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The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order

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The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*

*Sanford Levinson** and Mark A. Graber****

INTRODUCTION

Herbert Wechsler's *On Neutral Principles in Constitutional Law* is one of the most widely cited¹ and reviled essays in the legal literature. After declaring that judicial decisions "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved,"² Wechsler insisted that the most canonical of all twentieth century cases, *Brown v. Board of Education*, did not meet this standard.³ Wechsler first maintained that justices applying neutral principles would treat segregated schools as raising "freedom of association" issues.⁴ He then professed to be unable to discern a proper neutral principle that would constitutionally justify a judicial decision forcing whites who did not wish to associate with African-Americans to attend the same public schools as students of color.⁵ Wechsler was correctly chastised for what many, most notably Charles Black, demonstrated was a stunning obtuseness to the realities of American history and the role that sheer racism played (and,

* We are grateful to the editors of the *Chapman Law Review* and to Dean Tom Campbell for encouraging us to collect our thoughts on this matter. We have also benefitted from the responses of Aziz Huq, Keith Whittington, and Kenneth Kersch, not to mention many conversations with colleagues and co-participants at conferences in Madison, Wisconsin, and New Orleans.

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1 Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

2 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

3 *Id.* at 22; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

4 Wechsler, *supra* note 2, at 34.

5 *Id.*

for that matter, continues to play) in allocating the burdens and benefits of life in the United States.⁶ To accept Wechsler's notion that constitutional law should in essence ignore self-conscious and public Southern-white efforts to establish racial apartheid, whatever might be thought to be constitutional commands to the contrary, is akin to writing a guide to normal everyday life for Londoners in 1941 that ignored the Battle of Britain.

Wechsler's analysis of *Brown* has been confined to the dustbin of history, but his claim that constitutional decision makers should abstract constitutional law problems from their underlying constitutional politics is alive and well in the legal literature on executive power in the age of Donald Trump. Experts and pundits commonly claim that President Trump is constitutionally entitled to exercise the same constitutional authority as has been historically exercised by other presidents. Journalists and constitutional analysts insist that courts should engage in "business as usual" when evaluating President Donald Trump's exercise of executive power. *The Washington Post* gave the Fourth Circuit Court of Appeals a scolding when the judges quoted Trump's bigoted remarks on the campaign trail as reasons for finding unconstitutional a federal order severely limiting immigration from seven Muslim-majority countries.⁷ The *Post's* editorial quite correctly declared that in the past, "Presidents have enjoyed, and *deserve*, broad leeway when it comes to setting immigration limits."⁸ Lest one dismiss the *Post* writers as lacking in the requisite legal training, leading constitutional experts on prominent blogs, at least some of whom acknowledge that President Trump is woefully unqualified for office, nonetheless agree with the *Post* that courts should declare unconstitutional executive orders issued by the Trump Administration only if that tribunal would strike down an identical order issued by a more competent president for the same reasons. Josh Blackman claims that "[t]he judiciary should

⁶ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427–29, 427 n.19 (1960).

⁷ Editorial Board, *Mr. Trump's travel ban is offensive and imprudent. But is it really unconstitutional?*, WASH. POST (May 28, 2017), https://www.washingtonpost.com/opinions/mr-trumps-travel-ban-is-offensive-and-imprudent-but-is-it-really-unconstitutional/2017/05/28/901947d0-41aa-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.2952d4c6ebd8 [<http://perma.cc/2RGA-U6EY>].

⁸ *Id.* (emphasis added).

not abandon its traditional role *simply because* the president has abandoned his.”⁹

When judges treat this president as anything other than normal, it sends a signal to the public that the chief executive is not as legitimate as his predecessors. . . . Trump was elected through the same constitutional process by which judges received their lifetime commissions. He should be treated as such.¹⁰

Defense department experts have informed Congress that President Trump has the same power to begin a nuclear war as any other president. “If we were to change the decision-making process because of a distrust of this president,” former undersecretary for policy at the Defense Department Brian McKeon asserted, “that would be an unfortunate decision for the next president.”¹¹

This claim that all presidents enjoy the same Article II prerogatives was an implicit staple of the literature on executive power published prior to the 2016 election. Consider a brilliant article, *The President’s Enforcement Power*, published in 2013 by University of Michigan professor of law Kate Andrias.¹² Her subject, the discretion a president has to determine the actual enforcement of the law, could hardly be a more important topic in light of President Obama’s bitterly contested order that many undocumented aliens be freed from the potential burden of deportation if they present no genuine threat to the United States,¹³ or Attorney General Eric Holder’s decision not to enforce clearly valid federal drug laws¹⁴ against various Coloradans who

⁹ Josh Blackman, *Why Courts Shouldn’t Try to Read Trump’s Mind*, POLITICO (Mar. 16, 2017) (emphasis added), <http://www.politico.com/magazine/story/2017/03/why-courts-shouldnt-try-to-read-trumps-mind-214921> [<http://perma.cc/F8GB-PYB4>].

¹⁰ *Id.*

¹¹ Karoun Demirjian, *Trump’s nuclear authority divides senators alarmed by his ‘volatile’ behavior*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/power-post/senators-deadlock-in-debate-over-whether-to-restrain-trumps-nuclear-launch-authority/2017/11/14/491a994a-c95b-11e7-8321-481fd63f174d_story.html?utm_term=.15b6498a5436 [<http://perma.cc/Z6E5-NW3C>].

¹² See generally Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).

¹³ See Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. DEPT. OF HOMELAND SECURITY (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. But see *Texas v. United States*, 809 F.3d 134, 135, 146 (5th Cir. 2015) (enjoining enforcement of the order).

¹⁴ See Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Aug. 29, 2013, 1:30 PM), <http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado->

were taking advantage of the legalization of marijuana possession and sale in that state. Professor Andrias' article is extremely illuminating in many ways. What is especially striking from the perspective of 2017 is the essay's unrelenting abstraction in the tradition of "Neutral Principles." There are allusions to Washington and Obama, among many other presidents, but the article is very much, as promised by the title, about the constitutional authority of a reified president to determine how laws are, or are not, enforced.¹⁵ Professor Andrias, like other distinguished scholars of executive power,¹⁶ offers interesting proposals to govern the conduct of all possible occupants of the White House implementing laws passed by all possible Congresses.¹⁷

More fairly, we should write all "conceivable" occupants of the Oval Office as of 2013. No one writing about presidential power before the 2016 election could genuinely conceive of the possibility that Barack Obama would be succeeded by Donald Trump or a person equally as unfit for office. Staying within one, or even two, standard deviations of the norm is usually sufficient. When thinking of presidents, scholars should account for Franklin Pierce as well as Franklin Roosevelt, but good reason exists for thinking that the differences among the first forty-five presidents did not warrant significant variation in their formal legal powers. We do not usually require that scholars consider a wildly improbable figure, three standard deviations away, as would have been the case had Andrias or any other student of

doj_n_3837034.html [<http://perma.cc/LR6N-GFTX>]. Attorney General Sessions has recently announced his decision to reverse the Holder policy. *See, e.g.,* Jon Hill, *Sessions Reverses Obama-Era Marijuana Enforcement Policy*, LAW360 (Jan. 4, 2018, 6:20 PM), <https://www.law360.com/articles/998871/sessions-reverses-obama-era-marijuana-enforcement-policy>.

¹⁵ *See generally* Andrias, *supra* note 12.

¹⁶ For a sampling, see David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 699 n.20 (2008), citing the most influential pieces of scholarship on executive power over the last half century, none of which suggest that the legal power of presidents varies by office-holder. Substantial literature exists in political science pointing out that presidential capacity to exercise these fixed legal powers varies by officeholder and time. *See* STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* (The Free Press ed., 1990); JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* (4th ed. 1972).

¹⁷ *Id.* at 1078.

executive power considered the possibility that a bigoted, uninformed, serial liar would assume the powers of the oval office. John Hart Ely highlighted this facet of ordinary scholarship when his conclusion to his monumental *Democracy and Distrust* explained why his theory of representation reinforcement—and the concomitant rejection of the Supreme Court’s aggressively enforcing non-textual “fundamental rights”—did not prevent a hypothetical Congress from prohibiting the removal of gall bladders except when necessary to save the person’s life.¹⁸ Ely asserted that such a bill “couldn’t pass” in our actual political system and “refuse[d] to play the game”¹⁹ of constructing a constitutional theory concerned with what in context are the equivalent of science-fiction hypotheticals dealing with invasions by space aliens.

The flying saucers have landed. Donald J. Trump is now President of the United States. We are often informed that elections have consequences. What this means, of course, is that at least on occasion, the specific identity of those who win elections and are empowered to make decisions can have significant consequences, for good and for ill. As of January 2018 when we completed our revisions of this essay, one can discern an ever-growing consensus among at least a solid majority of the American public and probably at least ninety percent of the politically informed public that Trump is manifestly unfit to be president. That he *is* president is the consequence of a severe malfunction in the constitutional system for electing presidents, whether one assigns the failure to the constitutional text, the constitutional culture, or, as is almost certainly the case, both.²⁰ The question we must now ask is whether this constitutional failure is a subject only for political science or whether constitutional decision-makers, when interpreting Article II,

¹⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 182–83 (1980).

¹⁹ *Id.* at 183.

²⁰ Donald Trump’s election was also the consequence of a presidential primary system not imagined by those who designed the Constitution. He was immeasurably aided by having more than a dozen rivals at the beginning of the process and half a dozen until the last few primaries. This enabled him to prevail, especially in first-past-the-post states, with considerably less than a majority of the vote. Trump’s failure to obtain a plurality of the final national vote made him the first president in history to have lost both the majority of his party’s primary vote and the popular vote in the ensuing national election.

ought to take into account that Americans have elected a chief executive manifestly unfit to exercise the longstanding powers of the presidency. When Justice Joseph Story in *Martin v. Mott* spoke of “the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests,”²¹ was he speaking of a conclusive or a rebuttable presumption?

As readers may already have guessed, we challenge this almost unexamined assumption that the constitutional powers of the president can be blithely abstracted from the occupant of the White House. We insist that constitutional decision makers must take into account (assuming they realize) whether they are making decisions for a constitutional order functioning within normal parameters or, on the contrary, a constitutional order reeling from the collapse of crucial assumptions underlying the constitutional text and ordinary constitutional practice. We maintain that the Article II powers of a president manifestly unfit for office are different from the Article II powers of a president who has the character and capabilities appropriate for exercising those powers. Common sense, *The Federalist Papers*, other interpretive activities, and *Brown v. Board of Education* provide strong reasons for not vesting the anti-Publian president with Publian powers.

