Can Originalism Constrain the Imperial Presidency?

By Lee J. Strang

Federalism & Separation of Powers Practice Group

A Review of:

The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers, by Saikrishna Bangalore Prakash (Harvard University Press, 2020)
https://www.hup.harvard.edu/catalog.php?isbn=9780674987982

About the Author:

Lee J. Strang is the John W. Stoepler Professor of Law & Values at the University of Toledo College of Law.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Other Views:

• Gary L. Gregg II, *Is It Too Late to Recover the Founders' Presidency?*, Law & Liberty, (June 16, 2020), https://lawliberty.org/book-review/is-it-too-late-to-recover-the-founders-presidency/.

• Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const'l L. 323, (2016), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1614&context=jcl.

• Saikrishna B. Prakash & John C. Yoo, *The True Extent of Executive Power*, Federalist Soc'y Teleforum, (July 29, 2020), https://fedsoc.org/events/the-true-extent-of-executive-power.

The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers, by Professor Saikrishna Bangalore Prakash, is a readable, systematic, and well-reasoned description of today's living presidency, as well as a roadmap showing the way back to the constitutionally-authorized office. *The Living Presidency*'s thesis is that today's presidents routinely "alter the Constitution and laws" such that the office has "become the amending executive."[1] But, in the beginning, "the original presidency was not meant to be all-powerful [and] lacked the unilateral authority to amend the Constitution or to make, amend, or unmake statutory law."[2] Professor Prakash describes the causes of today's out-sized presidency, details support for his claims that the living presidency departs from the Constitution's original meaning, and then suggests means to tame the living presidency.

The Living Presidency is readable and accessible to lawyers and educated laymen. At one point, Professor Prakash refers to the "generations of schoolchildren who grew up watching Schoolhouse Rock's catchy song and video 'I'm Just a Bill.'"[3] He also colorfully describes Justice Hugo Black's statement that the president merely executes the law, calling it "as antiquated as a rotary dial telephone, at least if we use modern practice as the benchmark."[4] *The Living Presidency* is peppered with concrete examples supporting Professor Prakash's points. For example, while detailing the presidents' push to acquire the power to substantively amend federal statutes, he uses the example of President Barack Obama delaying implementation of the Affordable Care Act's employer mandate via "transition relief," which he justified by pointing to past presidents' delayed implementation of tax legislation.[5] One of Professor Prakash's most effective techniques is to propose thought experiments about alternative choices that could have been made by the Framers and Ratifiers. "[I]magine what Article II would look like," he asks, "if it had been written in a radically different era." Would Americans in 1975 have created such a powerful executive?[6]

Part of *The Living Presidency*'s accessibility also stems from its clear organization. In Chapter 2, Professor Prakash methodically explains why presidents have accumulated the power to make and amend laws. He identifies and discusses multiple motivations that have caused presidents to push the boundaries of their authority, including the love of power, a hunger for fame, and a desire to keep

1 Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument Against its Ever-Expanding Powers 42 (2020).

2 *Id.*

3 *Id.* at 41.

4 *Id.* at 216.

5 *Id.* at 227-29.

6 *Id.* at 24.

their promises to voters.[7] *The Living Presidency* overall likewise has a clear, interlocking structure that introduces Professor Prakash's idea of the living presidency, then examines the causes of the living presidency in general, and then drills down into three of the most important ways the living presidency has grown.

I. *The Living Presidency*'s Provocative Argument

Chapter 1, provocatively titled *Kingly Beginnings*, pushes against the conventional wisdom that the Framers and Ratifiers created a modest, even weak, republican chief magistrate whose primary task was to enforce Congress' will. Instead, Professor Prakash argues that the "Constitution did create a monarch, albeit a limited, republican one."[8] In other words, the president was to be a monarch because of his king-like powers, but the office was also limited in ways called for by our republican form of government. He details the key aspects of the new office, including a method of selection independent of the legislature, a relatively long term of office with the possibility for additional terms, a single office holder, and a variety of powers to control executive officers and to check Congress.[9] Then, why is the conventional wisdom conventional? Because, according to Professor Prakash, "we have exalted form over substance. We have been deceived by the republican trappings of the Constitution," such as the president's title, "and have paid little heed to its actual features."[10] Still—and this is the key point of Chapter 1—despite the office's robust powers, Professor Prakash maintains that Article II did not authorize the president to alter the law, either the Constitution or congressional statute. Instead, constitutional change is authorized only via Article V, and statutory change is authorized only via Article I.[11]

