



Chapman Law Review

Volume 21

Board of Editors

2017–2018

Executive Board

Editor-in-Chief

LAUREN K. FITZPATRICK

Managing Editor

RYAN W. COOPER

Senior Articles Editors

SUNEETA H. ISRANI
TAYLOR A. KENDZIERSKI
CLARE M. WERNET

Senior Symposium Editor

CINDY PARK

Production Editor

MARISSA N. HAMILTON

Senior Notes & Comments Editor

TAYLOR B. BROWN

Senior Submissions & Online Editor

ALBERTO WILCHES

Articles Editors

ASHLEY C. ANDERSON
ARLENE GALARZA
NATALIE M. GAONA
ANAM A. JAVED

KRISTEN N. KOVACICH
STEVEN L. RIMMER
AMANDA M. SHAUGHNESSY-FORD
DAMION M. YOUNG

Staff Editors

RAYMOND AUBELE
CARLOS BACIO
HOPE C. BLAIN
GEORGE E. BRIETIGAM
KATHERINE A. BURGESS
KYLEY S. CHELWICK

AMY N. HUDACK
MEGAN A. LEE
DANTE P. LOGIE
DRAKE A. MIRSCH
MARLENA MLYNARSKA
NICHOLE N. MOVASSAGHI

JAMIE L. RICE
JAMIE L. TRAXLER
BRANDON R. SALVATIERRA
HANNAH B. STETSON
SYDNEY L. WEST

Faculty Advisor

CELESTINE MCCONVILLE, *Professor of Law*

CHAPMAN UNIVERSITY
ADMINISTRATION

DANIELE C. STRUPPA
President

GLENN M. PFEIFFER
*Provost and Executive Vice
President for Academic Affairs*

HAROLD W. HEWITT, JR.
*Executive Vice President and Chief
Operating Officer*

SHERYL A. BOURGEOIS
*Executive Vice President for
University Advancement*

HELEN NORRIS
*Vice President and Chief
Information Officer*

THOMAS C. PIECHOTA
Vice President for Research

BOARD OF TRUSTEES

WYLIE A. AITKEN, *Chair*
ZEINAB H. DABBAH (JD '12),
Vice Chair
PARKER KENNEDY, *Vice Chair*
JOANN LEATHERBY, *Vice Chair*
JAMES MAZZO, *Vice Chair*
SCOTT CHAPMAN, *Secretary*
ZELMA M. ALLRED, *Assistant
Secretary*
GUY AMBRAMO
RICHARD AFABLE
LISA ARGYROS '07
DONNA FORD ATTALLAH '61
RAJ S. BHATHAL
JAMES P. BURRA
MICHAEL J. CARVER
PHILLIP H. CASE
AKIN CEYLAN '90
IRVING M. CHASE

HAZEM H. CHEHABI
JEROME W. CWIERTNIA
DALE E. FOWLER '58
BARRY GOLDFARB
STAN HARRELSON
GAVIN S. HERBERT, JR.
WILLIAM K. HOOD
ANDY HOROWITZ
MARK CHAPIN JOHNSON '05
JENNIFER L. KELLER
THOMAS E. MALLOY
SEBASTIAN PAUL MUSCO
RICHARD MUTH (MBA '05)
JAMES J. PETERSON
HARRY S. RINKER
JAMES B. ROSZAK
THE HONORABLE LORETTA
SANCHEZ '82
MOHINDAR S. SANDHU
RONALD M. SIMON
RONALD E. SODERLING
KAREN R. WILKINSON '69
DAVID W. WILSON

EMERITUS CHAIRS

THE HONORABLE GEORGE L.
ARGYROS '59
DOY B. HENLEY
DAVID A. JAMES, SR.
DONALD E. SODARO

EMERITUS TRUSTEES

RICHARD BERTEA
LYNN HIRSCH BOOTH
ARLENE R. CRAIG
J. BEN CROWELL
ROBERT A. ELLIOTT
DAVID C. HENLEY
ROGER C. HOBBS
JACK B. LINDQUIST
RANDALL R. MCCARDLE '58 (M.A. '66)
CECILIA PRESLEY
BARRY RODGERS

RICHARD R. SCHMID
R. DAVID THRESHIE

EX-OFFICIO TRUSTEES

CONNIE BENSON '93
REVEREND LA TAUNYA BYNUM '76
REVEREND DON DEWEY
BARBARA EIDSON
NANCY FLEEMAN '86
REVEREND DAYNA KINKADE
MELINDA M. MASSON
DANIELE C. STRUPPA
REVEREND FELIX VILLANUEVA

BOARD OF ADVISORS

PARKER KENNEDY, *Chair*
WYLIE A. AITKEN
ROBERT ALVARADO
KAY ANDERLE
PHILLIP H. CASE
BOB CURRIE
ZEINAB H. DABBAH, M.D. (JD '12)
JOHN R. EVANS
WOLFGANG FRISCH '97 (JD '00)
THE HONORABLE RICHARD D.
FYBEL
THE HONORABLE ANDREW J.
GUILFORD
THE HONORABLE W. MICHAEL
HAYES
DOY B. HENLEY
THE HONORABLE PHILIP K.
MAUTINO
THE HONORABLE LAYNE H.
MELZER
ROBERT E. MURDOCK
DAVID MURPHY
THOMAS D. PHELPS
STEVEN P. RUDEN (JD '05)

SCHOOL OF LAW
ADMINISTRATION

MATTHEW J. PARLOW
*Dean and Donald P. Kennedy
Chair in Law*

MARISA S. CIANCIARULO
*Associate Dean for Academic
Affairs and Professor of Law*

JAYNE TAYLOR KACER
Associate Dean for Student Affairs

DONALD J. KOCHAN
*Parker S. Kennedy Professor in
Law and Associate Dean for
Research & Faculty Development*

AMY ROGAN-MEHTA
Associate Dean for Administration

JUSTIN CRUZ
*Assistant Dean of Admissions and
Diversity Initiatives*

LINDA KAWAGUCHI
*Hugh and Hazel Darling
Foundation Library Director and
Professor of Law*

RICHARD FAULKNER
*Director of Academic Achievement
Program and Assistant Professor*

RONALD L. STEINER
*Director of Law Graduate
Programs and Professor*

GEORGE WILLIS
*Director of the Tax Law Clinic,
Associate Professor, and
Administrator of the Graduate Tax
Programs*

MARYAM ISLES
Registrar

KELLY FARANO
Business Manager

LAW SCHOOL FACULTY

DEEPA BADRINARAYANA
Professor of Law

RITA BARNETT-ROSE
Professor of Legal Research and Writing

MICHAEL BAZYLER
Professor of Law and 1939 Society Law Scholar in Holocaust and Human Rights Studies

THOMAS W. BELL
Professor of Law

DENIS BINDER
Professor of Law

DANIEL BOGART
Bolinger Chair in Real Estate, Land Use, and Environmental Law

DR. THOMAS CAMPBELL
Professor of Law

LAN CAO
Betty Hutton Williams Professor of International Economic Law

JENNY CAREY
Professor of Legal Research and Writing

ANTHONY T. CASO
Professor, Clinical Faculty

MARISA S. CIANCIARULO
Professor of Law and Associate Dean of Academic Affairs

BOBBY DEXTER
Professor of Law

FRANK J. DOTI
William P. Foley II Chair in Corporate Law and Taxation

DAVID DOWLING
Professor, Clinical Faculty

DR. JOHN EASTMAN
Henry Salvatori Professor of Law and Community Service, Former Dean (2007-2010), and Director of the Center for Constitutional Jurisprudence

KURT EGGERT
Professor of Law and Director of the Alona Cortese Elder Law Center

RICK FAULKNER
Associate Professor and Director of Academic Achievement

JUDD FUNK
Professor, Entertainment Law Faculty

DR. JOHN A. HALL
Professor of Law and Director of International Law Emphasis Program

KATHY HELLER
Associate Professor of the Practice of Law and Executive Director of the Entertainment Law Emphasis Program

ERNESTO HERNANDEZ
Professor of Law

HUGH HEWITT
Professor of Law

SCOTT W. HOWE
*Frank L. Williams Professor of
Criminal Law*

LINDA KAWAGUCHI
*Professor of Law and Director of
the Hugh and Hazel Darling
Foundation Law Library*

JANINE KIM
Professor of Law

DONALD J. KOCHAN
*Associate Dean for Research and
Faculty Development and Parker
S. Kennedy Professor in Law*

MICHAEL LANG
Professor of Law

CAROLYN LARMORE
*Professor of the Practice of Law,
and Director of the Externship
Program*

STEPHANIE LASCELLES
*Associate Professor of Legal
Research and Writing*

LISA LITWILLER
Professor of Law

MARIO MAINERO
*Professor of Academic Achievement
and Executive Director of Bar
Preparation and Academic
Achievement*

JULIE MARZOUK
*Assistant Professor, Clinical
Faculty, and Co-Director of the
Bette and Wylie Aitken Family
Protection Clinic*

CELESTINE MCCONVILLE
Professor of Law

HENRY NOYES
Professor of Law

MATTHEW J. PARLOW
*Dean of Fowler School of Law and
Donald P. Kennedy Chair in Law*

ABIGAIL PATTHOFF
*Professor of Legal Research and
Writing*

DR. RICHARD REDDING
*Professor of Law and Vice Provost
for Graduate Education*

SUSANNA K. RIPKEN
Professor of Law

LAWRENCE ROSENTHAL
Professor of Law

RONALD D. ROTUNDA
*Doy and Dee Henley Chair and
Distinguished Professor of
Jurisprudence*

MARY LEE RYAN
*Professor, Entertainment Law
Faculty*

NANCY SCHULTZ
*Professor of Law and Director of
Competitions and Alternative
Dispute Resolution Program*

WENDY M. SEIDEN
*Professor, Clinical Faculty, and
Co-Director of the Bette and Wylie
Aitken Family Protection Clinic*

SANDRA W. SKAHEN
*Associate Professor, Clinical
Faculty*

DR. VERNON L. SMITH
*George L. Argyros Endowed Chair
in Finance and Economics and
Professor of Economics and Law*

KENNETH STAHL
*Professor of Law and Director of
the Environmental, Land Use, and
Real Estate Law Program*

DR. WILLIAM STALLWORTH
Professor of Law Emeritus

DR. RONALD L. STEINER
*Professor and Director of Law
Graduate Programs*

DR. PARHAM H. WILLIAMS, JR.
Dean and Professor Emeritus

GEORGE WILLIS
*Professor, Clinical Faculty and
Director of the Tax Law Clinic*

DR. BART J. WILSON
*Donald P. Kennedy Chair of
Economics and Law*



Chapman Law Review

Volume 21

Winter 2018

Number 1

© 2018 by Chapman Law Review

SYMPOSIUM: CONSTRAINING THE EXECUTIVE

Introduction to Constraining the Executive <i>Tom Campbell</i>	1
Constraining Moses: Rethinking Thanksgiving Day Proclamations <i>Paul Baumgardner</i>	19
Promoting Executive Accountability Through <i>Qui Tam</i> Legislation <i>Randy Beck</i>	41
Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place <i>Neal Devins</i>	55
State Standing to Constrain the President <i>F. Andrew Hessick and William P. Marshall</i>	83
Representative/Senator Trump? <i>Gary Lawson</i>	111
The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order <i>Sanford Levinson and Mark A. Graber</i>	133

War Powers Litigation After <i>Zivotofsky v. Clinton</i> <i>Michael D. Ramsey</i>	177
Franklin Roosevelt and Presidential Power <i>John Yoo</i>	205

Editor's Note

It is my honor to introduce *Chapman Law Review's* first issue of Volume 21. This issue consists of our "paper-only symposium," a collection of scholarly works discussing "Constraining the Executive," that features eight articles discussing if, and how, constraining the executive is appropriate.

The issue opens with a thought-provoking introduction by Professor Tom Campbell that provides insight into the creation of this written symposium and the articles in the collection, while also challenging the propositions advanced through this scholarship. The articles thereafter highlight each author's unique and compelling insight into, and proposals for, executive constraint. Mr. Paul Baumgardner begins the conversation by focusing on one specific way to constrain the executive—Thanksgiving Proclamations. Professor Randy Beck explains *qui tam* actions and how they should be expanded to allow Congress, when necessary, to legislate private standing in order to constrain the executive. Professor Neal Devins argues against congressional standing and argues that the judiciary's role in checking the executive branch should not be expanded when Congress fails to check the president itself. Professors Andrew Hessick and William Marshall focus on creating easier standing requirements for states as plaintiffs to bring lawsuits against the president in order to check executive authority.

Professor Gary Lawson suggests that the executive should constrain itself by, among other means, vetoing laws that grant the executive branch authority and appointing federal judges to return the executive branch to the limits that Professor Lawson believes the Framers intended. Professors Sanford Levinson and Mark Graber argue that rules of judicial deference to the executive depend on the qualities of the president currently in office; a president who is anti-Publican (i.e., lacking the virtues of Publius) should be given less deference by the judiciary, and justiciability constraints against the president should not apply. Professor Michael Ramsey focuses on *Zivotofsky v. Kerry* and its implications for constraining the executive through litigation in regards to foreign affairs decisions. Finally, Professor John Yoo wraps up our symposium by addressing Franklin D. Roosevelt's presidency and using it as an example of the benefits that occur when executive action is not constrained.

Chapman Law Review is grateful for the continued support of the members of the administration and faculty that made this written symposium and the publication of this issue possible, including: Dean of Chapman University Dale E. Fowler School of Law, Matthew Parlow; our faculty advisor, Professor Celestine McConville; and our faculty advisory committee, Professors Deepa Badrinarayana, Michael Bayzler, John Hall, Janine Kim, and Associate Dean of Research and Faculty Development, Donald Kochan. We would especially like to thank Professor Tom Campbell for his guidance and assistance with this issue—from his efforts in developing the topic and recruiting scholars, to his personal contribution to the discourse on “Constraining the Executive.” Finally, I would like to personally thank the *Chapman Law Review* editors for their tireless efforts in completing this volume.

Lauren Fitzpatrick
Editor-in-Chief

Introduction to Constraining the Executive

*Tom Campbell**

The essays in this symposium illuminate aspects of the task of keeping the executive branch within its constitutionally appointed boundaries. The symposium was conceived before the 2016 elections, so its plan was not directed toward the current president. Nevertheless, it is inescapable that, writing after those elections, the authors took recent developments into account.¹ The lessons to be learned from these essays, however, have more permanent application than simply for the immediate present. In this introduction, I review the articles of the symposium hoping to highlight the valuable contribution to separation of powers jurisprudence that each offers for the long term.

This symposium focuses on *means* of constraining the executive. There is, of course, a vibrant recent literature on what constitutes the kind of executive overreach in need of being constrained.² This symposium takes as given that there have been, and will be, instances of executive action or inaction needing restraint (without becoming embroiled in the specifics of any specific example), and turns its attention to what institutional remedies may be available.

A. Constraining the Executive Through the Courts

The courts are the logical place to seek relief when the executive's action needs to be constrained. However, standing requirements might preclude identifying any plaintiff qualified to bring a case under Article III's case or controversy requirement.

* Professor of Law, Dale E. Fowler School of Law; Professor of Economics, George L. Argyros School of Business and Economics, Chapman University. I am grateful for expert research assistance by Ms. Sherry Levsen, J.D., M.L.S., M.A., of the Hugh and Hazel Darling Law Library, Chapman University.

¹ In one instance, that of Levinson and Graber's article, their entire point of departure deals with the specifics of President Trump, though they propose a set of judicial responses that would apply to future presidents with characteristics similar to his.

² See, e.g., Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 *FORDHAM L. REV.* 1199 (2017); contra Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1 (2017).

Four of the articles in this symposium recommend ways to expand how cases challenging the president can be brought in federal court.

1. Professor Randy Beck

Drawing from historical precedent, Professor Randy Beck proposes a broader use of *qui tam* actions. Such actions are already available in American courts under the False Claims Act.³ Under that approach, when money is owed to the federal government, and a private party draws that fact to the executive's attention but the executive fails to pursue the claim, the private party can proceed, keeping a portion of any funds recovered. It is like a whistleblower statute combined with a finder's fee.

The *qui tam* plaintiff has standing because she or he has a percentage of potential money damages to be gained. A good example here is the Antideficiency Act, where criminal penalties can be imposed on an executive officer who spends government money without authorization.⁴ If a private citizen uncovers an unauthorized expenditure of money by an employee of the federal executive branch, that private citizen can bring a *qui tam* action to collect the unauthorized payment back to the federal treasury, minus a share which the private plaintiff gets to keep.

Elsewhere, I have suggested *qui tam* as a way to get before a federal judge the issue of the legality of a war carried on by the executive without the approval of Congress,⁵ where money was spent on expenses of such a war. Beck would allow Congress to go even further. In connection with any specific duty or prohibition imposed on the executive by statute, Congress could add a penalty provision, owed to the U.S. Treasury, by an executive officer who fails in her or his duty. Beck would thus allow Congress to legislate private standing in almost any context it might wish to constrain the executive through the simple expedient of specifying a sum of money an executive agent would owe the government, if found to be deficient in her or his duties under that statute. The *qui tam* plaintiff would thus distinguish herself or himself from the large mass of citizens by her or his interest in a share of that sum.

I see no fault with the logic that this creates a case or controversy regarding the *qui tam* claimant that sets her or him

³ 31 U.S.C. §§ 3729–33 (2012).

⁴ See 31 U.S.C. § 1518 (removal from office); § 1519 (fine and imprisonment); § 1341 (predicate).

⁵ Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 585 (2017).

apart from the average citizen. Unlike *qui tam* actions under the False Claims Act, however, Beck's expanded recourse to *qui tam* does not start with a pre-existing sum of money which is, by hypothesis, owed to the government. That "res" constitutes the case or controversy for Article III purposes.⁶ The *qui tam* statute merely expands the number of persons with a specific interest in that "res." Can Congress both create the "res" and the class of persons with a specific interest in it? Beck maintains from historical precedent that this can be done, and was done, often, in British jurisprudence, going back to the fourteenth century. He maintains that several American states have done the same, including when they were colonies. Legislatures essentially harnessed private energies to enforce duties on public officials by imposing a fine on failure to fulfill such duties and letting the private party share in the fine.

Beck realizes other jurisprudential doctrines, especially the political question doctrine, might yet shield executive action or inaction from judicial scrutiny. He also perceives a danger in over-zealous use of the device he is advancing: executive agents might be chilled in the conscientious performance of their duty by the risk of personal liability. That risk, presumably, would be taken into account as Congress decided the set of executive actions or inactions in regard to which the expanded *qui tam* claims could be brought. Beck suggests three, from recent public events: waging war without Congressional authorization, failing to preserve government emails as government records, and not spending money the Congress has appropriated.

Is there a limit to what Beck proposes? At what point would the Supreme Court say Congress could not create standing where none existed before just by monetizing an executive duty? How to articulate a constraining principle is the weakness in Beck's proposal—though one might view it as a strength, in that no action of the executive would be able to evade judicial review (at least on standing grounds) when the Congress put its mind to so subjecting it.⁷

2. Professors Andrew Hessick and William Marshall

Professors Andrew Hessick and William Marshall also seek to constrain the executive by greater access to the judicial

⁶ See *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (referring to the focus of the False Claims Act on a financial loss to the government).

⁷ Of course, any Congressional bill creating the *qui tam* action might be vetoed, so Beck's remedy would require a two-thirds consensus of both houses of Congress. While not a constraining substantive principle, that does constitute a practical constraint on over-use of Beck's imaginative idea.

branch. In their article, they recommend easier standing requirements for states as plaintiffs. They view litigation of the type brought by twenty-six states against President Obama's "Deferred Action for Parents of Americans" ("DAPA") as a salubrious mechanism for checking executive authority (in that case, executive inaction)—whether a court ends up siding with the president or not.

States as plaintiffs hold advantages over Congress, in Hessick and Marshall's view, because Congress has declined markedly in its vigorous vindication of legislative prerogatives, becoming instead an instrument of partisanship.⁸ A Republican Congress will challenge a Democratic president, but not a Republican one, and vice versa. Of course, the same could be said of state attorneys general and governors, so Hessick and Marshall suggest a form of discretion in judicial rulings on standing that would incorporate whether a bipartisan mix of states' governors or attorneys general were bringing the suit. If such a group of states brings suit, then Hessick and Marshall would ease the standing requirement of "injury in fact" to allow a more speculative kind of injury to be pled, as in *Massachusetts v. Environmental Protection Agency*,⁹ a case where, they maintain, a private party's fear of rising sea levels from global warming would have been insufficient to establish standing.

Are Hessick and Marshall justified in claiming that states have a unique kind of interest, deserving relaxed standing requirements? They recognize the sovereign interest of states to oppose being turned into instruments of the federal government. That was the situation in one part of the challenge to the Affordable Care Act/Obamacare ("ACA") that prevailed before the Supreme Court.¹⁰ There is also the non-sovereign interest that the states have in suing on behalf of their citizens for their citizens' harm, in *parens patriae* actions.¹¹ What they see in addition to these established forms of standing is the states' interest in constraining any federal action (not just presidential action) because federal action will preempt state authority.¹²

⁸ For an in-depth development of the same theme, see Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOBAL LEGAL STUD. 369 (2017).

⁹ 549 U.S. 497 (2007).

¹⁰ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

¹¹ See 15 U.S.C. § 15c (West 2018).

¹² In Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017), Professor Nash explores the concept of a state having special standing when the federal government has legislatively preempted a subject area, but then the federal executive fails to vindicate that interest. Hessick and Marshall's insight is a similar one.

They note states have a legitimacy that private parties do not because of democratic accountability; and they further applaud the development of expertise and judgment from the recurring nature of this kind of litigation involving state actors, as opposed to any private party in a given case.

Yet the same might be said of Congress. Any upholding of presidential action in an area of shared authority cuts back what Congress could do absent the president's action. That affects Congressional prerogatives as much as upholding a presidential action in an area of potential state authority does the state's prerogatives. If getting many states on board confers legitimacy, so also might legitimacy be found for a suit by a house of Congress not brought just by a few members, but sanctioned by a resolution from the house of Congress bringing the lawsuit, as occurred in *U.S. House of Representatives v. Burwell* (originally filed as *Boehner v. Burwell*) (challenging the payments to insurance companies under ACA as not having been appropriated).¹³

Also similar to Hessick and Marshall's argument for the states as parties, the House or Senate, too, will develop expertise over the years, if permitted standing to challenge executive authority. Hessick and Marshall's preference for empowering states, rather than Congress, to sue the executive, thus comes down to a reluctance to weigh in on the side of Congress in balance of powers issues, and a correlative willingness to weigh in on the side of states in federalism issues, at least where the group of states presenting the challenge is bipartisan.

For many years, the D.C. Circuit applied a doctrine of equitable discretion to allow suits by members of Congress in some circumstances.¹⁴ *Raines v. Byrd* appeared to end that route for Congressional standing,¹⁵ but the Court recently opened a new avenue for state legislators to sue agencies of state government in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹⁶ distinguishing suits by state legislatures from those by Congress.¹⁷ The Court identified the same concern based on separation of powers that Hessick and

¹³ See *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 169 (D.D.C. 2016).

¹⁴ See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 880–81 (D.C. Cir. 1981), *cert denied*, 454 U.S. 1082 (1981); see also Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990).

¹⁵ *Raines v. Byrd*, 521 U.S. 811, 818–29 (1997).

¹⁶ 135 S. Ct. 2652 (2015).

¹⁷ *Id.* at 2665 n.12. Regarding the revived standing of states to sue the federal executive for violations of federal legislative prerogatives, see Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism,"* 105 CAL. L. REV. 1739, 1745–50 (2017).

Marshall did about Congressional recourse to the courts, but noted the absence of such a concern when the state legislature was suing a state agency.¹⁸ The defendant was a state agency, not the federal executive, in *Arizona Independent Redistricting Commission*. Hence, the Court's explicit distinction between state legislatures and Congress as plaintiffs might presage the Court's willingness to take exactly the course that Hessick and Marshall advocate, and allow greater standing to states as plaintiffs to invoke the third federal branch to constrain the second federal branch.

3. Professor Michael Ramsey

Professor Michael Ramsey finds new hope for constraining the executive through litigation where the subject is foreign affairs because of the Supreme Court's opinion in *Zivotofsky v. Kerry*.¹⁹ Ramsey points out how the *Zivotofsky* decision restricts the political question doctrine as announced in *Baker v. Carr*,²⁰ cutting back *Baker's* six criteria to only two: (1) whether the issue was textually committed to another branch of government, and (2) whether manageable standards were available for the court to make a judgment. Eliminating the more open-ended of *Baker's* criteria makes it more difficult for a court to cite the political question doctrine. In Ramsey's view, future challenges to executive action in foreign affairs, including the exercise of war powers, would be justiciable insofar as they call on a court to interpret the meaning of a statute or a clause of the Constitution.²¹ If a litigant asks a court to make a factual judgment, however, especially one calling into question whether a presidential decision was justified, the political question doctrine would remain.

¹⁸ *Id.* at 2665 n.12.

¹⁹ 135 S. Ct. 2076 (2015).

²⁰ 369 U.S. 186, 217 (1962).