Our argument proceeds as follows. We begin by briefly elaborating the consensus that Donald Trump lacks the constitutional, even if not the “legal,” qualifications to be President of the United States. The next section discusses how Publius in *The Federalist Papers* closely yoked presidential powers to the character of the office-holder. We then note how such other interpretive exercises as plays, athletics, and contract law routinely make adjustments when events undermine the assumptions underlying the authoritative text, whether that text be instantiated in a script, play, or bargain. American constitutional practice, we continue, has been historically far more responsive to Publian failures than contemporary claims about executive power under President Trump acknowledge. Such decisions as *Brown v. Board of Education*²² and *New York*

²¹ *Martin v. Mott*, 25 U.S. 19, 32 (1827).

²² 347 U.S. 483 (1954).

*Times Co. v. Sullivan*²³ are far better explained as judicial responses to constitutional frauds perpetrated by the Jim Crow South than the more abstracted reasons given by the justices in their opinions. *Brown*, in fact, provides a model for thinking about limiting the power of an anti-Publican president. Such judicial strategies include focusing on actual motives for executive action, taking rationality standards seriously, and limiting, wherever possible, official powers when the officeholder or officeholders demonstrate that they are incapable of using or unwilling to use those powers responsibly or consistently with established constitutional norms.

Given our ostensible 5000-word limit, very generously interpreted to mean 5000 words per author, our essay is necessarily provocative. We hope to initiate an important—and overdue—conversation rather than provide anything in the way of definitive answers (even assuming such things exist with regard to complex legal and political dilemmas). Both of us believe the American constitutional order is broken, even as we dispute the nature of the malady and the remedy.²⁴ We also agree that the remedy for a broken constitutional order is not constitutional interpretation as usual. Doing so, we think, is analogous to telling a quarterback to throw a long pass because that was the called-for play, even though the receiver has fallen down. At the very least, we hope to convince readers that the Constitution of the United States might not be officeholder-indifferent, and that constitutional politics as usual is not the remedy for the Trump presidency or, for that matter, the severe crisis of American constitutional democracy. The pages below provide one, but hardly the exclusive, path for constitutional decision makers and American citizens to begin thinking about presidential power in light of the actual officeholder and, more generally, to think about constitutional practice in a time of severe constitutional failure.

²³ 376 U.S. 254 (1964).

²⁴ See SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012) (arguing the American constitutional order is broken); Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunction Constitutional Order*, 94 B.U. L. REV. 611, 617–18 (2014).

I. DONALD TRUMP AS THE ANTI-PUBLIAN PRESIDENT

President Donald Trump lacks every constitutional qualification for office save that he was elected consistently with the rules set out in Article II of the Constitution of the United States, including, obviously, the Electoral College. Trump is known to be proudly ignorant, uninterested in constitutional limits on his power, a probable sex offender, a likely associate of Russian mobsters eager to launder their money by lending to someone who cannot procure loans from almost any leading American bank given his demonstrated record in refusing to honor his debts,²⁵ a bully, and a bigot who professes to see no real difference between George Washington and Robert E. Lee.

James Clapper, the former Director of National Intelligence, told CNN following an August 2017 Trump campaign rally in Phoenix, Arizona that he “really question[s] [Trump’s] ability to be—his fitness to be—in this office.”²⁶ After labeling Trump’s remarks and demeanor “downright scary and disturbing,”²⁷ Clapper, who served in the Clinton, Bush II, and Obama Administrations, denounced Trump’s “behavior and divisiveness and complete intellectual, moral and ethical void,”²⁸ describing his presidency as “this nightmare[.]”²⁹ Clapper was particularly disturbed about presidential access to, and power to put into operation, America’s nuclear codes. “In a fit of pique he decides to do something about Kim Jong Un, there’s actually very little to stop him,” Clapper said. “The whole system is built to ensure rapid response if necessary. So there’s very little in the way of controls over exercising a nuclear option, which is pretty damn scary.”³⁰

That most Democrats or political liberals might readily agree with Clapper is hardly surprising. What is remarkable, though, is the extent to which Donald Trump’s gross unfitness for office

²⁵ We cannot, of course, supply sufficient proof of this assertion because of his resolute refusal to release any of his tax returns that might well indicate significant interaction with Russian moguls.

²⁶ Leinz Vales, *James Clapper calls Trump speech ‘downright scary and disturbing’*, CNN (Aug. 24, 2017, 5:05 PM), <http://www.cnn.com/2017/08/23/politics/james-clapper-trump-phoenix-rally-don-lemon-cnntv/index.html> [<http://perma.cc/9KL7-WPDS>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

has become the conventional wisdom among conservative commentators. *Washington Post* columnist Michael Gerson, who loyally served George W. Bush as a speechwriter and a conduit to the Christian community, describes Trump as “willfully blind to history” with “a shriveled emptiness where [his] soul once resided.”³¹ Gerson is not alone among conservatives in his contempt for Trump. George Will, who re-registered as an independent after Trump’s nomination, observed that Trump has “an untrained mind bereft of information and married to stratospheric self-confidence.”³² Jack Goldsmith, a lawyer who headed the Office of Legal Counsel in the Bush II administration, describes Trump as a “President of the United States who does not at all grasp the Office he occupies, and who thus entirely lacks the proper situation sense, or contextual knowledge, in which a President should exercise judgment or act.”³³ Benjamin Wittes, the editor of *Lawfare* who is associated with both the Brookings Institution and the Hoover Institution, declared that Trump “does not enter office with a presumption that as President he will pursue a vision of what national security means . . . or that he will do so in a rational fashion[.]”³⁴ “What does it even mean,” he asked, “for a person who contradicts himself constantly, who says all kinds of crazy things, who has unknown but extensive financial dealings that could be affected by his actions, and who makes up facts as needed in the moment to swear an oath to faithfully execute the office?”³⁵ Peter Wehner, who served Republican Presidents Reagan, George H. W. Bush, and George W. Bush, recently referred, approvingly, to “a Republican member of Congress [he] spoke with [who] called the

³¹ Michael Gerson, *There is a shriveled emptiness where Trump’s soul once resided*, WASH. POST (Aug. 17, 2017), https://www.washingtonpost.com/opinions/there-is-a-shriveled-emptiness-where-trumps-soul-once-resided/2017/08/17/bb9edd22-8370-11e7-b359-15a3617c767b_story.html?utm_term=.aaa9527e2dd8 [<http://perma.cc/BN78-B936>].

³² George F. Will, *Trump has a dangerous disability*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/opinions/trump-has-a-dangerous-disability/2017/05/03/56ca6118-2f6b-11e7-9534-00e4656c22aa_story.html?utm_term=.43785bf8d842 [<http://perma.cc/ZQE4-LQW6>].

³³ Jack Goldsmith, *Two Reflections on the Comey Statement*, LAWFARE (June 7, 2017, 8:56 PM), <https://www.lawfareblog.com/two-reflections-comey-statement> [<http://perma.cc/Z2WA-NEJQ>].

³⁴ Benjamin Wittes & Quinta Jurecic, *What Happens When We Don’t Believe the President’s Oath*, LAWFARE (Mar. 3, 2017, 12:30 PM), <https://www.lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath> [<http://perma.cc/YZ8T-F9FH>].

³⁵ *Id.*

president a ‘child king,’ and a ‘self-pitying fool.’”³⁶ Continued hopes that Trump as president will prove significantly different from what he had revealed about himself during the campaign are naïve. Doyle McManus of the *Los Angeles Times* notes that “[l]ast November, 63 million voters gave Trump a chance to grow into the office he won . . . Instead, he seems intent on proving that he’s either unable or unwilling to grow.”³⁷ Daniel Drezner answers the question, “Can Donald Trump Grow up in office?” by responding, “toddlers are gonna toddler.”³⁸

The above sources are all prior to September 2017, when this essay was initially drafted and submitted to the editors of the *Chapman Law Review*. The ensuing months have provided an abundance of additional sources. Consider an October 26, 2017 column by Mr. Gerson praising Republican senators John McCain and Bob Corker for their criticisms of Donald Trump. McCain and Corker pointed to the undoubted truth that “Americans have elected a president who is dangerously unstable, divisive, childish, nasty, deceptive, self-deluded, morally unfit, deeply unconservative and thus badly wrong on some of the largest issues of our time.”³⁹ Arizona Senator Jeff Flake, who recently denounced Trump—and, by implication, the contemporary Republican Party—while announcing his own decision to retire from the Senate rather than face almost certain defeat in the Republican primary, describes the

[M]oral vandalism that has been set loose in our culture, as well as the seeming disregard for the institutions of American democracy. The damage to our democracy seems to come daily now, most recently with the president’s venting late last week that if he had his way, he would hijack the American justice system to conduct political prosecutions—a practice that happens only in the very worst places on

³⁶ Peter Wehner, *Behold Our ‘Child King,’* N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/opinion/sunday/trump-our-child-king.html?ref=opinion&r=0>.

³⁷ Doyle McManus, *Another day, another vulgar Trump tweet. The president clearly isn’t learning on the job.*, L.A. TIMES (June 29, 2017, 9:45 AM), <http://www.latimes.com/opinion/op-ed/la-oe-mcmanus-trump-tweet-mike-20170629-story.html> [<http://perma.cc/CV7H-TSZV>].

³⁸ Daniel W. Drezner, *Can Donald Trump grow up in office?*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/03/can-donald-trump-grow-up-in-office/?utm_term=.bb6933cad2bb [<http://perma.cc/3C4S-RFZ2>].

³⁹ Michael Gerson, *God bless all the anti-Trump Republicans*, WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/opinions/god-bless-all-the-anti-trump-republicans/2017/10/26/14f45b9a-ba80-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.c452e623f3db [<http://perma.cc/GGR9-RHC7>].

earth. And as this behavior continues, it is not just our politics being disfigured, but the American sense of well-being and time-honored notions of the common good.⁴⁰

Michael Wolff's *Fire and Fury: Inside the Trump White House* dominated the news in early January 2018. Wolff quoted numerous White House insiders who referred to the President as an "idiot" or the equivalent of a "child" with an insatiable need for loyalty and approval. These observations, the above paragraphs demonstrate, are neither new nor surprising. What may be most striking is Wolff's conclusion to an article he published in *The Hollywood Reporter*, which maintained Trump may be exhibiting signs of dementia. "Hoping for the best," Wolff wrote:

[W]ith their personal futures as well as the country's future depending on it, my indelible impression of talking to [Trump's associations in the White House] and observing them through much of the first year of his presidency . . . came to believe he was incapable of functioning in his job.