Chapters 2 and 3 contain Professor Prakash's methodical and fulsome explanation for the evolution of the office to today's living presidency. Chapter 2 explains *why* presidents have sought and gained lawmaking power. Professor Prakash details the numerous factors—both internal and external to the office, and both benign and self-serving—that have caused presidents to seek more power, along with the resulting transformation of the presidency into a law- and Constitution-changing office. For example, presidents desire power (seemingly a negative), and presidents wish to keep campaign promises (seemingly a positive), and these (along with other) motivations push presidents to expand the bounds of their power.[12] Part of the persuasiveness of Professor Prakash's description derives from the fact that the identified causes of the growth of presidential power are not tied to a particular party, ideology, or personality; instead, the causes have accumulated over time, and the presidents responding to them do so out of typical human motivations.

Chapter 3 continues the argument begun in Chapter 2 by explaining *how* presidents have acquired lawmaking power. The living presidency arose from a number of mutually-supporting mechanisms. First, Article II's grant of all "executive Power" to the president was plausibly leveraged by presidents to argue that their capacious interpretations of their own power were faithful to the text. Second, the other branches of government were hindered structurally and by their own choosing from effectively combatting the energetic presidency. For instance, Congress' many structural limitations, such as bi-cameralism, hindered its capacity to quickly and effectively check the president. Third, modern political circumstances, including especially the president's claim to be the sole nationally-elected tribune of the American people, gave the president an advantage over Congress in democratic legitimacy.

Professor Prakash even-handedly lays blame for today's sorry state of affairs at the feet of Americans of all political stripes. Readers see this in the examples he employs and his explanations. For example, Professor Prakash details how Presidents Bill Clinton, George W. Bush, and Barack Obama all expanded the scope of the president's commander-in-chief power to suit their immediate policy interests.[13] Professor Prakash argues that the development of presidents into party leaders has caused Americans in the president's party to support their president's illegal exercises of power:[14]

> A Democratic president who negates a pro-life provision . . . on grounds that it is unconstitutional can expect almost unanimous support from pro-choice co-partisans . . . . And a Republican president who asserts that an existing federal policy insufficiently respects the freedom of religion will find a base champing at the bit to endorse this assertion.[15]

Similarly, Professor Prakash's proposals in the last chapter to cabin the living presidency would benefit Americans of all political stripes, at least in the long-term, though they have political valence in the short term. For example, Professor Prakash recommends augmenting congressional staff.[16] This would give Congress the manpower it needs to identify, evaluate, and marshal legal and other resources to tame the living presidency, and there is no obvious political reason why this proposal should not gain widespread bi-partisan support in the long run.

In Chapter 4, Professor Prakash criticizes both originalists and living constitutionalists for what he calls "fickle originalism" and "fickle living constitutionalism."[17] He focuses most of his critical attention on living constitutionalists which makes sense, as readers will learn, because of their blind spot regarding the living presidency. Professor Prakash argues that originalists have fallen prey to finding support for today's "imperial" presidency by misinterpreting Article II. He criticizes "fickle originalists" for "apply[ing] different rules" to the presidency, such as citing

7 *Id.* at 44-57.

8 *Id.* at 23.

9 *Id.* at 29-30.

10 *Id.* at 36.

11 *Id.* at 36-41.

12 *Id.* at 45-46, 48-53.

13 *Id.* at 175-77.

14 *Id.* at 80-82.

15 *Id.* at 81-82.

16 *Id.* at 253-55.

17 *Id.* at 94.

to modern practices to justify their interpretations.[18] He does not name names, however, which makes it difficult for readers to know which scholars and arguments he has in mind.

Living constitutionalists, on the other hand, put aside their typical embrace of changing constitutional meaning and uncharacteristically "would have us believe that the Founders got it right on this one point alone" by creating a limited executive.[19] Professor Prakash identifies more of the "fickle living constitutionalists" he is criticizing, and that makes it easier to understand his argument. For instance, he describes Professor Bruce Ackerman's theory of informal amendment and shows how one could reasonably apply it to the modern presidency to justify President George W. Bush's practices (which Ackerman himself criticized).[20] Even here, however, it would have been valuable to know how representative the couple of identified "fickle" living constitutionalists are of their compatriots.