²¹ Professor Julian Mortenson also sees increased likelihood for successful challenges of presidential action in foreign affairs as a result of *Zivotofsky*, but for substantive reasons in the opinion itself. See Julian Mortenson, *Zivotofsky: The Difference Between Inherent and Exclusive Presidential Power*, 109 AJIL UNBOUND 45 (2017).

"It is not for the president alone to determine the whole content of the nation's foreign policy. That said, it is for the president alone to make the specific decision of which foreign power he will recognize as legitimate." Besides taking every opportunity to emphasize the narrowness of its holding, the majority seems repeatedly to go out of its way to celebrate the role of the legislature: "[W]hether the realm is foreign or domestic," the opinion urges over and over again, "it is still the Legislative Branch, not the Executive Branch, that makes the law." There is reason for more than a little suspicion that *Marbury*-style jiu jitsu may be at work here: this decision reaches a pro-executive outcome, but does so through the creation of a vehicle whose analytical structure and overall atmosphere is strikingly pro-congressional.

Id. at 48–49 (footnotes omitted).

Ramsey cannot point to any post-*Zivotofsky* case where a court abandoned the political question doctrine, but he does successfully identify how lower courts have, in writing their opinions, trimmed their reliance on the doctrine because of the *Zivotofsky* formulation. Ramsey also very helpfully traces the history of the political question back to *Marbury v. Madison*,²² through later decisions of the Marshall Court, and the Civil War *Prize Cases*,²³ to demonstrate that *Baker*'s restrictive formulation of the political question doctrine was more of an aberration than a continuation of settled jurisprudence. (To this, I would add that Justice Brennan's announcement of six principles for the political question doctrine in *Baker* was actually *obiter dicta*: the Court held the doctrine did not apply to that case, so what was said about when it might apply does not qualify as a holding.)

If Professor Ramsey is correct, perhaps the most important consequence is that *Zivotofsky* will have opened up the courts to deciding whether the War Powers Resolution²⁴ is constitutional.²⁵ That is a profoundly important question that has eluded judicial resolution for forty-five years. Such a question would fit Ramsey's formulation: it would not require analysis of the facts of any particular conflict. Rather, the two fundamental challenges to its constitutionality would be answered as matters of constitutional law: (1) can the president's use of force be restricted to sixty days absent an affirmative vote of Congress; and (2) can Congress delegate to the president its right to choose against whom to wage war for sixty days?

Academics, legislative leaders, and average citizens can only hope that Professor Ramsey's prediction does prove true, and that members of the third branch take up the invitation to constrain the executive in the foreign affairs area, in those instances where a pure question of constitutional law or statutory interpretation is required.

4. Professors Sanford Levinson and Mark Graber

Professors Levinson and Graber make a tremendously original contribution to the academic literature on judicial review of executive action with their submission to this symposium.²⁶

²² *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803).

²³ *The Brig Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863).

²⁴ 50 U.S.C. §§ 1541–48.

²⁵ See Mortenson, *supra* note 21, at 45.

²⁶ The only recent treatment I have seen that deals with some of these same issues is Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017). Professor Shaw largely opposes judicial cognizance of presidential speeches; while Professors Levinson and Graber base much of their argument for heightened scrutiny of President Trump on his speeches and other public

The entire U.S. constitutional scheme for executive authority rests, in their view, on a conception of the president as minimally qualified, not subject to conflicts of interest, and not emotionally immature. When a president lacks these qualities, specific rules of judicial deference to the executive, and justiciability constraints on suits against him, should no longer apply.

Professors Levinson and Graber maintain President Trump does lack these qualities. Accordingly, courts should approach challenges to his actions with the following presumptions. Wholesale delegations of power from Congress to the president in legislation passed in an earlier era should be narrowly interpreted now, and explicit grants of authority should be required rather than allowed to be inferred. The kind of motive-analysis with which the Supreme Court approached the actions of southern legislatures in the civil rights era, but not in other contexts, should be revived regarding President Trump. Levinson and Graber invite federal courts to make use of President Trump's campaign (and some subsequent) statements as to his own (possibly unconstitutional) motivations. They also encourage federal courts to accept full constitutional challenges, facial and as-applied, to actions by President Trump. They urge a narrowing of the constitutional avoidance maxim, because the premise that a co-equal branch did not intend to violate the Constitution is not true in the case of President Trump.²⁷

Their article focuses entirely on how courts should entertain challenges to a president who is anti-Publican: that is, lacking the virtues that Publius, the pseudonymous author of the Federalist Papers, assumed a president would possess. Professors Levinson and Graber's guiding principle in recommending this approach is that the Constitution has given way to exceptional powers granted to the president in some contexts (war and other national emergency), and to great skepticism of federalism in the face of overt racial motivation for states' actions. So, why in the present context of a president less qualified than any in history, and who has in his own statements evidenced prejudice often and clearly, they ask, should we not also see a tailoring of judicial doctrines developed in more normal circumstances?

pronouncements. However, Professor Shaw departs from her overall premise in her section "Presidential Speech as Evidence of (Constitutionally Forbidden) Government Purpose," *id.* at 137–40, which is where Professors Levinson and Graber have put most of their focus.

²⁷ For a similar skepticism of the constitutional avoidance doctrine, see Anell Kovvali, *Constitutional Avoidance and Presidential Power*, 35 YALE J. REG. BULL. 10 (2017).

It is true that the Supreme Court has evaluated motive in striking down state governmental action neutral on its face, but with a racially discriminatory effect.²⁸ The normal deference owed to a state legislature was suspended when the assumption of their action in good faith was cast into serious doubt. Levinson and Graber point to *New York Times v. Sullivan*²⁹ as a case abandoning centuries of libel and slander law to create a protection for the press unique in world jurisprudence, all driven by the specific circumstances of the civil rights era. So also, Professors Levinson and Graber argue, we might normally expect a court to ignore campaign rhetoric by a candidate in evaluating that candidate's actions once in office, and even accord some deference to a plausibly constitutional motivation for official action (as in the constitutional avoidance maxim for legislative acts). They argue we should not do so, however, in the case of President Donald Trump, whose campaign (and subsequent) statements of an anti-immigrant nature, for example, corrupted his various travel-bans, thus providing a legitimate basis for overruling them, even though a court might have allowed an identical executive order to go into effect from a president not so tainted. This, of course, was the rationale of the Fourth Circuit in overturning President Trump's exclusion orders for immigrants from select countries he claimed had imposed inadequate vetting, but which the court held were selected because of their Muslim populations.³⁰

Professors Levinson and Graber's suggestions deal with the doctrines of justiciability developed under the rubric of judicial prudence, not constitutional requirement. Adopting what the Professors argue, therefore, would violate no constitutional provision. As noted above, years ago, the D.C. Circuit developed a doctrine of "equitable discretion" for deciding when to grant standing to members of Congress to challenge presidential acts.³¹ The approach advanced by Professors Levinson and Graber should be seen as no more controversial than that.

What is more difficult, however, is to determine "neutral principles"³² for deciding when a president is non-Publian. President Donald Trump qualifies for so many reasons, in the Professors' view, the conclusion is, in mathematical terms,

²⁸ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 340, 340 (1960) (enjoining action by the Alabama legislature to redraw the boundaries of Tuskegee so as to eliminate almost all black residents).

²⁹ 376 U.S. 254 (1964).

³⁰ *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575–76 (4th Cir. 2017).

³¹ See *supra* note 14 and accompanying text.

³² Levinson and Graber's point of departure in their article is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

“overdetermined.” It is not entirely clear which characteristics they would consider sufficient. Among the determinants they cite are President Trump not having won a majority of the popular vote, his being roundly criticized as incompetent by other office-holders, silence of other office-holders who might have been expected to defend him, his business conflicts of interest, his crude speech especially on matters of race, his many factual misstatements, his seeming inability to admit an error, the manifest absence of any previous qualifying experience, and his many changes of position, even within the same day.

Professors Levinson and Graber analogize treating a non-Publian president differently from a “normal” president to reforming a contract in the face of mutual mistake, improvising dialogue in a theater piece when an actor forgets a line, or running a different sports play when the originally planned move becomes impossible. In each such case, however, the parties act to re-establish what would have been done had they known a fact at the start that only became apparent subsequently. That is not the case with President Trump. Most, if not all, of the flaws identified were well known from the campaign. This is more a case of buyers’ remorse than mutual mistake. Indeed, President Trump would maintain there was no mistake at all.

A suggestion I offer is that the decision to treat a president as Publian or not should not be binary.³³ Rather, I would suggest that courts adopt a sliding scale, opting for higher scrutiny of presidential action the more non-Publian the president may be. This approach would allow for different decisions in different contexts: in the instance of President Trump, his statements about the federal judge being ineligible to decide the case involving Trump University because of his parents’ Mexican heritage might serve to justify a non-Publian conclusion in a matter involving immigration, but not, necessarily, in a matter of imposing offsetting tariffs for perceived trade violations by other nations.

The Supreme Court will soon have the occasion to consider the Levinson-Grabber suggestion when it rules on President Trump’s travel bans. Professors Levinson and Grabber have served up to the Court a rationale for taking into account the

³³ Professors Levinson and Grabber identify several other presidents whose qualifications for president were minimal, but whom they would not consider non-Publian. As a humbling note to this exercise, I might add to the presidents they suggest, the case of our country’s greatest president, a one-term Congressman from Illinois (though he had experience in the part-time state legislature), who never won a majority of the popular vote, and whom the intelligent critics at the time considered uneducated and uneducable.

very specific facts of this president's behavior, qualifications, and public statements, should the Court be inclined to do so.

B. Constraining the Executive by the Executive?

1. Professor Gary Lawson

In his article in this symposium, Professor Lawson suggests that an effort to constrain the executive might be launched from an entirely different source: the executive itself, and, especially, President Trump himself. Structurally, of course, Professor Lawson is right. A president devoted to limiting executive power can go far to effectuating that result. Lawson identifies several ways: vetoing laws that grant more power from Congress to the executive branch, proposing the repeal of existing laws that grant such delegations, failing to use the authority that has already been delegated, and appointing federal judges who will revive the nondelegation doctrine and otherwise return the executive branch to the limits Lawson believes the Framers intended.

Lawson concedes the attraction of using executive power for "good ends" might overcome these self-constraining instincts of a president. President Obama's approach to immigration reform is a good example. President Obama wanted to grant protected status to two large categories of individuals who had entered America illegally, but withheld doing so for almost six years, saying "for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President."³⁴ Eventually, his desire for the policy outcome overcame his reservations about whether he had the constitutional authority to allow those groups of immigrants to stay.

To have lasting effect, as the President Obama precedent just cited shows, President Trump would have to do more than simply implement his own preferred approach to administrative law. He has ordered his executive branch agencies to repeal two regulations for every one new regulation desired; but a new president could reverse that instantaneously.

The ACA individual mandate has now been repealed, thereby cutting back a huge grant of authority to the Secretary of U.S. Health and Human Services to specify what elements had to be in anyone's health insurance. The next target of the Trump

³⁴ *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 783 (W.D. Pa. 2014) (quoting President Barack Obama, Remarks by the President at the Univision Town Hall, (Mar. 28, 2011, 10:37 AM), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [<http://perma.cc/2APS-LQR5>]).

administration has already been identified: the Consumer Financial Protection Bureau, created by the Dodd-Frank legislation, with sweeping authority to outlaw “unfair” financial practices, and protected from the Congressional oversight afforded by the appropriation process by reason of being funded directly by the Federal Reserve.

For President Trump to fulfill his promise as Professor Lawson sees it, Trump would have to urge the repeal of more than just the ACA and Dodd-Frank. He would have to get Congress to cut back the very broad delegations of power to the executive enshrined in statutes such as the Federal Trade Commission Act, with its prohibition of “unfair methods of competition,”³⁵ and the Securities Exchange Act, whose section 78j allows the Securities Exchange Commission to promulgate any regulations “necessary or appropriate in the public interest or for the protection of investors.”³⁶ Such a major step would require Congressional majorities supporting President Trump much larger than he now possesses and a systemic review of the statutory underpinnings of the administrative state that has not yet even been commenced.

The way President Trump might come close to achieving the potential Lawson sees for him is more likely in his judicial appointments. Professor Lawson notes that Justice Gorsuch brings an interest in reviving the non-delegation doctrine to the Supreme Court, far beyond any such disposition by Justice Scalia whom he replaced. If future appointments to the Supreme Court and the D.C. Circuit reflect a zealous focus on restoring the non-delegation doctrine (as opposed to simply a commitment to judicial conservatism), President Trump will have constrained the executive more powerfully, and more permanently, than any of the other mechanisms discussed in this symposium. In Professor Lawson’s Monty Python lexicon, that would be “something completely different.”

2. Mr. Paul Baumgardner

Mr. Paul Baumgardner enlivens our symposium with one particular area to constrain the executive. Claiming to be neutral as to the policy, he nevertheless sets forth the arguments against the propriety of presidents issuing Thanksgiving Proclamations. A Jeffersonian respect for the wall of separation between church and state should inhibit presidents from this practice, he maintains, even in the absence of any such proclamation’s calling

³⁵ Federal Trade Commission Act, 15 U.S.C. § 45.

³⁶ 15 U.S.C.A. § 78j(b).

on citizens to undertake particular religious acts or prayers, such as thanking God.

Baumgardner does not provide any constraining principle, so that his arguments would apply just as well to a presidential speech as to a Thanksgiving Proclamation. If that suggestion were followed, I personally would have deep regret. Perhaps the finest Inaugural Address in history, Lincoln's Second Inaugural, places the Civil War squarely in the tradition of a vengeful God's punishment to North and South alike for the offenses of slavery, which both parts of the nation tolerated, promoted, and from which they both derived benefit. Here is the soaring rhetoric that, under Baumgardner's sources and reasoning, should never have been spoken in March of 1865:

Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."³⁷

Since Baumgardner's analysis is directed at presidential speech and not executive actions or regulations, I cannot see how his analysis can be made to have force—except by convincing individual presidents to self-censor. As a personal preference, I would not deprive our nation of the treasure of Lincoln's Second Inaugural Address. As a constitutional matter, Baumgardner does not grapple with the president's own First Amendment right to speak, or freely to exercise his religion. Nor, extrapolating his arguments to apply to Congressional speech invoking God, does

³⁷ President Abraham Lincoln, Second Inaugural Address, BARTLEBY (Mar. 4, 1865), <http://www.bartleby.com/124/pres32.html> [<http://perma.cc/2SR6-CL3H>].

his logic address the provision that any speech made in Congress not be “questioned in any other place.” These are also parts of the Constitution and need to be read in conjunction with, not to be decimated by, the Establishment Clause.

As a thought piece, Baumgardner’s article provides a caution to politicians who might exploit religion, but that assumes that kind of politician is subject to shaming. I personally believe there is a place for religion in public discourse, short of exploitation, and it would be a great loss to see it end.

C. Against Expanded Constraint of the Executive

1. Professor Neal Devins

Professor Neal Devins describes an almost apocalyptically partisan world in Congress, from which situation he derives the conclusion that courts should be even more reluctant to hear lawsuits brought by legislators against executive overreach than they have hitherto.³⁸ Relying on impressive original research, Devins details the demise of the institutionalists in Congress: House members and Senators who would stand up for the authority of Congress even against a president of their own party. Now, Devins sees an urban battle zone pockmarked by hollowed out buildings that once stood for institutional principles, destroyed by their use as targets and weapons in an unceasing partisan divide.

He is largely right. Bipartisanship seems reserved for former Congress members,³⁹ and several current Senators who have formed the Common Sense Caucus,⁴⁰ dedicated to overcoming the partisanship that has stymied legislative progress on America’s most pressing needs. However, the former group is significant for many members who found bi-partisanship only after leaving Congress; and the latter group, while productive in ending the first government shutdown of 2018, has yet to fulfill its promise as the critical mass able to move between the two parties to create a transitory majority of sixty Senators able to overcome filibuster by Democrats, and ideological purity from the

³⁸ Professor Devins is not unique in his pessimistic description of the decline of Congress’s ability and willingness to assert its institutional interests in a bipartisan way. See, e.g., David Fontana & Aziz Z. Huq, *Institutional loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 33–37 (2018).

³⁹ Over 180 former Members of Congress have formed the “ReFormers Caucus.” See *ReFormers Caucus Members*, ISSUE ONE, <https://www.issueone.org/reformers/#reformer-full-list> [<http://perma.cc/BW74-23XH>]. Just over one hundred are Democrats, and over eighty are Republicans. See *id.*

⁴⁰ See Alex Swoyer & David Sherfinski, *Centrist senators form Common Sense Caucus*, WASH. TIMES (Jan. 23, 2018), <https://www.washingtontimes.com/news/2018/jan/23/centrist-senators-form-common-sense-caucus/> [<http://perma.cc/LNA2-MJHA>].

Republicans. For all the reasons Professor Devins laments, we should wish these efforts well; but he's right, their prospects for success are bleak.

We are left with a dysfunctional Congress, incapable of standing up for its institutional privileges against an expanding executive. Professor Devins worries that allowing more legislators' lawsuits will create a new forum for the partisan divide, and may, therefore, paint the courts also with a more partisan cast. This leaves Professor Devins with no specific remedy for the problem he has chronicled: an institutional lassitude by Congress in the face of executive branch encroachments.

Professor Devins and I respectfully disagree on the value of expanded legislator standing.⁴¹ The value served by allowing legislators to sue the executive is not in the unique insight of the legislators' legal arguments, but in the fact that in many cases they may be the only parties with standing to challenge executive actions. I trust courts to cut through the partisan nature of arguments submitted in briefs by members of one party in the House or Senate. What those members do, however, in getting a case to court could be irreplaceable.

Consider, for instance, an executive's failure to enforce laws: whether President Obama on immigration, or President Trump on the ACA tax. What private party would have standing to force a president to act?⁴² Or consider the challenge to a president spending money that was not the subject of an appropriation, as the U.S. Constitution requires?⁴³ If a group of members of Congress, even though entirely partisan, nevertheless are held to have standing (as, for instance, the House did in *U.S. House of Representatives v. Burwell*⁴⁴), and no one else conceivably could, then I would weather the risk that a judge would be drawn into a partisan dispute, in order to get the issue resolved. The political question doctrine would still be available for the judge to avoid ruling if there were too great a partisan divisive risk in doing so.

2. Professor John Yoo

Professor John Yoo presents a contrast to the majority of participants in this symposium by a robust defense of executive

⁴¹ See generally Campbell, *supra* note 5.

⁴² I grant that it is still not clear that even members of Congress would have standing in such situations, but their institutional interest in seeing laws passed by Congress be enforced is of a different kind than that of the average citizen. That is the gist of my article. See generally Campbell, *supra* note 5.

⁴³ "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7.

⁴⁴ See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76 (D.D.C. 2015).

action, occasionally even beyond legal limits. He provides an exhaustive, insightful, and largely laudatory recounting of the presidency of Franklin D. Roosevelt, as analyzed in domestic policy, foreign policy, and civil liberties. Yoo sees the success of FDR's four terms in office as the direct result of FDR's willingness to stretch the powers of the presidency to the utmost.

In the area of domestic policy, Yoo candidly observes with historical hindsight that the New Deal, and tight monetary policy, prolonged rather than alleviated the Great Depression. He criticizes the expansion of the administrative state, whereby FDR's legacy of federal agencies, excessive delegation of power from Congress, and truncating state's reserved powers continues to have effects to this day—not all bad, but mostly so.

Yet in foreign affairs, and civil liberties, Yoo finds redemption for FDR's robust assertion of executive authority. Yoo maintains that if the president abided by the spirit (and the letter) of Congressional enactments consistent with the nation's preference for neutrality, America might never have helped Britain at the time of Britain's greatest need, and might have entered the European theater of war too late, if at all. The wartime civil liberties restrictions, including massive wiretapping without warrants, are similarly justified, in Professor Yoo's view, by their results: An America largely protected from enemy sabotage throughout World War II.

One might put Yoo's position this way: Of what use is the separation of powers, the rule of law, and the Bill of Rights in America in a world where Nazism and fascism had triumphed in Europe and intimidated the United States into the status of a vassal state? This is a variant of Justice Jackson's argument, dissenting in *Terminiello v. Chicago*, that our U.S. Constitution is not a "suicide pact."⁴⁵ The argument is that courts must not ignore what is necessary to protect our country's very existence by an overly scrupulous regard for civil liberties or restrictions on executive action more suited to normal times. Professor Yoo is in this camp, in my view. He has good company; Justice Jackson knew what he was talking about, having just returned from his role as prosecutor in the Nuremberg trials. *Terminiello* dealt

⁴⁵ "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also Linda Greenhouse, *The Nation*; 'Suicide Pact,' N.Y. TIMES (Sept. 22, 2002), <http://www.nytimes.com/2002/09/22/weekinreview/the-nation-suicide-pact.html> (discussing other appearances of this or similar phrases in Supreme Court opinions).

with incitements to a mob, and Jackson detailed in his opinion how manipulation of mobs had allowed Hitler to come to power.

Nevertheless, if we dull our sensitivity to violations of civil liberties and to encroachments by the executive upon the people's representatives in the legislative branch, I believe we run another risk of losing our identity as a constitutional democratic republic of limited government powers and maximum individual freedom. We have already seen these tendencies developing rapidly in our "war on terror," with unprecedented incursions into individual liberties under the Patriot Act, and reliance on *ex parte* judicial proceedings (like the Foreign Intelligence Surveillance Court) to issue search warrants and wiretaps that sweep up information about innocent Americans along with foreign suspects.

Undoubtedly, presidents like FDR (and Lincoln) exceeded the boundaries of executive authority. Undoubtedly, they are also two of the most beloved presidents in our country's history. Both saved our country.

Perhaps we have, tacitly, become the Roman Republic: allocating exceptional powers to Consuls in time of great crisis. The Roman Republic set a strict time limit for their Consuls, with authority automatically reverting to the Senate when the time ran out. That historical precedent, however, is not a comforting one. The Roman Republic grew used to autocracy. The security and welfare offered by those given dictatorial power were favored by the people over their own freedom. The Consul became the Emperor, and the days of Rome as a republic came to an end.

Constraining Moses: Rethinking Thanksgiving Day Proclamations

*Paul Baumgardner**

INTRODUCTION

Modern American presidents enjoy an extensive reserve of formal and informal powers, which have developed in accordance with the historical, institutional, and ideological changes across the federal government. In recent months, many Americans have felt the reach and impact of one particular power—the president’s rhetorical power. Long before Donald Trump told the American people that “there is blame on both sides” in Charlottesville, Virginia, political scientists had begun researching the outsized capital that presidential discourse can marshal.¹ A president’s words possess an unparalleled institutional power to arrange and rearrange the populace—to motivate action, encourage restraint, to assuage strife, and also to send peasants scrambling for pitchforks.

Our political knowledge of a president’s rhetorical power ought to inform and complicate how we analyze the constitutionality of certain presidential practices. In this article, I focus on one such presidential practice: Thanksgiving Day Proclamations. The presidential tradition of offering Thanksgiving Proclamations began with our first president, George Washington, and it has remained a common—but not constant—oratorical practice of American presidents up to the present. However, Thanksgiving Proclamations have sustained a fair degree of legal and political scrutiny, even during the founding generation.

In this article, I examine the core criticisms of Thanksgiving Proclamations that have connected certain Founders, such as Thomas Jefferson and James Madison, with contemporary Supreme Court Justices. Jeffersonian and Madisonian concerns about religious entanglement and endorsement align with recent

* Paul Baumgardner is a PhD candidate in the Department of Politics and the Humanities Council at Princeton University. During the 2017–2018 academic year, he is a visiting fellow in the Institute for Law and Philosophy at Rutgers Law School.

¹ Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides,’* N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html?mcubz=1&r=0>.

Supreme Court cases and constitutional standards concerning the Establishment Clause of the First Amendment. As currently understood by some members of the Court, the First Amendment's prohibition on government actions respecting an establishment of religion brings the content of Thanksgiving Proclamations under sharp scrutiny.

Although the Supreme Court has not yet deemed presidential Thanksgiving Proclamations to be unconstitutional, it has criticized and, in some cases, struck down similar calls to prayer. In this article, I unpack the political, legal, and historical arguments against presidential Thanksgiving Proclamations and outline some of the advantages of "constraining Moses."

The reasons for selecting this particular presidential rhetorical practice are manifold, but one of the most intriguing certainly is the political preparatory work/worries that already have been accomplished—prematurely—in anticipation of this very article.² To be clear: I do not advocate for the end of presidential Thanksgiving Proclamations. However, it is important to uncover the best variations of these arguments, including the sort of resources that they should draw on.³ In the final analysis, these arguments may not supply the best moral or constitutional course for future Establishment Clause jurisprudence.⁴ Rather, this thesis-less article is designed to highlight the pieces that seem best ordered for justifying this constitutional direction, even if such a direction proves unlikely or unwarranted in the current political climate.