At Mar-a-Lago, just before the new year, a heavily made-up Trump failed to recognize a succession of old friends.⁴¹

That Donald Trump is no George Washington is of less constitutional concern to contemporary Americans than to the framers. Publius imagined presidents in the image of Washington, who rise above the partisan strife of their day. Such characters were recognized as being "pre-eminent for ability and virtue"⁴² across the political spectrum. The two-party system that developed almost immediately after the Constitution was ratified (and which developed in part because of the structure of presidential elections)⁴³ obviated the possibility of a universally esteemed president. Partisan presidents in a Publian system can at best lay claim to having the qualifications their party believes necessary to be a successful president. Parties have nevertheless remained within what might be called a "zone of acceptability"

⁴⁰ Jeff Flake, *In a Democracy, There Can Be No Bystanders*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/opinion/jeff-flake-speech-letters-democracy.html>.

⁴¹ Michael Wolff, "You Can't Make this S--- Up": *My Year Inside Trump's Insane White House*, THE HOLLYWOOD REPORTER (Jan. 4, 2018, 4:00 AM), <https://www.hollywoodreporter.com/news/michael-wolff-my-insane-year-inside-trumps-white-house-1071504> [<http://perma.cc/YJ6M-ME7T>]; MICHAEL WOLFF, *FIRE AND FURY: INSIDE THE TRUMP WHITE HOUSE* (2018).

⁴² THE FEDERALIST NO. 68, at 461 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁴³ See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

with regard to the candidates they present for the White House, with presidential nominees perhaps deficient in one qualification possessing other prerequisites for the oval office.

Even within this context, Donald Trump appears to be no Rutherford B. Hayes, James Earl Carter, or even Warren G. Harding who, unlike the vindictive Woodrow Wilson, pardoned Eugene Debs and even invited him to visit Harding at the White House (which Debs did).⁴⁴ These less distinguished presidents were thought competent to hold office by a substantial segment of their party, including, crucially, experienced political leaders and office-holders, even as members of the rival party and rival factions of their party frequently jeered at their qualifications. Moreover, commentators often exaggerate formal qualifications. The most formally qualified presidents in our history, in terms of the multiplicity of offices they occupied before moving to the White House, were John Quincy Adams, James Buchanan, and George H. W. Bush. Abraham Lincoln was among the least qualified. Barack Obama scarcely teemed with obvious qualifications for the office he sought. (His predecessor, George W. Bush, had at least been governor for six years of a major state.) What makes Donald Trump historically unique is his lack of *any* serious qualification for public office and the ever-growing consensus among informed members of his party that he is, in addition, a menace to American constitutional institutions. Republican members of Congress, unaware that their microphones are on, have been caught describing Trump as “crazy” and have not retracted such comments.⁴⁵ Tennessee Republican Senator Bob Corker stated on the record that “[t]he president has not yet been able to demonstrate the stability, nor some of the competence, that he needs to demonstrate in order to be successful.”⁴⁶ Texas Senator Ted Cruz, when speaking of Trump prior to his nomination, stated: “This man is a pathological liar”

⁴⁴ Peter Richardson, *Democracy's Prisoner: Eugene V. Debs, the Great War, and the Right to Dissent* by Ernest Freeberg, L.A. TIMES (June 15, 2008), <http://www.latimes.com/style/la-bk-richardson15-2008jun15-story.html> [<http://perma.cc/44EB-UTNP>].

⁴⁵ Philip Bump, *Senators on hot mic: Trump is 'crazy,' I'm worried.* WASH. POST (July 25, 2017), https://www.washingtonpost.com/news/politics/wp/2017/07/25/senators-on-hot-mic-trump-is-crazy-im-worried/?utm_term=.3c36f79061e6 [<http://perma.cc/X6MJ-6XKD>].

⁴⁶ Richard Cowan, *Republican senator says Trump yet to demonstrate needed stability*, REUTERS (Aug. 17, 2017), <https://www.reuters.com/article/us-usa-trump-corker/republican-senator-says-trump-yet-to-demonstrate-needed-stability-idUSKCN1AX2DW> [<http://perma.cc/KB95-FWSW>].

who “doesn’t know the difference between truth and lies.”⁴⁷ Many congressional Republicans, of course, have remained relatively silent, but as Sherlock Holmes noted long ago, dogs that do not bark in the night can provide central clues. In this case, what is striking is the nearly complete absence of Republican office-holders who are willing to counter Senator Corker, Senator Cruz, Senator Flake, leading conservative columnists, and Admiral Clapper by praising Trump’s capacity for sober judgment and ability to be an adroit Commander-in-Chief.⁴⁸

II. PRESIDENTIAL CHARACTER AND PRESIDENTIAL POWERS

So what, one might ask. Shouldn’t constitutional decision makers—most importantly inhabitants of judicial office, but also academics who play a vital role in socializing young would-be lawyers—be committed to upholding universal and neutral constitutional norms? Shouldn’t they suppress their “private” (and therefore legally irrelevant) reluctance to do so and instead permit President Trump to exercise the same presidential powers as any other occupant of the Oval Office?⁴⁹ Article II is facially indifferent to the character of the office-holder. The Qualifications Clause requires only that the President meet the age requirement, be a “natural-born” citizen, and reside within the United States for at least fourteen years before taking office.⁵⁰ Lawyers, doctors,

47 David Wright et al., *Cruz unloads with epic takedown of ‘pathological liar,’ ‘narcissist’ Donald Trump*, CNN (May 3, 2016), <http://www.cnn.com/2016/05/03/politics/donald-trump-rafael-cruz-indiana/index.html> [<http://perma.cc/Q22F-YSGD>].

48 Perhaps the most notable exception is Alabama Senator Lucius Strange, at a time when he was desperately (and, it turned out, unsuccessfully) trying to hold on to the seat to which he was appointed to succeed now-Attorney General Jeff Sessions. “President Trump is the greatest thing that has happened to this country,” Strange has said. “I consider it a biblical miracle that he’s there.” Not to be out-Trumped, but as it were, his principal (and ultimately successful) opponent in the Republican primary, former state Chief Justice Roy Moore proclaimed, “God puts people in positions he wants. I believe he sent Donald Trump in there to do what Donald Trump can do.” Ben Jacobs, *‘A biblical miracle’: Alabama GOP Senate primary set to test Trump’s reach*, THE GUARDIAN (Aug. 15, 2017, 6:00 PM), <https://www.theguardian.com/us-news/2017/aug/15/alabama-gop-senate-primary-donald-trump-mitch-mcconnell> [<http://perma.cc/L49R-EB6V>].

49 See *supra* notes 45–47 and accompanying text.

50 U.S. CONST. art. II, § 1, cl. 5. Had Ted Cruz been elected, we might have considered the “true” meaning of “natural born citizen.” Should a Puerto Rican citizen who moved to the mainland when he was thirty decide to run for the presidency ten years later, we could mull over whether Puerto Rico, though not a state, is now “within the United States.” See *Downes v. Bidwell*, 182 U.S. 244, 251 (1901). Chief Justice Fuller, in his *Downes* dissent, asks if “a native-born citizen of Massachusetts [would] be ineligible if he had taken up his residence and resided in one of the territories for so many years that

other professionals, and many applicants for ordinary, minimum wage positions must meet rigorous educational standards and less rigorous character tests, but not the President of the United States. The text states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States,”⁵¹ *not* that “the President shall be Commander in Chief, provided that he is a mature adult.” The impersonal language of the text seemingly compels a court considering the constitutionality of presidential decrees that determine who is fit to enter the United States to follow the same interpretive practices judges would follow if the ban on entry was issued by Barack Obama, George W. Bush, Abraham Lincoln, George Washington, or, were they eligible to hold the office, St. Francis of Assisi or Adolf Hitler. That the president in question is unfit to hold the office is not relevant because “equal protection of presidents” requires that all be treated as identical to one another.

We think this consensus is tragically mistaken, not only as a matter of intellectual analysis, but, quite possibly, with regard to the actual future of what Burke might have referred to as the living and the yet unborn. We agree with the major premise. Constitutional decision makers, when assessing President Trump’s actions, should be guided by constitutional norms. We disagree, however, with the near universal view that those norms are indifferent to the particular office-holder. The Constitution presupposes at least some version of what we call “Publian presidents,” presidents with the character and capacity necessary to exercise the vast powers conferred by Article II.

The term “Publian presidents” is drawn from *The Federalist Papers*. Although we are not “originalists” as that term is used in intra-mural debates among constitutional interpreters, we do believe that understanding the knowable presuppositions underlying the constitutional text is important. Americans do not have a rigid duty to adhere to past norms or empirical assumptions as to how institutions would work to achieve those norms, but constitutional fidelity entails an intellectual duty to examine how those responsible for the Constitution of the United

he had not resided altogether fourteen years in the states?” *Id.* at 357. Fortunately, these speculations are beyond the scope of this article.

⁵¹ U.S. CONST. art. II, § 2, cl. 1.

States thought constitutional institutions would work to achieve constitutional norms, as well as to understand the back-up systems they did (or did not) put in place, should particular constitutional institutions fail. A wooden esteem for the Founders' parchment ignores their repeated emphasis on the importance of learning from the "lessons of experience." John Marshall proclaimed in *McCulloch v. Maryland* that a "constitution[] intended to endure for ages to come" must "be adapted to the various crises of human affairs."⁵² We break faith with the framers and the American constitutional tradition when we treat the Constitution as a mere set of rules that must be followed even when following the letter of the rules subverts more fundamental constitutional purposes.

The presidency of Donald Trump is one such "crisis of human affairs" calling for constitutional adaptation. The framers, we shall see, anticipated the possibility of such a constitutional failure and provided constitutional decision makers with special tools for constraining the anti-Publican president. They regarded as only a rebuttable presumption that the President of the United States would be a mature adult. Unlike Justice Antonin Scalia, who regarded as a conclusive presumption that any child born within a marriage was fathered by the husband, whatever the demonstrable impossibility of that assertion,⁵³ the framers were empiricists committed to an evidence-based constitutional politics and constitutional law.⁵⁴

The selection process set out in the Constitution with regard to presidents exhibits both the framing commitment to republican leadership and their insistence that Americans be empirically minded when determining how to obtain republic leaders. As is well known, Americans were not (and are not today) given the opportunity directly to elect their presidents. That task is assigned to presidential electors. Not surprisingly, immediately after assuring his readers that the president would not enjoy the powers of a monarch in *Federalist* No. 67,⁵⁵ Publius immediately turns in *Federalist* No. 68 to elaborate how the

⁵² *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed).

⁵³ See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989).

⁵⁴ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION xv (1996).

⁵⁵ THE FEDERALIST NO. 67, at 452 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

constitutional scheme for a presidential election is designed to guarantee, as far as is humanly possible, the selection of persons with exceptional capacities and virtuous character.⁵⁶

This process of election affords a moral certainty, that the office of president, will seldom fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honors in a single state; but it will require other talents and a different kind of merit to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of president of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.⁵⁷

Publius hedged when asserting that the electoral college will assure that only “seldom” will the president be less than a sterling individual. That suggests the importance of other, “auxiliary precautions” to which we will turn presently. But one cannot read this paragraph without believing that the electors will be faithful trustees for the public in preventing the rise of a scoundrel to our highest office. That this no longer describes the actual role of electors, who are now viewed simply as “delegates” of the voters who formally placed them in power, increases the importance of other institutional mechanisms that secure the election of a president with the character and capacity to operate the constitutional order. If such mechanisms no longer exist, then this raises fundamental questions about the relevance of “originalism” in a constitutional universe bereft of the institutions the framers thought vital to maintaining the constitutional order they fashioned.

