# INTERPRETING PRESIDENTIAL POWERS

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ABSTRACT

*Justice Holmes famously observed that "[g]reat cases . . . make bad law." The problem may be especially acute in the domain of national security, where presidents frequently interpret their own powers without judicial review and where executive precedents play a large role in subsequent interpretive debates. On the one hand, some of the historical assertions of presidential authority that stretch constitutional and statutory language the furthest seem hard to condemn in light of the practical stakes. On the other hand, to credit the authority of executive precedent risks leaving the president dangerously unbound.*

*To address the conundrum posed by executive precedent, this Article proposes a two-tiered theory for the interpretation of presidential powers. Framed as an analogy to a position in moral philosophy known as "threshold deontology," two-tiered interpretive theory treats rules that restrict executive power as normally inviolable, not subject to a case-by-case balancing analysis. Analogously to threshold deontology, however, two-tiered theory also recognizes that when the costs of adherence to ordinary principles grow exorbitantly high, extraordinary interpretive principles should govern instead and should result in the upholding of broad presidential power. For reasons that the Article explains, resort to extraordinary reliance on second-tier justifications for assertions of sweeping executive authority involves a legal analogue to "dirty-handed" moral conduct and should be labeled accordingly. And executive precedents set in extraordinary, second-tier cases should not apply to more ordinary ones. Through its conjunction of elements, two-tiered interpretive theory furnishes analytical and rhetorical safeguards against executive overreaching, but also allows accommodations for truly extraordinary cases.*

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## INTRODUCTION

With characteristically pithy perspicacity, Justice Holmes famously worried that "[g]reat cases . . . make bad law."[1] The problem with great cases has two aspects. First, as Holmes noted, extraordinary practical pressures may distort judicial judgment about how to resolve particular high-stakes controversies.[2] Second, rules of decision framed for great cases—even if appropriate to their exigent facts—may threaten to contaminate the resolution of future, more

1. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).
2. *See id.*

ordinary cases.[3] To quote another splendid Justice, a rule crafted for a rare and regrettable emergency may thereafter "lie[] about like a loaded weapon,"[4] risking future damage to previously long-settled legal, political, and moral ideals.

Although Justice Holmes warned about great cases with judicial decisionmaking in mind, the problems to which he called attention can arise just as acutely with respect to constitutional and statutory interpretation by the executive branch, especially within the domains of foreign policy and national security. Because disputes about the outer limits of presidential power to keep the nation safe and to manage international affairs seldom ripen into justiciable controversies,[5] the president—aided by a team of lawyers—frequently functions as the principal precedent-setter in these areas.[6] Rarely, if ever, does the president claim a power to violate the law. Instead, the president, with assistance from the White House or Justice Department legal staff, issues opinions justifying assertions of executive authority under the Constitution and laws of the United States.[7] Some of the precedential decisions thus reached come in the kind of great cases to which Justice Holmes referred. Ready examples emerge from the actions of President Abraham Lincoln in the early days of the Civil War, when he concluded that the emergency rendered it constitutionally permissible for him to take steps that would almost surely have been legally impermissible in less extraordinary times.[8] Equally precedential decisions come when presidents and administration lawyers determine the applicability of precedents set in genuinely great cases to less exigent circumstances.

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3. *Cf.* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1097 (2003) ("[T]here is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis has ended.").

4. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

5. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 436–38 (2012).

6. *See id.* at 460 (noting the frequency of executive-branch reliance on executive precedent, even in the absence of acquiescence by other branches, and observing that "there are plausible grounds for even nonexecutive actors to credit patterns of executive practice, at least in some circumstances").

7. For a caustic critique of the legal analysis thus produced, see BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 98–116 (2010). For a rejoinder, see Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692 (2011) (book review) (arguing that Professor Ackerman's "oversimplified account obscures the constraints built into the current institutional arrangement"). For further discussion, see *infra* note 62.

8. *See infra* notes 42–57 and accompanying text.

Professor Bruce Ackerman thus notes the tendency of presidents to justify actions that would otherwise be patently illegal or unconstitutional by arguing that executive precedent either glosses or displaces otherwise applicable norms.[9] He caricatures the resulting form of legal argument as follows: it is constitutionally permissible for the president to act unilaterally, despite the appearance of legal constraints, because "[t]hat's what Abe Lincoln did in the early months of the Civil War [and] that's what FDR did during the Great Depression."[10] According to Professors Eric Posner and Adrian Vermeule, our system has so evolved that law no longer meaningfully constrains the president, though political checks continue to operate.[11]

In this Article, I propose a response to the problems posed by great cases involving claims of presidential power—and executive precedents construing presidential powers very broadly—in the domains of war and national security. My proposal depends on an analogy between constitutional law and moral theory. In my view, the "threshold deontological" position that some moral prohibitions cease to bind absolutely when the costs of adherence grow excessive,[12] and the similar idea that public officials sometimes appropriately acquire morally "dirty hands,"[13] can illuminate thinking about presidential powers and the proper role of precedent in defining them. The underlying premise of these approaches, which I shall summarize under the rubric of "two-tiered morality," holds that morality operates on two levels. First, there is the level of ordinarily applicable moral rules, such as those, for example, that forbid lying, killing, and the deliberate infliction of harm. Second, there is a level at or above which the costs to others of adhering to the applicable rules grow so exorbitant that it becomes morally untenable to do so. Under such circumstances, a morally conscientious official has no choice but to do what ordinary morality forbids. Nevertheless, the underlying prohibition remains unmodified, and an official, though having done what she morally had to do, has acted regrettably and may even have done a "wrong," as reflected in the metaphorical suggestion that she thereby gets dirty hands.

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9. ACKERMAN, *supra* note 7, at 73.

10. *Id.*

11. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 14–15 (2010).

12. *See infra* notes 81–83 and accompanying text.

13. *See* Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 161–62 (1973).

Pursuing the analogy afforded by threshold deontology, I argue in this Article that we should conceptualize the rules of constitutional and statutory interpretation applicable to claims of presidential power as possessing a bifurcated structure. Ordinary rules, which apply in ordinary cases, may, with relative frequency, yield the conclusion that the president is constrained in ways that the president, for policy reasons, would not wish to be constrained. But in highly exigent cases, I argue, different rules of constitutional and statutory interpretation govern. When consequence-based imperatives possess sufficient urgency, it is right to conclude, as a matter of law, that the president can do some things that would be flatly illegal or unconstitutional under the ordinarily applicable rules.[14] This conclusion holds even in situations in which part of the purpose of the usual rules may be to circumscribe officials' discretion and to stop them from doing what they deem wise, expedient, or even prudentially necessary on a case-by-case basis. Nevertheless, by analogy to the moral wrongs that threshold deontology sometimes regards as lesser evils, some presidential actions that are justified only pursuant to the second-tier principles governing exigent cases should be regarded as lesser *legal* evils that are regrettably in breach of ordinary legal and constitutional ideals that emergency does not eradicate. By marking extraordinary claims of executive authority as tainted in this way, we would equip ourselves with the best intellectual, legal, and political tools for stopping what was lamentably necessary in one case from evolving into normal operating procedure in others. Going forward, I shall thus argue, we should distinguish between ordinary and extraordinary claims of presidential power; limit extraordinary claims to truly extraordinary cases; parse precedents much more closely to ascertain whether they correctly apply this distinction; and accord strong precedential authority only to past presidential actions and practices that emerge as adequately justified under the appropriately applicable rules.

The novelty of my proposal that we embrace a two-tiered theory of constitutional and statutory interpretation inheres in its status as a legal theory, framed to fit and rationalize much, though not all, of historical and current U.S. legal practice, and in the resources it

14. *Cf.* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257 (2004) ("The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements.").

provides for identifying and challenging executive overreaching. A large political philosophical literature discusses the emergency powers, if any, that a well-designed constitution would assign to the executive.[15] By contrast, my aim and method are "interpretive" in the sense in which Professor Ronald Dworkin uses that term:[16] I seek to offer an account that not only fits our historical and contemporary practices for gauging the scope of executive authority, but also casts those practices in the best normative light and thus offers attractive guidance for the future. That guidance crucially involves a strategy of identifying even justified invocations of emergency interpretive principles as inherently regrettable or even dirty-handed and of resisting the spread of principles framed for great cases to more ordinary ones, even in the field of national security.[17] By invoking moral and political philosophy to shape the development of a legal interpretive theory, this Article also distinguishes itself from arguments that officials confronted with emergencies are morally justified in acting extralegally.[18]

The Article's interpretive methodology, as informed by an analogy to moral philosophy, also distinguishes it from constitutional scholarship that has debated the scope of presidential war powers on exclusively historical and functional grounds, often without reference to issues of statutory interpretation. To neglect statutes and issues involving their interpretation is myopic. As Professors David Barron and Martin Lederman have shown, Congress frequently enacts legislation that restricts or might be interpreted to restrict presidential

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15. That literature notably includes JOHN LOCKE, TWO TREATISES OF GOVERNMENT 374–79 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); NICCOLÒ MACHIAVELLI, *The Prince*, *in* THE PRINCE AND THE DISCOURSES 1, 56–57 (Max Lerner ed., Luigi Ricci trans., Random House 1950) (1532); and CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., Univ. of Chi. Press 1985) (1922). Distinguished recent contributions include DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006); NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES (2009); and HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER (1989).

16. *See* RONALD DWORKIN, LAW'S EMPIRE 239, 255–58 (1986) (maintaining that proposed interpretations must be judged by the sometimes competing criteria of "fit" and normative attractiveness).

17. *Cf.* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1404 (1989) (observing that "[e]mergency rule has become permanent"); Paulsen, *supra* note 14, at 1257–60 (proposing special interpretive principles for cases of constitutional necessity without addressing problems involving the contamination of nonemergency cases by principles framed in ones of genuine exigency).

18. *See generally, e.g.*, Gross, *supra* note 3.

authority, even with respect to the Commander-in-Chief power.[19] We need a theory addressing the proper interpretation of such legislation.

The Article unfolds as follows: Part I first elaborates the constitutional intuition that extraordinary interpretive principles should apply to a few high-stakes cases, then juxtaposes that intuition with grounds for justified anxiety that allowing legal accommodations for great cases may create bad law. Against the background of that juxtaposition, Part II introduces threshold deontological moral theory as a potential source of analogical guidance. Applying the analogy that threshold deontology affords, Part II also offers a provisional statement of, and defends, a two-tiered approach to statutory and constitutional interpretation. Part III moves from a largely conceptual defense of the idea of a two-tiered interpretive theory to the development of a framework for analyzing particular cases. More specifically, Part III frames the questions to which a fully specified two-tiered theory would need to supply answers, as illustrated by discussions of concrete cases. Part IV considers the proper application of two-tiered theory to past executive precedents, including those emerging from "great cases," and offers a set of prescriptions for ensuring that reliance on precedent, and especially executive precedent, does not subvert the analytical structure that two-tiered theory otherwise mandates.

## I. OUR CURRENT PREDICAMENT REGARDING CLAIMS OF PRESIDENTIAL POWER

At least in academic circles, the notion has gained astonishingly broad currency—including respectful consideration even from those who ultimately reject it—that the president possesses substantially unlimited powers, especially in the domain of national security. With some academic support, the George W. Bush administration defended a sweeping view of inherent presidential powers related to national defense.[20] Those powers, the administration argued, lay

19. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 947–48 (2008).