So let us jump in. First, an introduction to a spectrum of presidential Thanksgiving Proclamations. In Section II, a brief

² *We built this moated fortress and have had it manned for years, because we knew your horde would eventually come!* See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 100–03, 113 (1985) (Rehnquist, J., dissenting); *Cty. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 670–71 (1989) (Kennedy, J., concurring in part and dissenting in part); *Lee v. Weisman*, 505 U.S. 577, 633–35, 645 (1992) (Scalia, J., dissenting); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting); Wes Barrett, *God Returns to Presidential Thanksgiving Proclamation*, FOX NEWS (Nov. 25, 2010), <http://www.foxnews.com/politics/2010/11/25/god-returns-to-presidential-thanksgiving-proclamation.html> [<http://perma.cc/GER5-5HXC>]; Chuck Norris, *Obama vs. George Washington on Thanksgiving*, WORDNETDAILY (Nov. 23, 2014, 4:13 PM), <http://www.wnd.com/2014/11/obama-vs-george-washington-on-thanksgiving/#6Ofv9G2XPslDYBAK.99> [<http://perma.cc/8HAB-DVAE>]; Joel Siegel, *Obama Leaves God out of Thanksgiving Speech, Riles Critics*, A.B.C. NEWS (Nov. 25, 2011), <http://abcnews.go.com/Politics/obama-omits-god-thanksgiving-address-riles-critics/story?id=15028644> [<http://perma.cc/5W5D-RBZN>]; Carson Holloway, *Thanksgiving and the Constitution*, PUBLIC DISCLOSURE (Nov. 26, 2013), <http://www.thepublicdiscourse.com/2013/11/11618/> [<http://perma.cc/9KPV-QKJM>]; DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* 2–3, 18–20 (2010).

³ *But why is this "uncovering" so important if you're not advocating for the abolition of presidential Thanksgiving Proclamations? What do you have against Thanksgiving!?*

⁴ *Moral or constitutional? Oh dear! What would Dworkin have said to this distinction?*

political science interlude on presidential rhetoric. In Section III, linkages to Establishment Clause cases and considerations, old and new. In Section IV, cameo appearances by some unimpeachable Founding presidents/precedents. In Section V, select reservations, resignations, and Bible readings.

I. SO WHAT ARE WE DEALING WITH HERE? SOME EXAMPLES OF PRESIDENTIAL THANKSGIVING PROCLAMATIONS

Many American presidents have issued Thanksgiving Proclamations. A central constitutional worry with this practice is that it exploits the station of the presidency for the purposes of evangelism. As directives from the country's highest executive office, which generally are designed to (1) situate the country's eyes on a certain god, a specific religious tradition, and/or a particular set of beliefs, and (2) encourage participation in discrete spiritual actions, these proclamations could approach the line of religious establishment.

So what are we dealing with here? These executive actions have taken on a variety of forms over the years. Quite a few proclamations have served as calls to worship God—wielding religious symbols and Judeo-Christian rhetoric to reaffirm a preference for a particular belief system and a governmental push to embrace that belief system *now*—while others have sounded more like general statements of appreciation for the successes and strengths of our nation. Compare, for example, President Barack Obama's 2011 Thanksgiving Day Proclamation to President George W. Bush's 2008 Thanksgiving Day Proclamation.

The first sentence of President Obama's Proclamation 8755 reads: "One of our Nation's oldest and most cherished traditions, Thanksgiving Day brings us closer to our loved ones and invites us to reflect on the blessings that enrich our lives."⁵ This opening line was indicative of the general tone and thesis of Obama's Thanksgiving Proclamation. The President focused on the origins and history of the holiday. He also emphasized the cooperation between Native Americans and Pilgrims, the valuable contributions of Native Americans, and the importance of diversity, family, and friendship in the good times and bad.⁶

President Obama also mentioned that Americans "give thanks to each other and to God for the kindness and comforts

⁵ President Barack Obama, Thanksgiving Day Proclamation 8755 (Nov. 16, 2011), <http://www.presidency.ucsb.edu/ws/?pid=97063> [<http://perma.cc/R5T3-9QKD>].

⁶ *Id.*

that grace our lives.”⁷ With the exception of one reference to George Washington’s praise of God in the first presidential Thanksgiving Proclamation, this was the only time the word “God” appeared in President Obama’s Proclamation.⁸ Instead of invoking a certain god or a specific religious tradition, President Obama exhorted:

[T]he people of the United States to come together—whether in our homes, places of worship, community centers, or any place of fellowship for friends and neighbors—to give thanks for all we have received in the past year, to express appreciation to those whose lives enrich our own, and to share our bounty with others.⁹

Three years before President Obama’s Proclamation, President George W. Bush gave his final Thanksgiving Proclamation.¹⁰ In his opening paragraph, President Bush declared: “We recognize that all of these blessings, and life itself, come not from the hand of man but from Almighty God.”¹¹ Unlike President Obama’s Proclamation, President Bush’s address centered on religion, thankfulness to God, and pronouncements of faith that the Christian God (that many of our Founding Fathers turned to) would continue to help the United States.¹² He also counseled Americans to “let us all give thanks to God who blessed our Nation’s first days and who blesses us today. May He continue to guide and watch over our families and our country always.”¹³

President Bush’s 2008 Thanksgiving Proclamation is not an outlier in terms of religious rhetoric and instruction. Just look at President Dwight D. Eisenhower’s Proclamation more than five decades earlier.¹⁴ In Proclamation 3036, President Eisenhower supplied a very short, priestly admonishment for citizens to genuflect.¹⁵ Wasting no time or ink, the Proclamation’s introduction dove right into a direct call to prayer:

As a Nation much blessed, we feel impelled at harvest time to follow the tradition handed down by our Pilgrim fathers of pausing from our labors for one day to render thanks to Almighty God for His bounties. Now that the year is drawing to a close, once again it is fitting that we

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ President George W. Bush, Thanksgiving Day Proclamation 8322 (Nov. 21, 2008), <http://www.presidency.ucsb.edu/ws/?pid=84954> [<http://perma.cc/PAR7-BB2B>].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ President Dwight D. Eisenhower, Thanksgiving Day Proclamation 3036 (Nov. 7, 1953), <http://www.presidency.ucsb.edu/ws/?pid=72469> [<http://perma.cc/W7BN-25G8>].

¹⁵ *Id.*

incline our thoughts to His mercies and offer to Him our special prayers of gratitude.¹⁶

Eisenhower's proclamation from 1953 designated the American population to be "a religious people," faithful to the presumably Christian God but still in need of some good, old-fashioned kneeling.¹⁷ On Thanksgiving, he told the country to "bow before God in contrition for our sins, in supplication for wisdom in our striving for a better world, and in gratitude for the manifold blessings He has bestowed upon us and upon our fellow men."¹⁸

II. PRESIDENTIAL RHETORIC

Although there has been remarkably little scholarly analysis of Thanksgiving Proclamations, recent American political scientific research does illuminate some of the cardinal political worries surrounding this governmental practice.¹⁹ For example, presidential Thanksgiving Proclamations have a breadth, directness, and authoritativeness that other controversial forms of government benediction do not possess. In fact, the president has unrivaled rhetorical powers in American politics.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See James W. Ceaser et al., *The Rise of the Rhetorical Presidency*, 11 PRESIDENTIAL STUD. Q. 158, 159–61 (1981); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 445–46 (1993); KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, PRESIDENTS CREATING THE PRESIDENCY: DEEDS DONE IN WORDS 6–9 (2008); Jeffrey E. Cohen, *Presidential Rhetoric and the Public Agenda*, 39 AM. J. POL. SCI. 87, 87–89 (1995); Todd Garvey, *The Obama Administration's Evolving Approach to the Signing Statement*, 41 PRESIDENTIAL STUD. Q. 393, 394–95, 406 (2011); Vanessa B. Beasley, *Speaking at Selma: Presidential Commemoration and Bill Clinton's Problem of Invention*, 44 PRESIDENTIAL STUD. Q. 267, 268–69, 286–87 (2014); Jeffrey Friedman, *A "Weapon in the Hands of the People": The Rhetorical Presidency in Historical and Conceptual Context*, 19 CRITICAL REV. 197, 199–200 (2007); ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 2–6 (2009); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 3–4 (1987); Jeffrey K. Tulis, *Revisiting the Rhetorical Presidency*, in BEYOND THE RHETORICAL PRESIDENCY 3–4, 13–14 (1996); Christopher S. Kelley et al., *Assessing the Rhetorical Side of Presidential Signing Statements*, 43 PRESIDENTIAL STUD. Q. 274, 274–76 (2013); Michael J. Berry, *Controversially Executing the Law: George W. Bush and the Constitutional Signing Statement*, 36 CONGRESS & THE PRESIDENCY 244, 244–45, 266–68 (2009); Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRESIDENTIAL STUD. Q. 248, 248–67 (2008); Martin J. Medhurst, *A Tale of Two Constructs: The Rhetorical Presidency versus Presidential Rhetoric*, in BEYOND THE RHETORICAL PRESIDENCY xi–xxv (1996); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 176–77 (2003); BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC 3–5 (2006); SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 1–2 (3d ed. 2007).

According to political scientist Keith Whittington, presidential rhetoric has a disparate and more pronounced role in modern times than in the early years of American political history.²⁰ Since the twentieth century, Americans have witnessed a different brand of president—an institutional actor more willing to engage with the public, by giving more speeches, making more proclamations, and attempting to connect directly with citizens.²¹ This rhetorical shift in the modern presidency is aimed at exerting political power over the citizenry—influencing public sentiment by rallying support or disdain, pushing certain policy agendas, and inculcating particular civic values and practices. Whittington writes, “[p]residential rhetoric not only persuades but also constructs a political world within which various political actors operate.”²²

Presidency scholars take note of the disproportionate amount of public attention that is paid to presidential discourse and how this coverage creates a greater number of political opportunities for the chief executive.²³ Presidential rhetoric can significantly impact public opinion and influence policy.²⁴ When a president speaks to the public, his words have the power to increase the salience of certain issues and civic practices.²⁵ Modern presidents rely on rhetorical performances such as directives, public speeches, and proclamations to set agendas and communicate to the American people how they prioritize different people, cultures, and values.

III. ESTABLISHMENT CLAUSE JURISPRUDENCE: CASES, PRECEDENTS, AND OTHER CONSTITUTIONAL CONSIDERATIONS

The historical scrutiny that has been leveled against a constellation of related governmental institutions, persons, and practices seriously informs the legal and normative considerations about presidential Thanksgiving Proclamations. These adjacent religious figures and observances include prayers issued at the start of municipal meetings and state appointments and uses of chaplains and benedictions at public school graduations and athletic events. Now, although there are important distinctions between Thanksgiving Proclamations and

²⁰ KEITH E. WHITTINGTON, *The Rhetorical Presidency, Presidential Authority, and President Clinton*, 26 PERSP. POL. SCI. 199, 199–201 (1997).

²¹ *Id.*

²² *Id.* at 205.

²³ See generally Cohen, *supra* note 19; CANES-WRONE, *supra* note 19; KERNELL, *supra* note 19.

²⁴ See Cohen, *supra* note 19, at 87–88, 101, 103.

²⁵ See CANES-WRONE, *supra* note 19, at 19–23; see also KERNELL, *supra* note 19, at 1–9.

this constellation (with many of these distinctions casting *additional* doubt on the constitutionality of presidential proclamations), it would be wise to first highlight the significant number of similarities and legal precedents involved.

The most relevant constitutional provision to these matters is the Establishment Clause, which reads: “Congress shall make no law respecting an establishment of religion.”²⁶ Located within the First Amendment of the U.S. Constitution, this clause initially prohibited only the federal government from respecting an establishment of religion.

In *Everson v. Board of Education*, the Supreme Court incorporated the Establishment Clause, thus extending the prohibition to states.²⁷ The divided Court provided important clarification to this short constitutional clause.²⁸ *Everson*, one of the foundational twentieth century Establishment Clause cases, highlighted the guiding principles within the Clause, principles which—to this day—serve as a controversial set of standards for Establishment Clause analysis. In direct and forceful language, Justice Hugo Black articulated the strict separation enshrined by the Clause:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”²⁹

Although the Justices were divided about how to apply the Establishment Clause to the case before them, the Court was unified about the strict separation principles undergirding the Clause: the Government must be neutral between religions and

²⁶ U.S. CONST. amend. I.

²⁷ See *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947).

²⁸ See *id.* (finding “[t]hat [the First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary”).

²⁹ *Id.* at 15–16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

also between religion and non-religion; state and national governmental actions cannot show religious favoritism, either by favoring religion generally or favoring a specific religion; the government also would violate the Establishment Clause by demonstrating religious disfavor through a national or state law that actively harms a religion or its institutions, practices, and adherents.³⁰

But, in practice, how strict must the separation be between church and state? How do we know when the government has not been neutral towards religion? Must a citizen prove that the government coerced her into participating in an alien religious practice in order for the courts to be sure that a breach of the Establishment Clause has occurred? In a series of cases following *Everson*, many of which explicitly dealt with the topic of governmentally-sanctioned prayer, the Court provided greater definition to the strict separation principles within the Establishment Clause.

A. Prayer and Public Schools

In *Engel v. Vitale*, the Supreme Court ruled that a governmentally approved prayer said daily in New York public schools represented an impermissible establishment of religion.³¹ In a 6-to-1 ruling, the Court outlined the manifold problems with this sort of religious entanglement and promotion. Using sweeping language, the Justices in the majority argued that it is problematic for the government to encourage prayer—and not just because of the age of the admonished audience, but because of the state-sanctioned nature of the religious act.³² Justice Black turned to James Madison's writings for historical support. He asserted: "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."³³

The majority and concurring opinions in *Engel* also were clear that a governmental policy may violate the Establishment Clause even when no one is legally compelled to participate in a religious practice. Distinguishing the Establishment Clause from the Free Exercise Clause that follows in the First Amendment, the majority claimed the Establishment Clause "does not depend

³⁰ See generally *Everson*, 330 U.S. 1.

³¹ *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962).

³² See *id.* at 424–25, 432–33.

³³ *Id.* at 431–32 (quoting James Madison, Memorial and Remonstrance against Religious Assessments (June 20, 1785), in 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 187 (Gaillard Hunt ed., 1901)).

upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”³⁴ A year later, in *School District of Abington Township, Pennsylvania v. Schempp*, the high court again struck down governmentally-approved prayers and Bible readings, reiterating that “a violation of the Free Exercise Clause is predicated on coercion, while the Establishment Clause violation need not be so attended.”³⁵

Two additional Supreme Court cases offer insight into the constitutionality of presidential Thanksgiving Proclamations. In *Lee v. Weisman*, the Court determined whether the Establishment Clause forbids clergy from offering non-denominational prayers at middle school and high school graduation ceremonies.³⁶ Writing for the majority, Justice Anthony Kennedy dedicated a good deal of ink showcasing the “subtle coercive pressure,” “indirect coercion,” and “peer pressure” involved in these benedictions.³⁷ Those individuals who would not willingly participate in such prayers are placed in an uncomfortable situation in which religious activity is either required or is costly to avoid (because of the incredible social pressure that comes along with abstaining from participation). It was clear to the majority that although a governmental practice does not have to be coercive to contravene Americans’ religious liberty, coerced participation in prayer certainly is unconstitutional: “[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”³⁸

As in *Engel* (and numerous other Establishment cases) the writings, speeches, and actions of Thomas Jefferson and James Madison were used authoritatively by both the majority and

³⁴ *Id.* at 430; *see also id.* at 438 (Douglas, J., concurring) (“[T]here is no element of compulsion or coercion in New York’s regulation requiring that public schools be opened each day with the following prayer . . . a child is free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school official.”).

³⁵ *Sch. Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 223 (1963); *see also Wallace v. Jaffree*, 472 U.S. 38, 59–61 (1985) (holding an Alabama law that required public schools to set aside a short period of class time for silence, meditation, or prayer violated the First Amendment).

³⁶ *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992).

³⁷ *Id.* at 588, 592–93.

³⁸ *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

dissenting Justices in *Lee*.³⁹ In fact, Justice David Souter's concurrence, which was joined by Justices Stevens and O'Connor, relied on Thomas Jefferson's well-documented objection to presidential Thanksgiving Proclamations to support the view that the Establishment Clause entails no state endorsement of religion.⁴⁰

In *Santa Fe Independent School District v. Doe*, the Court analyzed the constitutionality of a prayer offered by a high school student and broadcast before high school football games in Santa Fe, Texas.⁴¹ Following *Lee*, the Court stressed the heightened coercion and social pressure involved in this practice of praying "on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer."⁴² Writing for the six-member majority, Justice John Paul Stevens found the school district improperly "invite[d] and encourage[d] religious messages."⁴³ The Establishment Clause cannot brook this sort of "perceived and actual endorsement of religion."⁴⁴

As in earlier Establishment cases, the presidential practice of making Thanksgiving Proclamations hovered in the background of *Santa Fe*. Whereas the majority of the Court claimed that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer,"⁴⁵ the dissenting Justices—led by Chief Justice William Rehnquist—rejoined:

Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God."⁴⁶

³⁹ See *id.* at 634 (Scalia, J., dissenting) (noting that Jefferson, in his second inaugural address, specifically "acknowledged his need for divine guidance and invited his audience to join his prayer"); see also *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962).

⁴⁰ *Id.* at 623 (Souter, J., concurring).

⁴¹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315–17 (2000).

⁴² *Id.* at 290.

⁴³ *Id.* at 306.

⁴⁴ *Id.* at 305.

⁴⁵ *Id.* at 313.

⁴⁶ *Id.* at 318 (Rehnquist, C.J., dissenting) (quoting George Washington, Presidential Proclamation (Oct. 3, 1789), in 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 64 (J. Richardson ed., 1897)).

Prayer cases such as these should bear heavily on our evaluation of the constitutionality of Thanksgiving Proclamations. For if a high school student cannot give a “nonsectarian, nonproselytizing” prayer before an audience of a few hundred people,⁴⁷ it is difficult to imagine how the President of the United States can give a (sometimes highly sectarian) prayer and encourage hundreds of millions of Americans to continue with more (sometimes highly sectarian) praying. If “the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration,” is it not reasonable to assume that the American people also perceive the president’s Thanksgiving Proclamation as an expression of the public’s view, endorsed by the United States federal government?⁴⁸

B. Legislative Prayer

Two Supreme Court cases addressed aspects of legislative prayer that are informative of constitutional questions and the specific modes of analysis that may be involved in reconsidering presidential Thanksgiving Proclamations.

The first of these cases concerns state appointments and uses of chaplains. In *Marsh v. Chambers*, the Court considered whether the Nebraska state government violated the Establishment Clause by authorizing a chaplain to conduct prayers before legislative sessions.⁴⁹ Of added legal concern was the fact that “a clergyman of only one denomination has been selected by the Nebraska Legislature for 16 years, that the chaplain is paid at public expense, and that the prayers are in the Judeo-Christian tradition[.]”⁵⁰

The Court ruled 6-to-3 that the chaplaincy position and legislative prayers did not constitute an establishment of religion. Chief Justice Warren Earl Burger penned the majority opinion, which gave special weight to this practice of “unique history” and tradition, and argued that the chaplain’s duties served as “a tolerable acknowledgment of beliefs widely held.”⁵¹

In a blistering dissent, Justice William Brennan rejoined that these government-sanctioned prayers are at odds with the Constitution and inconsistent with the Court’s previous

⁴⁷ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294.

⁴⁸ *Id.* at 308.

⁴⁹ See *Marsh v. Chambers*, 463 U.S. 783, 784 (1983).

⁵⁰ *Id.* at 783–84.

⁵¹ *Id.* at 791–92.

decisions.⁵² The simple fact that Nebraska’s legislature—as well as the U.S. House of Representatives, the U.S. Senate, and many state legislatures—has a rich history of praying before sessions does not erase the Establishment transgression. In pointed response to the majority opinion, Justice Brennan noted: “Prayer is serious business—serious theological business—and it is not a mere ‘acknowledgment of beliefs widely held among the people of this country’ for the State to immerse itself in that business.”⁵³

The fact that a large number of Americans share a particular faith or participate in a similar religious practice only increases the need for a robust Establishment Clause and a “wall between church and state” that is “kept high and impregnable.”⁵⁴ Government-sanctioned prayer, including prayer from a legislative chaplain, undercuts the fundamental purposes of the Establishment Clause and instead “forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues.”⁵⁵

More than thirty years after *Marsh* was decided, the Court returned to the matter in *Town of Greece v. Galloway*. In *Greece*, the Court evaluated the constitutionality of prayers offered at the start of municipal meetings.⁵⁶ In the town of Greece, New York, the municipal council regularly invited local clergymen to deliver an invocation before meetings began and government business was conducted. Many of the prayers were Christian in nature and were given by Christian clergymen, for “nearly all of the congregations in town were Christian.”⁵⁷

In one of the most anticipated Establishment Clause rulings handed down by the U.S. Supreme Court this decade, the *Greece* Court, divided 5-to-4, found the town council prayers to be a constitutional exercise.⁵⁸ Writing for the majority, Justice Anthony Kennedy worked hard to elaborate the critically non-religious aspects of the pre-meeting invocations. According to the majority, the prayers were redeemable because they

⁵² See *id.* at 795–96 (Brennan, J., dissenting).

⁵³ *Id.* at 819.

⁵⁴ *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947).

⁵⁵ *Marsh v. Chambers*, 463 U.S. 783, 808 (1983) (Brennan, J., dissenting).

⁵⁶ See *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1815 (2014).

⁵⁷ *Id.* at 1816. During the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. These four prayers occurred in 2008, shortly after the plaintiffs began complaining about the town’s Christian prayer practice and nearly a decade after that practice had commenced. *Id.* at 1839 (Breyer, J., dissenting).

⁵⁸ *Id.* at 1813.

furnished a number of secular benefits.⁵⁹ For instance, the clergyman’s invocation “lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”⁶⁰ Justice Kennedy stressed the purely ceremonial and somehow innocuous nature of this form of government prayer, arguing it is a benign part of our heritage and “intended to place town board members in a solemn and deliberative frame of mind.”⁶¹

Offsetting his language about the ceremonial and significantly secular nature of the town council prayers, Justice Kennedy explored the setting and audience for the prayers to ascertain the extent to which people were being coerced into religious participation.⁶² Fortunately for Kennedy & Co., the critically non-religious religious oration was determined to be non-coercive and principally directed at lawmakers. Justice Kennedy was clear to point out that “[t]he analysis would be different if town board members directed the public to participate in the prayers Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public.”⁶³ The majority’s logic clearly hinged on the limited number of citizens that attended town council meetings, citizens were not the intended audience for the prayers, and attendants’ ability to opt out of listening and participating.

The brightest parts of Justice Elena Kagan’s dissenting opinion, which was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, sharply disagreed over this very evaluation of the setting and audience for town council prayers. According to the four dissenters, many members of the audience during these council meetings were members of the general public.⁶⁴ Moreover, “the prayers there [were] directed squarely at the citizens.”⁶⁵

An especially damning characteristic of the prayers was their association with a single religion—Christianity. Justice

⁵⁹ *Id.* at 1818.

⁶⁰ *Id.*

⁶¹ *Id.* at 1816.

⁶² *See id.* at 1825 (“It is an elemental First Amendment principle that government may not coerce its citizens ‘to support or participate in any religion or its exercise.’ . . . The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.”) (quoting *Cty. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 659 (1989)).

⁶³ *Town of Greece, N.Y.*, 134 S. Ct. at 1826.

⁶⁴ *Id.* at 1842 (Kagan, J., dissenting).

⁶⁵ *Id.* at 1848.

Kagan was especially troubled by the establishment risks that attend to this level of sectarianism. In her dissent, Kagan walked through several examples of governmental actors—a judge, an election official, an official at a naturalization ceremony—engaging in public religious invocations to show how “prayer repeatedly invoking a single religion’s beliefs in these settings—crossed a constitutional line.”⁶⁶ This clashes with the principle of full and equal citizenship guaranteed by the Establishment Clause. A government-sponsored prayer aligned with a single faith can offer the impression that they are less than full citizens and their equal rights and equal ownership over democratic government is predicated on an established religious orthodoxy.⁶⁷ In the closing paragraph of her opinion, Justice Kagan reinforced this point, writing: “When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another . . . they should not confront government-sponsored worship that divides them along religious lines.”⁶⁸

C. Grounds for Reconsidering Thanksgiving Proclamations

Not coincidentally, almost every court case discussed so far included some judicial reference to, or sustained commentary on, American presidents’ practice of issuing Thanksgiving Proclamations. Although the U.S. Supreme Court has never evaluated this particular practice, it certainly has given citizens the resources to do so. The arguments best equipped to cast doubt on the constitutionality of Thanksgiving Proclamations certainly include materials from the aforementioned constellation of governmental institutions, persons, and practices. Many of the precedents and modes of judicial reasoning generated by the Supreme Court’s Establishment Clause jurisprudence, spanning at least from *Everson* to *Greece*, complicate our historical embrace of presidential prayers and executive calls to thank and praise God.

For decades now, courts have turned to *Everson v. Board of Education* when explicating the strict separation principles undergirding the Establishment Clause. Based on these

⁶⁶ *Id.* at 1843.

⁶⁷ *Id.* at 1841 (“I think the Town of Greece’s prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. . . . In my view, that practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.”).

⁶⁸ *Id.* at 1854.

principles, it seems that presidential Thanksgiving Proclamations must be neutral between religions and also between religion and non-religion for them to pass constitutional muster. These official governmental actions cannot show religious favoritism, either by favoring religion generally or favoring a specific religion. After examining the various Thanksgiving Proclamations of the past, it should be clear that many of these executive statements have favored religion generally and also favored a specific religion.

