samuel Nelson to the Court illustrates the power that the Constitution vests even in a weak President, the power to forge compromises—or to build bridges between the parties—through the exercise of the nominating authority. The Constitution neither requires nor prohibits a President to avoid conflict, or to achieve consensus, through his exercise of his nominating authority. With his successful nomination of Nelson to the Court, Tyler became the first President to reach across the aisle to nominate someone from the opposition party to the Supreme Court. His success was not lost on subsequent Presidents, even more popular ones, who were interested in attaining bipartisan consensus on their appointments to the Court.⁷⁴

C. Zachary Taylor

Over the course of the next eight years, the Whig conception of the presidency took a pounding from which it never recovered. In the first four of those eight years, James Polk, a Democrat, modeled himself on the antithesis of the Whig conception of the presidency:

⁷³ See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 105–06 (2d ed. 1985) (describing the credentials of Tyler's Supreme Court nominees).

⁷⁴ In fact, Abraham Lincoln would be the first of ten Presidents to follow Tyler's example in nominating someone from outside his party to the Supreme Court. The other Presidents to do this were Benjamin Harrison, William Howard Taft, Woodrow Wilson, Warren Harding, Herbert Hoover, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, and Richard Nixon.

Andrew Jackson.⁷⁵ The election of another Whig President, Zachary Taylor, in 1848, renewed the hopes of the Whig Party that its conception of the presidency might finally be realized. But, Taylor quickly dashed these hopes. First, and most importantly, in his first—and only—annual message, Taylor laid out the single, boldest proposal of his administration—allowing Congress to vote separately on the admissions of California and New Mexico as new states into the Union.⁷⁶

Taylor's plan was bold for at least two reasons. First, he did not defer to what congressional leaders wanted to do on the admission of new states into the Union. Instead, he asserted his authority as President to call upon Congress to defer to his proposal and thus to consider separately the applications of California and New Mexico for statehood. While most members of Congress either opposed or favored not voting on Taylor's plan, Missouri Senator Thomas Hart Benton, a Democrat, vigorously defended Taylor's plan as closely adhering to the historical practice of unconditionally admitting new states. In response to demands that the admission of new states be conditioned on their acceptance of slavery, Benton proclaimed on the Senate floor that

[D]uring the sixty years in which we have been admitting new States into the Union, there had been no example of combining any other subject with the question of the admission of a State I deem it a very material thing, as it is proposed that we should now commence with doing by a new State what is without precedent in the annals of legislation, and which many feel to be a deep indignity to that State, that I shall, by reference to the cases of admission of new States, show that such a thing has never been done before.⁷⁷

Moreover, it was widely understood that Taylor's plan of admitting California and New Mexico as new states would dramatically tip the balance of power in the Senate (and thus the Union) in favor of anti-slavery forces.⁷⁸ While Taylor believed that his proposal had the advantage of avoiding a debate in Congress over the regulation of slavery in the territories, it upset members of Congress who believed it was their prerogative to decide whether or not (as well as the extent of their power) to regulate California and New Mexico as territories. While Taylor construed the Constitution as not requiring Congress to

⁷⁵ See generally JOHN SEIGENTHALER, JAMES K. POLK (2004).

⁷⁶ See President Zachary Taylor, First Annual Message (Dec. 4, 1849), in 5 RICHARDSON, *supra* note 41, at 18–19.

⁷⁷ CONG. GLOBE, 31st Cong., 1st Sess. 704 (1850).

⁷⁸ See *id.* at 358–59 (noting Rep. Henry Washington Hilliard's speech regarding the government of the territory acquired from Mexico by the treaty of Guadalupe Hidalgo and the impact on the South if California and New Mexico were admitted as new states).