Publius discusses the character of the president before discussing presidential powers. One can reasonably infer that the scope of presidential powers is a function of the character of the office-holder. Consider in this context the pardon power, discussed in *Federalist* No. 74.⁵⁸ A president must know when mercy is required to rectify the inevitable errors in a system of

⁵⁶ THE FEDERALIST NO. 68, at 460–61 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁵⁷ *Id.*

⁵⁸ THE FEDERALIST NO. 74, at 500–03 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

procedural justice; but he must also know when service to the republic requires pardoning even those who might validly be accused of insurrection, like the participants in the Whiskey Rebellion who were wisely pardoned by George Washington. Publius tightly connects presidential power and presidential character when stating, “a single man of prudence and good sense, is better fitted, in delicate conjunctures, to balance the motives, which may plead for and against the remission of the punishment, than any numerous body whatever.”⁵⁹ Prior to Donald Trump and his pardon of “Sheriff Joe” Arpaio, one could only speculate about what a president lacking in “prudence and good sense” might make of the plenary power to pardon.

The theme of virtuous leadership runs through *The Federalist Papers*, including the most canonical of all, *Federalist* No. 10.⁶⁰ Although some political scientists interpret *Federalist* No. 10 as the first statement of what would come to be known as interest-group pluralism,⁶¹ any close reading reveals the likelihood of an “expanded republic” producing the election of more virtuous leaders disposed to seek the public good or “common interest,” rather than simply reflect the preferences of their constituents.⁶² Other papers elaborate on the importance of the character of the officials who will be exercising constitutional powers. *Federalist* No. 57 declares that every political Constitution should strike above all “to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.”⁶³

Federalist No. 31 makes intimate the connection between the character of an official and official powers. The text states that “all observations founded upon the danger of usurpation, ought to be referred to the composition and structure of the government,

⁵⁹ *Id.* at 501–02.

⁶⁰ THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961).

⁶¹ See, e.g., Martin Diamond, *Democracy and the Federalist: A Reconsideration of the Framers’ Intent*, 53 AM. POL. SCI. REV. 52, 56 (1959).

⁶² THE FEDERALIST NO. 10, at 59, 63 (James Madison) (Jacob E. Cooke ed., 1961) (noting that elections in the extended republic “will be more likely to centre on men who possess the most attractive merit”).

⁶³ THE FEDERALIST NO. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1961).

not to the nature or extent of its powers.”⁶⁴ Good government, Publius repeatedly insists, needs broad powers.⁶⁵ For this reason, Americans then and now should not be obsessed with the powers of the national government or with the powers of any individual within the government. Rather, Publius would concentrate our constitutional focus on whether the schemes for staffing a government privilege the selection of persons able to wisely exercise government powers. Presidential power is constitutionally justified when the process for staffing the presidency has generated “characters pre-eminent for ability and virtue.”⁶⁶ Contrary to one popular view of the Constitution as a “machine that will run by itself,”⁶⁷ independent of the actual office-holders, Publius was more than aware that character was important even if he certainly did pay attention to the importance of well-designed institutional structures. Indeed, *The Federalist Papers* integrates character and institutions. The machine would “run by itself” only if the institutional structures privileged the establishment of a republican leadership class and provided incentives for maintaining their republican character when in office.

These observations cast new light on Publius’s claim in *Federalist* No. 51 that the separation of powers is an “auxiliary precaution.”⁶⁸ A back-up generator is an auxiliary precaution, not the main power supply. A crucial feature of an auxiliary precaution is that the system functions differently in times of emergency. The back-up generator comes on only when the main power fails. “Checks and balances” function similarly; other institutions must step up more vigorously when constitutional institutions, designed to ensure virtuous leadership, malfunction and produce persons who lack the capacities that justify the powers of their office and consequent respect from other officials. This should not be viewed as “civil disobedience” or any other extra-constitutional assertions of power, but instead, as the

⁶⁴ THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁶⁵ This is the central theme of *Federalist* No. 23. See THE FEDERALIST NO. 23 (Alexander Hamilton).

⁶⁶ THE FEDERALIST NO. 68 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁶⁷ See, e.g., MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (Alfred A. Knopf, Inc. ed., 1986).

⁶⁸ THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

generation of a “legal-constitutional opposition”⁶⁹ contemplated by the drafters themselves and instantiated in the institutions they created.

If presidential powers are justified by the anticipated character of the president, and if the separation of powers exists in part to prevent leadership by unfit officials, then contrary to much received wisdom, the persons responsible for the Constitution did not intend for constitutional decision makers charged with maintaining it to be indifferent to the character of the president when assessing at any given time how much executive power a particular president should wield. Publius would not have constitutional interpreters be president-indifferent. *The Federalist Papers* point to an important auxiliary precaution in the original Constitution when emphasizing the capacity for federal legislative and judicial officials to afford less deference to an anti-Publican president.

III. GOING OFF-SCRIPT AND BROKEN PLAYS

Our claim that interpretation responds to breakdowns in underlying assumptions is more ordinary than extraordinary. Contract law and contract practice make adjustments when background conditions that structured the bargain change in ways not anticipated by the parties. Actors go off-script when props malfunction or other actors forget previous lines. Athletes improvise when the play called in the huddle breaks down because of unforeseen developments. Conventional constitutional wisdom that paradoxically is labeled “textualism” from the perspective of these activities is both extraordinary and perverse in insisting that constitutional decision makers not take into account failings that any person with common sense would recognize compel changing planned behaviors that have become either impossible to perform or counterproductive.

The long tradition in American constitutionalism that regards the Constitution of the United States⁷⁰ as a collective contract provides powerful support for interpreting constitutional

⁶⁹ We owe this phrase to Ken Kersch, who provided very helpful comments to an earlier draft.

⁷⁰ See Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2–4 (1999).

provisions in light of their background assumptions. Contract law does not interpret every provision of a contract as having a “no matter what” clause. Charles Fried, when analyzing the famous case of *Krell v. Henry*,⁷¹ points out that the contract for rooms to watch the coronation procession of Edward VII contained neither the clause “unless there is no procession to view” nor the clause “whether or not the coronation is subsequently canceled.”⁷² Because the decision to enforce the literal terms of the bargain was just as much an interpretation as a decision to interpret the contract as not covering a cancellation, Fried maintains that contract authorities had to consider which interpretation best expressed the promises the parties made to each other in light of a circumstance neither anticipated. *Krell*, he concluded, correctly recognized that the contract between the parties made sense only on the assumption that the coronation would take place as planned, and that no damages should be paid when events falsified that mutual assumption.⁷³

Contract law in practice is even less committed to the wooden textualism that would insert “no matter what” clauses into all provisions in Article II. Stewart Macaulay’s study of contractual relationships among businesspersons observes:

Disputes are frequently settled without reference to the contract or potential or actual legal sanctions. There is a hesitancy to speak of legal rights or to threaten to sue in these negotiations. Even where the parties have a detailed and carefully planned agreement which indicates what is to happen if, say, the seller fails to deliver on time, often they will never refer to the agreement but will negotiate a solution when the problem arises apparently as if there had never been any original contract. One purchasing agent expressed a common business attitude when he said, “if something comes up, you get the other man on the telephone and deal with the problem. You don’t read legalistic contract clauses at each other if you ever want to do business again.”⁷⁴

A constitution “intended to endure for ages to come,” a good businessperson would recognize, should be interpreted in

⁷¹ *Krell v. Henry* [1903] 2 KB 740 (Eng.).

⁷² CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 64 (1981).

⁷³ *See id.* at 60–61, 67.

⁷⁴ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963).

ways that are responsive to failures in the functioning of basic institutions.

Actors engage in similar improvisations as businesspersons when faced with what contract law might call “frustration” of script.⁷⁵ The swan in *Lohengrin* fails to show up. The pulley taking Don Juan to the underworld fails. A phone rings off cue. A nervous performer completely misses crucial lines.⁷⁶ When these events occur, experienced, and most inexperienced, actors respond. Sometimes a bon mot seems appropriate. “Does anyone know when the next swan is leaving?” “It seems Hell has no vacancies.” An apocryphal story relates that one actor picked up the phone and promptly handed the receiver to the other, saying, “It’s for you.” In other circumstances, actors adjust their lines to the circumstances. They do not woodenly repeat the next line in the script when the failure to say an earlier line makes their planned line incomprehensible. Instead, actors think about what they might say to enable the cast to perform the play as close to as originally intended under the new, unanticipated circumstances.

Athletes respond the same way as businesspersons and actors to failures in the assumptions underlying their texts. Gifted sportspersons improvise when a play breaks down, as when a baseball batter misses a hit-and-run signal or a football receiver runs the wrong route. Faced with circumstances in which following the letter of the plan will defeat the purpose of the plan, athletes attempt to figure out alternatives for achieving the purpose of the plan, knowing that while some members of their team have failed, others are performing their expected tasks. The runner scrambles back to first base. The quarterback throws the ball to whatever receiver appears open.

The routine practices of businesspersons, actors, and athletes illustrate how texts are routinely interpreted differently when crucial background conditions fail. To be sure, the reasons for going off-script must usually be plain.⁷⁷ Strong presumptions

⁷⁵ RESTATEMENT (SECOND) OF CONTRACTS § 265–69 (AM. LAW INST. 1979).

⁷⁶ For some of these and related mishaps discussed in this paragraph, see ANDREW FOLDI, *OPERA: AN ACCIDENT WAITING TO HAPPEN (40 YEARS OF MUSICAL MISHAPS)* (1999); Dick Cavett, *Oh, No! Live Drama and Unwritten Humor*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/opinion/oh-no-live-drama-and-unwritten-humor.html>.

⁷⁷ We might trust an experienced actor or athlete to make judgments to go off-script that we would deny to their less experienced peers.

exist in most interpretive practices that background conditions are functioning smoothly. Nevertheless, improvisation plays an important role in text-bound activities. When systematic malfunctions occur, businesspersons, actors, and athletes engage in a Dworkinian effort to make the text “the best it can be.”⁷⁸ If a contract to purchase weapons for a third party should be interpreted on the assumption that the third party has not joined a terrorist cell or indicated a strong desire to murder an estranged spouse, a script should be interpreted on the assumption that the phone will ring on cue, and a play should be interpreted on the assumption that crucial participants have not suffered serious injuries, then the constitutional clause “the President shall be Commander-in-Chief”⁷⁹ should be interpreted in light of the assumption that the president is a mature adult whom one would, at the bare minimum, feel comfortable hiring to watch over one’s own children.