Those who may claim that Thanksgiving Day Proclamations are vindicated by the fact that such Proclamations do not force citizens into religious observance should return to the U.S. Supreme Court's decisions in *Engel* and *Abington*. In these cases, the Court communicated the State's constitutional duty to avoid this exact sort of religious entanglement and promotion.⁶⁹ State-sanctioned calls for prayer are constitutionally suspect, even when no one is legally compelled to participate in the religious practice. This is because a government practice does not have to be coercive to violate the Establishment Clause.

Following the holdings in *Lee* and *Santa Fe*, we might wonder about the "subtle coercive pressure," "indirect coercion," and "peer pressure" involved in these benedictions, which flow from an individual who is regularly interpreted as the leader of the free world and the most powerful person on Earth.⁷⁰ A strong claim could be made that the president's words disseminate as a "perceived and actual endorsement of religion."⁷¹

Although the outcomes of *Marsh* and *Greece* appear to justify Thanksgiving Proclamations, this is not necessarily the case. The United States does not have a unique and unbroken history of presidential Thanksgiving Proclamations. Not every president has delivered this sort of religious message, and several who have issued Proclamations were troubled by their actions and/or used brief, muted, and/or secular declarations.

Justice Kennedy's majority opinion and Justice Kagan's dissenting opinion in *Greece* both illustrated the added constitutional obstacles facing presidential Thanksgiving addresses. Thanksgiving Proclamations are not purely ceremonial and innocuous words, issued by a local minister to a small crowd. Many of these Proclamations include religious exhortations, deeply theistic messages, and explicitly Judeo-Christian language and references. If four Justices of the

⁶⁹ See *supra* Section III(A).

⁷⁰ *Lee v. Weisman*, 505 U.S. 588, 592–93 (1992).

⁷¹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000).

Court were made queasy by the town council of Greece's strong association with a single clerical background, they must surely shudder by the language of Thanksgiving Proclamations and their common religious affiliation.

Even the majority opinion in *Greece* was adamant that “[t]he analysis would be different if town board members directed the public to participate in the prayers.”⁷² The setting and audience for presidential Thanksgiving Proclamations is the public at large—political recipients of executive orders and messages. These Proclamations represent official governmental statements and are widely reported in the media. Moreover, many of these Proclamations clearly direct the public to participate in prayers.

IV. “THOU SHALT NOT MAKE RELIGIOUS PROCLAMATIONS” – JAMES MADISON AND THOMAS JEFFERSON

In addition to the conventional political scientific wisdom on presidential rhetoric and the relevant First Amendment jurisprudence on government-sanctioned prayer, several frank opinions from the founding generation may prove valuable to the evaluation of presidential Thanksgiving Proclamations. Some may consider this line of inquiry to be a fool's errand, especially because the first two presidents—George Washington and John Adams—both felt comfortable in offering Thanksgiving Proclamations.⁷³ Several influential leaders (and presidents) in the early years of our nation, however, expressed serious concerns over these exact practices.

An unmistakable characteristic of the Establishment Clause case law is the repeated struggles between competing historian-Justices over how best to appropriate (and pay homage to) James Madison and Thomas Jefferson. Madison and Jefferson wrote

⁷² *Id.* at 1826.

⁷³ After he left office, however, John Adams seemed less comfortable with these decisions. See *From John Adams to Benjamin Rush, 12 June 1812*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Adams/99-02-02-5807> [<http://perma.cc/DWH2-B2FE>] (last modified June 29, 2017).

The National Fast, recommended by me turned me out of Office. It was connected with, the general Assembly of the Presbyterian Church, which I had no concern in. . . . A general Suspicion prevailed that the Presbyterian Church was ambitious and aimed at an Establishment as a National Church. I was represented as a Presbyterian and at the head of this political and ecclesiastical Project. The Secret Whisper ran through them all the Sects ‘Let Us have Jefferson, Madison, Burr, any body, whether they be Philosophers, Deist or even Atheists, rather than a Presbyterian President.’ This Principle is at the Bottom of the Unpopularity of national Fast and Thanksgivings, Nothing is more dreaded than the National Government meddling with Religion.

Id.

and spoke extensively on the topic of religious liberty, and both men were active in securing a strong separation of church and state while they served in governmental positions.

On the religion clauses of the First Amendment, these Founders' words have been "accepted almost as an authoritative declaration of the scope and effect of the amendment."⁷⁴ For example, the majority and dissenting opinions in *Everson* brim with dozens of references to these two men.⁷⁵ The Court turned to Madison and Jefferson throughout, as Establishment Clause exponents, experts, and historical beacons.⁷⁶ So if the actions and views of Madison and Jefferson are believed to offer "irrefutable confirmation of the Amendment's sweeping content,"⁷⁷ what can the lives of these two statesmen tell us about presidential Thanksgiving Proclamations?

For at least the past 140 years, Supreme Court Justices have trusted Thomas Jefferson's *Letter to the Danbury Baptists* as a reliable companion text to the Free Exercise Clause and Establishment Clause of the First Amendment.⁷⁸ Believing this letter helps to explicate the purposes and principles lying within our constitutionally guaranteed religious liberty protections, constitutional commentators have fought over the true meaning and history of Jefferson's missive.⁷⁹ Interestingly enough, a primary purpose behind President Jefferson's letter pertains to Thanksgiving Day Proclamations.

⁷⁴ *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁷⁵ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 34 (1947) (Rutledge, J., dissenting).

⁷⁶ See generally *id.*

⁷⁷ *Id.* at 34.

⁷⁸ See *Reynolds*, 98 U.S. at 164.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Id. (quoting Thomas Jefferson).

⁷⁹ See generally DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010); DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (First Harvard Univ. Press ed. 2002); VINCENT PHILLIP MUNOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON (2009); JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2000).

During his eight years as President, Jefferson never made such a Proclamation. Understanding the controversy surrounding this political decision, Jefferson relied on his *Letter to the Danbury Baptists* “to explain his reasons for refusing to issue presidential proclamations of days for public fasting and thanksgiving.”⁸⁰ On the same day that Jefferson sent the letter, he explained to then-attorney general Levi Lincoln these very intentions: “[T]he Baptist address now inclosed [sic] admits of a condemnation of the alliance between church and state, under the authority of the Constitution. [I]t furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings.”⁸¹

Although Jefferson had issued a Thanksgiving Proclamation more than twenty years earlier, as governor of Virginia, he did not believe the president was constitutionally authorized to engage in this sort of religious practice.⁸² During his final term in office, Jefferson reiterated his constitutional view on the matter:

I consider the government of the U.S. as interdicted by the constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. [T]his results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S. certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government . . . but it is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. [T]hat is that I should *indirectly* assume to the U.S. an authority over religious exercises which the constitution has directly precluded them from. [I]t must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it: not indeed of fine & imprisonment but of some degree of proscription perhaps in public opinion. [A]nd does the change in the nature of the penalty make the recommendation the less a *law* of conduct for those to whom it is directed?⁸³

⁸⁰ DANIEL L. DREIBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 2, 27–30 (2002).

⁸¹ Thomas Jefferson, *To Levi Lincoln, 1 Jan. 1802*, in 36 THE PAPERS OF THOMAS JEFFERSON: DECEMBER 1, 1801 TO MARCH 3, 1802, at 256–57 (Barbara B. Obery ed., 2009), available at <https://jeffersonpapers.princeton.edu/selected-documents/levi-lincoln-0> [<http://perma.cc/CK8A-7BLQ>].

⁸² President Thomas Jefferson, Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), <http://founders.archives.gov/documents/Jefferson/01-03-02-0187> [<http://perma.cc/2CWW-5WCN>].

⁸³ *From Thomas Jefferson to Samuel Miller, 23 January 1808*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/99-01-02-7257> [<http://perma.cc/VVU8-WSJH>] (last modified June 29, 2017).

Jefferson steadfastly believed it was not the responsibility of the president to direct a religious activity. Even if no legal compulsion accompanies the president's rhetoric, these official Thanksgiving Proclamations have the power to produce social pressure, inequality, and religious division among the American people.

James Madison, who played an instrumental role in the construction and congressional passage of the religion clauses of the First Amendment, shared Jefferson's constitutional worries and spent decades expressing his disapprobation with Thanksgiving Proclamations and similar practices. In his *Memorial and Remonstrance against Religious Assessments*, Madison expounded his belief in a meaningful separation of church and state.⁸⁴ Madison's petition argued a government could only secure religious equality for its citizens if it abstained from establishing a single faith or using public resources to support religion.⁸⁵ Religious life would thrive best, Madison reasoned, when it was divorced from government aid and our political institutions would operate most effectively when they did not depend on religious alliances.⁸⁶

Madison's commitment to a mutually beneficial divorce between church and state elucidates his discomfort with presidential Thanksgiving Day Proclamations. Unlike Jefferson, Madison did make such Proclamations while President. He was, however, cognizant of the public concern over the constitutionality and propriety of "religious Proclamations" coming from the presidency, and he wrote quite a bit about these religious exercises (even to President James Monroe).⁸⁷

In his *Detached Memoranda*, Madison deemed the appointment and use of legislative chaplains to be

⁸⁴ *Memorial and Remonstrance against Religious Assessments*, [ca. 20 June] 1785, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-08-02-0163> [<http://perma.cc/2ZEU-W4Q9>] (last modified June 29, 2017).

⁸⁵ *See id.*

⁸⁶ *See id.* ("If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of Conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.").

⁸⁷ *See From James Madison to James Monroe, 11 December 1818*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/04-01-02-0339> [<http://perma.cc/4QTD-XTCF>] (last modified June 29, 2017).

unconstitutional.⁸⁸ Immediately following this evaluation, he articulated why “[r]eligious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed.”⁸⁹ Madison went into detail on this point, recounting his legal, political, and historical “objections” to these Proclamations. These objections include the national government’s lack of legal authority to instruct religious activities such as prayer, the Proclamation’s offering the impression of an established national religion, and the possibility that politicians and political parties would use these prayers to serve political ends.⁹⁰

In an 1822 letter to Edward Livingston, Madison again identified Thanksgiving Proclamations as a practice that compromised “a perfect separation between ecclesiastical & Civil matters” in the United States.⁹¹ Madison complained: “There has been another deviation from the strict principle, in the Executive Proclamations of fasts and festivals; so far at least as they have spoken the language of *injunction*, or have lost sight of the equality of *all* Religious Sects in the eye of the Constitution.”⁹² Madison remained hopeful, though, about the future of religious liberty, telling Livingston: “I have no doubt that every new example will succeed, as every past one has done, in shewing that Religion & Govt. will both exist in greater purity, the less they are mixed together.”⁹³

Madison’s optimism was not entirely misplaced. The presidents immediately succeeding Madison stopped the practice. It was not until the 1860s, more than forty years after the last presidential Thanksgiving Proclamation was made, that Moses spoke again.

V. ON NON-CONCLUSIONS AND THERMIDOR

The political power of presidential rhetoric, the development of Establishment Clause jurisprudence, and the opinions of a few, long-dead Founding Fathers—where does all this leave us? Some may think it leads to a robust constitutional claim against presidential Thanksgiving Proclamations. Others may *pray* that

⁸⁸ *Detached Memoranda, CA. 31 January 1820*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/04-01-02-0549> [<http://perma.cc/64V2-WW3R>] (last modified June 29, 2017).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *From James Madison to Edward Livingston, 10 July 1822*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/04-02-02-0471> [<http://perma.cc/WU5T-CSLA>] (last modified June 29, 2017).

⁹² *Id.*

⁹³ *Id.*

it leads nowhere—drowned out by at least an equal number of political, scientific, legal, and historical materials and counterclaims. Let’s leave that necessary dialectic for a different day and another law review article. Until then, remaining puzzles (or excursus):

Some Thanksgiving Proclamations have been neither as separationist as President Obama’s nor as catechismal as President Bush’s or President Eisenhower’s. The subject of President Jimmy Carter’s 1979 Thanksgiving Day Proclamation was hope and determination.⁹⁴ President Carter highlighted the countless obstacles through which the American people have persevered: Pilgrims struggling on a new continent, a later generation maintaining faith during the Revolutionary War, and subsequent Americans remaining confident in the nation’s future even as the Civil War raged.⁹⁵ This Thanksgiving Proclamation was dedicated to a people who always made it through, who were virtuous, successful, and capable of finding their way out of trials.

Near the end of his Proclamation, President Carter did “ask all Americans to give thanks on that day for the blessings Almighty God has bestowed upon us, and seek to be good stewards of what we have received.”⁹⁶ But the President’s broader message to the United States seems to have been one of collective praise and unity, encouraging citizens to “be thankful in proportion to that which we have received, trusting not in our wealth and comforts, but in the strength of our purpose.”⁹⁷

. . .

“I have seen these people,” the Lord said to Moses, “and they are a stiff-necked people. Now leave me alone so that my anger may burn against them and that I may destroy them. Then I will make you into a great nation.”

But Moses sought the favor of the Lord his God. “Lord,” he said, “why should your anger burn against your people, whom you brought out of Egypt with great power and a mighty hand? Why should the Egyptians say, ‘It was with evil intent that he brought them out, to kill them in the mountains and to wipe them off the face of the earth’? Turn from your fierce anger; relent and do not bring disaster on your people. Remember your servants Abraham, Isaac and Israel, to whom you swore by your own self: ‘I will make your descendants as numerous as the stars in the sky and I will give your descendants all

⁹⁴ President Jimmy Carter, Thanksgiving Day Proclamation 4693 (Sept. 28, 1979), <http://www.presidency.ucsb.edu/ws/?pid=31444> [<http://perma.cc/BMJ2-YCTY>].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

this land I promised them, and it will be their inheritance forever.” Then the Lord relented and did not bring on his people the disaster he had threatened.

Moses turned and went down the mountain with the two tablets of the covenant law in his hands. They were inscribed on both sides, front and back. The tablets were the work of God; the writing was the writing of God, engraved on the tablets.

When Joshua heard the noise of the people shouting, he said to Moses, “There is the sound of war in the camp.”

Moses replied: “It is not the sound of victory, it is not the sound of defeat; it is the sound of singing that I hear.”

When Moses approached the camp and saw the calf and the dancing, his anger burned and he threw the tablets out of his hands, breaking them to pieces at the foot of the mountain. And he took the calf the people had made and burned it in the fire; then he ground it to powder, scattered it on the water and made the Israelites drink it.⁹⁸

⁹⁸ *Exodus* 32: 9-20.

Promoting Executive Accountability Through *Qui Tam* Legislation

Randy Beck*

The United States government has experienced a profound rebalancing of power over the past century as authority has shifted from the legislative branch to the executive branch.¹ In domestic affairs, much federal law now comes from agencies operating under broad statutory mandates, and the tasks of weighing conflicting interests, devising specific regulatory standards, and setting enforcement priorities often fall to the executive.² In the international sphere, there has been a rapid expansion in the number of agreements negotiated unilaterally by the executive branch, without submission to the Senate for ratification as treaties.³ With respect to military affairs, presidents have become increasingly comfortable with unilateral decisions to initiate combat and have sometimes side-stepped even the post-hoc congressional review process contemplated by the War Powers Resolution.⁴

* Justice Thomas O. Marshall Chair of Constitutional Law, University of Georgia School of Law. The research for this essay was conducted while the author was a Garwood Visiting Fellow in the James Madison Program in American Ideals and Institutions at Princeton University. I would like to express my appreciation to Tom Campbell for his comments on a draft of this essay.

¹ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444–45 (2012) (“The power of the modern presidency has been enhanced by the gradual accumulation over time of an extensive array of legislative delegations of power. The complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have necessitated broad delegations of authority to the executive branch.”).

² See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 961–62 (2016) (delegations of authority by Congress have increased the power of the executive branch, particularly in light of legislative gridlock); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 111–28 (2014) (detailing numerous mechanisms through which executive branch agencies exercise legislative functions).

³ See *Treaties*, UNITED STATES SENATE <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#3> (last visited May 10, 2017) [<http://perma.cc/876P-NYLL>]; Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1258–60 (2008) (375 treaties entered into by the U.S. from 1980–2000, compared to 2744 congressionally authorized executive agreements).

⁴ Douglas Kriner, *Accountability Without Deliberation? Separation of Powers in Times of War*, 95 B.U. L. REV. 1275, 1284 (2015) (“Since Truman, all presidents have asserted the office’s unilateral authority to order American military forces abroad, absent explicit congressional authorization, to pursue a wide range of policy goals.”); see also Eric

The increasing power of the executive branch underscores the importance of effective mechanisms to enforce legal constraints on executive conduct. The Constitution imposes on the president the duty to “take [c]are that the laws be faithfully executed,”⁵ and affords him the ability to respond to misconduct by his subordinates.⁶ But relying on the executive branch to police its own members will often prove inadequate due to unavoidable conflicts of interest and the difficulty of managing a vast bureaucracy. Congress can conduct occasional oversight hearings to investigate the legality of executive actions, but cannot directly respond to executive misconduct except through cumbersome processes like lawmaking or impeachment.⁷ That leaves the option of judicial enforcement of the law in suits by persons outside the executive branch. However, this mechanism can be stymied through application of Article III standing principles and other justiciability rules like the political question doctrine.⁸ In short, there may be many instances in which potentially illegal executive conduct goes unaddressed due to limitations of the standard options for ensuring executive branch legal compliance.

In a forthcoming article, I review the history of a now largely-abandoned method for enforcing the law against government officials.⁹ From the fourteenth-century through the establishment of the United States government, it was very common for Anglo-American legislatures to regulate government officials through *qui tam* legislation. A *qui tam* statute allowed any member of the community to collect a fine for violation of a legal duty, and keep part of the proceeds, even if the litigant did

A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 497–98 (2016) (noting partisan invocation of constitutional and War Powers Act restrictions in response to unilateral executive military interventions in Grenada, Panama, Serbia and Libya); Bradley & Morrison, *supra* note 1, at 440–47 (explaining reasons it can be easier for the executive branch to act than the legislative branch).

⁵ U.S. CONST. art I, § 3, cl. 1.

⁶ See Jurisdiction of Integrity Comm. When Inspector Gen. Leaves Office After Referral of Allegations, 2006 WL 5779980, at 3–4 (O.L.C. Sept. 5, 2006).

⁷ *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951–59 (1983) (Congress must comply with bicameralism and presentment requirements when acting to change legal rights, duties or relations of persons outside the legislative branch); U.S. CONST. art. I, §§ 2–3 (impeachment procedures), § 7 (procedures for passage of legislation).

⁸ See *Lujan v. Def. of Wildlife*, 504 U.S. 555, 575–78 (1992) (applying standing doctrine to reject case against executive branch official); Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK L. REV. 47, 47–48 (2016) (courts avoided ruling on the merits of Vietnam War cases in various ways including standing and political question grounds).

⁹ Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. (forthcoming 2018) [hereinafter Beck, *Qui Tam Litigation Against Government Officials*].

not have a particularized injury as required by modern rules of standing.¹⁰

This essay will consider the possibility of selectively reviving the tradition of *qui tam* legislation to enforce particular legal duties of executive branch officials. By overcoming Article III standing concerns, *qui tam* legislation has the capacity to fill gaps left by more common methods of enforcing the law. At the same time, introducing a profit motive into law enforcement carries risks that legislators should take into account. Part I will briefly describe the history of *qui tam* regulation of government officials in England, the early American states and the first two Congresses, and discuss the Supreme Court's conclusion that *qui tam* litigation satisfies Article III standing requirements.¹¹ Part II will consider hypothetical *qui tam* legislation to enforce executive branch legal duties in three areas: (1) expending funds without a supporting congressional appropriation, or refusing to spend funds as directed by statute; (2) pursuing military action in violation of the War Powers Resolution; and (3) using private email systems for public business.¹² Part III briefly considers downsides of reviving *qui tam* legislation to regulate executive officials.¹³

I. QUI TAM REGULATION OF GOVERNMENT OFFICIALS

The fourteenth-century English Parliament faced significant challenges in providing for enforcement of laws governing a large country with a dispersed population.¹⁴ Some legislation was less problematic because it was designed to benefit private citizens individually. Violation of this kind of statute could be addressed through litigation pursued by the victim of illegal conduct.¹⁵ The more difficult problem arose when a law protected interests of the entire community or of the central government, rather than individual citizens. Today, government officials typically enforce such laws. In the fourteenth-century, however, there were far fewer government officials, and those at the local level might not

¹⁰ *Id.* at 3; *see also* Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000) (finding *qui tam* plaintiff satisfied Article III standing requirements, even though suing based on injury to the United States).

¹¹ *See infra* notes 14–34 and accompanying text.

¹² *See infra* notes 35–73 and accompanying text.

¹³ *See infra* notes 74–81 and accompanying text.

¹⁴ *See* Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 567 (2000) [hereinafter Beck, *English Eradication*].

¹⁵ *See, e.g.*, Statute of Labourers, 23 Edw. 3, ch. 1 (1349) (cause of action for party “damned” by food merchant charging excessive prices, but also allowing *qui tam* enforcement as a backup).

vigorously enforce laws designed to advance goals of the central government.¹⁶

Parliament developed the *qui tam* statute to prevent under-enforcement of penal statutes, which could deprive laws of their deterrent effect.¹⁷ The typical *qui tam* statute imposed a legal obligation, specified a forfeiture for violation, and provided that any person could sue to collect the penalty, with the informer entitled to keep a percentage (usually half) if successful.¹⁸ The statutory authorization for anyone to sue, and the bounty offered to the successful informer, effectively deputized any member of the community to enforce the law, vastly expanding available law enforcement resources.¹⁹

Most English *qui tam* statutes regulated private conduct, often commercial in nature.²⁰ Early on, however, Parliament also deployed *qui tam* statutes to enforce specified duties of government officials. Initially, such *qui tam* provisions were used as a supplement to regulation of private commercial conduct, promoting integrity and diligence among regulatory officials. For instance, fourteenth-century statutes permitted *qui tam* actions against officials who traded in regulated commodities or who were less than diligent in enforcing regulatory requirements.²¹ Over time, though, Parliament expanded the practice to take in an increasing array of officials performing a growing list of functions, e.g., purveyors acquiring goods for the royal household, ecclesiastical judges exceeding the limits on their jurisdiction, officials responsible for enforcing religious uniformity laws, revenue officers handling tax receipts, and individuals serving in Parliament despite a statutory disqualification.²²

Regulation of government officials through *qui tam* legislation was widely practiced in the American colonies and early states. *Qui tam* monitoring was used to promote statutory compliance by an enormous variety of state officials, particularly those performing decentralized functions such as road construction and maintenance, judicial administration, and

¹⁶ Beck, *English Eradication*, *supra* note 14, at 567.

¹⁷ *Id.* at 568 (*qui tam* statute increased chances statutory forfeiture would be enforced). The *qui tam* label derives from a longer Latin phrase that can be translated “who pursues this action on our Lord the King’s behalf as well as his own.” *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000).

¹⁸ Beck, *English Eradication*, *supra* note 14, at 552–53 (describing characteristics of *qui tam* statutes).

¹⁹ *Id.* at 569.

²⁰ *Id.* at 570–71.

²¹ See Beck, *supra* note 9, at 22–24.

²² See *id.* at 25–29.

regulation of commercial activities.²³ It was common for early states to rely on *qui tam* oversight to ensure lawful conduct by officials performing functions critical to public confidence in government, such as conducting elections and collecting taxes.²⁴

The United States Constitution was ratified against the backdrop of over four and a half centuries in which Anglo-American legislatures had often regulated government officials through *qui tam* legislation.²⁵ It should come as no surprise, then, that the earliest Congresses extensively employed *qui tam* statutes to regulate both private parties and executive branch officials. Statutes enacted in the first two Congresses included *qui tam* provisions applicable to federal revenue officers, census workers, Treasury officials, postal workers, and those regulating trade with Native American tribes.²⁶ *Qui tam* regulation of executive branch officials disappeared over time as the growing number of government employees reduced the need for *qui tam* oversight and the demand for professionalization of public service prompted movement away from profit-motivated law enforcement mechanisms.²⁷ There can be no doubt though that supervising the legality of executive branch conduct through *qui tam* litigation was understood as a permissible legislative option when the Constitution took effect.

The case for selective *qui tam* monitoring of the executive branch rests on the Supreme Court's understanding of standing principles flowing from the Article III "case or controversy" requirement. The Court has articulated a familiar injury-causation-redressability test for evaluating a litigant's standing to sue: "The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."²⁸ For a quarter century, the Supreme Court has said that the requirement of a "particularized" injury—i.e., one that affects the plaintiff in a manner distinct from the public at large—represents part of the "irreducible constitutional minimum" of standing.²⁹ This particularized injury requirement is often applied to deny standing in cases against the executive

²³ *Id.* at 29–42.

²⁴ *Id.* at 45–49.

²⁵ *Id.* at 63.

²⁶ *See id.* at 50–62.

²⁷ *See generally* NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013) (detailing the shift away from profit-incentivized enforcement of the laws).

²⁸ *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

²⁹ *Id.* (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)).

branch, with courts dismissing claims that present only “generalized grievances” about the legality of government conduct.³⁰

Notwithstanding the rule that standing requires a particularized injury, the Court has found that *qui tam* litigation satisfies Article III requirements. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court considered a False Claims Act case in which a *qui tam* “relator” (*i.e.*, informer) alleged that a federal grant recipient submitted false claims to the Environmental Protection Agency in an effort to obtain excess grant funds.³¹ The Court recognized that the relator had no personal injury in fact; the only particularized injury was suffered by the government.³² The Court nevertheless found Article III standing on the theory that the statute’s *qui tam* provision acted as a partial assignment to the relator of the government’s claim.³³ The Court’s finding of standing for informers was supported by the “long tradition of *qui tam* actions in England and the American Colonies,” a history “well nigh conclusive with respect to the question before us here: whether *qui tam* actions were ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”³⁴ Since *qui tam* litigation allows the informer to challenge the legality of conduct that inflicts no particularized harm on the litigant, it creates the possibility of enhancing the legal accountability of executive officials in situations where private suits might easily be dismissed as generalized grievances.