allow—or disallow—the extension of slavery into the territories, he believed that a fight in Congress over its extension into the territories risked disrupting the Union. He further believed his plan had the advantage of respecting popular sovereignty (in following the will of the people of California and New Mexico), a principle that would become the central tenet of the Democratic Party in the years to come. Taylor knew his plan would be controversial, but urged that “we should abstain from the introduction of those exciting topics of a sectional character which have hitherto produced painful apprehension in the public mind; and I repeat the solemn warning of the first and most illustrious of my predecessors against furnishing ‘any ground for characterizing parties by geographic discriminations.’”⁷⁹ Taylor’s resolve to stand by his plan proved “unconquerable”⁸⁰ as its merits and constitutionality were debated in Congress without end until he died unexpectedly from cholera on July 9, 1850. His proposal had angered virtually every contingency in Congress but the northern Whigs. These Whigs reluctantly accepted Taylor’s abandonment of the Whigs’ conception of a weak presidency in exchange for his taking a position that actually fortified their opposition to the spread of slavery *and* their support for the Wilmot Proviso, which the House of Representatives had passed in 1847 and 1848 and which outlawed slavery in any federal territory to be acquired from Mexico (but excluding Texas which had been acquired before the Proviso’s passage).⁸¹ When Taylor in special messages of January 21 and January 23, 1850, defended his plan to Congress,⁸² it was not lost on anyone that he accepted in passing the constitutionality of the Wilmot Proviso.

Taylor’s second rejection of the Whig orthodoxy on the presidency arose in conjunction with his plan for the statehood of New Mexico. Encouraged by Taylor, New Mexico, still under a military governor, had made application for immediate statehood not only under an anti-slavery constitution but also with an eastern boundary

79 Taylor, *supra* note 76, at 19.

80 ELBERT B. SMITH, *THE PRESIDENCIES OF ZACHARY TAYLOR AND MILLARD FILLMORE* 121 (1988).

81 *See generally* HOLT, *supra* note 25, at 266–83 (discussing Taylor and the Wilmot Proviso).

82 *See* President Zachary Taylor, Message to the Senate (Jan. 23, 1850), *in* 5 RICHARDSON, *supra* note 41, at 26–30 (arguing for the admission of California and New Mexico as states); *see also* Letter from Robert Toombs to John Crittenden (Apr. 23, 1850), *in* ULRICH BONNELL PHILLIPS, *THE LIFE OF ROBERT TOOMBS* 65–66 (1913) (“When I came to Washington, as I expected, I found the whole Whig party expecting to pass the Proviso, and that Taylor would not veto . . . I saw Genl. T. and talked fully with him upon the subject, and while he stated he had given and would give no pledges either way about the Proviso, he gave me clearly to understand that if it was passed he would sign it.”).

that Texas refused to accept. Indeed, no sooner had Taylor announced the plan than Texas authorities threatened to acquire, by force if necessary, all the New Mexico territory east of the Rio Grande, including Santa Fe.⁸³ Texas authorities apparently were preparing to fight in order to extend the domain of slavery. If the United States decided to intervene militarily to stop Texas, it was likely a civil war would ensue. Nevertheless, Taylor, upon learning that Texas might invade New Mexico, ordered federal troops to go to Santa Fe. He directed the colonel in charge to prepare his troops to rebuff any invasion of New Mexico.⁸⁴ The federal troops garrisoned in Santa Fe kept the Texas forces at bay, and a stalemate ensued that was not broken until after Taylor's death on July 9.

Taylor's decision to send troops to thwart the threatened invasion of New Mexico had enormous significance for the presidency. For Taylor had not turned to Congress for any special authorization to order federal troops to Santa Fe. We have no documents that spell out his thinking on the subject. Instead, we must infer his likely reasoning from the actions he took, and it is possible to identify four constitutional grounds to support his unilaterally ordering federal troops to New Mexico. The first was it was consistent with his duty as President of the United States to "take Care that the Laws be faithfully executed."⁸⁵ In this circumstance, the law he could have claimed to have been trying to preserve had not yet been enacted—the bills for admission of California and New Mexico as states. Yet, it is possible he might have thought that his authority as President to enforce the laws faithfully empowered him to do whatever he felt was necessary to protect the integrity of the lawmaking process in Congress. Second, Taylor's ordering federal troops to protect New Mexico was consistent with a belief that as the Commander-in-Chief of the United States the President has unique, constitutional authority to put down

83 See K. JACK BAUER, *ZACHARY TAYLOR: SOLDIER, PLANTER, STATESMAN OF THE OLD SOUTHWEST* 294 (1985) (detailing Texas's efforts to reclaim her territory).