IV. JUDICIAL IMPROVISATION IN TIMES OF CONSTITUTIONAL FAILURE

The Supreme Court of the United States has consistently adjusted constitutional doctrine when responding to breakdowns in the fundamental assumptions underlying the constitutional order. That tribunal for more than two-hundred years has been Marshallian, with judicial “adaptation” a regular feature of the attempt to resolve perceived crises. Some crises are external. Supreme Court Justices have adjusted existing constitutional doctrine in light of wars and economic depressions. Other crises are internal. Much constitutional law, most notably the constitutional law fashioned by mid-twentieth century judicial liberals and the civil rights movement, has been a consequence of adjustments made when constitutional institutions have not functioned as expected.

Much constitutional doctrine that takes circumstances into account reflects framing understandings that crisis would shake the American constitutional regime and constitutional law would adjust accordingly. Justice Oliver Wendell Holmes in *Schenck v. United States* refrained from wooden textualism when asserting

⁷⁸ RONALD DWORKIN, *LAW’S EMPIRE* 62 (1986).

⁷⁹ U.S. CONST. art. II, § 2, cl. 1.

that “[w]hen a nation is at war,” the speech entitled to constitutional protection shifts.⁸⁰ In other cases, Justices have adjusted constitutional doctrine to take into account crises no one anticipated in 1789 or 1868. Chief Justice Charles Evans Hughes in *Home Building & Loan Ass’n v. Blaisdell* held that constitutional protections for contracts had to be interpreted in light of an economic collapse unforeseen by the framers.⁸¹ His opinion insisted that constitutional decision makers committed to “preserv[ing] the essential content and the spirit of the Constitution”⁸² could not “confine[]” themselves “to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon” various clauses.⁸³ No universal agreement exists about the validity or desirability of these and numerous other “adaptations.” *Prigg v. Commonwealth of Pennsylvania*,⁸⁴ which one of us (Levinson) believes to be the most execrable decision in our history, was arguably a “necessary adaption” designed to maintain a constitutional order designed to create, in Don Fehrenbacher’s words, a “slaveholding republic.”⁸⁵ We are nevertheless confident that Americans cannot understand their constitutional order by ignoring how decision makers, including judges, treat what they believe to be genuine crises as matters that must be addressed by the constitutional doctrine rather than matters beneath the purview of fundamental law that should be simply ignored.

The Supreme Court has been as creative when adapting constitutional doctrine to internal constitutional crises. The most famous footnote in the canon, footnote four of *United States v. Carolene Products Co.*,⁸⁶ exemplifies the judicial response to what came to be perceived as the constitutional failure of governing

⁸⁰ *Schenck v. United States*, 249 U.S. 47, 51–52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight[.]”).

⁸¹ *See* *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934).

⁸² *Id.* at 443.

⁸³ *Id.*

⁸⁴ 41 U.S. 539 (1842).

⁸⁵ DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (Ward M. McAfee ed., 2001). For an account of *Prigg* as an unfortunate constitutional adaption, see Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994). For a more sympathetic treatment, see generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

⁸⁶ *See* *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

institutions adequately to protect the rights of vulnerable minorities granted by the post-Civil War Amendments. The Court, when announcing a program of remarkable deference to legislatures when litigators challenged state and federal commercial regulations, emphasized that stricter scrutiny might be merited when courts had greater reasons to believe ordinary legislative processes had malfunctioned.⁸⁷ The Supreme Court's "double standard" of rights protection that emerged in the mid-twentieth century was rooted in theories about the strength and weaknesses of evolving constitutional institutions, rather than on claims that some constitutional rights were more important than others. The consensual greatest series of decisions in Supreme Court history, *Brown v. Board of Education*⁸⁸ and the subsequent judicial rulings dismantling the constitutional foundations for the Jim Crow state, required the justices to modify longstanding judicial rules and practices to prevent former Confederate states from getting away with what they now deemed to be the equivalent of constitutional fraud, instead of accepting the anodyne and remarkably obtuse "neutrality" and deferential stance of such earlier decisions as *Pace v. Alabama* and *Plessy v. Ferguson*.⁸⁹

Louis Lusky, the law clerk generally considered responsible for the *Carolene Products* footnote,⁹⁰ maintained that justices should normally sustain legislative outputs when political processes were functioning as constitutionally expected. His 1942 essay in the *Yale Law Review* asserted:

[I]f every person has an equal opportunity to take part in controlling the government which in turn controls him, there will be a general confidence that the laws are designed to serve the needs of the entire community, by making a fair adjustment between the conflicting interests of groups within the community and advancing as far as possible the welfare of the community as a whole.⁹¹

Race discrimination merited stricter judicial scrutiny because constitutional institutions repeatedly malfunctioned when

⁸⁷ *Id.*

⁸⁸ 347 U.S. 483 (1954).

⁸⁹ See *Pace v. Alabama*, 545 U.S. 1108 (2005); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹⁰ David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 765 (1981).

⁹¹ Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 5 (1942).

elected officials considered racial issues. “A government from which [African-Americans] are largely excluded,” Lusky pointed out, is not “properly responsible to their needs” with the end result being that “general confidence in the just enactment of laws will be greatly weakened.”⁹² The text of footnote four is a bit confusing because two distinctive *Carolene Products* footnotes exist. Paragraph 1, which was inserted at the request of Chief Justice Hughes,⁹³ maintains “certain rights deserve particular judicial solicitude.”⁹⁴ The far more influential paragraphs 2 and 3, providing the foundation for judicial protection of rights to free speech and racial equality, are rooted in the “dynamics of government,”⁹⁵ a “corrective” for faulty “political processes.”⁹⁶

The *Carolene Products* double standard was a judicial attempt to adjust to two fundamental changes in the American constitutional regime. The first was the constitutional commitment to some version of interest-group pluralism as opposed to the original constitutional commitment to some version of republicanism. Lusky, Chief Justice Harlan Fiske Stone, and other constitutional decision makers in the mid-twentieth century assumed that constitutional institutions should be designed in ways that accommodated various social interests as opposed to the Madisonian vision of government institutions designed to transcend various social interests.⁹⁷ The second was the increased recognition that “prejudice against discrete and insular minorities”⁹⁸ prevented most elected officials from accommodating the interests of persons of color to remotely the same degree as white persons. Hence, in contrast to the original understanding of the post-Civil War Amendments,⁹⁹ courts

⁹² *Id.* at 5–6.

⁹³ See Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1097–98 (1982).

⁹⁴ *Id.* at 1100 (emphasis removed).

⁹⁵ *Id.* at 1097–98.

⁹⁶ *Id.* at 1103.

⁹⁷ For the classic expression of interest group pluralism, see DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (Alfred A. Knopf eds., 1951). *Federalist* No. 10 is the classic expression of constitutional republicanism. See *THE FEDERALIST NO. 10* (Alexander Hamilton, James Madison & John Jay) (Jacob E. Cooke ed., 1961). For the classic account (and critique) of the transition from republicanism to interest-group liberalism, see THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1st ed. 2009).

⁹⁸ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁹⁹ See Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEXAS L. REV. 1361, 1363 (2016).

rather than legislatures took primary responsibility for securing African-Americans and other racial minorities the “equal protection of the law.”

In “Toward Neutral Principles of Constitutional Law,” Professor Wechsler unwittingly detailed how the Supreme Court in *Brown* engaged in the constitutional improvisation called for by *Carolene Products* to correct what were now deemed the constitutional failures responsible for Jim Crow segregation.¹⁰⁰ Wechsler insisted that the “question posed by state-enforced segregation is not one of discrimination at all,” but concerned “the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.”¹⁰¹ He reached the remarkable conclusion that *Brown* was a freedom of association case by denying that judicial authorities could know the crucial facts that might make *Brown* a discrimination case. Such an approach was warranted on matters on which courts should trust state officials. What Chief Justice Warren understood, and Wechsler failed to acknowledge, is that no reason existed in 1954 (or, for that matter, in 1896 when *Plessy* was decided) to trust a state legislative judgment that separate schools promoted racial equality. The “reconciliation” between Northern and Southern whites that placed African-Americans both literally and metaphorically at the back of the railway left neither Congress nor the courts willing to implement the post-Civil War Amendments. Fortunately, in ways “neutral principles” could not detect, American politics had changed, particularly after World War II, as well as the role of the Court.

Wechsler’s analysis of *Brown* presented an accurate picture of how courts should function in normal constitutional times in a regime committed to interest group pluralism. He began by noting that justices have legal obligations to defer to legislative fact-findings.¹⁰² Wechsler then denied that the evidence was sufficient “to sustain a finding that the separation harms the Negro children who may be involved[.]”¹⁰³ Nor, apparently, could courts ask about what actually motivated state legislatures to

¹⁰⁰ See Wechsler, *supra* note 2, at 22–23.

¹⁰¹ *Id.* at 34.

¹⁰² *Id.* at 6.

¹⁰³ *Id.* at 32–33.

impose segregation. To inquire into the actual justification for segregation would “involve an inquiry into the motive of the legislature, which is generally foreclosed to the courts[.]”¹⁰⁴

These claims that courts should normally defer to legislative fact-findings and not inquire into legislative motives make sense when, as Lusky noted, political processes are fair and open to all so that political victors at any particular time might be fearful of being displaced in the next election should they prove captive simply to factional interests. This is the basis of John Hart Ely’s aforementioned book that defends a vigorous concern by the Court for “representation reinforcement,” but condemns judicial intervention when representative government is thought to be working reasonably well.¹⁰⁵ Elected officials can then be trusted to make good faith interpretations of the Constitution and take rational steps to pursue the public good. Aggressive judicial inquiry into facts and motives is counter-constitutional in times of normal constitutional politics. The system for staffing the national government and process for making laws are the main devices for ensuring that elected officials make accurate fact-findings and do not deliberately violate the Constitution. No good reason exists for thinking courts will do any better than the rest of the political system, especially if we are willing to accept what may well be the legal fiction that Publian institutions are generating Publian or quasi-Publian rulers and laws. This is why the Supreme Court in *Williamson v. Lee Optical of Oklahoma*¹⁰⁶ subordinated suspicions that the Oklahoma legislature might have been influenced by campaign donations of optometrists and ophthalmologists when applying what is known as a “minimum rationality test” that makes such suspicions irrelevant if a possibly sane person could believe that the legislature was genuinely motivated by a desire to safeguard the health, safety, and welfare of Oklahomans. Perhaps eye-doctors did better with respect to this law than the general public, but no good reason existed to think that optometrists and ophthalmologists were “special favorite[s] of the law”¹⁰⁷ in post-World War II Oklahoma.