20. The Bush administration not only claimed unilateral authority to prosecute a war in Iraq without congressional authorization if it so chose (though it later opted to seek, and won, such authorization), *see* LOUIS FISHER, PRESIDENTIAL WAR POWER 215–30 (2d ed., rev. 2004), but also maintained that Congress was wholly impotent to enact legislation restricting the president's authority to respond to perceived national security threats, *see, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Counsel to the President, The President's Constitutional Authority To Conduct Military

beyond the reach of Congress to regulate. Professors Posner and Vermeule offer a more qualified claim about the capacity of law to restrict the president, but also one that sweeps more broadly with respect to subject matter. According to them, "law does little to constrain the modern executive" at all,[21] as illustrated and established by past "showdowns" in which other branches have acceded to claims of presidential power.[22]

The view that the president is almost totally unconstrained by law seems to me to border on the unintelligible. By constituting the office of president, and the surrounding network of other offices with distinctive responsibilities, law establishes what it *means* to be president.[23] Given what it means for someone to hold the office of president under a Constitution that also creates a Congress and a judicial branch, and confers individual rights, the president cannot, unilaterally, raise tax rates on the wealthy, confer life-tenured judgeships on men and women whom the Senate will not confirm, or incarcerate citizens who have not taken up arms against the United States or been convicted of crimes. As a conceptual matter, the alternative to a legally constrained president is not a legally unconstrained president, but rather no president at all (as opposed to a constitutional dictator or supreme potentate, for example).[24]

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Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 214 (Sept. 25, 2001). For examples of academic discussions roughly in line with the Bush administration's position, see generally Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority To Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002); Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807 (2006); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996) [hereinafter Yoo, *The Continuation of Politics by Other Means*]; and John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002). For critical discussion of the Bush administration's positions regarding executive power, see generally, JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008); and CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

21. POSNER & VERMEULE, *supra* note 11, at 15. For a detailed critique of the empirical claim that executive power has become substantially unconstrained, see generally JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012).

22. *See* POSNER & VERMEULE, *supra* note 11, at 67–83.

23. *See* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 986–89 (2009).

24. *See id. See generally* Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) (identifying mechanisms of legal constraint on the president).

Much more plausible is the notion that presidents, although constrained by law in many respects, are—and frequently should be—able to construe their powers very expansively, or to read limits on their powers as narrow to the point of vanishing, in times of perceived emergency. In this Part, I shall first develop the constitutional intuition that special interpretive rules should apply, with the effect of relaxing restrictions on presidential power that otherwise would govern, in great, emergency, or high-stakes cases. I shall then elaborate the concern that this intuition should be rejected based on the Holmesian premise that "[g]reat cases . . . make bad law."[25] Finally, I shall explain how the conjunction of point and counterpoint with respect to these matters frames the challenge that the remainder of this Article addresses.

### *A. The Constitutional Intuition That Special Rules Apply to the Determination of Presidential Powers in Exigent Cases*

Justice Jackson's much-celebrated concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[26] the leading Supreme Court case on presidential powers, highlighted the significance of determining whether the president acts with the authorization of Congress, acts in a context to which Congress has not spoken, or acts in the teeth of a congressional prohibition.[27] This is an extremely helpful categorization, as reflected in the widespread acknowledgment that Justice Jackson's *Youngstown* concurrence provides the framework for analysis of presidential power.[28] As *Youngstown* illustrates, however, an important prior question will often involve the interpretation of a statute. In *Youngstown*, a majority of the Justices read a statute giving some powers to the president as impliedly denying him others. In other cases, by contrast, the Supreme Court has construed seemingly limited grants of presidential power as tacit approvals of broader assertions of executive authority.[29]

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25. *See supra* note 1 and accompanying text.

26. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

27. *See id.* at 635–38 (Jackson, J., concurring).

28. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 524 (2008) (referring to "Justice Jackson's familiar tripartite scheme" as "the accepted framework" for evaluating claims of executive power).

29. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 677–80 (1981).

In considering whether great, emergency, or high-stakes cases call for the recognition of presidential powers that could not be persuasively justified if the stakes were lower, it may help to start with cases of statutory interpretation. Although I do not wish to overstate my claim, in statutory cases we may have a clearer sense of what "ordinary" interpretation would be—that is, of how we would construe statutory language in the absence of a plausible claim of exigency—than we would in pure cases of constitutional interpretation, in which tradition teaches that "we must never forget, that it is *a constitution* we are expounding."[30]

Even in statutory cases, no general claim about the nature of interpretation can wholly escape controversy. For example, textualists and "new textualists" endorse one set of methodological principles, while purposivists embrace another.[31] Nevertheless, these and nearly all other theories of statutory interpretation define themselves partly in opposition to the pervasively pragmatic view that statutes should always be interpreted to reach whatever result would have the best consequences, all things considered.[32] In contrast with such thorough-going pragmatism, other theories impose significant constraints, even though they characteristically permit or require some sensitivity to consequences.

For purposes of argument, let us assume, then, that the adherents of one interpretive theory or another would sometimes regretfully conclude that a statute either fails to give the president a power, or precludes the president from exercising a power, that they think it desirable for the president to have. Such a conclusion, we might say, would reflect the outcome of ordinary statutory interpretation. And ordinarily we would expect those with interpretive authority to live with the conclusion that ordinary statutory interpretation—conducted pursuant to their methodology, whatever that methodology might be—generates.

In some cases, however, it may seem obvious that both the Supreme Court and executive officials have strained to reach the conclusion that the president is not relevantly constrained, despite

30. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

31. For a highly illuminating overview of the overlap and divergence of these two approaches, see generally John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006).

32. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 50 (2003) (defining pragmatism as "judg[ing] proposals by the criterion of what works," as measured by the "concrete consequences for a person's happiness and prosperity").

obstacles that nearly any interpretive theory would interpose. It is hard to give examples, because what would count as straining or stretching depends on the theory with which one begins, and I do not mean to identify a preferred theory against which to measure deviations. But I suspect that nearly everyone may sometimes feel sympathy for those who have struggled to rationalize conclusions that would be difficult to justify within their ordinarily applicable theories. For many, an example may come from the effort of then-Attorney General Robert Jackson to read pertinent statutes as not barring the destroyers-for-bases trade with Great Britain that President Franklin Roosevelt effected when Britain stood virtually alone against Nazi Germany.[33] Among a series of legal obstacles, the gravest stemmed from a statute enacted in 1917 that barred the transfer of "any vessel built, armed, or equipped as a vessel of war" to a nation at war.[34] Jackson found the prohibition inapplicable because the over-age destroyers were not initially "built, armed, or equipped with any . . . *intent* or with reasonable cause to believe that they would ever enter the service of a belligerent."[35] If we believe this interpretation of the statutory prohibition to be strained, but nevertheless justified under the circumstances, it may be a sense of the exigency of the situation that moves us,[36] and we may be provoked to ask whether, and if so how, exigency could matter to a question of statutory interpretation. In so saying, I assume that all statutory interpretation allows for some degree of sensitivity to consequences, but that a special sense of straining arises because the ordinary limits have been reached. We may feel a similar tug of legal impulses in considering actual and possible questions of presidential authority under the Constitution in any of Justice Jackson's categories. Once again, I recognize that different interpreters will have different constitutional

33. *See* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940). For discussion of the episode, see NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 194–200 (2010); and Barron & Lederman, *supra* note 19, at 1042–47. For detailed criticism of the legal arguments on which the Roosevelt administration relied, see Aaron Xavier Fellmeth, *A Divorce Waiting To Happen*: *Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 BUFF. J. INT'L L. 413, 473–81 (1996).

34. *See* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, *supra* note 33, at 494 (quoting Act of June 15, 1917, Pub L. No. 65-24, § 3, 40 Stat. 217, 222).

35. *Id.* at 496 (emphasis added).

36. For a discussion of the surrounding exigency, see ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 105–09 (First Mariner Books ed. 2004).

theories.[37] It is also pertinent that the decisionmakers who determine the bounds of lawful presidential authority are likely to be executive-branch officials, rather than courts.[38] Even so, I imagine that a genuine interpretive process will occur,[39] not just a pragmatic calculation of what the president can get away with,[40] and that concerned citizens will also apply one or another theory to gauge the president's lawful authority. If the question is whether the normal application of an interpretive theory would justify a claim of presidential authority, for most theories, the answer surely will be "no" in some cases. For many, *Youngstown* furnishes an example: President Harry Truman had neither statutory nor inherent constitutional authority to seize the nation's steel mills under the circumstances.[41]

But it should again prove easy to think of cases in which courts as well as executive officials have strained to uphold assertions of presidential authority—and in which adherents of nearly any constitutional theory may feel sympathy for their efforts. Some of President Lincoln's actions at the outset of the Civil War, as explained in his July 4 Message to Congress,[42] exemplify the kind of reasoning that I have in mind. During the period between the firing

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37. Prominent examples include originalism, *see generally, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); Professor John Hart Ely's representation-reinforcing approach, *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Dworkin's prescription to give a "moral reading" to language incorporating moral values, *see* RONALD DWORKIN, FREEDOM'S LAW 1–15 (1996); and what Professor David Strauss has called common law constitutional interpretation, *see generally* David L. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

38. *See supra* notes 5–6 and accompanying text.

39. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 724–25 (2008) (rejecting the view that executive officials and other nonjudges are unaffected by constitutional argumentation); Morrison, *supra* note 7, at 1714–15 (describing interpretive norms followed by the Justice Department's Office of Legal Counsel (OLC)).

40. *See, e.g.*, Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1404–05 (2012) (reviewing POSNER & VERMEULE, *supra* note 11) (examining a rational-choice theory argument that "presidents follow the law not out of any normative obligation or the more specific duty to faithfully execute the laws but only when the cost-benefit metric of compliance is more favorable than that of noncompliance").

41. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

42. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421 (Roy P. Basler ed., 1953).

on Fort Sumter on April 12 and the first subsequent convening of Congress on July 4, 1861, Lincoln, among other extraordinary actions, ordered payments out of the Treasury to support an enlarged army and navy,[43] notwithstanding the provision of Article I, Section 9 that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[44] He also authorized the suspension of the writ of habeas corpus,[45] even though the constitutional authorization for suspensions comes in Article I,[46] which lists the powers of Congress, not in Article II, which vests executive power. When Chief Justice Taney then ruled that the president lacked suspension power and ordered the writ to issue in *Ex parte Merryman*,[47] Lincoln directed Union officers to defy the Chief Justice.[48] Once again, we may have some instinct—as Lincoln did—that it was right to interpret the Constitution to let the president rise to the emergency, even if that conclusion requires extraordinary interpretive liberties.

Even if instinctively sympathetic toward Lincoln, we might incline toward saying that, in at least some instances, the justification for his actions had to come from morality or necessity, not constitutional law. In a letter explaining some extraordinary actions during his presidency, Thomas Jefferson famously wrote that obedience to law is not necessarily a public official's highest duty.[49] So we might, quite intelligibly, relegate questions about whether the president is justified in claiming powers that are difficult to sustain by ordinary interpretive methods to the realm of political morality and ask whether the president ought to defy the law.[50]

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43. For a description and analysis of the steps that President Lincoln took before convening Congress, see DANIEL FARBER, LINCOLN'S CONSTITUTION: THE NATION, THE PRESIDENT, AND THE COURTS IN A TIME OF CRISIS, 17–19 (2003); and Barron & Lederman, *supra* note 19, at 997–1005.