84 There is no executive order on record in which Taylor officially ordered federal troops to thwart a Texas invasion into New Mexico. There is, however, correspondence and memoirs from the period—or later—confirming the series of steps Taylor took to defend New Mexico as a "possession of the United States" against invasion by one of the United States. See, e.g., Letter from General A. Pleasanton to Thurlow Weed (Sept. 22, 1876), in 2 THURLOW WEED BARNES, *LIFE OF THURLOW WEED* 180–81 (1970) (recounting a conversation with Taylor in which Taylor reportedly told Pleasanton that, "I am glad you are going to New Mexico. I want officers of judgment and experience there. These southern men in Congress are trying to bring on civil war. . . . Tell Colonel Monroe . . . he has my entire confidence, and if he has not force enough out there to support him . . . I will be with you myself. . . .").

85 U.S. CONST. art. II, § 3.

a rebellion, and he might have viewed the threats made by Texas as Texas threatening a rebellion against the authority of the United States and the integrity (and boundaries) of the prospective State of New Mexico. Third, Taylor's actions were consistent with the belief that the Constitution barred a state from interfering with, or undermining, a federal instrumentality, including federal territory. New Mexico was federal territory—it belonged to the United States—and he believed that no state could invade a territory of the United States. Fourth, Taylor might have believed that in ordering federal troops, even without special congressional authorization, he was acting both to avert a civil war and to keep the Union intact. At least one prominent historian has intimated that had Taylor lived, his willingness to use federal force to stop an invasion of New Mexico might have precipitated a civil war.⁸⁶

The third example of Taylor's rejection of the Whig conception of a weak presidency was the way in which he used his Cabinet. Contrary to Whig philosophy, he refused to allow the Whig leadership to dictate his cabinet appointments.⁸⁷ Hence, his Cabinet had no one representing either the northeastern part of the country or the most progressive wing of the Whig party. Instead, his Cabinet consisted entirely of men who were personally loyal to him. In making these and other appointments, Taylor primarily followed his own counsel rather than that of the Whig leadership, which responded by blocking or rejecting most of his nominations to executive offices.⁸⁸ Indeed, the very fact that Taylor chose not to abdicate his nominating authority to influential Senators in exchange for their favors is further evidence of his rejection of the Whig conception of the presidency.

Moreover, Taylor, like Tyler before him, construed his recess appointment authority broadly to allow him to make temporary appointments to any offices that, for whatever reason, had not been filled by the time of a recess (understood to be the then-lengthy period in between sessions). In fact, Taylor made 428 recess appointments.⁸⁹

86 See 1 ALLAN NEVINS, *ORDEAL OF THE UNION* 334 (1947) (predicting a schism between Northern and Southern Whigs that might have resulted if Taylor had lived).

87 See generally BAUER, *supra* note 83, at 249–62 (describing the process by which Taylor assembled his Cabinet).

88 See HOLT, *supra* note 25, at 421 (describing the mechanisms utilized by the Whig leadership to delay Taylor's appointments).

89 See Carl Russell Fish, *Removal of Officials by the Presidents of the United States*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1899, at 78 (1900) (illustrating removals and appointments under Taylor).

Taylor's views on his removal authority were also antithetical to the Whig conception of the presidency. Interestingly, both Whigs and Democrats largely did not dispute Taylor's constitutional authority to replace Polk's Cabinet with choices of his own.⁹⁰ Taylor's remarkable, unilateral decision to remove nearly two thirds of Polk's appointees during his first (and only full) year in office⁹¹ provoked some debate in Congress but ultimately no other response.

Taylor went further to contemplate replacing most of his Cabinet.⁹² In fact, he intensified the effort in response to the biggest scandal of his administration. The scandal resulted from an official decision made by Taylor's Attorney General to authorize Taylor's Treasury Secretary to pay the full amount of the interest on a claim against the United States dating back to 1773.⁹³ When it became known that the interest was five times the size of the principal and that half of the principal and half of the interest were to go to Taylor's War Secretary, George Crawford, for his legal services on behalf of the claimants, a public outcry arose. The matter festered for months, while the House considered censuring the three members of Taylor's Cabinet involved in the scandal and Taylor mused about the necessity of firing his entire Cabinet in order to remove any appearances of corruption within his administration.⁹⁴ The only other President before Taylor to have removed his entire Cabinet had been Andrew Jackson,⁹⁵ who had been the antithesis of the Whig conception of the presidency.

90 In fact, Whigs were eager for Taylor to remove as many Democrats from federal offices as possible to make the spots available to Whigs. See HOLT, *supra* note 25, at 418.

91 See SMITH, *supra* note 80, at 66 (detailing several of Taylor's cabinet appointments among the different factions of the Whig party).