¹⁰⁴ *Id.* at 33.

¹⁰⁵ See ELY, *supra* note 18, at 182–83.

¹⁰⁶ 348 U.S. 483, 487–88 (1955).

¹⁰⁷ *United States v. Stanley*, 109 U.S. 3, 25 (1883).

The Southern white political actors who imposed state-mandated segregation were not attempting to do what was best for all races or acting on a good faith interpretation of the post-Civil War Amendments. White elected officials in the former Confederacy did not fear electoral displacement by aroused African-American voters because they had taken care, by the beginning of the twentieth century, to eliminate as much as possible the reality of an African-American vote. Rather, as speaker after speaker declared in the southern constitutional conventions that provided the legal foundations for the Jim Crow state,¹⁰⁸ members of former Confederate states were trying to find every constitutional loophole in order to subvert the Fourteenth Amendment's constitutional commitment to racial equality and, most importantly, the ostensibly unequivocal commitment of the Fifteenth Amendment to the suffrage on a non-racial basis. They were openly committing what Justice Oliver Wendell Holmes described as "a fraud upon the Constitution of the United States."¹⁰⁹ In sharp contrast to Wechsler, Holmes did not deny the presence of the fraud. Instead, he said judges were without the practical power to reinstate the kind of Reconstruction-era monitoring that would be necessary to obviate the fraud.¹¹⁰

Brown makes sense only in light of a judicial commitment to eradicate frauds upon the Constitution. Chief Justice Warren in judicial conference had no difficulty basing his vote on motives and facts the court had ruled out-of-bounds in ordinary cases. He bluntly informed other justices that segregation was based solely on white supremacy. "The doctrine of 'separate but equal,'" he stated when leading off the judicial conference on *Brown*, "rested

¹⁰⁸ See PAUL E. HERRON, FRAMING THE SOLID SOUTH 217–25 (2017).

¹⁰⁹ *Giles v. Harris*, 189 U.S. 475, 486 (1903); see also Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 205, 297, 301–02 (2000) (describing a full examination of this truly perfidious episode in our judicial history).

¹¹⁰ See *Giles*, 189 U.S. at 488. There was no nonsense about "neutral principles" compelling the outcome in *Giles*. The Court's decision in *Brown II* was quite Holmesian inasmuch as the decision to settle for "all deliberate speed" was based on pragmatic institutional considerations that were inattentive to facts on the ground. What made Wechsler's views distinctive was his utter indifference to pragmatic actualities and the ascent into a thoroughly abstract analysis reminiscent of Anatole France's famous suggestion that the rich and poor alike would enjoy the opportunity to spend their nights under the bridges of Paris when it snowed.

upon the concept[ion] of the inferiority of the colored race.”¹¹¹ Other justices agreed. Justice Robert Jackson, who more than any other justice recognized that *Brown* could not be resolved by the appropriate norms for resolving ordinary cases, determined to vote to constitutionally prohibit segregated schools because “in the South the Negro suffers from racial suspicions and antagonisms” and “has suffered great prejudice from the aftermath of the great American white conflict.”¹¹² Jackson recognized how the original constitutional mechanisms for enforcing racial equality had malfunctioned when asserting in oral argument, “I suppose that realistically the reason this case is here is that action couldn’t be obtained from Congress.”¹¹³ Charles Black best captured the contemporary sense of why *Brown* was correctly decided when he maintained:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.¹¹⁴

New York Times Co. v. Sullivan, the case in which the Supreme Court abandoned almost 200 years of precedent when declaring that the First Amendment prohibited libel suits by public officials unless they could prove the speech was either intentionally false, or false and made with reckless disregard of the truth, is another example of constitutional law bending in response to the breakdown of constitutional norms in the Jim Crow South.¹¹⁵ This strong and unprecedented¹¹⁶ holding was motivated by commitments to racial equality as much as

¹¹¹ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICAN’S STRUGGLE FOR EQUALITY* 679 (1976).

¹¹² *Id.* at 688 (quoting Memorandum from Robert H. Jackson on *Brown v. Bd. of Educ.* (Feb. 15, 1954) (on file with Library of Congress)).

¹¹³ Joel K. Goldstein, *Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS U. L.J. 777, 806 (2004) (quoting ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7 (1970)).

¹¹⁴ Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 422, 424 (1960).

¹¹⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

¹¹⁶ Not quite. A few state courts had reached a similar result in the late nineteenth and early twentieth centuries. *See, e.g.*, *Coleman v. McLennan*, 98 P. 281, 292 (Kan. 1908); *Atkinson v. Detroit Free Press*, 9 N.W. 501, 524 (Mich. 1881). For the origins of actual malice, see MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 41–44 (1991).

commitments to the First Amendment. The *Sullivan* litigation was part of the southern strategy to prevent media coverage of the civil rights movement by imposing huge libel damages for minor misstatements.¹¹⁷ In the trial court, Lester Sullivan obtained the largest damages award in Alabama history. Had racial concerns been absent, everyone knew Sullivan probably would have received nominal damages at most. The Supreme Court decision overturning that ruling permitted *The New York Times*, as well as major television networks, to remain in the South and continue providing shocked Americans with stories of police dogs attacking children on peaceful protest marches.

The Supreme Court in *Sullivan* also improvised when issuing final judgment. The Court in an ordinary case would have remanded the case back to the Alabama courts for reconsideration in light of the new constitutional standard for determining libel. The Justices knew, however, that Alabama legal authorities would not determine in good faith whether Sullivan was a victim of actual malice. Rather, Chief Justice Warren could be confident that the courts in Alabama would award damages no matter what the judicial standard. For this reason, the Justices broke from routine practice, made a fact finding that actual malice could not be found, and entered a final judgment for *The New York Times*.¹¹⁸

Numerous other Warren Court decisions are best understood as the judges altering rules of normal practice to account for constitutional breakdowns in the Jim Crow South. Many of these cases were resolved on grounds other than racial equality. Michael Seidman details how the Justices conceptualized such cases as *Miranda v. Arizona* as responses to racist law enforcement practices rather than as efforts to construct neutral rules of constitutional criminal procedure that would apply in all times and places.¹¹⁹ A similar analysis could be offered of the motivation behind the Supreme Court's decision to enter what

¹¹⁷ See KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW AND THE FREE PRESS* 69–70 (2011). The national press could have lost millions of dollars in potential liability if they lost lawsuits filed throughout the South by purportedly aggrieved white segregationists. *Id.* at 84–85.

¹¹⁸ See *N.Y. Times Co.*, 376 U.S. at 285–86.

¹¹⁹ Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673 (1992); see also *Miranda v. Arizona*, 384 U.S. 436 (1966).

Justice Felix Frankfurter called the “political thicket” of legislative districting¹²⁰ in *Baker v. Carr* and then far more dramatically in *Reynolds v. Sims*, which upended the political systems of almost all the states.¹²¹ Earl Warren viewed these decisions as part of the “civil rights docket” of the Court, as means to ensure urban African-American votes counted as much as rural white votes.¹²² That *Baker* arose in Tennessee and *Reynolds* in Alabama was not coincidental, even if the doctrinal consequences, as in *Sullivan*, were national. “[T]he dominant motif of the Warren Court,” Lucas Powe details, was “an assault on the South as a unique legal and cultural region.”¹²³

The Supreme Court during the civil rights era was responding to the constitutional failure to protect the rights of African Americans rather than engaging in ordinary constitutional decision-making. *Brown* might be regarded as implementing the constitutional commitment to racial equality,¹²⁴ although when making that decision the Supreme Court did not take seriously the original understanding of the Fourteenth Amendment,¹²⁵ ignored evidence that Congress was primarily responsible for implementing the Fourteenth Amendment,¹²⁶ implicitly engaged in forbidden motive analysis, and did not give elected officials the deference appropriate when a constitutional order is functioning within normal parameters.¹²⁷ *Sullivan*, *Reynolds*, *Miranda*, *Morgan v. Virginia*,¹²⁸ and related cases however, belie constitutional politics as usual. The Supreme Court would not have dramatically changed the constitutional law of free speech, voting rights, constitutional criminal procedure, and the Dormant Commerce Clause had the Justices not regarded those cases as race cases and made rules to correct

¹²⁰ See *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

¹²¹ See *Baker v. Carr*, 369 U.S. 186, 279–89 (1962) (Frankfurter, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 590–625 (1964) (Harlan, J., dissenting).

¹²² See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 381 (1997).

¹²³ LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 490 (2000).

¹²⁴ See JACK BALKIN, LIVING ORIGINALISM 230–31 (2011); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

¹²⁵ See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995).

¹²⁶ See Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361 (2016).

¹²⁷ See *supra* notes 105–107 and accompanying text.

¹²⁸ 328 U.S. 373, 374, 386 (1946) (striking down on Dormant Commerce Clause grounds a Virginia law mandating segregation on interstate and intra-state motor cars).

both the breakdown of constitutional norms in the Jim Crow South and the constitutional failure of the elected branches of the national government to respond to that breakdown.¹²⁹ Contemporary constitutional civil rights law was forged in failure.

The Supreme Court has adjusted constitutional law when responding to acute constitutional failures, as well as the chronic failure of national, state, and local institutions to protect the rights of persons of color. During the Civil War, the Justices invented procedural mechanisms for avoiding ruling on the constitutional measures judicial majorities thought unconstitutional.¹³⁰ Most notably, in *Roosevelt v. Meyer*, the Justices when holding no jurisdiction existed to determine whether the Legal Tender Act of 1863 was constitutional, ignored the provision in the Judiciary Act of 1789 giving the Supreme Court jurisdiction whenever a state court denied a claim of federal right.¹³¹ When peace was restored and normal constitutional operations returned, the Justices immediately overruled *Roosevelt*.¹³² The justices did not need decades to assess whether a constitutional breakdown had occurred. The Civil War Court abandoned precedent shortly after a constitutional crisis began and restored the status quo shortly after the constitutional crisis ended.

V. FROM JIM CROW TO THE ANTI-PUBLIAN PRESIDENT

Brown, *Sullivan*, and other seminal decisions dismantling the segregated state provide the road map for constitutional responses to the Anti-Publian presidency of Donald Trump. Both Jim Crow and Trump's election occurred because constitutional institutions failed, whether the failure was inherent in the institutions themselves or in the people operating the constitutional institutions. Constitutional decision makers faced with constitutional failures, American history teaches, jettison rules of constitutional practice and constitutional interpretation rooted in assumptions that constitutional institutions are functioning normally. The Warren Court, when dismantling Jim

¹²⁹ See *supra* notes 115–123 and accompanying text.

¹³⁰ This paragraph summarizes Mark A. Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 33–66 (Ronald Kahn & Ken I. Kersch eds., 2006).

¹³¹ See *Roosevelt v. Meyer*, 68 U.S. 512, 517 (1863).