44. U.S. CONST. art. I, § 9, cl. 7.

45. Barron & Lederman, *supra* note 19, at 998–99.

46. U.S. CONST. art. I, § 9, cl. 2.

47. *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

48. Barron & Lederman, *supra* note 19, at 999.

49. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* BASIC WRITINGS OF THOMAS JEFFERSON 682–83 (Philip S. Foner ed., 1944).

50. Oren Gross adopts substantially this approach in his much-discussed article, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional? See generally* Gross, *supra* note 3. For one extended discussion of Gross's article, see David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2026–30 (2006).

Before doing so, however, we should heed an interesting ambivalence in the way that Lincoln set up his defense of asserting extraordinary powers. His July 4 message to Congress divided the actions that he had already taken during the secession crisis into two categories. After reciting a number of his initiatives, Lincoln said that "[s]o far all was believed to be *strictly* legal."[51] He then began a discussion of actions falling within what he took to be a separate category, apparently involving steps that may not have been "strictly legal," but that he nevertheless regarded as constitutionally permissible under the exigent circumstances.[52]

Only after introducing the distinction between actions that were strictly legal and those that he appeared to regard as justifiable only because of crisis-based imperatives did Lincoln advance his famous defense of unilateral presidential authority to suspend the writ of habeas corpus. Noting that critics had maintained "that one who is sworn to 'take care that the laws be faithfully executed,' should not himself violate them,"[53] Lincoln countered: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[54] Having framed this question, Lincoln insisted that it had not actually arisen. When the Constitution was properly read, he argued, it gave the executive the authority to suspend the writ when suspension was a practical necessity: "[A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers . . . intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."[55]

Although the train of Lincoln's thought is not entirely clear, his remarks can be interpreted to suggest that constitutional legality operates at two levels. There is the ordinary level—what Lincoln categorized as the domain of the "strictly legal"—within which it would suffice to note the dictates of a law or constitutional provision that appears to speak precisely to the case at hand. Yet Lincoln also appears to contemplate another level, applicable in extraordinary

51. President Abraham Lincoln, Message to Congress in Special Session, *supra* note 42, at 428 (emphasis added).

52. *See id.* at 429.

53. *Id.* at 429–30.

54. *Id.* at 430.

55. *Id.* at 430–31 (footnotes omitted).

cases, in which rigid adherence to a single law or constitutional norm would have potentially grave, adverse implications for superveningly important constitutional values. In sufficiently momentous cases, Lincoln implied, strict legality may sometimes yield to a conception of what the Constitution authorizes or requires under extraordinary circumstances.[56] As Lincoln put it, "I felt that measures, otherwise unconstitutional, *might become lawful*, by becoming indispensable to the preservation of the nation."[57]

Here lies the germ of a two-tiered theory of executive power and of the appropriate interpretation of statutes and constitutional provisions bearing on executive power. Stated provisionally, the theory would be this: Within a two-tiered legal framework, two kinds of overrides of ordinarily applicable rules may be permissible when the costs of adhering to those rules grow exorbitantly high. First, ordinary rules of statutory interpretation may yield. Second, if no statutory authority can be found, and if ordinarily applicable constitutional principles would preclude the recognition of a presidential power, exigency may trigger principles of constitutional interpretation that provide the president with adequate constitutional grounds for doing something that is not "strictly legal," because it violates applicable principles, but that is nevertheless ultimately constitutionally justified, as measured on another scale.

This theory not only captures what I expect to be widely shared intuitions about the appropriate interpretation of the president's powers in the cases that I have discussed, but also echoes with other doctrines in constitutional law. Insofar as individual rights are concerned, we may have an example of two-tiered constitutional thinking in cases governed by strict judicial scrutiny and the compelling interest test.[58] Under this test, courts enforce rights up to, but not above, the point at which countervailing governmental interests grow compelling.[59] Although not necessarily based on

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56. *See* SCHLESINGER, *supra* note 36, at 60 ("[W]here Jefferson, like Locke, saw emergency power as a weapon outside and beyond the Constitution, Lincoln suggested that crisis in some sense made it a constitutional power.").

57. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 42, at 281 (emphasis added).

58. *See* Paulsen, *supra* note 14, at 1281–82. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing the historical origins and varying interpretations of the compelling interest test).

59. *See* Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 807–08 (2007) (arguing that the strict scrutiny test gauges whether genuine rights have been overcome by competing considerations).

constitutional considerations, the necessity defense in criminal law may similarly reflect the premise that ordinarily applicable legal and moral rules are subject to override in exigent circumstances: the necessity defense generally applies when a defendant's conduct was necessary to prevent a greater evil and no specific legal justification or excuse applies.[60] We may even have a notion of extraordinary constitutionality applicable to situations in which Congress and the president act in concert under Justice Jackson's first *Youngstown* category.[61] But we do not have any comparably worked out notion regarding presidential interpretations of statutes or presidential power unsupported by congressional enactments. Once again, my provisional suggestion is that the elaboration of such a notion could substantially advance thought about constitutional law and statutory interpretation involving presidential powers. It could do so by clarifying why the law might occasionally tolerate what would otherwise be legally intolerable on the ground that it is a lesser legal evil, not an unproblematically justifiable application of a unitary, mutually reinforcing set of legal principles.

### *B. A Competing Worry*

With the provisional case for recognizing that special rules of statutory and constitutional construction apply to emergency cases now having been laid out, it is time to recall Justice Holmes's worry that great cases—and ad hoc intuitions about how great cases ought to be decided—risk making bad law. As I emphasized earlier, the problem may inhere partly in the need for courts to make pressured judgments on such cases' peculiar facts, but it also involves the operation, and occasions for the extension, of precedent. The cause for concern may grow especially acute, moreover, when the president and lawyers in the executive branch not only establish, but also apply, the central precedents.[62] This concern has two aspects. The first is that

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60. *See* MODEL PENAL CODE § 3.02 (1985). *See generally* George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999) (discussing the necessity defense).

61. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty." (footnote omitted)).

62. *See, e.g.*, ACKERMAN, *supra* note 7, at 88 (asserting that the "stream of authoritative-looking opinions" produced by the OLC and the White House Counsel on the scope of presidential authority "is produced under conditions that allow short-term presidential

great cases such as those that I have discussed will establish precedents that are expressly cited and applied in more ordinary cases. The second is that acknowledgment of presidential authority to assert extraordinary powers in exigent cases involving national security will support patterns of analysis that categorically exempt claims of presidential authority from ordinary norms of constitutional and statutory interpretation.

An example from 2011 may illustrate the latter ground for anxiety. When the Obama administration initially claimed constitutional authority to participate in air attacks in Libya without congressional authorization, officials argued that, as a number of executive precedents demonstrated, the Constitution granted the president unilateral power to order limited military operations, short of war, that he believed to be in the national interest.[63] Thereafter, a

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imperatives to overwhelm sober legal judgment"). In a response in which he dismisses Ackerman's account as "oversimplified," Dean Trevor Morrison emphasizes institutional restraints within the OLC. Morrison, *supra* note 7, at 1692. Yet even Morrison does not deny that the "OLC's written opinions tend to be protective of executive power." *Id.* at 1715. According to Morrison, of the 245 publicly released OLC opinions between the beginning of the Carter administration and the first year of the Obama administration, "193 opinions (79%) found in favor of the White House's position without significant limitation, twenty (8%) provided a more mixed answer . . . , and thirty-two (13%) went predominantly against the White House." *Id.* at 1717–18. Morrison believes that "the rate at which [the OLC's] written opinions say yes to the President can be highly misleading . . . because many of OLC's no's" are tendered orally and "never result in written opinions." *Id.* at 1719. But the written opinions appear to have a disproportionate precedential significance. A July 2010 OLC opinion expressly affirms that "OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office" and that they "should not lightly depart from such past decisions." *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1453 (2010) (quoting Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2010), *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf) (internal quotation marks omitted).

63. *See* Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen., Authority To Use Military Force in Libya 6 (Apr. 1, 2011), *available at* http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf. The cited precedents included a "bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993–1995), and a bombing campaign in Yugoslavia (1999)." *Id.* at 7. The memorandum articulated two limiting principles on the president's power: First, substantial national interests must justify the operations. *Id.* at 10. Second, the president may not have the power unilaterally to order operations that would amount to a "war" under the Declare War Clause. *See id.* In determining that Libya did not rise to that level, the memorandum relied heavily on the Haiti and Bosnia examples. *See* Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen., *supra*, at 9, 13.

further issue arose under the War Powers Resolution,[64] which provides that presidents must terminate any commitment of U.S. Armed Forces to "hostilities" within sixty days unless Congress has "declared war or has enacted a specific authorization for such use of United States Armed Forces."[65] At this point, relying almost wholly on executive precedent, State Department Legal Advisor Harold Koh argued that the involvement of U.S. forces in air operations against Libyan forces did not constitute "hostilities" within the meaning of the War Powers Resolution.[66] This otherwise tendentious construction rested almost wholly on past executive precedents established via previous presidentially mandated commitments of military personnel to Lebanon in 1983, Grenada in 1983, the Persian Gulf from 1987 to 1988, and Somalia in 1993. In those cases, Koh noted, the executive concluded that "hostilities" did not occur, despite the presence of thousands of U.S. ground troops, combat, casualties, and a high risk of escalation.[67] According to Koh, these precedents, although never considered by any court, demonstrated that the term "hostilities" as used in the War Powers Resolution does not apply "when U.S. forces engage in a limited military mission that involves limited exposure for U.S. troops and limited risk of serious escalation and employs limited military means."[68]

The premises of Koh's precedent-based argument are familiar, but also unsettling. However one judges the specific arguments of the Obama administration, previous administrations have cited executive precedent to justify assertions of unilateral executive authority to do nearly anything that the president has deemed desirable in the name of national security, up to and including the initiation of war in every practical sense of the term.[69] The thought that past executive precedent would plausibly support presidential claims of unilateral

64. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006 & Supp. V 2011).

65. *See id.* §§ 1543(a)(1), 1544(b).

66. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7 (June 28, 2011) (statement of Harold Hongju Koh, Legal Adviser, Dep't of State).

67. *See id.* at 15 & nn.15–16.

68. *Id.* at 9.

69. Probably the most dramatic example of an administration actually acting upon a claim of unilateral executive authority based largely on past executive precedent—on which the George W. Bush administration in turn relied in the OLC Memorandum of September 25, 2001—involved entry into the Korean War. *See supra* note 20 and accompanying text. The George H.W. Bush administration also claimed an independent executive authority to prosecute a war in the Persian Gulf, though it ultimately procured congressional authorization before doing so. *See* FISHER, *supra* note 20, at 171–72.

authority to initiate and prosecute a major and protracted war—for the Korean War does indeed supply such a precedent[70]—ought to give pause.[71] An executive branch unbounded in national security matters by any legal limits that it has not chosen to acknowledge would deviate sharply from traditional notions of constitutional legality and the ideal of the rule of law.[72] Nevertheless, the idea that past executive practice—some of it developed under circumstances of genuine exigency—helps define the scope of current presidential authority is not easy simply to reject.