II. POSSIBLE MODERN APPLICATIONS OF *QUI TAM* LEGISLATION TO THE EXECUTIVE BRANCH

Qui tam legislation offers a potentially appealing mechanism for promoting legal compliance by executive branch officers because it allows judicial consideration of legal challenges that might otherwise fail for lack of standing. Let’s consider three types of legal duties that might be enforceable through *qui tam* monitoring.

A. Reinforcing the Congressional Power of the Purse

The Constitution vests in Congress broad control over the use of public money. Congress has the affirmative power “to pay the Debts and provide for the common Defense and general

³⁰ See, e.g., *Lujan*, 504 U.S. at 571–78.

³¹ *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770 (2000).

³² See *id.* at 772–73.

³³ *Id.* at 774.

³⁴ *Id.* at 766–77 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

Welfare of the United States.”³⁵ This power is reinforced by a negative prohibition: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.”³⁶ Administrations of both major political parties have sometimes sought to circumvent the congressional power of the purse. The Nixon Administration famously asserted an authority to “impound” public funds, refusing to spend money on grounds unrelated to the congressional spending program in question.³⁷ The Obama Administration, on the other hand, was found to have violated the Constitution by sending money to insurance companies under the Affordable Care Act without a supporting congressional appropriation.³⁸

Standing doctrine tends to foreclose many lawsuits challenging the use of public money.³⁹ In *Frothingham v. Mellon*, the Supreme Court determined that taxpayer status did not give an individual standing to challenge the constitutionality of a federal expenditure.⁴⁰ An individual’s interest in money in the U.S. Treasury “is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”⁴¹ This bar to taxpayer standing has long been understood as one application of the generalized grievance principle.⁴² Other case law has strictly limited lawsuits by individual members of Congress seeking to protect legislative powers.⁴³ The recent case challenging Affordable Care Act payments to insurers satisfied standing concerns only because an entire house of Congress decided to file suit, something that would be impossible in many cases.⁴⁴

³⁵ U.S. CONST. art. I, § 8, cl. 1.

³⁶ *Id.* art. I, § 9, cl. 7.

³⁷ See *Train v. City of N.Y.*, 420 U.S. 35, 40–41 (1975) (finding the statute did not permit Environmental Protection Agency to allocate less funds for municipal sewage and treatment facilities than Congress authorized for appropriation); Adam Rozenzweig, *The Article III Fiscal Power*, 29 CONST. COMM. 127, 138–39 (2014) (discussing impoundment controversy).

³⁸ See *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 174–75 (D.D.C. 2016).

³⁹ See, e.g., *Brown v. Ruckelshaus*, 364 F. Supp. 258, 265 (C.D. Cal. 1973) (plaintiff lacked standing to challenge Environmental Protection Agency’s withholding of funds).

⁴⁰ *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

⁴¹ *Id.* at 487.

⁴² See *Turner v. City & Cty. of S.F.*, 617 Fed. Appx. 674, 677 (9th Cir. 2015) (claim asserted as taxpayer could not be pursued in federal court because only raised generalized grievance).

⁴³ See, e.g., *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding individual members of Congress lacked standing to challenge Line Item Veto Act).

⁴⁴ *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 80–81 (D.D.C. 2015).

There is precedent for using *qui tam* legislation to monitor government officials in connection with fiscal matters, as in the English and American statutes that regulated tax collection efforts.⁴⁵ *Caswell v. Allen*⁴⁶ was an early American case against one of the county supervisors of Cayuga County, New York. The New York legislature had instructed the county to raise up to \$800 in tax revenues to build a fireproof clerk's office near an anticipated new courthouse.⁴⁷ The defendant joined the majority that voted down a proposal to comply with the legislative directive. A *qui tam* informer then sued the defendant under a statute imposing a \$250 forfeiture on any county supervisor who neglected or refused to follow a law directing the county to levy funds for public buildings.⁴⁸ The issue on appeal was whether the legislation concerning funds for a clerk's office was mandatory or discretionary. The appellate court concluded that the legislation imposed a mandatory duty to raise revenue for a clerk's office and therefore granted a new trial against the defendant.⁴⁹

A modern *qui tam* statute could be used to reinforce Congress' power of the purse. The statute could impose a forfeiture on any executive official who refused to spend funds where a statute made the expenditure mandatory, or who authorized an expenditure that was not supported by a congressional appropriation. The *qui tam* provision would overcome Article III objections and eliminate the barrier to adjudication created by the rule against taxpayer standing.

B. Preserving the Congressional Role in Military Affairs

The constitutional allocation to Congress of the power to "declare war" has proved ineffective in ensuring congressional control over the use of military force. Our political and legal institutions early on accepted the lawfulness of military engagements that involved no such declaration.⁵⁰ In the aftermath of the Vietnam War, Congress sought to reinvigorate the legislative role in military decision-making by adopting the War Powers Resolution ("WPR"). The provisions are complex, but the key points can be outlined succinctly. The president must

⁴⁵ See *supra* notes 22, 24 and 26 and accompanying text.

⁴⁶ 7 Johns. 63 (N.Y. 1810).

⁴⁷ *Id.* at 63.

⁴⁸ *Id.*

⁴⁹ *Id.* at 68–69.

⁵⁰ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2059–60 (2005) ("One reason is historical practice. Starting with early conflicts against Indian tribes and the Quasi-War with France at the end of the 1700s, the United States has been involved in hundreds of military conflicts that have not involved declarations of war.")

consult with Congress whenever possible before introducing military forces into actual or imminent “hostilities,”⁵¹ and must report such deployments to Congress.⁵² As a general rule, the resolution instructs the president to terminate the deployment of troops unless Congress within sixty days declares war or adopts “specific authorization” for the use of force.⁵³ Authorization may not be inferred from a provision of an appropriation statute unless it “specifically authorizes the introduction of United States Armed Forces into hostilities” and states that it is intended to satisfy the WPR authorization requirement.⁵⁴

Many observers argue that certain recent military operations have violated the letter or spirit of the WPR. President Clinton continued U.S. participation in the NATO bombing of Kosovo beyond the sixty day limit of the WPR based on the theory that Congress authorized the action through an appropriation provision, even though the statute rejects authorization by that means.⁵⁵ President Obama claimed that extended participation in the NATO operation in Libya was not subject to the WPR because our drone and bombing attacks did not amount to “hostilities.”⁵⁶

Qui tam legislation was used historically to regulate militia service, enforcing duties such as showing up for training exercises with the necessary equipment.⁵⁷ Could *qui tam* legislation potentially help Congress in the higher profile context of enforcing the WPR? Imagine a law imposing *qui tam* forfeitures on executive branch officials for acts such as (1) introducing troops into hostilities (perhaps accompanied by further definition of the term) without consulting with Congress in a situation where such consultation was possible, (2) failing to report to Congress within a specified time period after troops have been introduced into hostilities, or (3) continuing

⁵¹ 50 U.S.C. § 1542.

⁵² *Id.* § 1543(a).

⁵³ *Id.* § 1544(b).

⁵⁴ *Id.* § 1547(a)(1).

⁵⁵ See Jason Reed Struble & Richard A.C. Alton, *The Legacy of Operation Allied Force: A Reflection on Its Legality Under United States and International Law*, 20 MICH. ST. INT'L L. REV. 293, 310–13 (2012). But see Abraham D. Sofaer, *The War Powers Resolution and Kosovo*, 34 LOY. L.A. L. REV. 71, 76–77 (2000) (arguing WPR provision preventing appropriations from serving as approval of a military operation is legally ineffective).

⁵⁶ Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), <https://newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-see-congressional-authorization> [<http://perma.cc/R34Z-8NPC>] (stating that Obama administration construction of War Powers Resolution in connection with Libya operations was unconvincing).

⁵⁷ See Beck, *supra* note 9, at 43.

participation in hostilities for more than 60 days without congressional authorization in the required form.

A *qui tam* provision could remove the Article III standing barrier that courts have invoked to avoid adjudication of claims under the WPR.⁵⁸ Cases seeking to enforce the resolution could nevertheless face other barriers to justiciability, especially the political question doctrine.⁵⁹ The application of the political question doctrine depends on a variety of factors,⁶⁰ but the force of some factors could be minimized by careful drafting. For instance, if Congress specified objective conditions that would trigger legal duties under the WPR and made clear that the duties are mandatory rather than discretionary, a court would be less likely to find a lack of “judicially discoverable and manageable standards” for resolving the case or the need for “an initial policy determination of a kind clearly for nonjudicial discretion.”⁶¹ Dismissal on political question grounds would be more likely if the legal question arguably turned on the exercise of military or foreign affairs expertise. For instance, a court might find a political question if the executive branch was offering an intelligence-based analysis of the historical relationship between Al Qaeda and the Islamic State to argue that operations against the Islamic State come within the scope of the 2001 Authorization for the Use of Military Force against Al Qaeda.⁶² On the other hand, if the sole issue was whether Congress had authorized a military action and (as in Kosovo) the only arguable authorization was an appropriations bill, the questions presented to the court would seem more legal in nature.

While a *qui tam* provision might help get a WPR case into court, it is an open question whether one should view that as a desirable outcome. Some people would consider it unwise to place

⁵⁸ See *Campbell v. Clinton*, 203 F.3d 19, 20–26 (D.C. Cir. 2000) (finding members of Congress lacked standing to challenge Kosovo bombing as a violation of the War Powers Resolution).

⁵⁹ See Vladeck, *supra* note 8, at 47–48 (noting that in cases challenging the Vietnam War, courts avoided decisions on the merits in “every way imaginable,” including political question doctrine).

⁶⁰ See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁶¹ *Id.*

⁶² See MATTHEW C. WEED, CONGRESSIONAL RESEARCH SERVICE, R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS (2017) (“During his Administration, President Obama stated that the Islamic State can be targeted under the 2001 AUMF because its predecessor organization, Al Qaeda in Iraq, communicated and coordinated with Al Qaeda; the Islamic State currently has ties with Al Qaeda fighters and operatives; the Islamic State employs tactics similar to Al Qaeda; and the Islamic State, with its intentions of creating a new Islamic caliphate, is the ‘true inheritor of Osama bin Laden’s legacy.’”).

the president under legally enforceable constraints—even the loose constraints of the WPR—in dealing with rapidly changing international threats. Moreover, those desiring a greater congressional voice in decisions about the use of military force might find that overcoming barriers to adjudication proved a Pyrrhic victory. A court could resolve a case on the merits by reading the WPR in a manner deferential to the executive.⁶³

C. Preserving Official Email Records

So far, we have discussed use of *qui tam* legislation to allow adjudication of high-level legal conflicts central to the allocation of power between Congress and the president. Disputes over the congressional appropriations power or the president’s unilateral initiation of military action are important, but not frequent. Historically, *qui tam* legislation was more often used to monitor activities of lower level officials performing the mundane daily tasks of government. For instance, *qui tam* statutes were often used in past centuries to promote thorough and accurate record keeping by public officials. English law used *qui tam* remedies to regulate record keeping regarding sales of horses at fairs and markets.⁶⁴ Early state laws deployed *qui tam* monitoring to ensure that records of a justice of the peace were preserved upon death or resignation.⁶⁵ The first Congress adopted *qui tam* legislation to govern creation and retention of census records.⁶⁶

To round out our discussion of the potential use of *qui tam* legislation to promote executive branch accountability, it is worth considering a modern record-keeping question that has been much in the news. The 2016 presidential election was roiled by disclosures that the Democratic nominee had set up a private email system through which she sent and received official electronic correspondence in her role as Secretary of State.⁶⁷ Official inquiries confirmed that an earlier Republican Secretary of State had also conducted some government business through a private email account.⁶⁸ Doing public business on a private email

⁶³ Given longstanding questions about the constitutional status of the War Powers Resolution, the risk of an executive-leaning interpretation might be heightened by the canon of constitutional avoidance. See *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (“If one of [two plausible statutory constructions] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”).

⁶⁴ Beck, *supra* note 9, at 25.

⁶⁵ *Id.* at 37–38.

⁶⁶ *Id.* at 56–57.

⁶⁷ OFFICE OF INSPECTOR GENERAL, ESP-16-03, OFFICE OF THE SECRETARY: EVALUATION OF EMAIL RECORDS MANAGEMENT AND CYBERSECURITY REQUIREMENTS 23–25 (2016) (discussing private email use by Secretary Clinton).

⁶⁸ *Id.* at 21–22 (discussing private email use by Secretary Powell).

system can undermine laws designed to ensure preservation of records, promote transparency, and reduce cybersecurity risks.⁶⁹ Notwithstanding campaign criticism of the Democratic nominee's email practices, at least six close advisors to President Trump have reportedly used private email accounts since the election to discuss White House matters.⁷⁰

A private litigant might have difficulty challenging an official's practice of using a private email account for public business. Assuming a relevant cause of action could be identified, the plaintiff could be deemed to allege a generalized grievance widely shared by the public at large.⁷¹ One public interest organization did manage to secure disclosure of many of the Secretary of State's emails using the Freedom of Information Act ("FOIA"), presumably establishing a particularized injury based on the rights created by a FOIA request.⁷² However, since FOIA applies to an agency, it may not guarantee accountability of individual federal employees, and a significant number of agency records are exempt from release under the statute.⁷³

So how might *qui tam* legislation address modern concerns about email preservation by government employees? Imagine a statute imposing a \$1000 forfeiture for each email sent in the course of a government employee's official duties using a private email account. Statutory definitions could be used to create greater certainty about when an email was subject to the statute. A safe harbor provision could protect a government employee from suit if an email sent from a private account was promptly archived among the government's official email records. The legislation could be enforced by any *qui tam* informer with

⁶⁹ See *id.* at 2–19 (record keeping, preservation and transparency requirements), 26–34 (cybersecurity policies). Lisa Jackson, director of the Environmental Protection Agency in President Obama's first term, raised comparable transparency and record-keeping concerns (though not necessarily cybersecurity risks) when she sent emails on a second government email account registered under the alias "Richard Windsor." Julian Hattam, *Former EPA Chief Under Fire for New Batch of 'Richard Windsor' Emails*, THE HILL (May 1, 2013), <http://thehill.com/regulation/energy-environment/297255-former-epa-chief-under-fire-for-new-batch-of-richard-windsor-emails> [<http://perma.cc/7E5L-5FXN>]; see also Jaime Dupree, *Documents Show Ex-Attorney General Lynch Used "Elizabeth Carlisle" as Email Alias*, ATLANTA JOURNAL CONST. (Aug. 7, 2017), <http://jamiedupree.blog.ajc.com/2017/08/07/documents-show-ex-attorney-general-lynch-used-elizabeth-carlisle-as-email-alias/> [<http://perma.cc/864J-T3RP>].

⁷⁰ Matt Apuzzo & Maggie Haberman, *At Least 6 White House Advisers Used Private Email Accounts*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/politics/private-email-trump-kushner-bannon.html>.

⁷¹ See, e.g., *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (lawsuit challenging failure to release list of CIA expenditures presented a generalized grievance).

⁷² See *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 953 (D.C. Cir. 2016) (case seeking to recover emails from former Secretary of State's private email accounts not moot).

⁷³ See, e.g., 5 U.S.C. § 552(b)(c) (1976) (FOIA exemptions).

evidence of an email violating the prohibition, with a successful informer entitled to keep half (or perhaps all) of the recovery as a bounty.

At this point, some readers may be thinking this sounds like an excellent way to ensure that executive branch employees comply with legal obligations flowing from their role as public servants. Other readers, however, may be getting nervous as they contemplate how the statute might work in practice. Would federal employees be distracted from their jobs by burdensome litigation? Would profit-motivated lawyers or informers develop a business of targeting careless federal employees? Would the statute be put to political use by interest groups or partisan warriors? Such concerns underscore some of the possible downsides of *qui tam* regulation and help explain why such statutes fell into disfavor in England and the United States. The next section discusses some of the problems with *qui tam* legislation and whether those problems might be ameliorated through legislative drafting.

III. POSSIBLE DRAWBACKS TO *QUI TAM* REGULATION OF EXECUTIVE OFFICIALS

England eliminated its remaining *qui tam* statutes in 1951.⁷⁴ I have argued elsewhere that recurring problems experienced in the history of *qui tam* enforcement flowed from a conflict of interest built into the design of the legislation. A *qui tam* statute deputizes private citizens to represent the interests of the public in enforcing the law, but simultaneously offers the informer a private financial interest in the outcome. When these public and private interests pull in different directions, informers may pursue private gain at the expense of the public good.⁷⁵

English informers sometimes negotiated secret settlements with those allegedly in violation of *qui tam* legislation, keeping payments that should have been shared with the government.⁷⁶ They sometimes pursued fraudulent or malicious claims.⁷⁷ They brought suit in inconvenient locations, making it burdensome for defendants to litigate.⁷⁸ They sought to enforce statutes in ways that undermined the public good.⁷⁹ Legislative responses to such abuses were only partially successful.⁸⁰ Professional informers,

⁷⁴ Beck, *English Eradication*, *supra* note 14, at 548–49.

⁷⁵ *Id.* at 549.

⁷⁶ *Id.* at 580–81.

⁷⁷ *Id.* at 581–83.

⁷⁸ *Id.* at 583.

⁷⁹ *Id.* at 583–85.

⁸⁰ *Id.* at 574–75, 590.

who made a livelihood through *qui tam* litigation, came to be despised by the public and were sometimes beaten by angry mobs.⁸¹

It is easy to imagine a modern informer's conflict of interest producing analogous problems to those experienced in English history. If a statute permitted *qui tam* litigation against executive branch employees for failing to perform some legal duty, lawyers might be tempted to build a practice around suing agents of the federal government. The public interest could be undermined by distracting employees from their duties, or by applying the statute to the limits of its language. If there was a *qui tam* statute penalizing government use of private email, for instance, and a federal employee used a private email system to deal with an unanticipated emergency, a public prosecutor would have discretion to decline to bring a case, reasoning that the public interest did not warrant prosecution. The bounty provision of a *qui tam* statute, however, tends to make profit maximization the goal of law enforcement. *Qui tam* legislation can effectively eliminate the disinterested exercise of prosecutorial discretion for the benefit of the public.

Such problems could potentially be ameliorated in the drafting process. Perhaps Congress could make *qui tam* bounties very low, so that such litigation would only be pursued by public interest firms motivated by considerations other than profit. Perhaps the legislation could place a cap on the amount a person could earn under a *qui tam* statute, preventing individuals from becoming professional informers. There could be a mechanism for the Department of Justice to dismiss *qui tam* cases it considered abusive or contrary to the public interest. At the very least, however, the problems that led England to eliminate *qui tam* legislation midway through the last century suggest that Congress should exercise great caution, carefully weighing costs and benefits, before deploying this particular tool for promoting executive branch accountability.

⁸¹ *Id.* at 576–78.

Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place

*Neal Devins**

This essay will make two points about Congress-President relations—one is clearly right and the other is debatable. One point (clearly right) is that Congress is generally uninterested in the Constitution, especially with regard to asserting its institutional prerogatives and checking presidential unilateralism. This was largely the case before polarization set in (around 1995) and polarization has significantly exacerbated this phenomenon. In particular, lawmakers from the president's political party no longer assert institutional prerogatives to resist presidential encroachments; consequently, Congress cannot act in a bipartisan way to block presidential initiatives. The second point (debatable) is that courts should not relax standing to sue limitations so that disappointed lawmakers can take their grievances to the judiciary when Congress is unable to stand up for itself. Polarization may make it harder for Congress to check the president, but polarization also cuts against lawmakers (or even institutional counsel) speaking Congress's voice in court.¹ More than that, polarization has fueled the growing perception that the court itself is polarized and politicized—so much so that the courts have good reason to steer from this political thicket.

In making these points, I will focus my attention on how Congress turns to the courts to assert its institutional prerogatives. Section I will talk generally about structural and practical limits to Congress advancing a pro-Congress theory of either statutory or constitutional interpretation before the courts.

* Sandra Day O'Connor Professor of Law and Professor of Government, William and Mary School of Law. Thanks to Tom Campbell for asking me to be a part of this symposium and for his insights.

¹ When a House or Senate committee seeks to enforce a subpoena in court, the committee is speaking its own voice and not Congress's voice. See Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 622 (2014). For this reason, the broader point I make against lawmaker efforts to speak Congress's voice in court does not apply to committee enforcement of subpoenas. See *infra* note 46 and accompanying text.

The centralization of litigation authority in the Department of Justice is a manifestation of these limits. Section I will also explain how it is that Congress sought to combat these limits in separation of powers disputes with the executive—giving itself some institutional voice in court by creating the Office of House Counsel and the Senate Office of Legal Counsel. Section II will examine how both lawmakers and institutional counsel have become less and less interested in separation of powers disputes as Congress has become more polarized. In particular, lawmakers have shifted away from institutional pursuits and toward the pursuit of social issues that divide the parties. In making this point, I will also highlight how party polarization has transformed Congress—from mildly disinclined to think about its institutional prerogatives under the Constitution, to outright uninterested in protecting its role in our system of divided government. Correspondingly, lawmakers of the president’s party no longer use their oversight authority to check the president; lawmakers of the opposition party see oversight principally as a vehicle to embarrass their political opponents. Section III will consider the ramifications of increasing party polarization on the standing of lawmakers and institutional counsel in disputes with the executive. These disputes are increasingly visible; opposition party lawmakers have strong incentive to discredit the president and frustrate his agenda. Litigation is a visible, low cost way to pursue their interests. For this very reason, however, litigation exacerbates polarization and threatens the judiciary. The judicial role in checking the executive should not expand to take into account Congress’s failure to assert its institutional prerogatives through traditional Article I devices, most notably, oversight and legislation.²

I. WHY CONGRESS (PRETTY MUCH) LEAVES IT TO THE
DEPARTMENT OF JUSTICE TO DEFEND CONGRESS’S INTERESTS
IN COURT³

The competing incentives of the president and Congress explain both Congress’s disinterest in asserting its institutional

² My argument will be limited to the question of whether polarization—as a policy matter—cuts in favor of more expansive standing for lawmakers and institutional counsel. I will not engage in constitutional analysis to ascertain the appropriate scope of lawmaker or institutional standing. For recent treatments of this constitutional question, see Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015); and Michael Sant’Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253 (2017).

³ This Section builds on and occasionally borrows from earlier writings of mine, most notably, Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495 (2017).

prerogatives and the related dynamics of Congress's interface with both the executive and the courts. To start, presidents are well positioned to simultaneously advance policy goals and expand the power of the presidency. In particular, presidents always claim they are constitutionally authorized to pursue favored policy positions and, as such, presidents are consistent and persistent advocates of executive power. Political scientists Terry Moe and William Howell put it this way: "[W]hen presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power."⁴

For its part, Congress possesses ample weapons to defend its institutional interests, but has little incentive to make use of these tools. While each of Congress's 535 members have some stake in Congress as an institution, lawmakers regularly trade-off their interest in Congress as a strong, vibrant institution. They put aside institutional interests in favor of their interests in reelection, in serving on a desired committee, in assuming a position of leadership in their party, or in advancing their and their constituents' policy goals. Lawmakers, in other words, are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."⁵

This collective action problem stymies Congress in two distinctive ways. First (and most obviously), lawmakers have little interest in defending congressional prerogatives. On war powers, for example, lawmakers rarely assert Congress's constitutional powers. In particular, today's military is all volunteer and generally supportive of presidential power; lawmakers feel little constituent or public pressure to reign in presidential warmaking.⁶ Consequently, notwithstanding the clear constitutional mandate that Congress "declare war,"⁷ lawmakers often find it more convenient to acquiesce to presidential unilateralism than to face criticism that they obstructed a necessary military operation.⁸

⁴ Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999).

⁵ *Id.* at 144.

⁶ Neal Devins, *Bring Back the Draft?*, 19 GA. ST. U. L. REV. 1107, 1110 (2003).

⁷ U.S. CONST. art. I, § 8, cl. 11.