¹³² See *Trebilcock v. Wilson*, 79 U.S. 687, 687 (1871).

Crow, abandoned presumptions that former Confederate states were making good faith interpretations of the Equal Protection Clause. The Justices on that tribunal refused to defer to decisions made by white supremacists in circumstances that justified substantial deference to elected officials committed to constitutional norms. They did not assume good motives or rational decision making when segregationists claimed that separate but equal benefited persons of all races. While Donald Trump remains president, judges and other governing officials, when interpreting such exercises of executive power as the travel ban, the ban on transgendered persons in the armed forces, the withholding of federal funds from sanctuary cities and orders to prosecute Trump's political rivals should be similarly wary. They should assume that Trump is far more devoted to pandering to his base by keeping unconstitutional campaign promises rather than defer to post hoc accounts of the underlying facts invented by administration lawyers for litigation purposes only. No one should assume Trump is engaged in rational decision making in the public interest when he makes decisions that seem better explained by his family's financial interests or his desire to avoid criminal prosecution.

When an anti-Publican president runs for office repeatedly promising flagrant constitutional violations, courts should adopt the presumption that the efforts to implement that platform violate the Constitution until the program is redesigned in ways that eliminate unconstitutional features “root and branch.”¹³³ Donald Trump on the campaign trail declared he would prevent Muslims from immigrating to the United States.¹³⁴ His first travel ban looked suspiciously like a Muslim ban. President Trump declared the executive order a travel ban.¹³⁵ Lower courts were therefore correct in taking the President at his word rather than taking seriously the novel arguments administrative lawyers made in court when defending the constitutionality of the travel ban (“EO-2”). The Fourth Circuit, after pointing to

¹³³ *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968).

¹³⁴ These campaign statements are summarized in *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575–76 (4th Cir. 2017).

¹³⁵ Eugene Scott & Ariane de Vogue, *Trump says he's calling it a 'travel ban,'* CNN (June 5, 2017, 2:58 PM), <http://www.cnn.com/2017/06/05/politics/trump-travel-ban-courts/index.html> [<http://perma.cc/LNL3-TUHH>].

Donald Trump’s “numerous campaign statements expressing animus towards the Islamic faith” and “his proposal to ban Muslims from entering the United States,” concluded:

Plaintiffs have more than plausibly alleged that EO-2’s stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the “facially legitimate” reason proffered by the government is not “bona fide,” we no longer defer to that reason and instead may “look behind” EO-2.¹³⁶

Constitutional decision makers have no more reason to assume that Donald Trump’s executive orders are based on rational policy judgments than the Warren Court had to believe that segregated schools were grounded in reasonable pedagogy. The “minimum rationality” (or “rational basis”) test assumes a president (or other elected official) makes good faith efforts to pursue the common good or a plausible constitutional vision underlying the dominant political party.¹³⁷ A president who has demonstrated a fondness for white supremacists¹³⁸—more so than any other president since Woodrow Wilson left the White House—does not satisfy the conditions for deference on racial issues. A president who consistently puts his business interests ahead of the national interest¹³⁹ does not meet the standard for deference when a potential conflict of interest is present. When Trump issues an executive order on matters that trench on race or Trump family business interests, other constitutional decision makers ought to demand a set of probable facts that clearly support the order, and not be satisfied with rationales developed for litigation purposes by the White House legal staff that bear little resemblance to the actual justifications for the announced policy. Members of the White House legal staff may have a lawyer’s duty to be “zealous” in presenting all conceivable arguments in favor of their client, although whether lawyers who collect their paychecks from the United States instead of from

¹³⁶ *Int’l Refugee Assistance Project*, 857 F.3d at 591–92. For a similar argument, see Vicki Jackson & Judith Resnik, *Against Deference: Considering the Trump Travel Ban, Take Care* (Dec. 8, 2017), <https://takecareblog.com/blog/against-deference-considering-the-trump-travel-ban> [<http://perma.cc/YED5-63L7>].

¹³⁷ See *supra* notes 106–107 and accompanying text.

¹³⁸ See Bret Stephens, *President Jabberwock and the Jewish Right*, N.Y. TIMES (Aug. 19, 2017), <https://nyti.ms/2v9MUnk>.

¹³⁹ See Keith Whittington, *Possibly Impeachable Offenses: The Need for Congressional Investigation*, NISKANEN CENTER (Aug. 2, 2017), <https://niskanencenter.org/blog/possibly-impeachable-offenses/> [<http://perma.cc/DG7L-79NK>].

Donald Trump personally can be singularly devoted to their individual client instead of the interests of the American people is debatable. Those on the receiving end of such argument labor more clearly under no such duty.

Constitutional decision makers have no more reason for empowering Donald Trump to make complex policy decisions than they had to empower white supremacists to make decisions about race. The present delegation doctrine assumes a president has expertise or, more often, access to expertise on complex empirical and scientific questions.¹⁴⁰ A president who does not care to be informed on and routinely lies about basic domestic and foreign policy matters¹⁴¹ does not meet this standard for open-ended delegations. Courts should therefore require clear statements from Congress that the Trump administration is authorized to make a policy before permitting the administration to make that policy.

Many devices for disempowering the Trump administration apply standard judicial canons for avoiding constitutional litigation. Courts are expected to interpret statutes as not raising difficult constitutional problems, such as the scope of presidential authority, whenever possible. Justice Louis Brandeis, in *Ashwander v. Tennessee Valley Authority*, famously declared: “The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of.”¹⁴² Given the probability that Donald Trump’s executive orders are based on unconstitutional motives, engage in unconstitutional self-dealing, or do not meet constitutional standards for rational policy making, the judicial obligation to refrain from making unnecessary constitutional decisions should compel courts to require Congress to delegate clearly when Congress wishes to empower Donald Trump.

¹⁴⁰ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405 (1928).

¹⁴¹ See David Leonhardt & Stuart A. Thompson, *Trump’s Lies*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html?mcubz=0>; see also David Brooks, *Getting Trump Out of My Brain*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/opinion/getting-trump-out-of-my-brain.html?mcubz=0> (“There’s nothing more to be learned about Trump’s mixture of ignorance, insecurity and narcissism. Every second spent on his bluster is more degrading than informative.”).

¹⁴² *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936).

The constitutional universe will hardly fall apart should courts and other constitutional decision makers, explicitly or implicitly, engage in motive analysis, up the standard of scrutiny, and interpret statutes as not delegating power when adjudicating Trump Administration efforts to exercise Article II powers. The constitutional universe did not fall apart when the Supreme Court abandoned inherited practices in order to repair the constitutional breakdown caused when southern (and many northern) governing officials committed to white supremacy refused to make good faith interpretations of the Equal Protection Clause. The innocuous *Brown* opinion generated a healthy debate over what policies are entailed by a constitutional commitment to racial equality.¹⁴³ On some doctrinal matters, most notably free speech, courts have largely retained precedents that supported civil rights protestors and media coverage of the civil rights movement.¹⁴⁴ On other doctrinal matters, most notably state action, courts largely abandoned precedents that struck down Jim Crow practices when litigants sought to extend those decisions to non-racial matters.¹⁴⁵ On still other doctrinal matters, most notably constitutional criminal procedure, liberals and conservatives dispute whether rules put in force to prevent official racial abuses should remain in place today.¹⁴⁶

The Supreme Court's decision in *Shelby County, Alabama v. Holder*¹⁴⁷ illustrates how Supreme Court Justices debate the status of precedents that respond to constitutional failures. All parties to that case agreed that "[t]he Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem."¹⁴⁸ Chief Justice John Roberts began his opinion by recognizing that "racial discrimination in voting" was "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution," and that "exceptional conditions

¹⁴³ See Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939, 1004–08 (2008).

¹⁴⁴ See, e.g., *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852 (2014).

¹⁴⁵ See Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 L. & SOC. INQUIRY 273, 276–77 (2010).

¹⁴⁶ See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

¹⁴⁷ 133 S. Ct. 2612 (2013).

¹⁴⁸ *Id.* at 2618.

can justify legislative measures not otherwise appropriate.”¹⁴⁹ Roberts then announced that the test originally adopted by Congress when passing the seminal Voting Rights Act of 1965 that triggered what might well be called “strict scrutiny” by the Justice Department over any changes in voting laws by states was no longer needed in 2013, and therefore had become unconstitutional as an unnecessary incursion on state autonomy.¹⁵⁰ Justice Ginsburg insisted that the prophylactic rules adopted by Congress in 1965 still made sense and that the judicial policy of deferring to Congressional judgment as to the remedies for voting discrimination should be maintained.¹⁵¹ Both Roberts and Ginsburg endorsed judicial decisions that adjusted constitutional doctrine in response to failures within the constitutional order. They disputed only whether those failures had been corrected and whether doctrine forged in constitutional failure ought to be maintained for the foreseeable future.¹⁵²

The dispute between Roberts and Ginsburg in *Shelby County* highlights how the present question is not whether limits on the singular presidency of Donald Trump should apply forever to all future presidents. Future constitutional decision makers may conclude that both Trump and the rules used to constrain Trump were temporary aberrations or they may conclude that Trump represented a more enduring change in the American constitutional order that requires more enduring doctrinal adjustments. “Adaptation” by definition must be responsive to circumstances, but what those circumstances are and whether they warrant adaption is always controversial. The question is when what appears to be “settled doctrines” warrant some degree of “unsettlement” in light of what may be temporary aberrations or enduring changes in a constitutional order. If judicial decisions limiting the power of the Trump Administration unsettle constitutional law a bit, that may be a good thing,¹⁵³ reminding us of the continuing wisdom of Justice Holmes’s placement of

¹⁴⁹ *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 334 (1966)).

¹⁵⁰ *Id.* at 2631.

¹⁵¹ *Id.* at 2652 (Ginsburg, J., dissenting).

¹⁵² Compare *id.* at 2625 (“Nearly 50 years later, things have changed dramatically.”), with *id.* at 2634 (Ginsburg, J., dissenting) (noting ongoing “second generation barriers’ to minority voting”).

¹⁵³ See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 6–8 (2001).

“experience” over “logic” as the most important motivating force for an effective legal order.¹⁵⁴

CONCLUSION

Clinton Rossiter some seventy years ago published a truly important and disturbing book on the phenomenon of what he called “constitutional dictatorship.”¹⁵⁵ Drawing in his American chapter primarily on Lincoln, Wilson, and Roosevelt, he argued that in times of crisis, the United States, like Great Britain, France, and Germany (and ancient Rome), placed near-plenary power in their leaders to confront perceived crises.¹⁵⁶ Rossiter dismissed any argument that we could in fact eliminate the need for “constitutional dictatorship.”¹⁵⁷ That would require eliminating the presence of emergencies or crises that elicited displays of what could, under ordinary times, be described as presidential overreaching. Contemporary presidential power is here to stay, even if modified to some degree. More than ever, we have good reason to ask about the trustworthiness of presidents in whose hands we necessarily place immense powers that quite literally touch on national and world survival.