92 See generally NEVINS, *supra* note 86, at 324–27 (examining the repercussions in the Cabinet following the Galphin scandal).

93 See Allowance of Interest on Claims, 5 Op. Att'y Gen. 227, 227–28 (1850) (ordering that interest be paid to George Galphin on his claim against the United States).

94 See NEVINS, *supra* note 86, at 324–27; see also BAUER, *supra* note 83, at 312 (discussing any potential wrongdoing in the interest payment to Galphin).

95 See Andrew Jackson, Protest to the Senate (Apr. 15, 1834), in 3 RICHARDSON, *supra* note 41, at 73 (arguing, *inter alia*, that “neither the President nor any other officer can be rightfully subjected to the operation of the judicial power of the Senate except in the cases and under the forms prescribed by the Constitution”); *id.* at 76 (“If the House of Representatives shall be of opinion that there is just ground for the censure pronounced upon the President, then will it be the solemn duty of that House to prefer the proper accusation and to cause him to be brought to trial by the constitutional tribunal.”).

D. Millard Fillmore

Taylor's death made Millard Fillmore, as ardent a Whig as there ever was, the President of the United States. But, over the course of his thirty-three months as President, Fillmore often rejected the Whig conception of the presidency. First, he took the initiative in helping to steer the passage of the Compromise of 1850 in Congress. The Whig conception of the presidency would have required Fillmore to sign the bill, which he did, but it had never countenanced a President's taking a leadership role and in his using all of his other powers, as Fillmore did, to push the controversial bill through the Congress.⁹⁶

Second, Fillmore, like Jackson and Polk before him, vigorously defended the principle of rotation in office. On his second day in office, Fillmore became the first President to accept the resignation of his entire Cabinet.⁹⁷ Although he asked the cabinet members to stay for a month while he reorganized his government, they all left within a week of his inauguration. When he came into office, Fillmore also "gave directions that the dissident wing of the Whigs [in his administration] should be turned out in favor of 'real' Whigs."⁹⁸ Webster alone was responsible for helping Taylor to remove 60% of the political appointees in the State Department.⁹⁹ By seeking nearly a wide-scale removal of personnel from within his own party, Fillmore set a new standard on removals and helped to entrench the principle of rotation in office as a fact of constitutional life.

Third, Fillmore generally appointed people who were loyal to him and to the Compromise.¹⁰⁰ An additional criterion for cabinet selections was a sworn commitment not to become a candidate in the next presidential election. Although Fillmore's appointment preferences were designed to heal the Whig party and to unify support for his policies within his administration, his purpose was undercut by his purposeful exclusion of Whigs, particularly from the North, who had supported the Wilmot Proviso and Taylor. Moreover, in seeking to implement these preferences, he was acting in a decidedly non-Whiggish manner. He rejected William Seward's entreaty that he re-

96 See generally SMITH, *supra* note 80, at 171-94 (recounting Fillmore's role in the Compromise of 1850).

97 See generally *id.* at 167-68 (explaining the political motivations behind Fillmore's cabinet appointments).

98 WHITE, *supra* note 28, at 312.

99 See ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 689 (1997) (articulating Webster's influence on President Fillmore's appointments to the State Department).

100 See SMITH, *supra* note 80, at 167-68 (discussing Fillmore's cabinet appointments).

tain Taylor's Cabinet, and pointedly did not turn to Whig or Democratic leaders in Congress to advise him on his Cabinet. Instead, he followed his own counsel in appointing Webster as Secretary of State, and consulted primarily with Webster and Clay on sub-cabinet appointments. The end result was that, whereas Southerners had been a majority in Taylor's Cabinet, they held only three of the seven seats in Fillmore's Cabinet. The four other seats were all held by Northerners, though none were agreeable to Northern Whigs like Seward or Thurlow Weed.¹⁰¹

Fillmore followed a similar tact in his one successful Supreme Court appointment.¹⁰² When Associate Justice Levi Woodbury of New Hampshire died in September 1851, Fillmore turned to Webster, but notably not other congressional leaders, for advice. Webster recommended Benjamin Curtis, a faithful Whig who had actually opposed the Fugitive Slave Act. Within the region (and nation), Curtis was widely regarded as both a lawyer and scholar. Although Democrats held a majority 35-24 in the Senate, Curtis was quickly confirmed by voice vote.¹⁰³