⁸ See LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 166–68 (2000). For this very reason, institutionally-minded members of Congress have turned to the courts to preserve their constitutional powers. For one prominent example, see *Campbell v. Clinton*, 203 F.3d 19, 19, 23 (D.C. Cir. 2000), which holds that members of

Second, the policy interests of lawmakers are not necessarily in sync with the institutional interests of Congress. Lawmakers opposed to legislation on policy grounds often embrace a narrow view of congressional power. Indeed, constitutional objections to legislation are typically raised by lawmakers and those who oppose legislation on policy grounds.⁹ Examples abound, including the Affordable Care Act, the Defense of Marriage Act, and the federal Partial Birth Abortion Act. Lawmakers opposed to these statutes filed briefs arguing that Congress was without constitutional authority to enact these measures.¹⁰

With little interest in abstract discussions of legislative power, there clearly is no appetite for pursuing institutional goals such as enhancing pro-Congress interpretations of the Constitution or federal statutes. Likewise, lawmakers have little interest in contemplating potential judicial review of their handiwork—policy goals are pursued when a bill is enacted and a court decision striking down legislation is seen as an opportunity to reassert policy priorities through the enactment of new legislation.¹¹ When amending legislation in the wake of a judicial decision, lawmakers do not engage with the courts; they rather “make[] clear concessions to the Court’s decision” by embracing the same policy through alternative means.¹² As Second Circuit Judge Robert Katzmann put it, “Congress is largely oblivious of the well-being of the judiciary as an institution.”¹³ Consider, for example, issues of statutory interpretation that cut to the core of congressional priorities and prerogatives. The simple fact is that “[n]o one ever lost an election by saying ‘I’m for purposivism,’”¹⁴

Congress could not sue President Bill Clinton for alleged violations of the War Powers Resolution in his handling of the war in Yugoslavia. For additional discussion, see *infra* Section III, which argues that institutionally-focused lawsuits are a rarity and that most lawmakers seek partisan advantage through litigation.

⁹ See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 143–44 (2004).

¹⁰ See generally Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933 (2015). For reasons I will detail in Section II, polarization exacerbates this phenomenon, as today’s lawmakers are more apt to file briefs and make other formal declaration that Congress has exceeded its powers.

¹¹ See PICKERILL, *supra* note 9, at 23.

¹² *Id.* at 49.

¹³ ROBERT A. KATZMANN, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7 (1988).

¹⁴ Victoria F. Nourse, *Overrides: The Super-Study*, 92 TEX. L. REV. 205, 214 (2014). In 2016, congressional Republicans pursued legislation that would eviscerate judicial deference to agency interpretations. See Vikram David Amar, *Chevron Deference and the Proposed “Separation of Powers Restoration Act of 2016”: A Sign of the Times*, JUSTIA: VERDICT (July 26, 2016), <https://verdict.justia.com/2016/07/26/chevron-deference-proposed-separation-powers-restoration-act-2016-sign-times> [<http://perma.cc/DVG4-WFF9>]. When introduced, this bill—which was never taken up in the Senate—sought to call attention to the “lawless” Obama administration; lawmakers were not concerned with

and with no constituency payoff, there is no lawmaker interest in thinking about statutory interpretation techniques used by the courts.

A. Congress and the Department of Justice

Another manifestation of lawmaker uninterest in institutional power, including judicial review of Congress's handiwork, is the centralization of litigation authority in the Department of Justice ("DOJ"). First, although the defense of federal statutes is an executive function,¹⁵ Congress limits its influence over legal arguments made in court by centralizing litigation authority this way. Second (and somewhat relatedly), the entity within Congress that oversees the Justice Department (the House and Senate Judiciary Committees) have incentive to embrace judicial supremacy—potentially at the expense of pro-Congress theories of interpretation. Neither of these claims is obvious, so let me provide more details.

First, by centralizing litigation authority in the DOJ, subject matter committees in Congress focus their energies on policymaking; for most lawmakers, what matters is direct influence through the writing of laws, the holding of hearings, and related investigations.¹⁶ Unlike legislation and oversight, legal arguments made in court are abstract and indirect. Historically, however, Congress understood that decentralized lawyering enhanced lawmaker power vis-à-vis the executive. Before 1870, there was no DOJ; before 1933, powerful agency solicitors controlled statutory and administrative legal arguments.¹⁷ These solicitors had strong ties with congressional oversight committees and, at this time, oversight committees held greater sway with executive branch legal arguments.¹⁸

Recognizing the costs of decentralization to executive power, Franklin Delano Roosevelt reorganized executive branch litigation, transferring litigation authority from agency solicitors

congressional power, and indeed the bill sought to sift power to the courts, not Congress. In July 2017, the bill was reintroduced by Senate Republicans. See Press Release, Orrin Hatch, Senate Leaders Introduce Bill to Restore Regulatory Accountability (July 19, 2017), <https://www.hatch.senate.gov/public/index.cfm/2017/7/senate-leaders-introduce-bill-to-restore-regulatory-accountability> [<http://perma.cc/R32G-23RD>].

¹⁵ For reasons why I think this is so, see Grove & Devins, *supra* note 1, at 625. For a competing perspective, see Jack M. Beermann, *Congress's (Less) Limited Power to Represent Itself in Court: A Comment on Grove and Devins*, 99 CORN. L. REV. ONLINE 166, 168 (2014).

¹⁶ See Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L. & CONTEMP. PROBS. 205, 219 (1998).

¹⁷ See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990*, at 62–63 (1992).

¹⁸ See Devins & Herz, *supra* note 16, at 207.

to the DOJ.¹⁹ In so doing, presidents—through their Attorneys General—have greater control of the administrative state. In particular, unlike agency solicitors (who are more beholden to oversight committee chairs than to the White House), the Attorney General is typically a close political ally of the president, often involved in the president’s personal and political life.²⁰ Correspondingly, since the mission of DOJ attorneys is to defend the interests of the United States (rather than a single agency whose interests may be in conflict with other agencies), there is less chance that either narrow constituent interests or congressional committees will capture the DOJ. Indeed, defenders of centralized litigation authority highlight the perceived need for the government to make consistent legal arguments across a range of cases.²¹ More to the point, “DOJ attorneys may well see the president as their client.”²² Indeed, as Sai Prakash and I have examined in our study of DOJ refusals to defend federal statutes, the DOJ fends off agency rivals and thereby enhances its status within the executive by advancing a pro-president legal policy agenda.²³

Congress’s willingness to go along with DOJ control of litigation is a byproduct of the intensity of preferences within Congress and the executive branch. For reasons already noted, presidents push for centralization of litigation authority in the DOJ. The DOJ too is a fierce advocate for centralization; the power and prestige of the DOJ is tied to litigation authority, and the DOJ’s preference to control litigation far exceeds departmental and agency interests in decentralized arrangements. After all, agency heads have substantial power to advance policy preferences through their power to regulate and

¹⁹ See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 256–58 (1996).

²⁰ See Devins & Herz, *supra* note 16, at 219.

²¹ For a summary of DOJ arguments in support of centralized litigation authority, see The Attorney General’s Role as Chief Litigator for the United States, 6 Op. Att’y Gen. 47 (1982). For a fuller presentation and critique of those arguments, see Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558 (2003).

²² Devins & Herz, *supra* note 16, at 219; see also Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987). The DOJ, however, is not simply a lackey of the president; witness, in particular, the battle between President Trump and his DOJ.

²³ See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 537–59 (2012); see also Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1105–06 (2013). In making this point, a distinction must be drawn between DOJ efforts to advance the president’s legal policy agenda and possible DOJ investigations into criminal conduct by high-ranking executive officials. The power of the DOJ is hinged both to its advocacy of the executive’s legal policy agenda and its reputation for neutrality in the pursuit of criminal investigations.

their work with congressional committees in shaping federal law.²⁴ More significantly, the DOJ's overseers in Congress are strong supporters of centralization. The power of the House and Senate Judiciary Committees is significantly moored to the power of the DOJ and, as such, the Judiciary Committees look for ways to strengthen DOJ control of litigation. For example, when other congressional committees contemplate shifting litigation authority away from DOJ and to a regulatory agency, the Judiciary Committees fight back. Michael Herz and I recount several such episodes in our study of DOJ centralization of litigation authority, including fights between the House Judiciary and Energy and Commerce Committees regarding the enforcement of environmental laws.²⁵

The interests of the DOJ and Judiciary Committees also coalesce on judicial supremacy. Both are strong advocates of judicial power as the power of the DOJ and Judiciary Committees is moored to the courts. When the federal courts play a significant policy-making role, the power of the DOJ to speak the government's voice is at its apex, as is the power of the Judiciary Committees to oversee the DOJ. For this very reason, the DOJ embraces a duty to defend federal statutes that sees the Supreme Court as speaking the last word on the Constitution's meaning; as a result, the Senate Judiciary Committee typically demands that Solicitor General and Attorney General nominees formally commit to the defense of federal statutes.²⁶ Furthermore, Judiciary Committee members demonstrate respect for basic legal principles, "adher[ing] to formal rules against interfering in any way with ongoing litigation, and maintain[ing] a general policy that no bill should take effect retroactively."²⁷ In other words, unlike power committees who pay no attention to potential judicial roadblocks to favored policy initiatives, the Judiciary Committees are court-centric and conform to—rather than challenge—judicial limits on congressional power.²⁸

²⁴ See Devins & Herz, *supra* note 16, at 219 (explaining why agencies do not see litigation authority as core to their powers); see also Devins, *supra* note 3, at 1528–30 (highlighting agency role in drafting legislation).

²⁵ See Devins & Herz, *supra* note 16, at 221–22.

²⁶ For a discussion of DOJ views, see The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275 (1980). For a general discussion of the incentives of the DOJ, Congress, and the White House, see Devins & Prakash, *supra* note 23, at 538–59.

²⁷ Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 SETON HALL CONST. L.J. 317, 338 (1993).

²⁸ See *id.* at 317–62 (contrasting House Judiciary Committee to Energy and Commerce Committee).

B. Congress in Court

The fact that Congress largely leaves it to the DOJ to speak the government's voice in court does not mean that lawmakers never turn to the courts for recourse. In Section II, I will discuss lawmaker amicus filings as well as the practices of institutional counsel for the House and Senate—analysis that will highlight how party polarization has contributed to declining lawmaker interest in Congress's institutional authority vis-à-vis the president. In Section III, I will discuss court-imposed limits on the standing of disappointed lawmakers to defend Congress's institutional prerogatives. For the balance of this section, I will examine the political conditions that led to the establishment of institutional counsel—conditions that speak to the circumstances when Congress will overcome the disincentives that typically result in lawmaker disinterest in Congress's institutional authority.

The Office of Senate Legal Counsel was created by statute in 1978 as part of Watergate-era reforms to bolster congressional interests in separation of powers disputes; the Office of House Counsel was created by an administrative directive of the House Speaker Tip O'Neill in 1976.²⁹ Differences between the two offices reflect differences in the chambers. The House is controlled by the majority party and the House counsel essentially works for the majority party.³⁰ Senate norms traditionally favor bipartisanship and the Senate counsel acts at the behest of a supermajority of members from both parties.³¹ Indeed, Senate norms of bipartisanship explain the unwillingness of the House to sign onto a joint congressional counsel that would serve both

²⁹ See Grove & Devins, *supra* note 1, at 608–14. In addition to creating an Office of Senate Legal Counsel, Congress also mandates that the DOJ notify that office when it would not defend federal statutes (principally so that institutional counsel could defend congressional interests in separation of powers disputes). See 2 U.S.C. § 288e(a) (2006) (allowing the Senate counsel—when authorized—to appear in legal actions regarding “the powers and responsibilities of Congress under the Constitution”). The House Bipartisanship Legal Advisory Group (“BLAG”) directs the House counsel. See Grove & Devins, *supra* note 1, at 618. The BLAG is controlled by the majority party and has always backed majority party preferences.

³⁰ See Grove & Devins, *supra* note 1, at 618–19. In litigation defending the Defense of Marriage Act, the House counsel responded to Democratic complaints that it did not speak the voice of the entire House by acknowledging that it represents the views of the majority party. *Id.* In lower court filings, the counsel stated that although it “seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents.” *E.g.*, Brief for Defendant–Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335), 2012 WL 3647722, at *3 n.1.

³¹ See Grove & Devins, *supra* note 1, at 612–21 (noting that Senate counsel action must be approved by two-thirds of a group made up of four members of the majority party and three members of the minority party).

chambers and serve as a bulwark against presidential power.³² Notwithstanding arguments that “[n]either House acting alone can assert the prerogative of representing the Congress,”³³ House leadership feared that a nonpartisan joint office might not give voice to majority preferences in the House.

The willingness of lawmakers to back the creation of an Office of Senate Legal Counsel to advance the Senate’s institutional interests in the courts is a byproduct of unique political circumstances—so much so that the creation of this office is the exception, which proves the rule of lawmaker disinterest in protecting their institutional prerogatives. During the Watergate era (1972–1978), Democrats occupied every ideological niche and there were several liberal Republicans.³⁴ For this reason, George Wallace justified his third-party bid for the presidency by claiming that “there was not a ‘dime’s worth of difference’ between the two parties.”³⁵ Senate committees, for example, often made use of unified staff—rather than divide staff by majority or minority party.³⁶ With no meaningful ideological gap between the parties, bipartisanship was possible and Congress sometimes saw itself as an institution with a distinctive set of interests that set it apart from the White House. Nonetheless, lawmakers still needed to see personal political advantage in asserting Congress’s institutional interests and, as such, the previously discussed collective action problem typically stood as a roadblock to Congress’s asserting institutional interests, especially on matters as abstract as litigation authority. Watergate, however, made fears of presidential overreach politically salient and lawmakers rallied behind several significant legislative proposals designed to limit the president and protect Congress.³⁷ Congress enacted the

³² See *id.* at 612–13; see also Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & PRESIDENCY 131 (1993).

³³ *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearing on S. 555 Before the Comm. on Governmental Affairs*, 95TH CONG. 61 (1977) (statement of Sen. James Abourezk, D–S.D.).

³⁴ See SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 27–35 (2008); see also STEVEN S. SMITH & GERALD GAMM, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED 147–49 (Lawrence C. Dodd & Bruce L. Oppenheimer eds., 9th ed. 2009).

³⁵ Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79 in Alabama*, WASH. POST (Sept. 15, 1998), https://www.washingtonpost.com/archive/local/1998/09/15/ex-gov-george-c-wallace-dies-at-79-in-alabama/f77a36e4-0689-4086-9b96-b0d9a293cd57/?utm_term=.f39de6268e8c [<http://perma.cc/4CEW-DRM5>].

³⁶ See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne’s Testimony*, 54 DUKE L.J. 1525, 1543 (2005).

³⁷ See Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 401–06 (2009).

War Powers Resolution (overriding a presidential veto),³⁸ the 1974 Impoundment Control Act,³⁹ and the 1978 Ethics in Government Act.⁴⁰ All these statutes were politically popular; all these statutes responded to presidential overreach of core legislative powers.

In Section II, I will explain why today's Congress lacks the will and the way to assert institutional prerogative against the executive. Before doing so, let me close this section out by highlighting ways that institutional counsel—before polarization set in—defended congressional prerogatives in court. In the 1970s and 1980s, lawmakers were more willing to embrace a unified view of Congress's institutional prerogatives. In particular, rather than see themselves as Democrats or Republicans, lawmakers were sanguine with institutional counsel defending the constitutionality of federal statutes or seeking to enforce committee subpoenas against executive officials. Consider, for example, Congress's participation in two Reagan-era separation of powers disputes, *Immigration and Naturalization Services v. Chadha* (legislative veto) and *Bowsher v. Synar* (deficit reduction).⁴¹ In both cases, counsel for the House and Senate participated in oral arguments and filed briefs supporting Congress.⁴² In both cases, party identity did not matter—majority Democrats in *Chadha* initially litigated the dispute against the Carter administration; majority Senate Republicans litigated the *Synar* dispute against the Reagan administration.⁴³

The ability and willingness of institutional counsel to advance Congress's institutional interests in a bipartisan way, as we will see, stands in stark contrast to practices in today's polarized Congress. At the same time, the participation of institutional counsel in earlier separation of powers disputes should not be seen as a departure from this section's central claims about lawmaker uninterest in institutional authority and lawmaker acquiescence to judicial supremacy. To start, institutional counsel embraced separation of powers litigation and believed in judicial supremacy. At the time of *Chadha* and *Bowsher*, the status of the lawyers in these offices

³⁸ War Powers Resolution, 50 U.S.C. §§ 1541–48 (1973).

³⁹ Impoundment Control Act, 2 U.S.C. §§ 682–88 (1974).

⁴⁰ Ethics in Government Act, P.L. 95-521, 92 Stat. 1824 (1978).

⁴¹ *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

⁴² See Devins, *supra* note 10, at 950.

⁴³ In *Chadha*, no member of Congress filed an amicus brief. In *Bowsher*, there were two amicus briefs filed—one in support of the statute and one in opposition of the statute. These briefs were bipartisan. See *id.* at 1017–19.

hinged on their participation in marquee separation of powers disputes—high profile cases where they were arguing against top DOJ lawyers, cases which often made their way to the Supreme Court.⁴⁴ In the case of the Senate counsel, the very purpose of her office was to provide a bipartisan institutional voice to Senate interests in separation of powers disputes against the president.⁴⁵ Likewise, the power of these lawyers derives from the power of the courts; institutional counsel pursue high visibility cases in court and embrace the Court's power to say what the law is. For their part, lawmakers in the pre-polarization era were generally uninterested in the work of institutional counsel and acquiesced to a system that largely ran itself. In other words, after lawmakers put in place institutional counsel in the Watergate era, lawmakers did not see these offices as partisan tools and passively went along with the efforts of these offices to advance Congress's institutional interests in court.⁴⁶

II. HOW PARTY POLARIZATION HAS CONTRIBUTED TO GROWING LAWMAKER DISINTEREST IN CONGRESSIONAL PREROGATIVES

Section I highlighted the collective action problem that limits lawmaker interest in institutional power disputes, including lawmaker support of DOJ control of government litigation. Section I also explained the creation of institutional counsel for Congress in the Watergate era, highlighting how the political salience of presidential power disputes overcame collective action limitations. In this section, I will focus on today's polarized Congress. I will highlight how polarization exacerbates the collective action problem. I will also look to changing practices in both institutional counsel litigation and lawmaker amicus filings to document the diminishing salience of institutional power disputes to members of Congress.

A. Polarization and the Collective Action Problem

Polarization diminishes the ability of lawmakers to work together to defend Congress's institutional prerogatives. Unlike the Watergate era, today's lawmakers increasingly identify with party-defined messages and seek to gain power by advancing

⁴⁴ I speak from personal experience. In 1985, I had preliminary conversations with then-Senate counsel Mike Davidson about working in his office.

⁴⁵ See Grove & Devins, *supra* note 1, at 611–13.

⁴⁶ I certainly do not mean to suggest that all lawmakers were disengaged in separation of powers disputes. During the pre-polarization period, there were certainly institutionally-minded members in the House or Senate who cared deeply about Congress's constitutional prerogatives. At the same time, these members were a fairly small minority and most members were subject to the collective action problem discussed earlier in this section.

within their respective party.⁴⁷ Correspondingly, Republicans and Democrats are increasingly at odds with each other and increasingly unlikely to find common ground. Measures of ideology reveal that all or nearly all Republicans are more conservative than the most conservative Democrats.⁴⁸ Likewise, with the demise of Northern Rockefeller Republicans and Southern Democrats, there is no meaningful ideological range within either party.⁴⁹

The rise in party-line voting exemplifies this phenomenon. Unlike the Nixon impeachment (where—even before the release of Watergate tapes—seven of seventeen Republicans joined House Democrats in voting for articles of impeachment),⁵⁰ the “virtual party line votes in the House and the Senate” during the Clinton impeachment “reinforce[d] public perception of the intense partisanship underlying the proceedings.”⁵¹ The filibuster is another example. In November 2013, the then-Democratic Senate made it more likely that presidential lower court nominations would be approved by repealing the filibuster for those nominees; in April 2017, the Republican Senate likewise made it more likely that presidential Supreme Court nominations would be approved by repealing the Supreme Court filibuster rule.⁵² These examples, while striking, typify current practice: House Republicans vote with their party around

⁴⁷ See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 756–59 (2011); see also C. LAWRENCE EVANS, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 238 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

⁴⁸ See *The Polarization of the Congressional Parties*, VOTE VIEW (Jan. 18, 2013), web.archive.org/web/20131116022958/http://polarizedamerica.com/political_polarization.asp.

⁴⁹ See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 314–15 (2003).

⁵⁰ See Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CON. L.Q. 161, 255 (2007). Republicans and Democrats also came together in subpoenaing information from the executive and going to court to seek enforcement of that subpoena. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726–27 (D.C. Cir. 1974). For additional discussion, see Grove & Devins, *supra* note 1, at 600–01.

⁵¹ MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 193 (2d ed. 2000).

⁵² See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <https://nyti.ms/17Qt6DG>; see also Amy Davidson Sorkin, *Gorsuch Wins, The Filibuster Loses*, THE NEW YORKER (Apr. 6, 2017), <https://www.newyorker.com/news/amy-davidson/gorsuch-wins-the-filibuster-loses> [<http://perma.cc/3PHE-CAEJ>]. In September 2017, Senate Republicans threatened to do away with the so-called blue slip, a practice which allows Senators from the state of residence of a federal judicial nominee to delay or potentially block a vote on the nominee. See Karoun Demirjian, *McConnell Wants to End Practice of Allowing Senators to Block Appeals Court Judges*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/powerpost/senate-gop-leader-wants-to-end-practice-of-allowing-senators-to-block-circuit-court-judges/2017/09/13/d10aa028-98d9-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.81217b34d9a0 [<http://perma.cc/UQZ9-AR5U>].

ninety-two percent of the time and Senate Democrats vote with their party around ninety-four percent of the time.⁵³

When it comes to oversight and hearings, party identity is also key. Majority and minority staff no longer work together; each side, instead, calls witnesses who support preexisting party views.⁵⁴ Oversight too is contingent on party identity. When the majority party is the same as the president, oversight is lax; when the government is divided, oversight is a top priority.⁵⁵ Correspondingly, the House majority is willing to seek judicial enforcement of subpoenas against high-ranking executive officials during periods of divided government. When Democrats controlled the House in 2007, the Bush administration's firing of U.S. attorneys prompted extensive oversight and litigation.⁵⁶ In the Fast and Furious gun running case of 2012–2013, Republicans targeted Obama Attorney General Eric Holder.⁵⁷ In both these disputes, the minority filed competing briefs urging judicial restraint.⁵⁸

Party polarization, finally and most significantly, contributes both to the rise of presidential unilateralism and to Congress's acquiescence to judicial supremacy. Members of the president's party are unlikely to check presidential priorities and, consequently, the opposition party is unlikely to forge a bipartisan coalition to check presidential power.⁵⁹ Moreover, the

⁵³ Elahe Izadi, *Congress Sets Record for Voting Along Party Lines*, NAT'L J. (Feb. 3, 2014), <https://www.nationaljournal.com/s/62617> [<http://perma.cc/9GLY-ND99>].

⁵⁴ See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1544 (2005).

⁵⁵ See Devins, *supra* note 37, at 409.

⁵⁶ See Philip Shenon, *As New 'Cop on the Beat,' Congressman Starts Patrol*, N.Y. TIMES (Feb. 6, 2007), <http://www.nytimes.com/2007/02/06/us/politics/06waxman.html>.

⁵⁷ See John Bresnahan & Seung Min Kim, *Holder Held in Contempt of Congress*, POLITICO (June 28, 2012, 5:47 PM), <http://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988> [<http://perma.cc/8STK-YLEE>]. Another manifestation of polarization's impact on Executive Branch-Congress dynamics is the March 2018 decision of the Trump administration to turn over Obama-era documents on the Fast and Furious investigation to Republican-led Congress. See Sarah N. Lynch, *Trump administration to provide records on Obama-era gun-smuggling probe*, REUTERS (Mar. 7, 2018, 9:21 AM), <https://www.reuters.com/article/us-usa-justice-guns/trump-administration-to-provide-records-on-obama-era-gun-smuggling-probe-idUSKCN1GJ2KH> [<http://perma.cc/DL54-VBTK>].

⁵⁸ See Jordy Yager, *Dems File Brief Urging Court to Dismiss Issa's Contempt Suit Against Holder*, THE HILL (Dec. 19, 2012, 9:34 PM), <http://thehill.com/homenews/house/273827-dems-file-brief-urging-court-to-dismiss-issas-contempt-suit-against-holder.com> [<http://perma.cc/MN5W-KP94>]. The partisan divide in these cases stands in sharp contrast to the bipartisan efforts of the Watergate-era Congress to go to court to enforce a subpoena against President Nixon. For additional discussion, see *supra* note 50 and accompanying text.

⁵⁹ I do not mean to suggest that the president's party will never stand up to the president. In 2017, Republicans in Congress joined Democrats to back sanctions legislation against Russia for its meddling in the 2016 elections—legislation which was seen as a rebuke to President Trump. See Elana Schor, *Congress Sends Russia Sanctions to Trump Desk, Daring a Veto*, POLITICO (July 27, 2017, 1:55 PM),

prospects of both parties coming together to advance Congress's institutional interests through the enactment of legislation is less likely in divided government (and we have had divided government thirty-six of the past fifty years). The result: presidents act unilaterally and Congress stands aside. Sometimes presidents advance new policies through executive orders (Clinton on health care; Bush on faith based initiatives; Obama on immigration);⁶⁰ sometimes presidents take greater control of the administrative state through Office of Management and Budget regulatory review and related coordinating techniques.⁶¹

Polarization facilitates judicial supremacy for much the same reason. Lawmakers are increasingly at odds about preferred policies; on matters before the courts, lawmakers—as I will soon discuss—increasingly file conflicting Democrat and Republican amicus briefs. Consequently, courts are emboldened, as it is close to unimaginable that lawmakers will stand together to advance pro-Congress positions in ways that courts would take into account.⁶² Polarization furthers judicial supremacy in other ways. For example, polarization has resulted in a shift of power away from congressional committees and to party leaders—so much so that committee hearings related to constitutional and statutory interpretation are now dominated by the court-centric Judiciary Committees.⁶³

B. Polarization and Amicus Briefs⁶⁴

Lawmakers regularly file amicus briefs in federal court litigation, especially before the Supreme Court. From 1974–1985,

<http://www.politico.com/story/2017/07/27/russia-sanctions-bill-senate-to-pass-241034> [<http://perma.cc/TM7H-4FQH>]. At the same time, my bottom line claim is valid, that is, today's lawmakers rarely have incentive to check a president of their own party. Indeed, Congressional Republicans backed President Trump's efforts to discredit his own Department of Justice and FBI by releasing memos and conducting oversight favorable to the president. *See also infra* note 93 and accompanying text (discussing Republican support for President Trump during the first months of his presidency). For a provocative argument that Congress retains its core powers to check the president and that the failure to act speaks more about the situational use of power (rather than the diminution of power tied to polarization), see JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

⁶⁰ *See* Moe and Howell, *supra* note 4, at 165–66 (noting that only 3 of 1000 executive orders from 1973–1998 were overridden by legislation). For a more complete (and current) inventory, see WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 112–20 (2003).