In considering the relevance of historical practice to contemporary assessments of the president's war powers, those who resist claims of substantially unfettered presidential power confront an apparent dilemma. On the one hand, it is hard, maybe impossible, to gauge presidential authority without reliance on historical practice and precedent.[73] In many respects, the text of the Constitution is vague, and the original public meaning often appears either comparably vague or uncertain. Under these circumstances, nearly all agree that historical practice can constitute a gloss on the

70. At the time of the Korean intervention, Secretary of State Dean Acheson argued not only that the president had constitutional authority to commit U.S. troops unilaterally, but also that this authority lay beyond Congress's power to regulate. *See* Barron & Lederman, *supra* note 19, at 1060–61. For critical discussion of the Truman administration's decision not to seek congressional authorization, see FISHER, *supra* note 20, at 97–100. Fisher concludes that "[e]ven if a case could be made that the emergency facing Truman in June 1950 required him to act promptly without first seeking and obtaining legislative authority, nothing prevented him from returning to Congress and asking for a supporting statute for retroactive authority." *Id.* at 100.

71. *But see* POSNER & VERMEULE, *supra* note 11, at 5 ("Executive government is best in the thin sense that there is no feasible way to improve upon it, under the conditions of the administrative state.").

72. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 1001–07 (2012) (reviewing POSNER & VERMEULE, *supra* note 11) (arguing in support of traditional constitutional constraints on the president's national security powers).

73. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70 (1990) (describing the significance of "historical precedent that may be thought of as quasi-constitutional custom" (emphasis omitted)); SCHLESINGER, *supra* note 36, at 18 (describing how "life under the Constitution began," early in constitutional history, "to define the meaning of the Constitution"); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997–1002 (2008) (explaining how "showdowns" between branches of government create precedents that influence future expectations and interactions between the branches). For an analysis of the proper role of nonjudicial precedent in settling separation-of-powers issues, see generally Bradley & Morrison, *supra* note 5; Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

constitutional text.[74] Especially when historical practice is reasonably consistent across presidential administrations, it may capture accreting lessons about practical imperatives in an evolving world.[75]

On the other hand, in the domain of presidential powers, for all but the few who believe that Article II was originally intended and understood to give the president essentially limitless authority with respect to national security,[76] and that this allocation of power is desirable, it is difficult not to think that some precedents for assertions of presidential authority have gone too far. Indeed, looking to the future, those who believe that the president should be subject to any significant checks may view precedent-based reasoning as more nearly the problem than the solution to a problem.[77] Some of the troubling precedents involve claims of unilateral presidential authority that would persist even in the case of an attempted congressional prohibition.[78] Others assert latitudinarian interpretations of statutes, including the War Powers Resolution,

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74. *See* Bradley & Morrison, *supra* note 5, at 418 ("With some variations, the Supreme Court, executive-branch lawyers, and academic commentators have all endorsed the significance of such practice-based gloss."); *see also, e.g.*, American Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" (alteration in original) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915))); *Youngstown*, 343 U.S. at 610–11 (characterizing historical practice as a "gloss" on presidential power).

75. *See, e.g.*, SCHLESINGER, *supra* note 36, at viii (observing that accretions of power to the presidency have been necessary "to meet the great crises" of U.S. history and "to overcome the tendency" of the separation of powers to promote "inertia"); Bradley & Morrison, *supra* note 5, at 428, 455–56 (discussing Burkean and related grounds for according significance to historical practice).

76. *See, e.g.*, Yoo, *The Continuation of Politics by Other Means*, *supra* note 20, at 174. A majority of war-powers scholars appear to take the view that the founding generation believed that presidents could not resort to military force without congressional authorization except in response to a sudden attack. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–5 (1993); FISHER, *supra* note 20, at 8, 12; William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695, 699–701 (1997); *see also* Barron & Lederman, *supra* note 39, at 696 (concluding that "there is surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it").

77. *See, e.g.*, ACKERMAN, *supra* note 7, at 73.

78. For a survey of these precedents, see Barron & Lederman, *supra* note 19, at 951–1098.

either to confer authority on the president or at least not to preclude actions that the president wants to take.[79]

In response, it is easy to say that emergency powers should be reserved for emergencies. But as history shows, there is a very real problem of normalization: powers created for emergencies spill over their originally intended banks and become the norm. If so, the solution to one problem—recognition of extraordinary presidential powers that seem necessary under conditions of genuine exigency—may have created another.

The question is whether there is a way to conceptualize and cabin emergency interpretive powers so that they do not become the norm, especially in a domain in which the executive branch is frequently the leading creator and interpreter of precedents. In my view, an analogy to positions in moral philosophy will suggest the outlines of an affirmative answer.

## II. AN ANALOGY FROM MORAL PHILOSOPHY

At the very least, important analogies exist between law and morality. If we take those analogies seriously, it will be sensible to ask whether moral theory might illuminate the situation of someone who: (1) believes that the president both is and ought to be subject to statutory and constitutional restrictions that can be identified through ordinary rules of statutory and constitutional interpretation in ordinary cases; yet (2) also believes that exceptions might be warranted when the president's exercise of a normally forbidden power might achieve enormous benefits or avert extraordinarily dire results; and yet (3) further worries that it might prove analytically, psychologically, or politically impossible to stop emergency-based interpretation of executive power, if it is allowed, from expanding beyond its justifiable domain and becoming the operative norm in other cases. If such illumination can be found, it would most likely come from a moral theory that, analogously, posits the existence of moral norms that, though ordinarily unyielding, can be overcome in exigent cases, but only in exigent cases that are somehow narrowly defined and duly, though not excessively, stigmatized. Threshold deontology meets these specifications.[80]

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79. One such example is the Obama administration's precedent-based interpretation of the War Powers Resolution. *See supra* notes 66–68 and accompanying text.

80. For discussions of threshold deontology and of the leading criticisms directed against it, see EYAL ZAMIER & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 41–56 (2010); and

### *A. Threshold Deontology*

Threshold deontology begins with the premise that people have rights, rooted in their status as separate persons, that are not reducible to or derived from considerations of overall social welfare. But threshold deontology distinguishes itself from Kantianism and other absolutist theories by positing that some rights-based constraints on individual and governmental action hold only until the costs of adherence grow exorbitant.[81] At that point, a discontinuity occurs: consequentialist imperatives take practical precedence over otherwise inviolable principles.[82] Although conceptual logic does not dictate precisely where the relevant thresholds lie, defenders of threshold deontology have sometimes appealed to the idea of a "catastrophe" as providing at least an illustration of the need for deontological principles sometimes to give way, if not a specification of the point at which they would do so.[83]

Crucial to threshold deontology is its recognition of a category of cases in which consequence-based considerations take moral, action-dictating precedence over individual rights that nevertheless retain their status as rights: exigency does not eradicate rights, even in cases of exigent emergency, when the violation of those rights is warranted, all things considered. If such a category can exist, it is probably because, as the philosopher Thomas Nagel has written, two distinct kinds of moral reason exert strong claims on us. One is deontological

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Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 12, 2012), http://plato.stanford.edu/archives/win2012/entries/ethics-deontological.

81. *See* THOMAS NAGEL, *War and Massacre*, *in* MORTAL QUESTIONS 53, 56 (1979) (acknowledging that "it may become impossible to adhere to an absolutist position" when "utilitarian considerations favoring violation are overpoweringly weighty and extremely certain"); Alexander & Moore, *supra* note 80 (noting the distinction between threshold deontology and more absolutist positions).

82. *See* CHARLES FRIED, RIGHT AND WRONG 10 (1978) (explaining that even absolute norms have boundaries and exceptions); JOHN RAWLS, *Fifty Years After Hiroshima*, *in* COLLECTED PAPERS 565, 566–67 (Samuel Freedman ed., 1999) (noting that even under a "strict interpretation," human rights might give way "in times of extreme crisis"); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 329 (1989) (arguing that "moral absolutes" can be overridden "when th[e] consequences are horrendous enough").

83. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30 n.* (1974) (declining to consider whether "side constraints," i.e. rights, might "be violated in order to avoid catastrophic moral horror"); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74, 91 n.29 (1994) ("Warfare creates an atmosphere of emergency and catastrophe in which ordinary deontological constraints begin to lose their grip.").

or rights-based; the other, consequentialist or loosely utilitarian.[84] According to Professor Nagel, rights-based or deontological moral theories generally provide the best overarching explanation of our considered moral judgments and should therefore be preferred. But the pull of consequentialist impulses does not wholly disappear, and, in cases of great consequence, conflicts can occur. Because rights exist apart from consequentialist imperatives, there is no common medium in which one can define the limits of the other. We therefore cannot say that considerations of overall welfare define or limit rights by marking their outer conceptual boundaries. We can say, however, that rights are sometimes overridden by concerns about consequences and that it may therefore be the lesser evil to violate one or another moral norm. Nevertheless, because the relevant norms are not effaced, neither are the rights that they define, and—in one version of threshold deontology—a person who violates such rights has done a wrong, even if that wrong is warranted under the circumstances.[85]

Political philosopher Michael Walzer offers a partially parallel account.[86] According to Walzer, moral principles that are not primarily consequentialist mark some actions as absolutely required and others as absolutely forbidden. Like threshold deontologists, he acknowledges that situations may arise in which adherence to moral norms would impose excessive costs, especially in cases involving officials responsible for public security and welfare. In such cases, Walzer maintains, the ordinarily applicable norms are overridden. Nevertheless, he insists, the ordinary norms do not cease to apply, and an official who violates them thereby acquires "dirty hands."[87]

### *B. Parallels in Legal Interpretation*

If the analogy afforded by threshold deontology has value for legal and constitutional theory, its utility will emerge along two dimensions. First, the analogy may help to illuminate how it might be that our notions of constitutional legality include elements that may sometimes come into conflict, or at least apparent conflict, with one

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84. THOMAS NAGEL, *Ruthlessness in Public Life*, *in* MORTAL QUESTIONS, *supra* note 81, at 75, 83–86; *see also* NAGEL, *supra* note 81, at 53–55; ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 498 (1981).

85. *See* NAGEL, *supra* note 81, at 67 (observing that even if "one has no choice but to do something terrible" because of the intolerable consequences of not doing so, "[i]t does not become *all right*").

86. *See* Walzer, *supra* note 13, at 161–64.