But, Fillmore took a different and ultimately unsuccessful tact in trying to fill the other vacancy that arose during his presidency.¹⁰⁴ This vacancy arose in the summer of 1852 when Associate Justice John McKinley died. In trying to fill this vacancy, Fillmore accepted, as he had with his nomination of Curtis, the practice of trying to fill a vacancy with someone from the same circuit as the Justice being replaced. This time, Fillmore made four different nominations to fill the position, but all were in vain. First, he nominated a Whig lawyer, Edward Bradford, but the Senate, still led by Democrats but who were now eager to keep the vacancy open for the next President to fill, quickly tabled the nomination. Fillmore next tried to take advantage of the principle of senatorial courtesy—the Senate's historic deference to nominations of one of its own to confirmable offices. He nominated United States Senator George Badger of North Carolina, a Whig whom Fillmore believed would be generally agreeable as not

101 *Id.* at 168 (describing the geographic and political makeup of Fillmore's Cabinet).

102 *See generally* ABRAHAM, *supra* note 73, at 109–10 (describing the motivations behind the Curtis nomination).

103 Six years later, Curtis resigned from the Court to protest its decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). After leaving the Court, Curtis became one of the nation's most distinguished appellate advocates. He argued fifty-four cases before the Court, and successfully defended President Andrew Johnson in his Senate impeachment trial.

104 *See generally* ABRAHAM, *supra* note 73, at 110–11 (detailing Fillmore's failed attempts to fill the McKinley vacancy).

overly partisan and as a colleague. The Senate proved him wrong when it postponed any action by a single vote (in a rare instance of not complying with senatorial courtesy). Fillmore's next nomination also tried to take advantage of senatorial courtesy, but this time he took the unusual step of nominating a Democrat in an ironically Whiggish attempt to defer to the will of a majority of the Senate. Though the Senate confirmed his nomination of the newly elected Democratic Senator Judah Benjamin of Louisiana, Benjamin declined the appointment. Running out of time, Fillmore opted to nominate Benjamin's law partner, William Micou, a Whig whom he hoped Democrats would find agreeable because of his close association with Benjamin. Again, the Senate proved him wrong, tabling the nomination. With Franklin Pierce's inauguration only two weeks away, Fillmore had run out of time, and the Democrats had successfully preserved the vacancy for Pierce to fill. Fillmore's failures were historic: he was responsible for the second largest number of failed nominations made by a President to fill a single seat, and he had helped to establish an informal norm (still extant) in which the Senate tries to preserve for the next President to fill any vacancy that arises in a presidential election year.

Fourth, Fillmore only consulted his Cabinet when he saw fit. By the time he came into office, Whigs had largely abandoned their principle of allowing the Cabinet to determine administration policies by majority vote. Indeed, on the most important constitutional question to come before him as President—the constitutionality of the Fugitive Slave Act, he consulted only with Daniel Webster and his Attorney General, John Crittenden.¹⁰⁵

Fillmore's next rejection of the Whig constitutional philosophy of the presidency also occurred within his first month in office. Although he had signaled in his first message to Congress his (Whiggish) willingness to approve the compromise evolving in Congress, the first bit of news in the message sent shockwaves around the Capitol and violated the Whig orthodoxy on presidential power. Without consulting with congressional leaders, Fillmore decided to send an additional 750 troops to Santa Fe to stop a Texas invasion of New Mexico.¹⁰⁶ Like Taylor before him, Fillmore did not wait for Congress to act, and so there was no law specifically authorizing the President

105 See SMITH, *supra* note 80, at 200 (discussing Crittenden's opinion of the constitutionality of the Fugitive Slave Act); see also *Constitutionality of the Fugitive Slave Bill*, 5 Op. Att'y Gen. 254 (1850).

106 See SMITH, *supra* note 80, at 168–69 (describing Fillmore's use of the military in New Mexico).

to send troops to New Mexico, even to protect against a threatened invasion of United States property. In not waiting for more specific authorization, Fillmore seemed also to be making the larger point that the authority at stake was strictly that of the federal government. Through his actions and statements, he was emphasizing that a state lacked the authority to assert, by force or otherwise, the authority vested in the Congress by the Constitution to resolve boundary disputes within the United States.