⁶¹ *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247–49 (2001).

⁶² *See* Devins, *supra* note 3, at 1518–19; *see also* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 14–17 (1998) (arguing that the Supreme Court calibrates its decisions to take into account the possibility of congressional disapproval).

⁶³ *See* Devins, *supra* note 36, at 762–63.

⁶⁴ This subsection is drawn from Devins, *supra* note 10.

930 lawmakers signed onto fifty-two briefs in forty-five cases; from 2002–2013, those numbers skyrocketed—3807 lawmakers signed onto one hundred fifty briefs in eighty-six cases.⁶⁵ This spike in filings, however, does not speak to greater lawmaker interest in Congress’s institutional authority, nor greater congressional influence before the Court. In fact, differences between the less polarized 1974–1985 period and the highly polarized 2002–2013 period speak both to the rise of partisanship in lawmaker briefs and a shift away from less divisive separation of powers cases to salient divisive issues like abortion, health care, and gay rights. During the 1974–1985 period, fifteen briefs (twenty-nine percent) were filed on social issues and twenty (thirty-eight percent) were filed on institutional issues.⁶⁶ During the 2002–2013 period, fifty-two (thirty-five percent) were filed on social issues and forty-three (twenty-nine percent) were filed on institutional issues.⁶⁷ Individual lawmakers were twice as likely to sign onto social issue briefs (1822 lawmakers; forty-eight percent) than institutional briefs (926 signatories; twenty-four percent).⁶⁸ In the earlier period, lawmakers signed onto comparable numbers of social and institutional issue briefs (388 lawmakers, forty-two percent for social issue briefs; 372 lawmakers, forty percent for institutional).⁶⁹

More striking, today’s lawmakers focus almost exclusively on the underlying policy dispute. Briefs are filed in cases that do not implicate congressional power (affirmative action and legislative prayer are two recent examples).⁷⁰ The question of whether congressional power is expanded or limited is of secondary importance. Democrats backed the Affordable Care Act and campaign finance laws and opposed the Defense of Marriage Act; Republicans were on the opposite side of both issues.⁷¹

A closer look at abortion and separation of powers filings backs up these claims. For abortion, lawmakers did not file any amicus briefs in cases implicating state regulatory authority until 1986; in 1980, a bipartisan coalition of 238 lawmakers (104 Democrats, 135 Republicans) filed a brief arguing that lawmaker control over the appropriations process extended to the decision not to fund abortions.⁷² Starting in 1986, however, lawmakers

⁶⁵ *Id.* at 942–43.

⁶⁶ *Id.* at 945–46.

⁶⁷ *Id.* at 946.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 995–96, 999–1000.

⁷¹ *Id.* at 992–94, 998–99.

⁷² See Brief of Rep. Jim Wright et al. as Amici Curiae, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339672, at *1–5.

began to file in state as well as federal cases; partisan divisions also emerged. Initially, competing briefs were filed by coalitions dominated by Republicans or Democrats (pro-choice briefs were ninety percent Democrats and pro-life briefs were ninety percent Republicans).⁷³ By 2014, most briefs were exclusively Democrat or Republican filings. In the 2014 *Burwell v. Hobby Lobby* case (involving the contraceptive mandate of the Affordable Care Act), four of five briefs were one party briefs.⁷⁴

Abortion briefs are striking for another reason—hundreds of lawmakers sign onto these briefs (an average of 171 signatories per case).⁷⁵ In other words, lawmakers see abortion briefs as an opportunity to register a policy preference on an issue that divides the party. Lawmakers no longer care whether the underlying issue implicates state or federal power. More striking, even in cases implicating federal power, lawmakers now care only about pro-choice or pro-life preferences and not about the scope of federal power. Today, it is inconceivable that a broad bipartisan coalition would back legislative power—as they did in the 1980 abortion funding case.⁷⁶ Instead, Democrats will resist federal power to restrict abortion rights and back federal power to guarantee abortion access; Republican views of federal power are likewise contingent on whether pro-choice or pro-life policy outcomes are at play. In the 2007 *Gonzales v. Carhart* case, for example, Republicans uniformly backed and Democrats uniformly resisted congressional power to impose a federal partial birth abortion ban.⁷⁷

Amicus filings in separation of powers cases highlight both the growth of partisanship and the declining importance of separation of powers issues to lawmakers. As noted, today's lawmakers are less likely to participate in disputes implicating institutional power and less likely to sign onto briefs in cases where briefs are filed. While House and Senate counsel participation may deflate the number of signatories (a topic I will address in the next subsection), it is quite clear that there is less

⁷³ Devins, *supra* note 10, at 947.

⁷⁴ *Id.* at 948.

⁷⁵ *Id.* One hundred and seventy-one is the average number of briefs studied in my earlier research on congressional amici.

⁷⁶ In 2014, House Republican leadership filed a lawsuit against Obama administration implementation of the Affordable Care Act—claiming that the administration usurped Congress's appropriations power. For their part, Democratic leadership filed competing briefs—advancing a narrower view of the appropriations power. See Brief of Amici Curiae Members of Congress in Support of Defendants' Motion for Summary Judgment, *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 1:14-cv-01967-RMC), 2015 WL 10376844.

⁷⁷ Devins, *supra* note 10, at 1014–15. All 152 Republican signatories supported the law. Ninety-nine out of one hundred and one Democrat signatories opposed.

interest in staking out a position in a separation of powers dispute than a case implicating abortion or some other social issue. For example, throughout the enemy combatant dispute, a total of sixteen lawmakers signed amicus briefs and no amicus briefs were filed by the House or Senate counsel.⁷⁸ Additionally, when an amicus brief is filed, there are relatively few brief signers—roughly nineteen per brief as compared to 171 in abortion cases.⁷⁹

Separation of powers filings are revealing for other reasons.⁸⁰ First, there is a growing trend towards partisan filings; recent examples include George W. Bush litigation over enemy combatants, Barack Obama litigation over recess appointments and immigration, Donald Trump litigation over immigration.⁸¹ Second, although some bipartisan briefs were filed, lawmakers were not motivated by a desire to preserve or expand congressional power. In litigation over the item veto in the 1990s, lawmakers defended delegating legislative power to the president in order to facilitate their reputations as deficit hawks.⁸² In related 2012 and 2014 litigation over the authority of Congress to allow individuals born in Jerusalem to list Israel as their place of birth, brief signers were interested in reaffirming their support for Israel.⁸³

Lawmaker amicus briefs reflect growing polarization in Congress, including growing lawmaker disinterest in issues implicating Congress's institutional power. Moreover, with increasing attention paid to short-term goals tied to advancing party policy priorities, lawmakers are increasingly apt to file briefs highlighting limits in legislative power. Relatedly, today's amicus briefs largely cancel each other out—coalitions of Democrats and Republicans make competing arguments about constitutionality so that there are roughly as many briefs arguing that Congress is without authority as arguing that Congress has constitutional authority. And if that isn't enough—these briefs are further limited by the fact that Republicans and Democrats are inconsistent in their positions

⁷⁸ *Id.* at 949.

⁷⁹ *Id.* at 948. Nineteen is the average number of studied briefs in my earlier research.

⁸⁰ The balance of this paragraph is largely lifted from *id.* at 949–50.

⁸¹ *Id.* at 949; see also Seung Min Kim, *Dem Lawmakers Back Brief Supporting Obama's Immigration Action*, POLITICO (Mar. 8, 2016, 9:00 AM), <https://www.politico.com/story/2016/03/obama-immigration-action-democrats-amicus-brief-220419> [<http://perma.cc/BH6G-4L5N>]; Tal Kopan, *Congressional Democrats Join Court Challenge to Trump's Travel Ban*, CABLE NEWS NETWORK (Feb. 15, 2017, 3:28 PM), <http://www.cnn.com/2017/02/15/politics/democrats-amicus-brief-trump-travel-ban/index.html> [<http://perma.cc/9YT3-CFG4>].

⁸² Devins, *supra* note 10, at 949–50.

⁸³ *Id.* at 950.

over time. The flashpoint in these briefs is the underlying policy issue and not the more abstract question regarding the scope of congressional power. For reasons I will now detail, changes in the role of institutional counsel in Congress also demonstrate growing partisanship and polarization in separation of powers disputes.

C. Polarization and the Changing Role of Institutional Counsel

Party polarization has reshaped the role of institutional counsel. Gone are the days where institutional counsel served as a bulwark against a too powerful executive—defending the House and Senate in separation of powers lawsuits, typically speaking the voice for both Democrats and Republicans.⁸⁴ Indeed, in the period before polarization, lawmakers typically did not file amicus briefs and typically backed Congress as an institution when they did file amicus briefs.⁸⁵ At that time, the House and Senate counsel often worked in tandem, participating in the same cases and advancing the shared institutional interests of the House and Senate in a strong Congress.⁸⁶ Today, House-Senate differences are on prominent display as polarization has transformed the role of institutional counsel in ways that reflect profound differences between the House and Senate.

The Senate counsel was designed to reflect Senate norms of bipartisanship and consensus. From 1978 (when the Office of Senate Legal Counsel was first created) until 1995, the Senate counsel regularly participated in litigation involving the separation of powers. However, polarization has made bipartisan consensus next to impossible; as a result, the Senate counsel is largely moribund in the very separation of powers disputes that were core to the creation of the office. With one notable exception (that I will soon discuss), the Senate counsel has not locked horns with the executive and defended congressional prerogatives before the Supreme Court in any separation of powers dispute since 1995.⁸⁷ For example, in a 2014 dispute over the president's

⁸⁴ See Devins, *supra* note 10, at 950.

⁸⁵ See Grove & Devins, *supra* note 1, at 617; Devins, *supra* note 10, at 950.

⁸⁶ See Grove & Devins, *supra* note 1, at 614–22 (discussing efforts of House and Senate counsel to coordinate filings in separation of powers litigation).

⁸⁷ See *id.* at 617; see also Neal Devins, *Counsel Rests*, SLATE (Jan. 13, 2014, 5:55 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/the_senate_s_lawyer_doesn_t_participate_in_important_litigation_against.html [<http://perma.cc/3T3R-EU3N>]. In a 2015 dispute regarding a federal statute intended to facilitate the collection of money judgments brought by victims of terrorists acts, the Senate Counsel and Department of Justice both filed amicus briefs backing up congressional authority. See Brief for the U.S. as Amicus Curiae Supporting Respondents, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770), 2015 WL 9412676; Brief of Amici Curiae Former Senior Officials of

purported end-running of the Senate's confirmation power through the use of recess appointments, the Senate counsel stood on the sidelines while counsel for Senate Republicans filed briefs and made oral arguments before both the D.C. Circuit and Supreme Court.⁸⁸

The one case where the Senate counsel did participate, *Zivotofsky v. Kerry*, is the exception that proves the rule. The issue in *Zivotofsky* was whether Congress could override State Department policy to disallow individuals born in Jerusalem to claim on their passports that they were born in Israel (so that their passports would designate their birthplace as Jerusalem and not Israel).⁸⁹ Senate Democrats and Republicans did not come together to defend Senate prerogatives; they came together to support Israel. Lawmakers who signed amicus briefs in the case included some of the most liberal Democrats and some of the most conservative Republicans.⁹⁰ These lawmakers regularly signed onto single party briefs in other cases, but were united in their support of Israel. Indeed, while 333 signatories of a pro-Congress amicus brief signed a letter to President Obama affirming the “commitment to the unbreakable bond that exists between our country and the state of Israel,”⁹¹ no member of the *Zivotofsky* coalition spoke about the case's separation of powers implications on either the House or Senate floor.⁹²

On the House side, polarization has played out in fundamentally different ways, reflecting the fact that the House counsel speaks the voice of the House majority. During periods of unified government, the House typically leaves the president alone—seeing the president as the leader of their party and

the Office of Legal Counsel in Support of Respondents, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770), 2015 WL 9412677.

⁸⁸ See Devins, *supra* note 87. For their part, Senate Democrats too stood on the sidelines, not wanting to embrace a circumscribed confirmation power and not wanting to join Senate Republicans in their efforts to limit Obama administration efforts to fill judicial and administrative vacancies. *Id.* In *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014), the Supreme Court unanimously rejected Obama administration arguments and backed a larger Senate role.

⁸⁹ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081–83 (2015). The Supreme Court ruled that the president has complete power of recognition and that Congress cannot override that power by statute. *Id.* at 2096.

⁹⁰ Devins, *supra* note 10, at 954.

⁹¹ Letter by Representatives Steny Hoyer and Eric Cantor to Secretary of State Hillary Clinton Reaffirming the U.S.-Israel Alliance, AIPC (Mar. 26, 2010), https://www.aipac.org/-/media/publications/policy-and-politics/source-materials/congressional-action/2010/3_26_10_letter_to_secretary_of_state_re_us_commitment_to_israeli_security_and_middle_east_peace.ashx. That letter was sent by 333 House members; a nearly identical letter was sent by seventy-six Senators. See Ben Smith, *76 Senators Sign on to Israel Letter*, POLITICO (Apr. 13, 2010, 4:21 PM), <http://www.politico.com/blogs/ben-smith/2010/04/76-senators-sign-on-to-israel-letter-026380> [<http://perma.cc/N5GN-Y4CG>].

⁹² Devins, *supra* note 10, at 954.

someone to shield from opposition party criticism.⁹³ Oversight is lax and the president and House speaker sound similar messages on the issues that divide the parties. Needless to say, the House counsel is not engaged in litigation disputes with the White House during periods of unified government.⁹⁴

During periods of divided government, however, the House is increasingly willing to challenge presidential actions in court, including lawsuits against presidential initiatives and subpoena enforcement actions. As discussed earlier, the Democratic House sought to enforce subpoenas against the George W. Bush administration and the Republican House likewise sought to enforce subpoenas against the Obama administration.⁹⁵ More telling, the Republican House challenged Obama administration implementation of the Affordable Care Act, claiming that the administration “spent billions of unappropriated dollars to support the Patient Protection and Affordable Care Act” and that “under the guise of implementing regulations, effectively amended the Affordable Care Act’s employer mandate by delaying its effect and narrowing its scope.”⁹⁶ The House too has pursued the defense of federal statutes that the executive refuses to defend. Recent examples include Miranda override legislation

⁹³ The Trump administration may ultimately become the exception that proves the rule. At least until January 2018, however, Republicans in Congress—notwithstanding some public criticism of the president—have largely backed President Trump and certainly Republican lawmakers have not gone to court to challenge the president. See Aaron Bycoffe, *Tracking Congress in the Age of Trump*, FIVETHIRTYEIGHT (Sept. 14, 2016 3:24 PM), <https://projects.fivethirtyeight.com/congress-trump-score/> [<http://perma.cc/CG7L-YBV3>]. Indeed, House Republicans backed President Trump’s efforts to discredit his own bureaucracy by releasing a memo critical of the FBI. See *supra* note 59. At the same time, there is reason to think that Republicans in Congress may see personal advantage in criticizing the president and, as such, Congress may eventually step up its oversight of the Trump administration. In late September 2017, for example, Republican House overseers joined Democrats in seeking information regarding Trump administration officials’ use of personal emails to conduct government business. See Mike DeBonis, *Gowdy Joins Democrats in Probing Trump Administration’s Use of Personal Email*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/09/25/gowdy-joins-democrats-in-probing-trump-administration-use-of-personal-email/?utm_term=.174e3bea8e4a [<http://perma.cc/EKE6-7ZAC>].

⁹⁴ The only exception is a low salience separation of powers dispute regarding the Federal Advisory Committee Act in 1993. See Memorandum from Jennifer Casazza, DOJ Decline Defense Congressional Participation 6 (on file with author) (discussing the House Counsel’s participation in *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)).

⁹⁵ See Shenon, *supra* note 56; Bresnahan & Kim, *supra* note 57.

⁹⁶ *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57 (D.D.C. 2015). The House also appeared as amicus in backing a state challenge to Obama administration immigration initiatives. For additional discussion, see Brief for 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amicus Curiae in Support of Respondent Edith Schlain Windsor, *infra* note 106.

(*Dickerson v. United States*) and the Defense of Marriage Act (*United States v. Windsor*).⁹⁷

Dickerson and *Windsor* reveal the profound impact of polarization on the work of the House counsel. In periods of divided government, the House counsel will advance majority party preferences. In part, this means that the House counsel will engage in disputes that have nothing to do with the separation of powers—as the focus is advancing the policy agenda of the House (and, for reasons discussed, separation of powers gives way to social issues when Congress is polarized).⁹⁸ In part, this means that the minority party in Congress will publicly take issue with the House counsel. In both *Dickerson* and *Windsor*, the House minority filed a competing brief to make clear that the House counsel was both wrong on the merits and spoke only for the majority party.⁹⁹ Institutional power disputes follow a similar script. The minority party will make competing filings and the House counsel will focus her energies on highly politicized matters, especially investigations intended to embarrass high-ranking Executive Branch officials. Recent examples include Democratic investigations of the U.S. Attorneys' firings under George W. Bush and Republican investigations of Attorney General Eric Holder's handling of the Fast and Furious gun smuggling scheme.¹⁰⁰

In today's polarized Congress, the House and Senate counsel no longer represent Congress's institutional interests in disputes with the president. The Senate counsel is largely enfeebled by bipartisanship requirements. The House counsel represents the majority party and is only interested in checking the president during periods of divided government. Moreover, the House counsel largely limits her intervention to highly politicized disputes that divide Republicans and Democrats—so much so that the minority party increasingly rebuts House counsel filings with opposition briefs. Finally, as was true with lawmaker amicus filings, institutional disputes are less critical to institutional counsel and the social issues that divide the

⁹⁷ See Grove & Devins, *supra* note 1, at 618; see also *Dickerson v. United States*, 530 U.S. 428 (2000); *United States v. Windsor*, 570 U.S. 744 (2013).

⁹⁸ See Shenon, *supra* note 56; Bresnahan & Kim, *supra* note 57.

⁹⁹ See Brief Amicus Curiae of the House Democratic Leadership in Support of Petitioner, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 126192; Jennifer Bendery, *Defense of Marriage Act: House Republicans Tie Federal Gay Marriage Ban to House Rules*, HUFFINGTON POST (Jan. 23, 2014), http://www.huffingtonpost.com/2013/01/02/defense-of-marriage-act_n_2399383.html [<http://perma.cc/3XJR-ZC64>].

¹⁰⁰ See Shenon, *supra* note 56; Brian Montopoli, *So Is This U.S. Attorney Purge Unprecedented Or Not?*, CBS NEWS (Mar. 14, 2007, 5:17 PM), <https://www.cbsnews.com/news/so-is-this-us-attorney-purge-unprecedented-or-not/> [<http://perma.cc/73UP-WEHQ>]; Bresnahan & Kim, *supra* note 57.

parties are increasingly likely to spill over to the work of institutional counsel.

III. CONCLUSION: WHY EXPANDING LAWMAKER STANDING IS NOT THE SOLUTION TO CONGRESSIONAL DYSFUNCTION

In turning back a lawsuit by members of Congress who challenged the Reagan administration for subverting Congress's war making powers by backing the Contras, then-judge Ruth Bader Ginsburg claimed that "Congress has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. . . . 'If the Congress chooses not to confront the President, it is not our task to do so.'"¹⁰¹ This claim made sense in 1985 and even in 1993 when Judge Ginsburg was confirmed to the Supreme Court by a resounding bipartisan vote of 96–3;¹⁰² at that time, the seeds of polarization were planted but had not yet taken hold of Congress. Today, the natural disinclinations of lawmakers to invest in Congress as an institution have metastasized. The era of presidential unilateralism has now taken hold as Congress lacks the will and way to check the president and advance its institutional interests.¹⁰³

The question remains: Should the courts fill that void by providing avenues for disappointed lawmakers to challenge the president? After all, our system of checks and balances anticipates some check on presidential unilateralism and judicial intervention seems far more likely than Congress coming together in a bipartisan way to place limits on presidential entreaties. For institutionally minded lawmakers, court filings may be the only real vehicle available to check the president's expansionist tendencies.

For the balance of this essay, I will explain why polarization does not cut in favor of an expanded judicial role—notwithstanding the fact that polarization cuts against

¹⁰¹ Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir 1985) (Ginsburg, J., concurring).

¹⁰² Linda Greenhouse, *Senate, 96-3, Easily Confirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), <http://www.nytimes.com/1993/08/04/us/senate-96-3-easily-affirms-judge-ginsburg-as-a-justice.html>.

¹⁰³ As noted earlier, the Trump administration may become the exception that proves this rule. See Moe & Howell, *supra* note 4, at 138. Republicans (as of January 2018) are generally backing the president and, consequently, reinforcing the central claims of this essay. That may change and that change may add nuance to the claims made in this paper. Nonetheless, I truly doubt that the actions of Congress during the Trump era will undermine my central claims regarding congressional incentives. Furthermore, a tick up in congressional oversight would cut in favor of my bottom line conclusions regarding legislator standing to challenge the executive in court.

Congress asserting its institutional prerogatives through the legislative process. My argument is two-fold. First, lawmakers will increasingly turn to the courts for partisan ends and, relatedly, it is increasingly likely that there will be competing factions of Democratic and Republican filings. In other words, lawmakers will see courts as one more vehicle to articulate party preferences and call attention to differences between the two parties. These lawmakers speak for their political party; they do not speak Congress's institutional voice.

Consider four recent cases where the House of Representatives squared off against the Obama administration—*Committee on Oversight and Government Reform v. Holder* (where the House sued Attorney General Holder for failing to turn over requested documents in its Fast and Furious investigation); *United States House of Representatives v. Burwell* (where the House sued the Obama administration for implementing the Affordable Care Act in ways that allegedly undermined House prerogatives); *United States v. Windsor* (where the House defended before the Supreme Court the DOMA after the Obama administration refused to defend); and *United States v. Texas* (where the House appeared before the Supreme Court as amicus to challenge Obama's immigration directive).¹⁰⁴ In all four cases, Republican lawmakers sought to embarrass the Obama administration and/or advance favored policy priorities in the courts;¹⁰⁵ in all four cases, Democratic lawmakers filed competing briefs defending the Obama administration.¹⁰⁶ Needless to say, if Democrats controlled the House there would be a raft of lawsuits challenging the Trump administration.¹⁰⁷ Indeed, Democratic

¹⁰⁴ See Comm. on Oversight and Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2016); United States v. Windsor, 133 S. Ct. 2675 (2013); United States v. Texas, 136 S. Ct. 2271 (2016).

¹⁰⁵ See Bresnahan & Kim, *supra* note 56 (discussing Holder); see also *Burwell*, 130 F. Supp. 3d 53; Grove & Devins, *supra* note 1, at 618–19 (discussing DOMA); Brief for Amicus Curiae the United States House of Representatives in Support of Respondents, United States v. Texas, 809 F.3d 134 (5th Cir. 2015) (No. 15-674), 2016 WL 1377718.

¹⁰⁶ See Yager, *supra* note 58; Brief of Amicus Curiae Members of Congress in Support of Defendants' Motion for Summary Judgment, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 1:14-cv-01967-RMC), 2015 WL 10376844; Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amicus Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 840029; Brief of 186 Members of the U.S. House of Representatives and 39 Members of the U.S. Senate as Amici Curiae in Support of Petitioners, United States v. Texas, 809 F.3d 134 (5th Cir. 2015) (No. 15-647), 2016 WL 891342.

¹⁰⁷ For this very reason, there are real costs to a regime in which institutional counsel for the House have standing to speak the House's voice without allowing minority party lawmakers access to the courts to raise institutional power claims. Specifically, during periods of unified government, Congress would be mute. See Bycoffe, *supra* note 93. During periods of divided government, Congress would be active—but only presidential

state Attorneys Generals have launched more than a dozen lawsuits against the Trump administration and Democrats in Congress have also launched lawsuits.¹⁰⁸ For example, almost 200 Congressional Democrats have filed a lawsuit claiming that President Trump violated the Foreign Emoluments Clause by accepting benefits from foreign states without first seeking to obtain the consent of Congress.¹⁰⁹

There is little question that opposition party lawmakers are now locked and loaded; they will go to court whenever possible to strengthen their base, advance their agenda, and—whenever possible—embarrass the president. None of this is to say that the House and Senate never have standing to defend institutional prerogatives. Indeed, I have previously written (with Tara Grove) that House and Senate counsel can seek judicial enforcement of subpoenas.¹¹⁰ In particular, the House and Senate need not act as a bicameral body when it comes to implementing the “rules of . . . proceedings” of their respective chambers;¹¹¹ it therefore

opponents would speak Congress’s voice. To the extent that the Supreme Court signaled potential approval of such a regime in *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2657 (2015), the Court should rethink its approach to lawmaker and institutional standing. For further discussion of the *Arizona* case, see Sant’Ambrogio, *supra* note 2, at 1540.