87. *Id.* at 161.

another. Second, threshold deontology might provide resources for determining what to do, and also for characterizing the actions that are dictated, in cases presenting such conflicts.[88]

In my view, the existence of deep tension among fundamental legal norms is nearly self-evident in many high-stakes, emergency cases. On the one hand, we equate constitutional legality with adherence to rules, principles, or constraints that are not reducible to case-by-case determinations of what would be best under the circumstances, all things considered. Although nearly any theory of statutory or constitutional interpretation is likely to be applied in practice in a way that is context-sensitive,[89] every interpretive theory that is not avowedly pragmatist will insist that to engage in interpretation is to do something other than to calculate what would have the best consequences in every case. On the other hand, as much as we believe in fidelity to constitutional norms, most of us also accept the premise that the Constitution is "not a suicide pact"[90] and that it ought not be so interpreted, no matter what ordinary principles might dictate, as to promote genuinely disastrous consequences.[91] Most of us may have similar instincts within the domain of statutory interpretation, in which a number of longstanding canons guide interpreters away from untoward and absurd results.[92]

If the duality that I have posited between imperatives to show fidelity to individual constitutional and legal norms and to avoid severely adverse impacts on the overall constitutional order exists, then we might still think that cases of conflict call for an ordinary balancing judgment in which one principle is deemed to outweigh another in the circumstance presented. In ordinary cases of balancing,

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88. *Cf.* MANSFIELD, *supra* note 15, at 204, 255 (maintaining that Lockean constitutional theory "contains the extraconstitutional within the constitution" and that "the American Constitution . . . constitutionalize[s] necessities in the manner of Locke" (emphasis omitted)).

89. This may be especially true when the interpreters are executive officials who are subject to a variety of acutely practical and political pressures, especially insofar as their functions involve national security. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 35 (2007) (observing that OLC opinions do not always aspire to be "politically neutral rulings [like those] from a court").

90. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

91. *But see* Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1299–1300, 1319 (2004) (questioning whether the Constitution should always be construed to avoid severely harmful or even self-destructive results).

92. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results.").

we may apprehend no deep conflict of values, and certainly no tragedy, and may see no reason to invoke notions of apology, regret, or dirty hands. In my view, however, a more perspicuous portrayal of constitutional law characterizes it as capable of generating dilemmas analogous to those that threshold deontology depicts within morality.

The reason for adopting a dilemma-acknowledging account of constitutional legality has to do with what Professor Frederick Schauer has termed "the asymmetry of authority."[93] If we accept, as we ought to, that nearly all rules are over- or underinclusive,[94] the question arises why any rulemaking authority might want to subject officials—including the president—to duty-establishing or constraining rules at all, rather than simply authorize them to do whatever would be best under the circumstances. A part of the answer involves distrust. Although individual officials, including the president, may think that they could achieve better results by deviating from the rules that the law has imposed, the law-creating authority may have imposed the rules precisely because it distrusted officials' capacity to make unconstrained, case-by-case judgments.[95] This, roughly speaking, is the situation that I imagine to exist when a president claims extraordinary interpretive liberties—as, for example, Presidents Lincoln and Roosevelt did in the cases that I discussed above.[96]

Nevertheless, as those cases may illustrate, unforeseen and potentially catastrophic situations can materialize in which deviations from strict legality are necessary, or reasonably thought to be necessary, lest disaster occur. Although the obligation of fidelity to specific, constitutionally and statutorily established legal norms remains unaltered, consequence-based pulls of obligation to the overall legal order may in rare cases achieve a supervening legal force.[97] If such cases exist, as I believe they do, then threshold deontology suggests an apt conceptualization of how officials ought to

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93. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 128–34 (1991).

94. *See id.* at 31–34.

95. *See id.* at 130–33; *cf.* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1439–40 (2011) (describing how ex ante rules allow lawmakers to grant decisionmaking power to an agent while constraining how the agent exercises her discretion).

96. *See supra* notes 33–35, 42–43 and accompanying text.

97. *Cf.* Letter from Thomas Jefferson to John B. Colvin, *supra* note 49, at 684 ("An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences.").

proceed: it may sometimes be constitutionally permissible or even obligatory for officials to violate constitutional or statutory norms that do not cease to apply. Or, adapting Lincoln's formulation, we might say that although an official's deviation from applicable norms was not "strictly legal,"[98] what the official did was nevertheless legally right and even legally mandatory, in light of the consequences that the deviation was necessary to achieve or avert.[99] Nevertheless, if the analogy of threshold deontology is illuminating, then an official who deviates from the strictly legal norms that ordinarily apply, even if legally justified in having done so, will nonetheless have the legal equivalent of morally dirty hands. Officials who honor the law ought not claim entitlements to behave in ways that are not strictly legal and set a precedent for other officials to do so as well. The fact that their doing so is the lesser evil, and even the lesser legal evil, does not make their actions wholly and unproblematically "all right" from a legal perspective.[100]

### *C. Contrasts with Other Theories of Presidential Power*

If the position can be sustained that there can be constitutionally justified deviations from constitutional and statutory norms—typically involving cases in which consequentialist imperatives override the rules that would normally determine what an official legally ought to do—several contrasts would define the location of this two-tiered theory in debates about constitutional and statutory interpretation. First, the two-tiered view, although otherwise agnostic regarding the best general theory of statutory or constitutional interpretation, rejects any theory that characterizes all interpretation as reflecting a single, unified, and harmoniously continuous set of interpretive principles. Some such theories would deny either the existence of or the need for emergency principles.[101] Others would portray all legal interpretation as occurring along a sliding scale, on which practical considerations and imperatives always influence interpretation, with the extent of influence varying in degree as the

98. *See supra* note 51 and accompanying text.

99. *Cf.* BENJAMIN A. KLEINERMAN, THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER 184 (2009) (arguing that presidential "action outside of and especially against the Constitution" can "become constitutional" when necessary to national survival (emphasis omitted)).

100. *Cf. supra* note 85.

101. Gross calls this approach "the Business as Usual model." *See* Gross, *supra* note 3, at 1043–44.

significance of interpretive consequences rises or falls.[102] In contrast with these positions, two-tiered theory is discontinuous. It recognizes one set of principles for ordinary cases and another set for extraordinary cases. Only when the consequences rise very dramatically does a shift occur to the extraordinary principles that could constitutionally justify what otherwise would be unequivocal constitutional wrongs.

Second, two-tiered interpretive theory denies that a president who claims extraordinary powers necessarily acts extraconstitutionally by asserting an entitlement—rooted either in morality or necessity—to act without the authority, and in violation, of the law. In defending the position that emergency powers should be conceptualized as extraconstitutional, Professor Oren Gross relies heavily on an interest in creating the proper incentives for official action.[103] In his view, it is better for a president who engages in extraordinary action, unjustified by ordinary legal principles, to acknowledge outlaw status and petition the public for forgiveness. Otherwise, the temptation for officials to intrude recklessly on civil liberties in the name of national security might grow too large.

In my estimation, this theoretical approach mischaracterizes what happens—including what is experienced by both officials and the public—in the kind of cases for which two-tiered theory postulates the existence of extraordinary norms. When President Lincoln ordered executive officials to pay money out of the Treasury despite the absence of a congressional appropriation, or to defy a writ of habeas corpus issued by the Chief Justice, he did not ask those officials to join him in acting wholly outside the law. To equate his actions with a temporary coup d'état—or the response of Congress and the public as acquiescing in one—would radically misrepresent what I imagine to be the self-understanding of all relevant parties. Lincoln exercised powers granted to him by the Constitution as appropriately interpreted pursuant to a two-level theory.[104] Indeed, in exercising those powers Lincoln may well have discharged his constitutional *duty* to take care that the laws were faithfully executed

102. *See id.* at 1059 (describing a "model of interpretive accommodation" that "seeks to apply ordinary rules in times of crisis, but to change the scope of such rules by way of emergency-minded interpretation").

103. *See id.* at 1096–1133 (propounding and defending an "Extra-Legal Measures model" of emergency governmental powers).

104. *See* LAZAR, *supra* note 15, at 10 (noting that questions about appropriate conduct by officeholders are "institutional questions").

and to preserve, protect, and defend the Constitution under extraordinary circumstances.[105] The powers that Lincoln claimed were dangerous ones, requiring deviation from ordinary constitutional norms, but they nonetheless furnished a valid constitutional justification for his actions under the circumstances.[106] Indeed, when extraordinary claims of executive authority come before courts, courts should sometimes uphold those claims as a matter of law. I believe this to be true, for example, with regard to most of the actions that Lincoln explained and defended in his July 4 Message to Congress and also with regard to President Franklin Roosevelt's destroyers-for-bases deal.[107]

Third, two-tiered interpretive theory, as framed in light of the analogy to threshold deontology, differs from Professor Michael Paulsen's theory that the text of the presidential oath gives the president the duty, which implies a corresponding power, to do whatever is necessary to "preserve, protect, and defend the Constitution."[108] In contrast with Paulsen's theory, two-tiered interpretive theory does not claim to be either originalist or strictly textualist. The defense of two-tiered theory resides in a mix of its capacity to explain constitutional intuitions that most of us would be unwilling to renounce and its normative attractiveness.[109] In further contrast with Paulsen's theory, two-tiered theory is not limited in application to cases involving existential threats to the United States

105. *Cf.* Paulsen, *supra* note 14, at 1263 (asserting that the presidential oath gives the president the duty as well as the power to take reasonably necessary measures to preserve the nation from existential threats).

106. The proposal of Professors Charles Fried and Gregory Fried—to analogize the conduct of presidents who have justifiably violated normally applicable legal norms to "civil disobedience," *see* CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR 148–58 (2010)—invites similar objections. The analogy fails to explain how a president who violated legal norms that would clearly apply unless emergencies were *legally* relevant could act with the authority or even with the apparent authority—in the eyes of the subordinate officials to whom presidential directives issue—of law. There may be some presidential directives that would lack either actual or apparent authority, but President Lincoln's would not have numbered among them.

107. I thus believe that Chief Justice Taney erred by ruling in *Ex parte Merryman* that President Lincoln lacked authority to suspend the privilege of the writ of habeas corpus at a time of extraordinary exigency when Congress was not in session and thus unavailable to authorize a suspension. *See Ex Parte* Merryman, 17 F. Cas. 144, 147–48, 152 (C.C.D. Md. 1861) (No. 9487).

108. U.S. CONST. art II, § 1, cl. 8; *see* Paulsen, *supra* note 14, at 1263.

109. *See supra* notes 16–19 and accompanying text.

or imminent threats of the loss of many lives from foreign attack.[110] Finally, and perhaps most importantly, Paulsen's theory is framed exclusively as one of empowerment. By contrast, two-tiered theory incorporates conceptual and rhetorical resources for marking invocations of extraordinary principles as inherently suspect, even dirty-handed, and for resisting the spread of precedents established by emergency cases to less exigent ones.

### *D. The Limits of the Analogy to Threshold Deontology*

Although threshold deontology offers a helpful analogy for the development of a two-tiered theory of legal interpretation, it could of course be questioned whether threshold deontology is the best moral theory or even a tenable one.[111] Largely for the reasons advanced by Nagel, which I briefly summarized above, moral theories that distinguish between the rights-based norms applicable to ordinary cases and the consequentialist imperatives that very occasionally override such norms seem more persuasive to me than do single-track theories. I am strongly drawn to the view that life sometimes presents moral dilemmas in which any course of action entails moral costs and that what is morally obligatory under the circumstances could be aptly characterized as a lesser evil.

I have not, however, attempted to argue specifically in favor of threshold deontology as the preferred form of moral theory. Even if it were within my competence to contribute to the literature on moral philosophy, my current purposes make such an effort unnecessary. The analogy of moral analysis to legal interpretive theory is only an analogy. It is wholly possible that a position in moral philosophy could suggest an attractive approach to legal interpretation even if it failed to provide the best framework for thinking about purely moral issues.