In Chapters 5-8, *The Living Presidency* describes the key constitutional changes to the executive office itself and to Congress, which helped create the living presidency. Each chapter tells a familiar, sad tale. The original Constitution identified limited presidential power over a given subject and, over time, presidents pushed and pushed at the constitutional limits for reasons and using means described in Chapters 2 and 3. Because of this constant pressure pushing limits ever outward, today the living presidency has accumulated additional powers through multiple informal amendments to the Constitution. Professor Prakash dubs this the "practice-makes-perfect argument for the Constitution—that repeated practices can change the Constitution's meaning."[21] Chapter 5 introduces the three chapters that follow by summarizing the office's mutation from defending the Constitution to amending it. The office occupied by George Washington did not authorize the president to play any role in changing constitutional meaning, and it required the president to follow the Constitution and federal statutes. President Donald Trump's office, by contrast, has acquired the powers to change constitutional meaning and to modify or reject congressional statutes. Chapter 6 argues that presidents since Harry Truman have shifted the war-making powers from Congress to the presidency. Chapter 7 shows how presidents came to dominate American foreign affairs at the expense of Congress and the original Constitution. Chapter 8 details the living presidency's practice of evading, changing, and voiding federal statutes, along with its acquisition of lawmaking capacity.

Chapter 9, *The Living Presidency*'s last chapter, provides a map showing how Americans can return the office of the president to something like its original contours. Professor Prakash offers thirteen ways that Congress could limit executive power, including, for instance, requiring senior White House officials to receive Senate confirmation.[22] He also argues that federal courts should remove jurisdictional barriers to judicial review of executive actions (such as the political question doctrine) and reduce deference to executive decisions (such as that accorded under *Chevron*), which would empower the courts to better check the living presidency. And most importantly, he argues that courts should renounce the practice-makes-perfect or "historical gloss" theory of interpreting executive power.[23]

Provocatively, *The Living Presidency* identifies three more aggressive reforms that Professor Prakash believes are unconstitutional according to the original meaning, but that living constitutionalists would likely consider constitutional. Professor Prakash proposes, for instance, that Congress should convert existing *executive* administrative agencies (which are generally headed by a single person removable at the president's will) into *independent* administrative agencies (headed by multiple individuals removable by the president only for cause). This would increase the number of law-executing officials who are relatively independent of the president and who would therefore be less likely to engage in the living presidency's penchant for amending, ignoring, and creating law. This move would simultaneously reduce the living presidency's power and enhance Congress' power by creating institutions that more faithfully execute laws passed by Congress.[24] Professor Prakash briefly comments that these reforms would be most likely to pass prior to a presidential election when both political parties can hedge their risks through limiting the living presidency's power.[25]

II. What To Do With Nonoriginalist Presidential "Precedents"?

In Professor Prakash's telling, every American institution and most Americans have been part of the problem. "The transformations [of the presidency] are all around us, and every institution—Congress, the courts, the executive, and the public—has helped usher in those changes."[26] Of course, presidents, past and present, covet greater power for a variety of reasons, including fundamentally to secure their policy objectives. The federal judiciary, hedged in by both constitutionally mandated and self-imposed jurisdictional limits, has avoided disrupting the expansion of presidential powers. Congress is the branch that has ceded the most authority to the executive, because of its own institutional limitations, the role of parties, and its desire to shed responsibility for controversial subjects, among other reasons. Most worrisome, however, is the role played by the American people, who have come to expect presidents to make and keep campaign promises that can only be kept through unconstitutional

18 *Id.* at 98.

19 *Id.*

20 *Id.*

21 *Id.* at 226.

22 *Id.* at 250-68.

23 *Id.* at 272-74.

24 Professor Prakash also proposes an independent impeachment agency to which Congress would delegate its impeachment functions and which would be staffed by "experts" who would define and conduct impeachments and impeachment trials. Were this to happen, such an agency would be ironic because the living constitutionalism that gave rise to the living presidency and which helped Congress bust through its own limited and enumerated powers, would end up stripping Congress of its impeachment power and using that stolen power to tame the living presidency.