Last but not least, Fillmore, with the help of his Secretary of State, Daniel Webster, strenuously opposed the threats of several northern states to protest the Fugitive Slave Act and ordered federal troops to ensure enforcement of the controversial federal law when it faced resistance in Pennsylvania and Massachusetts.¹⁰⁷ To support their actions, Fillmore and Webster delivered extensive, public statements against the constitutionality of secession and the need for vigorous, uniform enforcement of the law to preserve the Union.¹⁰⁸ But, neither man deferred to congressional leaders in advancing the case for presidential action to ensure enforcement of the Fugitive Slave Act. Such initiative further buried the Whig conception of the presidency.

III. POSSIBLE LESSONS ON DEPARTMENTALISM

This final Part considers several significant lessons that can be derived from the case study in Part II. First, the case study shows that the Constitution actually matters. Although it is tempting to think that Presidents and members of Congress act strictly in their self-interest, the case study shows how Harrison, Tyler, Taylor, Fillmore, and others actually conformed their actions to what they believed the Constitution required or allowed. Sometimes, they did so against their self-interest. Harrison, Tyler, and Taylor chose to alienate Clay in spite of the fact that they would have been better off politically with Clay as an ally than an enemy. Fillmore sacrificed any chance to the election to the presidency in his own right by choosing to staunchly defend the constitutionality and the need for vigorous, uniform enforcement of the Fugitive Slave Act. The point is not whether one can take issue with their particular constitutional or political judgments that they each made but rather that their judgments had discernible constitutional consequences.

107 See generally *id.* at 210–16 (describing Fillmore’s detest of slavery but commitment to enforcing the Fugitive Slave Act).

108 See, e.g., REMINI, *supra* note 99, at 724–28 (detailing speeches by Fillmore and Webster discussing the constitutionality of the Fugitive Slave Act).

Second, the case study shows how important role-playing can be in the federal government.¹⁰⁹ People might conform their behavior regarding an office's powers and limitations once they hold the position. As President, Tyler gravitated toward emulating Jackson in spite of the criticism he leveled against Jackson as President, and Fillmore as President was willing to compromise his long-held views about the Wilmot Proviso to save the Union.¹¹⁰

Third, the case study shows how the Supreme Court was peripheral to, if not completely uninvolved with, the demise of the Whig conception of the presidency. Indeed, neither Congress nor the Presidents in the period from 1840 to 1852 turned to the Court to decide the fate of the Whig conception of the presidency. This conception collapsed solely because of what Presidents and members of Congress did, not what the Court said or did.

Fourth, the case study illustrates how departmentalism is a function of constitutional construction and non-judicial precedent. On the one hand, the Whig conception of the presidency collapsed largely because of both the blows struck against it by Presidents and the concomitant failures of Congress to prop it back up. Moreover, it is important to recognize that even as the Whig conception of the presidency was collapsing, congressional power was not receding. For instance, Tyler and Fillmore each effectively reached an impasse with the Senate over Supreme Court appointments that ultimately bolstered senatorial power.

Fifth, the collapse of the Whig conception of the presidency was not, and should not, be construed as a vindication of the unitary theory of the executive. It is true that Harrison, Tyler, Taylor, and Fillmore each failed to conform to the Whig orthodoxy on the presidency, but their resistance was not grounded on a fully articulated endorsement of the unitary theory of the executive as we now know it. Indeed, none of them ever expressly endorsed the theory. Moreover, sometimes these Presidents took stands that conflicted with this theory. For instance, it does not appear that Tyler or Taylor agreed with the notion of an absolute executive privilege, the notion that a President has complete, unilateral discretion over what information

109 I owe this insight to Fred Greenstein, Professor Emeritus at Princeton. Citing the social science literature on role-playing, Professor Greenstein suggested, in a conversation on April 21, 2009, that the case study is consistent with the social science literature showing that a person's perceptions or actions might depend on where the person is situated in the government or the office that he or she occupies.

110 Cf. SMITH, *supra* note 80, at 165 (discussing the impetus for Fillmore's altered stance on the Wilmot Proviso).

produced in the executive branch to maintain as confidential or to disclose. While such a notion seems consistent with, if not a part of, the unitary theory of the executive, Tyler often acquiesced to congressional documents and even produced internal executive branch documents without recognizing or claiming to have waived any applicable executive privilege.¹¹¹ Nor did the Presidents who served from 1840–1852 expressly support the President’s authority to remove anyone exercising executive power anywhere in the government. Taylor, Tyler, and Fillmore apparently thought they had such authority as reflected in their systematic efforts to reorganize their administrations with people who were personally or politically loyal to them and not just the Whig Party. Tyler and Fillmore did replace their Cabinets but only because of the mass resignations of their cabinet officers rather than the exercise of their removal power. Harrison actually endorsed at least some civil service reform which would have put some limits on the President’s removal authority,¹¹² and, as Calabresi and Yoo point out,¹¹³ Congress rejected Tyler’s Exchequer plan and presumably with it, the single most extensive endorsement he made of the unitary theory of the executive.