The most serious threat to the utility of the analogy that threshold deontology provides for assessing approaches to legal interpretation might appear to lie in the argument, most prominently

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110. Although Paulsen is slightly elusive about when "the constitutional principle of necessity" would apply, he appears to link it to the imperative of "defend[ing] the fundamental survival of the United States and its people." Paulsen, *supra* note 14, at 1290.

111. For sustained criticism, see Larry Alexander, *Deontological Constraints in a Consequentialist World: A Comment on* Law, Economics and Morality, JERUSALEM REV. LEGAL STUD., Aug. 2011, at 75 [hereinafter Alexander, *Deontological Constraints*]; and Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000) [hereinafter Alexander, *Deontology at the Threshold*].

advanced by Professor Larry Alexander, that threshold deontology is conceptually incoherent.[112] According to Alexander, threshold deontologists lack the resources to identify, in advance, the points at which one set of governing principles gives way to another and to explain why the thresholds lie exactly where they do.[113]

In considering Alexander's argument, it bears noting that his objection would vanish if the analogy that I proposed were to a theory that offered the same prescription as threshold deontology for rule-based moral analysis until the point at which that approach became exorbitantly costly, but that presented itself as a sophisticated form of rule consequentialism.[114] Such a theory could potentially explain why rule-based moral decisionmaking would tend to promote the best overall consequences in ordinary cases but affirm that the calculus shifts above some threshold.[115] Accordingly, even if threshold deontology were conceptually incoherent, the analogy that I wish to draw could rely instead on a form of two-tiered consequentialism with almost precisely identical behavioral prescriptions.

I do not believe, however, that threshold deontology is incoherent in the disqualifying sense of precluding reasoned, rationally defensible moral decisionmaking. As a matter of practical necessity, all moral reasoning must begin with moral conviction.[116] I cannot reason morally without testing moral claims against moral beliefs that I already hold.[117] And if one's unshakable convictions commit one to deontology in ordinary cases, but the Kantian demand to adhere to ordinary principles of right even if the heavens should fall strikes one as literally unbelievable in cases of almost certainly impending catastrophe, then one must reason from those starting points. In marking the thresholds at which ordinary principles cease to control, one must be prepared to give reasons, but within any

112. *See generally* Alexander, *Deontology at the Threshold*, *supra* note 111.

113. *See id*. at 905–10

114. *See id.* at 910–11.

115. For an example of two-tier consequentialism, see R.M. Hare, *Rules of War and Moral Reasoning*, 1 PHIL. & PUB. AFF. 166, 174–78 (1972) (arguing that moral thought needs to operate on at least two levels, with first-order thinking normally being rule-based rather than employing case-by-case utility calculations, and with second-order thinking—by which ordinary norms are defined, defended, and adjusted—being uncompromisingly utilitarian).

116. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 67 (2011) ("[W]e cannot justify a moral judgment . . . without relying on further moral convictions or assumptions.").

117. *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 64–72 (1998).

moral system the capacity to give more reasons will at some point run out.[118]

In anticipation of decision in cases of moral conflict, Alexander maintains that threshold deontologists must either offer algorithmic specifications of what becomes permissible under which circumstances or accept the conclusion—which he thinks disqualifying—that their theory requires "arbitrary" judgments.[119] But this objection depends on questionable assumptions about what constitutes unacceptable arbitrariness. For example, in Alexander's view, even a carefully considered decision, based on an assessment of all pertinent factors, would apparently fall within the condemnation if all of the considerations were not capable of reduction to a common currency. If, however, there simply is no common currency—as threshold deontologists maintain—and if one does the best one can to deliberate and explain a conflicted moral judgment, then I am doubtful that the charge of arbitrariness is a perspicuous one.

At bottom, Professor Alexander's argument relies on an undefended assumption that moral reality somehow satisfies the natural human craving for algorithmically correct answers, capable of statement in advance, to all moral issues. I see no reason to credit that assumption. To put the point differently, and to anticipate an issue that will arise recurrently in the remainder of this Article, I do not think it incumbent on either threshold deontologists or proponents of two-tiered legal theories to incorporate within their theories a set of necessary and sufficient conditions for identifying the thresholds that would justify deviations from ordinarily applicable moral or interpretive principles. At some point, rules and principles must depend for their application on a faculty of judgment that is not itself rule-governed;[120] otherwise, the demand for rules for the application of rules would descend into infinite regress.[121] The more that can be said about where particular thresholds lie, and in advance, the better. Rational consistency is not just a desideratum, but a requirement, of defensible moral as well as legal decisionmaking. Nonetheless, in seeking advance specification of what sound moral judgment requires, one cannot properly demand more precision than the nature

118. *See* DWORKIN, *supra* note 116, at 37–38, 67–68; SCANLON, *supra* note 117, at 64–72.

119. *See* Alexander, *Deontology at the Threshold*, *supra* note 111, at 905–10.

120. RONALD BEINER, POLITICAL JUDGMENT 8–9 (1983).

121. *Id.* at 131.

of the subject matter permits.[122] Almost invariably, real-world problems will require assessments of likely consequences under circumstances of greater or lesser uncertainty involving multiple dimensions.

## III. TOWARD A TWO-TIERED INTERPRETIVE THEORY

With Part II having sketched in conceptual terms how the analogy of threshold deontology could help to inspire a two-tiered theory of legal interpretation, I now want to discuss more concretely what such a theory might look like. I state that ambition slightly equivocally because it is important to distinguish between the concept of a two-tiered theory, which is formal or abstract, and particular versions of two-tiered theory, which are necessarily substantive. In other words, there could, in principle, be a variety of two-tiered interpretive theories. Although agreeing that legality operates on two levels, the proponents of different versions of two-tiered theory might differ about the circumstances under which ordinary interpretive principles should yield and about what could ultimately be justified under those circumstances. In this Part, my principal aim is to elaborate the central questions that any substantive two-tiered theory would need to address. But I shall also try to give a flavor of how two-tiered analysis might work in practice by offering substantive comment on both historical and contemporary examples of expansive claims of executive power.

### *A. Principles of Ordinary Interpretation*

Within a two-tiered framework, evaluation of any claim of presidential authority properly begins with "ordinary" principles of statutory and constitutional interpretation. As I have tried to make clear, however, the formal or abstract idea of two-tiered interpretive theory involves no specification of what those principles ought to be. It says only that whatever principles anyone holds already require supplementation by a set of extraordinary principles, framed for the assessment of claims of executive power in great, exigent, or emergency cases. Although taking people's ordinary interpretive theories as given, I assume, as I have said, that nearly everyone's

122. *Cf.* ARISTOTLE, NICHOMACHAEN ETHICS, bk. I, at 2 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) (c. 384 B.C.E.) ("Our discussion will be adequate if its degree of clarity fits the subject matter; for we should not seek the same degree of exactness in all arguments alike.").

theory will be consequence-sensitive to some extent. Accordingly, I would expect the application of ordinary principles to leave the president with impressively broad powers, wholly without regard to those that could be justified only if extraordinary, second-tiered principles applied. I shall return to this issue in Part IV. Nevertheless, the powers that could plausibly be justified under any first-tier theory would be less sweeping than those that the president has claimed (without distinguishing between first- and second-tier cases) in the past. Moreover, as Part IV will explain, the availability of extraordinary, second-tier principles for truly exigent cases should alleviate some of the pressure that currently exists to permit highly expansive interpretations of presidential power pursuant to ostensibly ordinary interpretive principles—regardless of the first-tier theory that one embraces.

### *B. The Threshold Triggering Second-Tier Interpretive Principles*

Just as threshold deontologists need to identify the thresholds above which ordinarily applicable moral principles cease to determine what conscientious moral agents ought to do, two-tiered legal theories require judgments about the magnitude of the consequences needed to justify deviations from ordinary interpretive principles. Some defenders of extraordinary presidential emergency powers might limit the occasions for their invocation to existential threats to the United States as a democratic political community or, possibly in addition, to imminent risks to very large numbers of American lives.[123] Abraham Lincoln would represent the paradigm of a president confronting an existential threat. Tested against an existential threat requirement, any other historical cases would raise questions of how immediate a threat would need to be, or how low the odds of its realization would have to fall, for it to fit the definition. For example, did Hitler's Germany pose an existential threat to the United States at the time of Franklin Roosevelt's destroyers-for-bases deal in 1940?

My own judgment would be that to restrict justifications based on practical imperatives exclusively to cases of demonstrably existential threats would set the bar too high. For example, I think the destroyers-for-bases deal should pass muster on grounds involving the

123. *Cf.* Paulsen, *supra* note 14, at 1290 (defending extraordinary presidential powers in cases of "indispensable necessity" and identifying "national survival" and protection against attacks that would threaten the nation's capacity to provide continuing protection against enemies as the only interests that "surely" come within that category).

threat that a Nazi-dominated Europe would have posed to the overall, long-term national interest, even if national survival was not strictly at stake.[124] To cite another example, the national interest in extricating U.S. hostages from Iran in 1981, and in resolving the surrounding crisis, seem to me to justify President Ronald Reagan's claim of authority—which I think would have been impossible to sustain otherwise—to enter into an agreement nullifying pending suits against Iran in U.S. courts.[125]

Nevertheless, the destroyers-for-bases deal, in particular, may help to illustrate the way in which even extraordinary claims of presidential authority that are ultimately constitutionally justified may have a dirty-handed aspect. During true emergencies, time pressures will almost always make constitutional amendment infeasible. But presidents, rather than asserting normally untenable claims about the import of existing statutes, could often request that Congress authorize steps that they think vital to the national interest. In contrast with Abraham Lincoln's situation at the outset of the Civil War—when Congress was not in session—Franklin Roosevelt was in a position to seek statutory authorization for a transfer of destroyers to Britain, but he could not persuade Congress to relax statutory restrictions on his powers.[126] In making what in other circumstances would have been the legally insupportable claim that no congressional action was necessary, Roosevelt not only deviated from normally applicable interpretive principles, but also violated ordinary constitutional norms governing the distribution of power between Congress and the president when a majority of Congress did not agree that emergency justified his chosen course of action. In a sense of the legal "ought" that does not wholly dissolve even when impending consequences ultimately establish a president's action as

124. British Prime Minister Winston Churchill maintained at the time that without the destroyers, Britain might be unable to hold the English Channel and would be in peril of falling to Hitler. *See* Barron & Lederman, *supra* note 19, at 1044. "Roosevelt would later describe the destroyer deal as the most important action in the reinforcement of the United States's own national defense since the Louisiana Purchase." *Id.* at 1046.

125. *See* Dames & Moore v. Regan, 453 U.S. 654, 658 (1981); POSNER & VERMEULE, *supra* note 11, at 86 (noting that in *Dames & Moore*, the Supreme Court construed a statute "[e]nacted to regulate and constrain executive action during international economic crises . . . to grant broad executive power").

126. Barron & Lederman, *supra* note 19, at 1045. President Roosevelt sought, and won, congressional approval for aid to Britain after the 1940 elections. *See* SCHLESINGER, *supra* note 36, at 110.

legally justified, presidents ought not arrogate to themselves powers to override normally applicable and persisting constitutional norms.