25 Prakash, *supra* note 1, at 271-72.

26 *Id.* at 216.

assertions of executive authority. If American voters want federal officials to achieve goals that require the officials to exceed their limited and enumerated powers, it is practically impossible to tame officials' use of those unconstitutional powers. This is the identical challenge that faces originalist scholars who argue that Congress exceeded its Commerce Clause authority when it enacted federal anti-discrimination laws[27]—there is no appetite among Americans to return Congress to its limited powers in this and other areas.

This raises the question of whether and to what extent presidential practices that violate the original meaning of Article II—the practices the form the basis of the "historical gloss" on Article II—possess any legal authority. The phenomenon described by Professor Prakash is one in which current governmental practices—the living presidency—diverge from what the Constitution's original meaning authorizes, and it is ubiquitous in today's American constitutional system. All three branches of the federal government have (especially since the New Deal) regularly acted inconsistently with the Constitution's original meaning. Congress regularly enacts legislation that is beyond its limited and enumerated powers, and the judiciary regularly issues rulings that are not warranted by the original meaning.[28] (Professor Prakash notes this at a number of points.[29]) Indeed, the phenomenon of nonoriginalist practices is so pervasive that critics of originalism have regularly employed this fact to criticize originalism,[30] and originalists have worked hard to respond to the criticism.[31]

One common response by originalists is to argue that at least some of the nonoriginalist practices have some legal authority. For instance, I have argued that the original meaning of "judicial Power" in Article III requires federal judges to follow some nonoriginalist precedent, and that this approach has many virtues including protecting the rule of law.[32] Most originalists appear to follow something like that approach.

The Living Presidency is called "an originalist argument" against the living presidency, but it does not discuss whether some of the living presidency's nonoriginalist practices retain legal authority similar to that of nonoriginalist judicial precedents. *If*, upon investigation, it turns out to be the case that some of the living presidency's nonoriginalist practices retain legal authority, then that undermines Professor Prakash's argument because some aspects of the living presidency would be legitimate under originalism itself. How much it is undermined depends on how many such practices are legally supported and the importance of those practices. Professor Prakash's argument is only valid to the extent nonoriginalist living presidency practices do not retain any legal authority.

What would an investigation of the legal authority of nonoriginalist executive practices look like?[33] A scholar would have to determine whether the original meaning of "executive Power" (or possibly some other aspect of the president's power as outlined in Article II) includes within it a requirement (or at least an authorization) that the current occupant of the White House follow his predecessors' unconstitutional "precedents." At first glance, there are reasons pointing to different conclusions. On the one hand, the reasons that pushed the American legal system (following the English legal system) to adopt stare decisis seem to apply to executive actions as well as judicial. For instance, the rule of law is enhanced by stability, which is promoted when the president exercises his powers within the same boundaries as his predecessors and does not transgress them. The rule of law also benefits when the president does not withdraw too much from the outer bounds set by past presidents who extended those boundaries. On the other hand, the history of English and American courts shows that stare decisis was originally understood to mean judges were following preexisting law; precedent was the product of the application of that law to concrete circumstances, not a development of new law that had to be followed. But that declaratory theory of judicial decision-making does not appear to have applied to the king, or later to American executives, and therefore it may not apply to the president.

The question is also complicated because, even if the original meaning of "executive Power" did not include a requirement or authorization for presidents to follow prior presidents' nonoriginalist practices, it could still be the case that presidents have the authority to do so if the practice falls into the "construction zone."[34] Summarized briefly, the construction zone exists when the Constitution's original meaning does not determine the outcome of a legal case. The original meaning may narrow the universe of outcomes, but it does not identify one, uniquely correct answer. One might argue that, in cases where the original meaning is underdetermined, the president

27 The Supreme Court upheld the 1964 Civil Rights Act using nonoriginalist reasoning in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964).

28 For instance, Congress purportedly relied on its Commerce Clause power to regulate farmer Filburn's production and consumption of wheat on his farm, and the Supreme Court ruled that that statute was constitutional. Wickard v. Filburn, 317 U.S. 111 (1942).

29 *See, e.g.*, Prakash, *supra* note 1, at 12, 282.

30 This nonoriginalist criticism comes in a number of forms. Most powerfully, some critics contend that the Constitution includes current practices (including nonoriginalist practices) so that originalists are mistaken about what the Constitution actually is. *See, e.g.*, Ronald Dworkin, Law's Empire 202, 225-27 (1986) (describing law as the best interpretation of legal practice). Second, nonoriginalist critics claim that overruling all or most nonoriginalist precedent would cause dramatic harm to rule of law values. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 231 (1980) (making the most prominent early version of this claim).