Problems with presidential impeachments, as well as the enormous power of the president, further support our claims that non-Publian presidents ought not be trusted with Publian powers. An August poll revealed that forty-three percent of those surveyed support Trump’s impeachment, with twelve percent supporting censure by Congress.¹⁵⁸ By October 31st, according to Public Policy Polling, the number had climbed to forty-nine percent, with only forty-one percent opposed.¹⁵⁹ Still, this solution is close to a fantasy. Whether one believes that the framers in Philadelphia explicitly rejected making

¹⁵⁴ See OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Am. Bar Ass’n ed. 1881).

¹⁵⁵ See generally CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1979); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 *MINN. L. REV.* 1789 (2010).

¹⁵⁶ ROSSITER, *supra* note 155, at 207–314.

¹⁵⁷ *Id.*

¹⁵⁸ Tom O’Connor, *Trump Impeachment Is Most Popular Solution Among Americans, Poll Says*, *NEWSWEEK* (Aug. 26, 2017, 8:00 AM), <http://www.newsweek.com/trump-impeachment-most-popular-solution-americans-655556> [<http://perma.cc/ZY36-SSVX>].

¹⁵⁹ See *Support for Impeachment at Record High*, *PUBLIC POLICY POLLING* (Oct. 31, 2017), <https://www.publicpolicypolling.com/polls/support-impeachment-record-high/> [<http://perma.cc/YU4N-2TYA>].

administrative “malfeasance” a ground for impeachment,¹⁶⁰ or instead simply thinks Republicans in Congress—out of party loyalty or fear of their base—will not impeach for political malfeasance,¹⁶¹ advocating impeachment or invoking the Twenty-fifth Amendment at present is a form of expressive politics unresponsive to the constitutional problems presented by a lawless chief law enforcement officer of the land and a Commander-in-Chief who lacks the emotional maturity to toss off even trivial slights.

One possible argument against our claim that the constitutional powers of the president are not indifferent to the officeholder is the possibility that the Framers of the Constitution, fearing human infallibility, drew firm lines in the sand. This constitution is one of fixed rules because human beings are tempted to abuse power otherwise.¹⁶² The Constitution of the United States “view[s] the abuse of power as the paramount evil,” Frederick Schauer maintains, and “thus choose[s] to minimize the occasions on which the abuse of power is not blocked, even at the cost of . . . imped[ing] the pursuit of the Good.”¹⁶³ Those who take this view believe that even if acting on the consensual view that President Trump is unfit to hold office will have good short-term consequences, constitutional rules should be woodenly followed because in the long run, constitutional decision makers are more likely to misuse, rather than properly use, authority to constrain a president they believe a menace to constitutional government and perhaps to regime and human survival.¹⁶⁴

¹⁶⁰ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 114–15 (2006).

¹⁶¹ For an argument that Congress may impeach for political malfeasance, see Whittington, *supra* note 139.

¹⁶² See SANFORD LEVINSON, *FRAMED* 21 (2012).

¹⁶³ Frederick Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 50 (1987).

¹⁶⁴ See Jonathan Turley, *What’s worse than leaving Trump in office? Impeaching him.*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/24/whats-worse-than-leaving-trump-in-office-impeaching-him/?utm_term=.10c28cfd40 [<http://perma.cc/8T96-H3RC>] for a fine example of such woodenness. Turley fears that impeaching Trump, at least on the basis of what is known about him as of late August 2017, “would fundamentally alter the presidency, potentially setting up future presidents to face impeachment inquiries or even removal whenever the political winds shifted against them.” *Id.* Turley does not provide any reason for thinking Trump is fit to hold office. He does not deny, for example, that the Constitution of the United States presently entrusts a president who cannot ignore the most trivial insult with the power to begin a nuclear war. Turley’s argument, an example of neutral

The problem with interpreting constitutional powers as officeholder-indifferent is that *The Federalist Papers* make clear that the Constitution of fixed rules is not the Constitution of the United States. The fixed rules that comprise what Levinson terms the “Constitution of Settlement” concern the rules for staffing offices and making laws.¹⁶⁵ The powers of each branch of the national government are as much a part of what Levinson terms the “Constitution of Conversation” as the “majestic generalities” of the Fourteenth Amendment.¹⁶⁶ Some constitutional rules explain why presidents are elected like clockwork every four years.¹⁶⁷ Other constitutional provisions explain why presidential power varies considerably over time and with each president; Franklin Roosevelt and Ronald Reagan were given far more deference by other officeholders than Herbert Hoover or Andrew Johnson.¹⁶⁸ Treating Donald Trump as a normal president exercising normal Article II powers would be a far greater break from this historical practice than recognizing that a bigoted, ignorant liar should not be accorded the same deference as a president who might plausibly claim to be “pre-eminent for ability and virtue.”¹⁶⁹

The obvious question in 2018 is whether realists committed to an experience-based politics should expect highly partisan members of Congress—and judges who are increasingly themselves identify with a single political party—to play their Publian role. That the answer may be no speaks to what Jack Balkin has termed “constitutional rot,”¹⁷⁰ not to the underlying presuppositions of the Publian constitutional order that, paradoxically or not, most Americans profess to respect. The strongest response to our argument is that (almost) no one today

principles run riot, is equivalent to the claim that Congress should not ban human sacrifices for fear of creating a precedent that might empower the national legislature in the future to ban religion.

¹⁶⁵ Levinson, *supra* note 162, at 19.

¹⁶⁶ *Id.* at 278.

¹⁶⁷ U.S. CONST. art. II, § 1.

¹⁶⁸ For studies demonstrating variance in presidential power over time and between presidents, see generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993); JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* (1972).

¹⁶⁹ THE FEDERALIST NO. 68, at 460–61 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁷⁰ Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. (forthcoming 2018).

takes truly seriously the notion of civic virtue and organizing our polity around it. That idea, associated with “civic republicanism,” was replaced by a much more “liberal” notion of politics that accepts the basic reality that all of us are motivated primarily by self-interest and unable (or, at least, unlikely) genuinely to tame those impulses in behalf of some evanescent idea of the “public interest” when the common good conflicts with our interests.¹⁷¹ One can find strong hints of this view in *Federalist* No. 10, perhaps the most canonical of all of the eighty-five *Federalist* essays. Down that road lies the Holmesian “bad man,” who looks at law simply as a price system that announces the costs of legal non-compliance, which assumes, of course, that the law will in fact be enforced.¹⁷² From one perspective, Trump is simply the latest exemplar of the “bad man” who in effect now constitutes our political order.

Recent events nevertheless suggest that, outside of Congress, other government officials are implicitly recognizing that Trump is not entitled to the same Article II prerogatives as presidents constitutionally fit for office. Military officials have not blindly followed presidential orders or have suggested they may refuse when they doubt presidential authority. Secretary of Defense James Mathis and other military leaders dragged their feet or flatly refused to implement Trump’s Twitter order banning transgendered patriots from serving in the armed forces.¹⁷³ General John Hyten, the head of the U.S. Strategic Command, declared that he will not automatically obey a presidential order to use nuclear weapons.¹⁷⁴ Lower federal courts have been unusually stingy with presidential authority. Within weeks of Trump’s taking office, Benjamin Wittes and

¹⁷¹ The seminal work on classical republicanism is JOHN GREVILLE AGARD POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975). For discussions of the differences between constitutional republicanism and constitutional liberalism, see Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493 (1988); and Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

¹⁷² See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897).

¹⁷³ See Travis J. Tritten, *Coast Guard commandant signals he will resist Trump’s military transgender ban*, *WASH. EXAMINER* (Aug. 1, 2017), <http://www.washingtonexaminer.com/coast-guard-commandant-signals-he-will-resist-trumps-military-transgender-ban/article/2630294> [<http://perma.cc/N4PV-UW8G>].

¹⁷⁴ Daniella Diaz, *Top general says he’d push back against “illegal” nuclear strike order*, *CNN* (Nov. 20, 2017, 5:07 PM), <http://www.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html> [<http://perma.cc/Q774-RNU6>].

Quinta Jurecic observed “a large number of judges around the country behav[ing] in a fashion untouched by deference or any kind of presumption of regularity in the President’s behavior[.]”¹⁷⁵ Federal courts have repeatedly found constitutional fault with Trump’s travel bans.¹⁷⁶ Federal District Court Judge William Orrick recently granted a permanent injunction prohibiting the Trump Administration’s efforts from denying federal funding to sanctuary cities.¹⁷⁷ Wittes and Jurecic suggest the “unprecedented barrage of leaks that has plagued the Trump administration” reflects common understandings that Trump is unfit for office.¹⁷⁸ “[W]hen the bureaucracy doubts the president’s oath,” they write, “that fact gravely frays the executive’s ordinary comparative unity. The people who work for the president no longer connect loyalty to the executive branch with the lofty goals to which the oath seeks to bind the president, so they become much more likely to act on their own.”¹⁷⁹ No military officer, judge, or leaker has justified his or her actions by claiming that Trump lacks the executive powers of previous presidents.¹⁸⁰ Nevertheless, the lack of deference to presidential authority that persons outside of Congress have demonstrated in Trump’s first year seems unprecedented.

Perhaps we are wrong about Donald Trump. Perhaps we are wrong about whether constitutional powers are indifferent to the officeholder. We are not wrong in thinking that the political order in the United States is in a severe state of constitutional rot.¹⁸¹ We hope with this paper to provoke specific constitutional conversations about the powers of an anti-Publican president, more general conversations about constitutional practice and interpretation during times of severe constitutional failures, and even more general conversations about whether the path to a more functional constitutional order lies in fixing our

¹⁷⁵ Benjamin Wittes & Quinta Jurecic, *What Happens When We Don’t Believe the President’s Oath*, LAWFARE (Mar. 3, 2017, 12:30 PM), <https://www.lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath> [<http://perma.cc/YZ8T-F9FH>].

¹⁷⁶ See *supra* notes 134–136 and accompanying text.

¹⁷⁷ See *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d. 497 (N.D. Cal. 2017).

¹⁷⁸ Wittes & Jurecic, *supra* note 175.

¹⁷⁹ *Id.* Wittes and Jurecic further observe that when a “large number of people in the press cannot start with the presumption that the president is making a good faith effort to do his job . . . the press no longer presumes that any presidential statement is true.” *Id.*

¹⁸⁰ Or, alas, cited a draft of this essay!

¹⁸¹ See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, U. MD. L. REV. (forthcoming 2018) (manuscript at 5–9, 11–13).

constitutional order through better interpretations of constitutional provisions, changes in the constitutional culture responsible for the anti-Publian president, or changes in the constitutional text that generated the anti-Publian president.