### C. *Enduring Demands of Law Even in Emergency Conditions*

A third, partially interconnected dimension along which the idea of a two-tiered theory of legal interpretation requires specification involves the limits on what can be justified as a matter of law even under exigent circumstances. All proponents of two-tiered theories should reject the propositions that emergency knows no law[127] and that in times of war, the laws go silent.[128] Just as threshold deontology is a theory about morality's dictates in exigent circumstances, and not a counsel to forsake morality when the costs become too high, two-tiered theories of constitutional law remain such in extraordinary cases. For example, the powers that two-tiered theory recognizes are the powers of constitutionally established offices. Although constitutional forms may require adaptation, they should not be abandoned—as President Lincoln recognized when he sought after-the-fact congressional ratification for most of the emergency steps that he took at the beginning of the Civil War. Nevertheless, proponents of two-tiered theories may reasonably disagree about what becomes acceptable under emergency conditions.

An illustration may emerge from the notorious "torture memos" of the Bush administration,[129] produced at a time when executive officials could plausibly have thought that the United States was subject to exigent threat. Those memoranda advanced two lines of argument. First, they defined the "torture" prohibited by federal statutes and international treaties exceedingly narrowly.[130] Second, they maintained that Congress could not, in any event, validly restrict the president from authorizing interrogational methods that he thought necessary for national security.[131]

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127. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646–52 (1952) (Jackson, J., concurring) (rejecting an argument predicated on the assumption that "necessity knows no law").

128. *Cf.* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 225 (1998) ("The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.").

129. *E.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

130. *See id.* at 173–99.

131. *See id.* at 203, 207.

From the perspective of a two-tiered interpretive theory, the most palpable error in the Bush administration's analysis lay in its proposed normalization of presidential authority to override prohibitions that Congress had plainly intended to establish.[132] Harder questions would have arisen if the Bush administration had asserted the more limited claim that the statutory prohibition against torture would infringe inherent presidential powers as applied, for example, to a case in which there was specific evidence of an impending terrorist calamity, as well as strong reason to believe that a particular detainee possessed relevant information, and all other possible means of averting the disaster had been exhausted. In those hypothetical circumstances, a two-tiered theory would need to take seriously the possibility that exigency might justify a claim of inherent executive authority that could not be justified otherwise.

To take an argument seriously is not, of course, necessarily to embrace it. In a book entitled *Because It Is Wrong*, Professors Charles Fried and Gregory Fried argue that torture is so inherently morally evil that there could never be a moral or legal justification for resorting to it;[133] whatever other prohibitions might yield to exigency, they maintain that the proscription against torture does not. Others who interpret the Constitution in light of an analogy to two-track moral theories might reach a different conclusion. For example, Professor Walzer has argued that in a case in which interrogational torture offered the last, best hope for avoiding a nearly certain calamity, a morally conscientious official would be constrained to

132. The memoranda have been widely condemned. *See, e.g.*, GOLDSMITH, *supra* note 89, at 148–51; Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 199–207 (2010). The Justice Department's Office of Professional Responsibility subsequently found that the analysis in some of the legal opinions constituted "professional misconduct." DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 254 (2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf. A reviewing official rejected the finding of professional misconduct but agreed that the legal work was "flawed" and reflected "poor judgment." Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to Eric Holder, Att'y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 64–69 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAG MargolisMemo100105.pdf.

133. FRIED & FRIED, *supra* note 106, at 145.

acquire morally dirty hands.[134] In such a case, the idea of a two-tiered theory of legal interpretation frames a question the resolution of which requires a further act of judgment concerning which reasonable people will understandably disagree.

## IV. THE PRESCRIPTIVE IMPLICATIONS OF TWO-TIERED THEORY FOR THE LEGAL AUTHORITY OF PAST EXECUTIVE PRECEDENTS

In the current state of American constitutional practice, a two-tiered theory of executive authority cannot deliver on the promises that I have made on its behalf unless it offers normatively attractive prescriptions regarding what we ought to do, going forward, with past executive precedents. If great cases have made bad law, or if they have encouraged the development of an interpretive culture within the executive branch in which executive precedents now give plausible support to nearly any claim of national security authority that the president might wish to make, how would the adoption of a two-tiered theory alter the existing state of affairs?

In schematic terms, this question permits a plain, blunt answer: two-tiered theory prescribes that we should begin immediately to reassess old cases to determine whether they constitute precedents entitled to guide thinking about new ones. In other words, we should accord executive-branch precedents as much—and only as much—precedential authority as a two-tiered theory entitles them to.[135]

On one view, historical practice has validated a scope of presidential authority, including interpretive authority, that now must be accepted,[136] even if it could not have been justified in the first instance. But arguments to this effect claim too much. Although a good legal theory must presumptively fit most (though not all) judicial precedents,[137] unilateral executive judgments, which are typically rendered by nonneutral decisionmakers without careful testing through the adversary process, should trigger more critical appraisal. One pertinent factor involves whether other branches have

134. *See* Walzer, *supra* note 13, at 166–68.

135. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 118–23 (4th prtg. 1978) (discussing the need for legal theories to include a "theory of mistakes").

136. *See, e.g.*, Peter Raven-Hansen, *Constitutional Constraints: The War Clause*, *in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 29, 33–35 (Gary M. Stern & Morton H. Halperin eds., 1994) (describing but criticizing the view that custom now vindicates claims of presidential authority to use military force prior to congressional approval).

137. *See supra* note 16.

approved—not merely tolerated—past, unilateral assertions of executive authority.[138] Another factor, which two-tiered theory also emphasizes, involves the force of the arguments that either were or retrospectively could be asserted in a particular precedent's defense. Although "it is folly to think a sound constitutional judgment can be made . . . without facing up to what the historical practice between the branches has actually shown,"[139] mere recitations of what presidents have done or asserted in the past cannot resolve the scope of presidential and congressional war powers.

### *A. Identifying and Applying Valid Second-Tier Precedents*

Within a two-tiered framework that reflects this attitude, I believe that executive precedents can have at least a marginal influence in determining when exigencies are sufficiently great to warrant an invocation of second-tier principles. For example, I would point to the general, retrospective approbation of President Roosevelt's destroyers-for-bases exchange as indicative that an imminent, existential threat is not an absolute prerequisite.[140] Nevertheless, executive precedent cannot compromise the basic architecture of two-tiered interpretive theory.

If executive precedents were parsed through the lens of two-tiered theory, the most celebrated great cases of the American past—including those involving Presidents Lincoln and Roosevelt—would cease to provide any foundation whatsoever for claims of executive authority in relatively more mundane cases. In this respect, two-tiered interpretive theory calls for a healthy revision within, but not a total overhaul of, existing practice. For example, the Obama administration has generally made selective decisions about which precedents to rely on in defending its claims of executive prerogative. In justifying its initial commitment of forces to the NATO operation in Libya, it thus eschewed reliance not only on precedents set by

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138. Although it is widely recognized that executive precedents take on elevated stature when other branches have "acquiesced" in them, *see, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11, 613 (1952) (Frankfurter, J., concurring); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915), acquiescence need not signify thoughtful endorsement on constitutional grounds, and sometimes it does not even signal endorsement at all. *See* Bradley & Morrison, *supra* note 5, at 448 (observing that "where acquiescence is the touchstone of the analysis, the standard for legislative acquiescence should be high"); Glennon, *supra* note 73, at 137–44 (discussing indicia of acquiescence).

139. Barron & Lederman, *supra* note 19, at 1100.

140. *See supra* notes 124–125 and accompanying text.

Presidents Lincoln and Roosevelt, but also on the dubious conclusion reached by the Truman administration that it did not need congressional authorization to enter the war in Korea.[141]

An unarticulated insistence on distinguishing ordinary- from extraordinary-tier cases may also underlie at least some of the Justices' reasoning in the *Youngstown* case. In defense of the president's authority to seize and operate the nation's steel mills, the Truman administration cited a number of past instances in which presidents had asserted authority to seize property unilaterally.[142] The only honest distinction of some of the precedents, including three seizures by President Roosevelt during the six months prior to Pearl Harbor, may have been that the earlier cases involved a truly exigent threat to national security, whereas the circumstances of *Youngstown*, in which the president had an alternative, statutorily authorized mechanism for averting a nationwide steel strike, did not.[143] Two-tiered theory would thus make explicit what Justice Black's majority opinion either left implicit or papered over entirely, even if it cannot supply rule-like criteria for marking the divide between exigent and nonexigent circumstances in a world in which knowledge of how the future will unfold rarely approaches perfection.[144]

If two-tiered theory's prescription for precedent-parsing were adopted, some past assertions of presidential authority that could be justified only if assigned to the exigent, second-tier category—such as President Truman's initiation of U.S. involvement in the Korean War—might pose testing issues. In asserting that if the Korean precedent could be justified, it would need to be pursuant to second-tier reasoning, I assume, as most constitutional scholars have

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141. *See* Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen., *supra* note 63, at 12–13.

142. *See, e.g.*, MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 154–58 (1977) (discussing the administration's arguments); Patricia L. Bellia, *The Story of the Steel Seizure Case*, *in* PRESIDENTIAL POWER STORIES 233 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (same).

143. *Cf.* FELDMAN, *supra* note 33, at 362 (criticizing Justice Frankfurter's concurring opinion in *Youngstown*, which acknowledged the relevance of historical practice, for its failure adequately to distinguish "[t]hese now embarrassing incidents [that] seemed precisely parallel to what Truman had done").

144. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) ("It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'" (quoting U.S. CONST. art. 1, § 8, cl. 18)).

concluded, that the Constitution at least normally does not authorize the president to wage war unilaterally except in response to a sudden attack.[145] Nor, I would argue, could second-tier principles—which reject the proposition that emergency and perceived emergency know no law—justify a unilateral presidential prerogative to commit the nation to a major armed conflict. However practically imperative war-fighting might appear to the president, in Korea or elsewhere,[146] Congress's solemn concurrence ought to be necessary before the executive branch can commit the nation to protracted, large-scale hostilities.[147]

In any event, even if one thought that the imperative for the United States to respond swiftly to an attack on South Korea justified the Truman administration's unilateral decision to rush troops into battle under second-tier interpretive principles,[148] that precedent would provide no valid support for presidential claims of authority to enter large-scale, protracted hostilities without congressional authorization when ample time exists for Congress to deliberate and act. Accordingly, the Korean War did not furnish a controlling precedent for arguments by the George H.W. Bush administration that the president could initiate and wage the first Persian Gulf War without congressional authorization if he so chose.[149] Nor could the

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145. *See supra* note 76 and accompanying text. On the acknowledged authority of the president to repel sudden attacks, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 32–38 (1993); and Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233–36, 285 (2001).

146. *See* Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 623 (1993) (noting that the Truman administration "had little time to wait" as "the military situation [of South Korea] deteriorated" in the face of a North Korean attack).

147. *See* Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 887 (1996) (reviewing FISHER, *supra* note 20) (emphasizing the importance of congressional authorization "to ensure American combat forces that the country is behind them; to convey American resolve to adversaries as well as allies; and to reduce the chances that Congress will precipitously undercut a deployment in the face of adversity").