31 Originalists have responded to the problem of nonoriginalist precedent in two basic ways. Some have argued for the "get-rid-of-it-all" position, and some have argued that originalism should accept at least some nonoriginalist precedent. *See* Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution 33-34 (2019) (summarizing the existing positions).

32 *Id.* at 103-41.

33 To be clear, I have not investigated this question or surveyed the literature on it.

34 *See* Strang, *supra* note 31, at 31-33, 63-91 (explaining constitutional construction and articulating the Deference Conception of Construction).

may create binding practices that later presidents must follow.[35] If, for instance, the Constitution does not determinatively settle whether the president has the power to unilaterally remove principal executive officers,[36] then past presidents' practice of doing so would liquidate constitutional meaning in favor of a presidential power to do so.

III. What Does the Living Presidency Mean for Living Constitutionalism?

Professor Prakash's book shows how the living presidency is a theoretical and practical problem for living constitutionalism. Living constitutionalists, as Professor Prakash details, claim that their constitutional theory gives Americans the good parts of the Constitution—things like robust free speech protections and few limits on Congress' power to do good—and lets them avoid being stuck with the bad parts—such as limits on administrative agencies and limited protection for equality and free speech.[37] However, when it comes to the living presidency, living constitutionalists suddenly "stay[] rather mum. . . . For many living constitutionalists, quite a few of whom loathe the idea of expanding presidential powers, the living presidency is akin to the crazy uncle in the attic: the less said, the better."[38] Living constitutionalists avoid the living presidency because it undermines living constitutionalism's claim to be "a theory of beneficial constitutional change."[39] The living presidency also shows that their living constitutionalism is selective and not a principled theory of interpretation.

Professor Prakash also persuasively argues that the existing practices of the living presidency are unstable. "Nothing about existing practices signals an end to such shifts. We have not arrived at some stable equilibrium. Given the incentives and motives of presidents, and their aides, today's conceptions will not be the same as tomorrow's."[40] Moreover, because the personal and institutional incentives that caused the presidency to metastasize continue to operate, the dynamic is one of continued indeterminacy that pushes toward greater presidential power. These problems show that the living presidency is not normatively attractive because of the instability it creates along with an ever more powerful president.

IV. Is Originalism the Best Way to Contain the Living Presidency?

In the debates between originalists and nonoriginalists, a standard nonoriginalist move, as Professor Prakash notes, is to point out how the living Constitution is more normatively attractive than the original one—that it gets better results even if it fudges on procedure. *The Living Presidency* challenges that claim in two important ways. First and directly, Professor Prakash details how the bloated powers of the living presidency exceed what most Americans, regardless of their jurisprudential views, believe is healthy. Most Americans, for instance, do not want the President to be able to unilaterally enter into a land war overseas. By any objective measure, the living presidency is too powerful.

Second, the living presidency's key mechanism of growth is past presidential practice, which is easy to manipulate to achieve immediate partisan goals. The partisans of the current occupant of the White House will marshal past presidential acts to support their president, while critics will marshal their own examples and distinguish the president's support. For instance, both Democrats and Republicans have switched between supporting and opposing congressional regulation of the armed forces based on the Commander in Chief Clause, depending on whether Clinton, Bush, or Obama was president.[41] This dynamic leads Professor Prakash to conclude that "muddled partisan disputes are about all we can expect under the living presidency approach."[42]

Originalism, by contrast and in principle, excludes resort to "modern politics or ethical considerations" in the dynamic of expanding presidential power, and therefore its "answers are clear."[43] Most of us will like some aspects of the original presidency and dislike other aspects. But most of us also wish to abandon the status quo: fights over indeterminate presidential practice aiming solely at current partisan advantage. The letter of party affiliation after a president's name ought not be relevant to whether he has the power to employ "enhanced interrogation techniques," or to "commit" but not "engage in" hostilities in Libya.[44] Originalism holds out the promise of reducing both the growth of the living presidency and the partisan acrimony that erupts over how to interpret past presidential practices.