Another important lesson is the limited utility of a given case study. Although I have given a few examples of the blows struck by Harrison, Tyler, Taylor, and Fillmore against the Whig conception of the presidency and the congressional responses to their respective blows, there is more, much more, to the story of the demise of the Whig conception of the presidency than I have related. It is especially important, in light of the present Symposium, to recognize that each of these Presidents sometimes embraced this conception and thus rejected or acted contrary to the unitary theory of the executive. For instance, Fillmore did not issue a single veto during his tenure as President,¹¹⁴ and Tyler, in spite of his aggressive exercises of his veto authority on six occasions, signed off on much of the Whigs’ domestic policy agenda during his presidency, including an early bank-

111 See PETERSON, *supra* note 27, at 171 (describing how Tyler complied with the House, sending its members information concerning an executive investigation of the Cherokee Indians).

112 See *id.* at 39–40 (explaining how Harrison balanced political pressure with his commitment to improving the civil-service system).

113 See CALABRESI & YOO, *supra* note 1, at 134 (discussing Tyler’s plan for an Independent Board of Exchequer and its failed enactment).

114 ROBERT J. SPITZER, *THE PRESIDENTIAL VETO* 39, 57 (1988).

ruptcy law.¹¹⁵ We should not read too much into a single case study, whether it be mine or those comprising *The Unitary Executive*; these are all incomplete accounts of departmentalism.

Last but not least, Matthew Adler is correct when he suggested as moderator of our panel that my positive account of departmentalism has certain normative consequences.¹¹⁶ One is that it cuts against the notion of judicial supremacy. My case study is a single example of departmentalism at work, but it reinforces the point I have made elsewhere that judicial supremacy is not a fact of much constitutional life.¹¹⁷

Another normative consequence of my positive account is that it suggests the practical impossibility that the unitary theory of the executive could ever be, or will ever be, fully implemented. The reason is simple: it is because departmentalism, as I have shown, is shaped both through internal interactions within a branch and external interactions with the other branches. The unitary theory of the executive, in its fullest form, poses a threat to a substantial number of laws that Presidents have signed and enforced in the past, by which the Congress still stands, and the Supreme Court has upheld. It is at this juncture that the force of precedent, both judicial and non-judicial, comes fully into play, for the full and complete implementation of the unitary theory of the executive is only possible if the leaders of all three branches of the federal government agree—and stick to their agreement over time—to abandon over two centuries of non-judicial precedents pertaining to presidential and congressional power. It is hard to imagine that the world of checks and balances can be made entirely anew to that extent.

CONCLUSION

The Unitary Executive is a singular achievement. It provides excellent case studies of the extent to which each President from Washington to Bush has recognized or tried to implement the unitary theory of the executive.

But, their account, as rich it is, tells only part of a larger story: the comprehensive history of the development of presidential power over

115 See Richard P. McCormick, *William Henry Harrison and John Tyler*, in *THE PRESIDENTS: A REFERENCE HISTORY* 146–47 (Henry F. Graff ed., 2d ed. 1997) (discussing Tyler's policies in office).

116 I am grateful to Professor Adler for raising this point in the discussion after our panel's presentations.

117 See Gerhardt, *Non-Judicial Precedent*, *supra* note 5.

time. Professors Yoo and Calabresi have given us the perspective of Presidents on the unilateral theory of the executive, but every President as well as members of Congress, not to mention the Supreme Court, has taken nuanced views of presidential power and often exercise power in contested circumstances. The history of the interaction of the branches, particularly the President and Congress, is a history of constitutional construction and the forging of non-judicial precedents, which shape dynamically the exercises of presidential and congressional powers.

Departmentalism might not work quite as precisely as the principle in physics that for every action there is a reaction; however, it is a function of the interaction of the branches over time. Presidential power does not develop in a vacuum; it has developed not only at the expense of congressional power but in concert with the growth of congressional power. We cannot understand one without the other.