148. Rather than relying on the arguably peculiar exigency of the situation, the State Department memorandum defending the action, U.S. Dep't of State, Authority of the President To Repel the Attack in Korea, 23 DEP'T ST. BULL. 173 (1950), articulated the strong view that the president, as the Commander in Chief, has "full control over the use" of the armed forces. *Id.* at 173. In support, it cited numerous (smaller) conflicts in which the armed forces had been sent abroad, without congressional authorization, "for protection purposes." *See id.* at 177–78. The memorandum also emphasized that important national interests—including the authority of the United Nations—justified the operations. *See id.* at 174–77.

149. In testimony before Congress, then-Secretary of Defense Dick Cheney "pointed to Korea in particular as an illustration of well-established principles concerning the president's

Korean precedent persuasively support the claim of the George W. Bush administration that the president did not need congressional approval before launching a war to topple Saddam Hussein.[150]

A defensible version of two-tiered interpretive theory would also give no cover to presidential claims that general and enduring threats to national security—such as those attending the Cold War or the War on Terror—suffice to authorize all actions the president might think prudent or otherwise advisable.[151] Within a two-tiered theory, a general threat that justifies an extraordinary application of legal norms in one situation may not warrant a comparably extraordinary application of legal norms in another, even during the same period. Whether the stakes are high enough and whether other, straightforwardly lawful measures would suffice needs to be determined on a case-by-case basis. The notions of dirty hands and of constitutionally justified violations of ordinarily governing rules signal that the deviations from baseline constitutional principles do not merit either general or unconditional approbation, even in threatening times.

### *B. Precedent and Presidential Authority in First-Tier Cases*

It is a further question how to parse claims of executive authority in the national security domain that depend on executive precedents involving first- or ordinary-tier cases. Once analysis and argument focus on first-tier principles and precedents—as two-tiered theory demands that they typically should—two-tiered theory will frequently not, by itself, furnish a determinate answer to the question whether an assertion of unilateral executive authority is justified. As I have emphasized, two-tiered theory operates as a supplement to whatever first-tier theories of constitutional and statutory interpretation adherents already embrace; it does not dictate a full set of first-tier interpretive principles, including principles concerning the

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authority to send U.S. forces to combat" and grouped that episode alongside smaller actions to distill a legal rule that congressional authorization was unnecessary. Stromseth, *supra* note 146, at 645 (quotation marks omitted) (citing *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications, Hearings Before the S. Comm. on Armed Services*, 101st Cong., 2d Sess. 702 (1990) (statement of Richard Cheney, Secretary of Defense)).

150. *See, e.g.*, FISHER, *supra* note 20, at 215–30.

151. In every year since 2001, Presidents George W. Bush and Barack Obama have declared that the United States is in a state of emergency arising from terrorist threats. *E.g.*, Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 77 Fed. Reg. 56517 (Sept. 12, 2012); *see* GOLDSMITH, *supra* note 21, at ix–x.

significance of past executive precedent. As I shall explain, however, two-tiered theory may carry implications about the need for line drawing to enforce the structural distinction between normal and exigent cases.

For my own part, applying my own first-tier interpretive theory, I would interpret both Article II and the War Powers Resolution—without need for reliance on extraordinary, emergency-based principles—as giving the president latitude to take unilateral steps to protect important U.S. interests through relatively modest, short-term uses of military force. By requiring the withdrawal of U.S. forces from hostilities after sixty days if Congress has not authorized a longer involvement, and by authorizing an additional thirty-day extension when necessary for the safety of U.S. forces,[152] the War Powers Resolution implicitly recognizes a presidential prerogative to conduct military interventions of limited duration and short of war.[153] I would also interpret Article II as conferring presidential powers consistent with what Professor John Hart Ely described as the "constitutional understanding [that] was quite consistently honored from the framing until 1950."[154] Pursuant to that understanding as Ely characterized it, presidents could deploy troops abroad to protect U.S. interests when they believed that immediate action was vital, and that major, long-term hostilities were unlikely to ensue, but "subject always to the core command underlying the constitutional accommodation . . . that [they] come to Congress for approval as soon as possible and terminate military action in the event such approval is not forthcoming."[155] Executive precedent is certainly consistent with, and

152. *See supra* note 65 and accompanying text.

153. *See* FISHER, *supra* note 20, at 145 (describing the War Powers Resolution as "recognizing that the President may use armed force for up to 90 days without seeking or obtaining legislative authority"); *cf.* SCHLESINGER, *supra* note 36, at 434–35 ("Before the passage of the resolution, unilateral presidential war was a matter of usurpation. Now, at least for the first ninety days, it was a matter of law.").

154. John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1388–89 (1988).

155. *Id.* at 1388–91; *see also* Barron & Lederman, *supra* note 19, at 1056–57 (asserting the existence of a prevailing understanding "[b]y the conclusion of the Clinton Administration" that although presidents may commit troops in some situations risking hostilities, "any conflict of a scale directly comparable to Korea or Vietnam must be carried out with legislative approval"). The question whether that presidential power is subject to congressional curtailment has not arisen and, in light of the War Powers Resolution, seems unlikely to arise.

provides some support for, this conclusion.[156] As Professor Curtis Bradley and Dean Trevor Morrison have recognized, however, no consensus exists about how precisely to characterize "the scope of the President's authority to initiate military conflicts without congressional authorization" or about how far Congress should be deemed to have acquiesced in many past assertions of executive power.[157]

Especially in the face of such uncertainty, two-tiered theory's recognition of a second tier of exceptional cases should reinforce the conviction that there are and must be limits on what ordinary interpretive principles can justify, lest the distinction between first- and second-tier cases prove pointless in practice. Taking seriously the commitment to line drawing that two-tiered theory reflects, I find unpersuasive the Obama administration's claim that the deployment of U.S. forces against the resisting Libyan military within Libyan territory did not constitute "hostilities" within the meaning of the War Powers Resolution. Given both the War Powers Resolution and Article II's recognition of presidential authority to initiate modest, short-term military interventions, I have no quarrel with the administration's position that the president acted permissibly in commanding U.S. participation in NATO-led military operations in Libya in the first instance or with its reliance on the precedents that it cited.[158] But even if past executive precedents have a limited capacity to gloss statutory meaning, they could not, in my view, suffice to establish the counterintuitive proposition—which State Department Legal Advisor Koh sought to defend—that "hostilities" do not necessarily exist within the meaning of the War Powers Resolution even in circumstances marked by the presence of thousands of U.S. ground troops, combat, casualties, and a high risk of escalation.[159] Even the more limited principle that Koh ultimately purported to distill from past executive precedents and then to apply—finding an absence of hostilities "when U.S. forces engage in a limited military mission that involves limited exposure for U.S. troops and limited risk

156. *See* Bradley & Morrison, *supra* note 5, at 464 ("[T]he general consensus that Presidents have some unilateral constitutional authority to use military force to protect or rescue U.S. citizens abroad is based in large part on historical practice and understandings.").

157. *Id.* at 465.

158. *See supra* notes 63, 66 and accompanying text.

159. *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, *supra* note 66, at 15 & nn.15–16.

of serious escalation and employs limited military means"[160]—imposes narrower limits on the term than I believe that ordinary interpretive principles will sustain.[161] If steeled to stop great cases from making bad law, we should be as resolute to prevent more ordinary cases from doing so, especially when the ordinary cases involve executive precedents, not clearly acquiesced in by Congress,[162] that strain legislative language beyond its common-sense meaning. In the absence of sharply etched boundaries on the president's power to initiate military action, any erosion of the War Powers Resolution's durational limit is especially lamentable if, as two-tiered theory affirms, significant restraints on presidential authority ought to be maintained.[163]

Others will of course disagree with my judgments about the Obama administration's actions in Libya—which, I hasten to add, reflected policy aims that I applaud. In disagreeing, moreover, critics may take issue not only with my ultimate legal conclusion, but also with my suggestion that the structure of two-tiered interpretive theory supports my line of reasoning. Acknowledging the scope that two-tiered theory leaves for disagreement, especially insofar as it fails to prescribe a full set of first-tier interpretive principles, I would insist only that two-tier theory frames the right issues for debate. At the very least, embrace of two-tiered theory would force those making and disputing claims of executive authority to argue openly about whether exigent necessity justifies a deviation from otherwise-applicable legal norms, and, if not, about how much straining of those norms is consistent with our first-tier commitment to the ideal of the

160. *Id.* at 9.

161. *See* Bradley & Morrison, *supra* note 5, at 431 ("[T]he weight given to historical practice varies inversely with the clarity of other sources . . . ."). Especially in the national security domain, reasonable presidential interpretations of statutes should command deference. *See* Chi. & S. Air Lines, Inc., v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (observing that military and foreign policy decisions are "of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"). As the courts have recognized, however, a deferential disposition does not always entail ultimate agreement. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 621–25 (2006) (rejecting a presidential interpretation of provisions of the Uniform Code of Military Justice in a case involving the use of military tribunals to try alleged war criminals).

162. *Cf. Recent Administrative Interpretation*, 125 HARV. L. REV. 1546, 1552 (2012) ("[I]n each of the examples Koh cited, the executive and Congress actively disputed the [War Powers Resolution]'s application, or events resolved too quickly for the sixty-day clock to expire.").

163. *Cf.* FISHER, *supra* note 20, at 132–33 (noting that the War Powers Resolution has furnished a politically if not legally enforceable constraint on the duration of involvements in hostilities).

rule of law—under circumstances in which cases of truly exigent necessity are already separately provided for.

## CONCLUSION

In this Article, I have appealed to the analogy of threshold deontology to argue in favor of a two-tiered theory of constitutional and statutory interpretation in cases involving claims of presidential power. Like morality, constitutional law incorporates principles that can be in fundamental tension with one another. On the one hand, the president is appropriately subject to constitutional and legal constraints, even in cases in which those constraints produce adverse consequences. Although applicable legal norms may be context- and consequence-sensitive to a degree, they frequently restrict official discretion to do what would be best under the circumstances, based on the assumption that officials should be bound by norms from which they cannot excuse themselves on a case-by-case basis, even to promote the public good. On the other hand, it is a premise of constitutional interpretation that the Constitution is not a suicide pact. That dictum reflects a deeper recognition that those interpreting and implementing the Constitution should respond to consequence-based imperatives to maintain the constitutional order and to promote its most fundamental values, even when ordinary interpretive principles would deny them authority to do so, in cases of existential threat or when the stakes are otherwise exorbitantly high.

Analogously to the way in which threshold deontology holds that otherwise inviolable moral principles can be overcome when adherence to them would have catastrophic consequences, two-tiered interpretive theory justifies the president in asserting otherwise indefensible claims of executive power in extraordinary cases, but not in ordinary ones. Like threshold deontology, however, two-tiered interpretive theory permits consequentialist imperatives to override otherwise inviolable norms only in narrowly defined circumstances. Although the Constitution is not a suicide pact, neither does it license substantially unrestricted executive power when nothing remotely analogous to suicide, or its avoidance, is at stake. And even when invocations of extraordinary interpretive principles can be justified, two-tiered interpretive theory would insist that those invocations are inherently dirty-handed. In a world in which presidential power has too often tended to expand indiscriminately, two-tiered interpretive theory furnishes a better conceptual, rhetorical, and political

safeguard than we now have against the normalization of practices that ought not become standard, even if they are justified in extraordinary cases.