Professor Prakash's argument that originalism possesses these two virtues is powerful and attractive, and I *think* it is accurate. However, there are at least two related reasons for caution. First, originalism has not been the governing method of interpretation since at least the New Deal, so it could be the case that originalism will not be able to bear the burden of governing—that originalism will not be able to separate politics from law, as it promises, when it is the predominant theory of interpretation.[45] Second, there are hints in some areas of originalist scholarship that originalism is susceptible to cracking under the strain of having to provide

35 *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019) (describing constitutional "liquidation," whereby the Constitution's meaning, where indeterminate, is settled by deliberate practice that receives public sanction).

36 I tentatively argue in a forthcoming essay that the Constitution *did* determinatively give the president that power, and that Congress, in the Decision of 1789, identified that determinative meaning. Lee J. Strang, *An Evaluation of Evidence for Constitutional Construction From "The Decision of 1789" Debate in the First Congress*, 46 Ohio N.U. L. Rev. ___ (2020).

37 Prakash, *supra* note 1, at 99-103.

38 *Id.* at 104.

39 *Id.*

40 *Id.* at 212-13.

41 *Id.* at 175-77.

42 *Id.* at 177.

43 *Id.*

44 *Id.* at 176-79.

45 At least in its focal case, when identifying and applying determinate original meaning.

sufficient—that is, accurate and determinate—answers to operate our constitutional system. For instance, what does one make of the variety of purportedly originalist interpretations of various provisions of the Constitution that conflict with one another? Professor Randy Barnett articulated one interpretation of the Commerce Clause, while Professor Jack Balkin contended for another, and both scholars presented originalist arguments to support their respective claims,[46] *and* both scholars' conclusions seemed to match their respective policy preferences. Originalists have reasonable responses to this phenomenon,[47] but this along with other hints should make originalists cautious.

V. How Does Contingency Affect Interpretation?

Professor Prakash repeatedly highlights the contingency of the contours of the executive office and how the office identified in Article II depends on the Framers' and Ratifiers' choices made in a particular context based on their reasonable—though not uniquely reasonable—assessment of the needs of and threats to the new constitutional order. "The Founders made a number of design choices for the new government, each backed by sound reasons."[48] To note just one: in developing the office of the president, the Framers were strongly influenced by the failure of post-Revolution state executives, which they thought resulted from their lack of independence and energy.[49] Different reasonable constitutional drafters in different contexts would reasonably have made different choices, as Professor Prakash's many thought experiments show.

By highlighting this constitutional contingency, *The Living Presidency* further emphasizes originalism's contributions to the rule of law. Precisely because of the dramatic contingency inherent in the Framers' and Ratifiers' prudential choices about how best to structure the executive office, reasonable Americans—then and now—may reasonably criticize their choices. For instance, it is reasonable to argue that Article II should have been more detailed, like Article I, to guard against the practice-makes-perfect theory of presidential power.[50] But if the president—or a judge, or any officer—can interpret the Constitution differently based on the interpreter's own prudential judgments (that differ from the judgments made by the Framers and Ratifiers), then the law's meaning will be subject to wide variation, and the Constitution's coordinating capacity will be correspondingly reduced.[51] Originalism, through its faithfulness to the Constitution's original meaning, secures the benefits of the rule of law by causing officers to treat the Framers' and Ratifiers' reasons, communicated via the original meaning, as exclusionary reasons.[52]

VI. Conclusion

The Living Presidency is a clear and persuasive account of how the modern presidency slipped its constitutional bonds so that today the president has the power to amend the Constitution and to amend, reject, and make federal law. Though he suggests a number of remedies for the living presidency, the story told by Professor Prakash is especially disturbing because the living presidency's many causes are so powerful and deeply entrenched that it makes hope for a return to the original presidency difficult to maintain.

46 Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 278-97 (2004); Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1 (2010).

47 My view on this phenomenon is that we should expect such pressures to pose challenges to originalism but that, over time, the scholarship will identify areas of agreement, areas of agreed-disagreement, and areas of pure disagreement on what the original meaning is. This challenge is unlike that facing living constitutionalism, where proponents of different partisan perspectives are incentivized to divine the president's powers from indeterminate presidential practices.

48 Prakash, *supra* note 1, at 62.

49 *Id.* at 24-27.

50 *Id.* at 65-68.

51 *See* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L.J. 97, 99-100 (2016) (summarizing the authors' similar argument).

52 These reasons, communicated through the original meaning, exclude other reasons from an officer's practical deliberations and thereby secure the original meaning's primacy and capacity to coordinate. *See* Strang, *supra* note 31, at 221-309 (making this argument).