¹⁰⁸ See Michael Levenson, *Maura Healey’s Top Target These Days is Donald Trump*, BOS. GLOBE (June 24, 2017), <https://www.bostonglobe.com/metro/2017/06/23/healey/8C3t7IXZZWENRHKlVqbIK/story.html> [<http://perma.cc/R9ET-ZK63>]. For a particularly revealing look at the efforts of New York Attorney General Eric Schneiderman’s efforts to wage legal warfare with President Trump, see Danny Hakim & William K. Rashbaum, *New York’s Attorney General in Battle with Trump*, N.Y. TIMES (Dec. 26, 2017), https://www.nytimes.com/2017/12/26/nyregion/eric-schneiderman-attorney-general-new-york.html?_r=0.

¹⁰⁹ See *Blumenthal v. Trump*, Complaint, No. 17-cv-01154, 2017 WL 2561946 (D.D.C. June 14, 2017). A related lawsuit filed by the Citizens for Responsibility and Ethics in Washington was dismissed for want of standing. See David A. Fahrenthold & Jonathan O’Connell, *Judge dismisses lawsuit alleging Trump violated Constitution*, WASH. POST, (Dec. 21, 2017), https://www.washingtonpost.com/politics/judge-dismisses-lawsuit-alleging-trump-violated-constitution/2017/12/21/31011510-e697-11e7-ab50-621fe0588340_story.html?utm_term=.0c2df9144622 [<http://perma.cc/V78R-PK6C>].

¹¹⁰ See Grove & Devins, *supra* note 1, at 597–603, 622. The House also may have standing in ongoing (as of fall 2017) litigation regarding the appropriations power and Obama-era enforcement of the Affordable Care Act. Specifically, since the Constitution mandates that appropriations legislation originates in the House, the House arguably suffers a distinct injury when presidential action allegedly undermines House appropriations authority. In *Burwell*, 130 F. Supp. 3d at 58, federal district judge Rosemary Collyer found standing for this reason. On December 15, 2017, Collyer’s standing holding was effectively ratified by a settlement between the Trump administration, House Republicans, and Democratic Attorneys General. See Anna Edney & Andrew M. Harris, *Obamacare Subsidy Lawsuit Settled by White House, Democrats*, BLOOMBERG POLITICS (Dec. 15, 2017, 3:10 PM), <https://www.bloomberg.com/news/articles/2017-12-15/obamacare-subsidy-lawsuit-settled-by-white-house-democrats> [<http://perma.cc/6WEC-X5FK>].

¹¹¹ U.S. CONST. art. I, § 5, cl. 2. The fact that either chamber might have authority to seek judicial enforcement of subpoenas does not mean that judicial resolution is superior

stands to reason that each chamber can pursue investigations as well as issue and enforce subpoenas as a unilateral body. At the same time, these lawsuits come at a cost in this age of polarized politics. Lawmakers are not motivated to use litigation to advance Congress's institutional interests; the focus of litigation is partisan gain and Democrats and Republicans will simply use the courts as another field of battle to engage in partisan battles with each other. Again, that is not to say that lawmakers or institutional counsel are without standing; my concern is whether polarization—as a policy matter—weighs in favor or against congressional standing.

My second argument against congressional lawsuits is that they embroil the courts in highly partisan political fights and that the courts pay a price for being embroiled in such overtly political litigation. Starting in 2010, the Supreme Court became a partisan Court—all of the Republican-nominated Justices are now to the right of all of the Democratic-nominated Justices.¹¹² Polarization has fueled this partisan divide and Senate Democrats and Republicans have both exacerbated this divide by engaging in party-line voting on judicial nominees and, relatedly, by ending the filibuster.¹¹³ When Barack Obama was president and Democrats controlled the Senate, Democrats broke a Republican logjam on lower court nominees by ending the filibuster for such nominees.¹¹⁴ When Republicans gained control, they blocked Obama's Supreme Court nominee Merrick Garland by claiming that the 2016 election should decide who appoints the next Supreme Court Justice.¹¹⁵ And after Democrats filibustered Trump nominee Neil Gorsuch, the majority Republican Senate ended the filibuster of Supreme Court nominees and confirmed Gorsuch on a near party line vote.¹¹⁶

to informal political bargaining. See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110, 130–32 (1996).

¹¹² See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 (2017).

¹¹³ *Id.* at 323–25.

¹¹⁴ Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0fd2ca728e67c_story.html?utm_term=.5cf247d3b95a [<http://perma.cc/GJ4F-AZDA>].

¹¹⁵ Mitch McConnell & Chuck Grassley, *McConnell and Grassley: Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html?utm_term=.b97a5e7c3539 [<http://perma.cc/F6KX-9PXB>].

¹¹⁶ Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, THE ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/> [<http://perma.cc/A4LD-9G66>]. Senate Republicans also did away with the blue slip (allowing home state Senators to

Against this backdrop, it is little wonder that the courts—especially the Supreme Court—are increasingly seen as another political, partisan institution.¹¹⁷ The Court, as the Justices have recognized, must “speak and act in ways that allow people to accept its decisions.”¹¹⁸ Indeed, to preserve their reputation as a collegial court, most Supreme Court Justices have spoken against the politicization of the Judiciary.¹¹⁹ Correspondingly, after the death of Justice Antonin Scalia, the Justices committed themselves to deciding cases unanimously and to avoid partisan 4–4 deadlocks.¹²⁰

Judicial resolution of congressional lawsuits cuts against these efforts of the Court to preserve its reputation as a court of law. For reasons discussed, congressional lawsuits are increasingly likely to be seen as partisan. And while some of these lawsuits will be filed by institutionalists interested in defending Congress’s constitutional prerogatives, it is nonetheless the case that judicial rulings on President Trump and the Emoluments Clause, or President Obama’s implementation of the Affordable Care Act, will both be seen as partisan and will dwarf nonpartisan efforts to, say, preserve Congress’s war-making authority. Again, it may be that lawmakers or institutional counsel already possess

block judicial nominees) when then-Senator Al Franken sought to hold up the nomination of Seventh Circuit judge David Stras. See Kevin Freking, *Senate confirms David Stras for Court of Appeals despite Al Franken withholding support*, TWIN CITIES PIONEER PRESS (Jan. 30, 2018, 3:57 PM), <https://www.twincities.com/2018/01/30/senate-confirms-david-stras-for-court-of-appeals-despite-al-franken-withholding-support/> [<http://perma.cc/S4JZ-SGYA>].

¹¹⁷ Richard A. Posner, *The Supreme Court is a Political Court. Republicans’ Actions are Proof*, WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?utm_term=.c21993986959 [<http://perma.cc/8B6n-Z3G2>].

¹¹⁸ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion). In quoting this language, I do not mean to suggest that the Court does or should follow public opinion.

¹¹⁹ See, e.g., Robert Barnes, *The Political Wars Damage Public Perception of the Supreme Court, Chief Justice Roberts Says*, WASH. POST (Feb. 4, 2016), https://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html?utm_term=.1723d547a198 [<http://perma.cc/725G-A48V>]; Ryan Lovelace, *Sonia Sotomayor Saddened by Perception of Judges as Political*, WASH. EXAMINER (Mar. 10, 2017, 10:42 AM), <http://www.washingtonexaminer.com/Sonia-sotomayor-saddened-by-perception-of-judges-as-political/article/2617019> [<http://perma.cc/ZUY4-W8FE>]; Catherine Lutz, *Justice Elena Kagan Talks Power on the Supreme Court*, ASPEN INST. (July 18, 2017), <https://www.aspeninstitute.org/blog-posts/supreme-court-associate-justice-elena-kagan-power-court/> [<http://perma.cc/93MK-DPM4>]; Lincoln Caplan, *A Workable Democracy*, HARV. MAG. (Mar.–Apr. 2017), <http://harvardmagazine.com/2017/03/a-workable-democracy> [<http://perma.cc/7LTC-2TBX>].

¹²⁰ See Adam Liptak, *Rulings and Remarks Tell Divided Story of an 8-Member Supreme Court*, N.Y. TIMES (May 30, 2016), <https://www.nytimes.com/2016/05/31/us/politics/rulings-and-remarks-tell-divided-story-of-an-8-member-supreme-court.html>; Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html>.

constitutional standing to bring such suits. Nonetheless, party polarization cuts against the bringing of those lawsuits and is reason for the courts to move cautiously before expanding congressional standing.¹²¹

In arguing against congressional standing, I understand full well that I am embracing presidential unilateralism. As Justice Jackson wrote in the Steel Seizure case, “[t]he tools belong to the man who can use them.”¹²² Congress is not likely to use its tools; it is naturally disinclined to stand up for institutional prerogatives and party polarization further cuts against Congress asserting its prerogatives. Nonetheless, the courts should not seek to prop Congress up by intervening in cases where standing is not clearly established. Today’s Congress is a cacophony of competing sound bites by Democrats and Republicans. Amicus curiae filings by lawmakers and institutional counsel provide an appropriate vehicle for the expression of the myriad interests of lawmakers and political parties. Congressional lawsuits are not such a vehicle; those lawsuits further expose partisan rifts in Congress and are potentially harmful to the courts’ institutional standing.

¹²¹ The courts are generally reluctant to intervene and look for ways to avoid tackling the merits in these disputes. Indeed, federal courts often seek end-runs where they do not have to rule on standing. This is true of information access disputes. See Complaint, *supra* note 109. It is also true of ongoing litigation regarding the appropriations power—where the D.C. Circuit Court of Appeals is holding the case in abeyance (starting December 5, 2016) rather than ruling on the lower court’s standing determination. In this litigation, the House and Trump administration both support the D.C. Circuit’s action. See Timothy Jost, *Parties Ask Court to Keep Cost Sharing Reduction Payment Litigation on Hold (Updated)*, HEALTH AFF. BLOG (Feb. 21, 2017), <http://healthaffairs.org/blog/2017/02/21/parties-ask-court-to-keep-cost-sharing-reduction-payment-litigation-on-hold/> [<http://perma.cc/2QUV-XPXE>].

¹²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

State Standing to Constrain the President

F. Andrew Hessick and William P. Marshall***

Ambition, as it turns out, has not been able to counteract ambition.¹ Or at least this has been true when the ambition that was supposed to be countered was that of the President of the United States and the institution doing the countering was the United States Congress. Presidential ambitions now consistently overwhelm those of the Congress with the result that the power of the presidency has now become far greater than the framers may have imagined—both in absolute and in relative terms.² As far back as 1952, in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson observed that the president “exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”³ Subsequent developments have only served to increase the president’s leverage since that time.

Perhaps because it has recognized this reality, the Supreme Court in recent years has become notably less sympathetic to the notion that it should defer to the vagaries of the political wrangling between Congress and the Executive.⁴ Consequently, the Court has become more active in reviewing separation of powers disputes.⁵ This does not mean the Court always rules

* Professor of Law, University of North Carolina.

** Kenan Professor of Law, University of North Carolina. We’d like to thank Tom Campbell for his helpful suggestions. Thanks also to Josh Roquemore for his research assistance.

¹ Cf. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

² See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816–18 (1996).

³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

⁴ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196–97 (2012) (rejecting the argument that recognition of foreign sovereigns is a political question not subject to judicial review) [hereinafter *Zivotofsky I*]; see also *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam) (resolving dispute about presidential electors instead of leaving the matter to Congress as prescribed by Article II).

⁵ See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (holding that the legislature cannot infringe on the president’s sole power to recognize other sovereigns and nations) [hereinafter *Zivotofsky II*]; see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014) (ruling that the president exceeded his authority by appointing a member to the National Labor Relations Board under the Recess Appointments Clause).

against the Executive.⁶ In fact, many of the Court's recent cases have upheld the exercise of federal executive power against separation of powers challenges.⁷ It does mean, however, that the Court has rejected the premise that political processes alone can protect against separation of powers encroachments. The Court, in short, has sent the message that it is ready to actively police structural constitutional issues.⁸

Against this background, it may not be surprising that there is a new sheriff in town aiming to challenge the exercise of federal executive power in the federal courts. Or, rather, there are new sheriffs. In recent years, state attorneys general have become increasingly more aggressive in seeking to patrol federal executive action. During the Obama Administration, for example, some state attorneys general instituted a series of cases, brought on behalf of their home states, challenging federal action in the areas of immigration⁹ and environmental protection.¹⁰ Since President Trump took office, other state attorneys general have filed actions against specific directives of his administration, most notably in the immigration area.¹¹ All signs suggest that

⁶ See *King v. Burwell*, 135 S. Ct. 2480, 2488, 2495–96 (2015) (ruling in favor of the Internal Revenue Service's ("IRS") interpretation of the Affordable Care Act ("ACA"), which would allow a tax credit for those enrolled in either a Federal Exchange or State Exchange, despite the ACA's seemingly clear language limiting the tax credit for those enrolled in State Exchanges).

⁷ See *Zivotofsky II*, 135 S. Ct. at 2096 (holding that the president has the sole power to recognize other sovereigns); see also *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 135 S. Ct. 1225, 1233 (2015) (remanding a nondelegation challenge to Amtrak rulemaking).

⁸ See *Zivotofsky II*, 135 S. Ct. at 2096; *Noel Canning*, 134 S. Ct. at 2577; see also Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1523 (2013) (criticizing the Court's willingness to resolve structural constitutional disputes); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 336 (2002) (arguing the Court is more willing to rule on structural matters).

⁹ See, e.g., *Texas v. United States*, 809 F.3d 134, 134, 146 (5th Cir. 2015) (twenty-three Republican state attorneys general, three Republican governors whose attorneys general were Democrat, and one Republican governor filed suit against the United States to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") initiative). *But see* Brief of the Amicus States of Wash., Cal., Conn., Del., Haw., Ill., Iowa, Md., Mass., N.M., N.Y., Or., R.I., and Vt., and D.C., in Support of Motion to Stay District Court Preliminary Injunction at 1–2, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), 2015 WL 1285125, at *2–3 (fourteen Democratic attorneys general for fourteen states and the District of Columbia filed briefs in support of the United States' amnesty policy).

¹⁰ See Brief for Petitioners at 1–2, *West Virginia v. EPA* (D.C. Cir. Nov. 26, 2014) (No. 14-1146), 2014 WL 6687575, at *6 (twelve Republican attorneys general filed briefs against the Environmental Protection Agency ("EPA") in response to increased regulation of coal power plants). *But see* Final Brief for State Intervenors in Support of Respondent at 10, *West Virginia v. EPA* (D.C. Cir. Mar. 4, 2015) (No. 14-1146), 2015 WL 926748, at *6–7 (eleven Democratic attorneys general and the District of Columbia filed in support of the EPA's increased regulation measures).

¹¹ All briefs filed by state attorneys general—both in opposition and in support of the travel ban executive order—were done so strictly along party lines. See, e.g., Motion for Leave to File and Brief for N.Y. et al. as Amici Curiae in Opposition to Petitioners' Stay

this trend of state attorneys general challenging exercises of presidential power will continue.¹²

These state attorneys' general suits face a critical threshold barrier: standing to challenge federal executive power. Do the states have such standing and, if so, under what circumstances may they do so? This issue was central in *Texas v. United States*, a case in which the Fifth Circuit found that Texas had standing.¹³ The question was ultimately left unresolved by the United States Supreme Court when the Fifth Circuit decision was affirmed by an equally divided Court.¹⁴

This essay examines the issue of state standing to constrain presidential power. Part I reviews why presidential power has so drastically expanded since the Founding. It further discusses why Congress has not been up to the task of checking the president and why expanded state standing might be a useful vehicle to constrain executive power. Part II canvasses the existing case law regarding state standing to challenge federal executive action and specifically includes recent cases brought against the Obama and Trump Administrations. Part III demonstrates how courts have found states to have standing to challenge federal executive action, but also discusses how the scope of that right is not yet clear. Part III(A) discusses why states might be appropriate parties to bring actions challenging federal executive power, including their role in diffusing power

Application at 3, *Trump v. Hawai'i*, 138 S. Ct. 42 (2017) (No. 16-1540), 2017 WL 3049332, at *5 (New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, and D.C. filed as amicus curiae in support of Hawaii's action); see also *Profiles in Courage*, DEMOCRATIC ATTORNEYS GENERAL ASSOCIATION, <http://democraticags.org/profiles-2/> [<http://perma.cc/MUC2-65YC>] (last visited Aug. 1, 2017) (showing every state attorney general in the aforementioned brief who opposed both the current administration's travel ban and climate change deregulation are Democrat); Motion for Leave to File and Brief for Tex. et al. as Amici Curiae in Support of Petitioners and their Stay Application at 1, *Trump v. Int'l Refugee Assistance Project* (2017) (No. 16-1436), 2017 WL 2533119, at *4 (Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and the Governor of the State of Mississippi filed as amicus curiae in defense of the administration's executive order); see also *Meet the Attorneys General*, REPUBLICAN ATTORNEYS GENERAL ASSOCIATION, http://www.republicanags.com/meet_the_ags [<http://perma.cc/69TD-XXFN>] (last visited Aug. 1, 2017) (showing every state attorney general in the aforementioned brief who supported the travel ban executive order are Republican).

¹² See Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html?utm_term=.a7c7b3e8b7b9&yoyolxmi [<http://perma.cc/UY2P-MQAT>] (reporting that Bloomberg Philanthropies funded a center to help state attorneys general bring environmental actions against the United States).

¹³ *Texas*, 809 F.3d at 155–56.

¹⁴ *Texas v. United States*, 136 S. Ct. 2271, 2272 (2016).

within the federal system. Part III(B) offers some reservations, such as the fact that the states' motivations in maintaining these suits may be based more on partisan interests than on structural concerns with constraining the federal executive. Part IV proposes that states should enjoy a modicum of liberalized standing by allowing a more generous construction of injury-in-fact as applied to them than would be applied to other entities. It suggests, however, that even this modest grant of standing should be subject to further prudential review in light of the potential problems that state standing engenders. Part V offers a brief conclusion.

I. THE EXPANDING POWER OF THE PRESIDENCY

As numerous participants in the Symposium have noted, presidential power has expanded exponentially since the Founding.¹⁵ There are many reasons for this expansion.¹⁶ Some are simply the unavoidable effects of forces inherent in modern government dynamics. For example, as Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*, the fact that the office of the president has a unique hold on public and media attention means that in “drama, magnitude and finality” its decisions far overshadow those of any other.¹⁷ In addition, the need for modern government to respond quickly to national crises necessarily invests power in the presidency because only that institution has the ability to act expeditiously.¹⁸ The growth of the administrative state¹⁹ and the power of the armed forces has inevitably empowered the president, who stands at the head of

¹⁵ See Randy Beck, *Promoting Executive Accountability Through Qui Tam Legislation*, 21 CHAP. L. REV. 41–42 (2018) (discussing a shift and rebalancing of power from the legislative to the executive branch); Gary Lawson, *Representative/Senator Trump?*, 21 CHAP. L. REV. 115–19 (2018) (demonstrating how executive branch's power has expanded through subdelegation of legislative authority); Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 168 (2018) (noting the large power of the “[c]ontemporary” president); see also Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 555–56 (2017) (noting expansions of executive power).

¹⁶ See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507–19 (2008); see also Flaherty, *supra* note 2, at 1816–19; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“Now, it is the President [instead of Congress] whose power has expanded and who therefore needs to be checked.”).

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

¹⁸ See Flaherty, *supra* note 2, at 1806.

¹⁹ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587 (1984) (describing the degree to which administrative agencies are centrally managed by the president).

both the Executive Branch and the military.²⁰ The president has unique access to and control over information in a world where information is power.²¹

Other factors have contributed to this expansion. Presidents, for example, are able to build upon the collective actions of their predecessors in justifying their own actions—creating a one-way ratchet that consistently expands presidential power from administration to administration.²² The legal limits on presidential power are defined in the first instance by the president's own appointees in the Justice Department²³ who, even if committed to providing objective legal advice, are often predisposed to finding ways in which the president can further his agenda.²⁴ Finally, presidents are interested in building legacies and they well understand that history judges leaders by their actions and not by their forbearance. They are therefore constantly exploring new avenues and methods to get things done.²⁵ After all, the last president celebrated for *not* exercising power may very well be George Washington and his decision not to run for a third term.²⁶

Another key reason why presidential power has so drastically expanded rests not with the presidency but with

²⁰ See also Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 338 (2005) (discussing presidential control of the military).

²¹ See Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 737 (2002).

²² See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1458–60 (1997); see also John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 429–30 (2008).

²³ See LUTHER A. HUSTON, ARTHUR S. MILLER, SAMUEL KRISLOV & ROBERT D. DIXON, JR., ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 51 (1968).

²⁴ See GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 103, 107 (2001) for a discussion about how the ability (and motivation) of the attorney general to challenge a president is likely to be particularly diminished in times of crisis. The most famous documented example of this involves Attorney General Francis Biddle and the evacuation of Japanese Americans during World War II. Although Biddle had considerable doubts as to the constitutionality of the evacuation order, he ended up dropping his opposition in the face of military objections and a president who had, nonetheless, decided to go through with the action. See *id.*

²⁵ President Bush, for example, was particularly aggressive in claiming that he had inherent powers that justified his taking unilateral actions on key matters. See *Bush Says He Signed NSA Wiretap Order*, CNN (Dec. 17, 2005, 8:07 PM), <http://www.cnn.com/2005/POLITICS/12/17/bush.nsa> [<http://perma.cc/9Y44-LF7H>]. President Obama, in turn, relied on his expansive reading of statutes to support his unilateral decisions. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?mcubz=3>.

²⁶ See Rufus King, Personal Memorandum (May 3, 1797), in 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING: COMPROMISING HIS LETTERS, PRIVATE AND OFFICIAL, HIS PUBLIC DOCUMENTS, AND HIS SPEECHES 545, 545 (Charles R. King ed., 1896).

Congress.²⁷ An effective system of separation of powers requires Congress to protect its institutional prerogatives to check the Executive. Yet the relationship between Congress and the president has become instead, in the words of Darryl Levinson and Richard Pildes, separation of parties.²⁸ Members of Congress see their primary role as advancing the interests of their party and not protecting Congress's institutional prerogatives.²⁹

This dynamic has reduced the power of Congress and increased the power of the president. When the same party holds Congress and the presidency, congressional majorities often stand behind their president even when doing so might diminish their own institution's authority, a practice that directly serves to expand presidential power. Less obviously, even when there has been a divided government, the dynamic of hyper-partisanship has indirectly led to increased presidential power. In times of divided government, of course, Congress is motivated to attempt to check the president because it is in its partisan interests to do.³⁰ Yet presidents have become adept at characterizing this resistance as Congress not doing its job to justify exercising executive power unilaterally. They have thus been able to turn congressional efforts to block their agenda into a mechanism for enhancing their own powers.³¹ Congress, meanwhile, has had no effective response.

In contrast to Congress, one institution that has been able to block the president thus far is the Supreme Court. In cases such as *Youngstown*,³² *United States v. Nixon*,³³ and the war-on-terror decisions,³⁴ the Court has imposed important limits on the Executive. Equally important, even in cases in which the

²⁷ See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2222 (2013).

²⁸ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329–30 (2006).

²⁹ See Jeff Flake, *My Party is in Denial About Donald Trump*, POLITICO MAG. (July 31, 2017), <http://www.politico.com/magazine/story/2017/07/31/my-party-is-in-denial-about-donald-trump-215442> [<http://perma.cc/UX7H-RPBY>] (condemning both parties for blindly engaging in partisan behavior).

³⁰ See Franita Tolson, *The Union as a Safeguard Against Faction: Congressional Gridlock as State Empowerment*, 88 NOTRE DAME L. REV. 2267, 2267–68 (2013) (describing an instance where Republican senators blocked a veteran jobs bill to prevent President Obama from signing beneficial legislation before the 2012 election).

³¹ See William P. Marshall, *Warning: Self-Help and the Presidency*, 124 Yale Online L.J. F. 95 (2014); William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 786 (2014).

³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

³³ *United States v. Nixon*, 418 U.S. 683, 713 (1974).

³⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 646 (2006); *Boumediene v. Bush*, 553 U.S. 723, 794 (2008).

president has prevailed, the Court has indicated it is fully willing to subject exercises of presidential power to judicial review.

Courts can hear cases only when parties have requisite standing. This means that presidential actions may be able to escape judicial review because of standing limitations. For example, if the lower courts had not granted standing to Texas to challenge President Obama's Dreamers initiative, which declared a policy of not enforcing immigration laws against a large class of immigrants, then it is likely no party would have been able to maintain that suit.³⁵ To establish standing to challenge a policy, an individual must show he suffered an injury in fact because of that policy.³⁶ The Dreamers policy of not enforcing the law does not obviously injure anyone; instead, it confers a benefit on the immigrants covered by it. Giving the states standing to sue, therefore, may be the only way through which a president's actions can be subject to judicial scrutiny. The next sections accordingly examine the current law governing state standing and discuss whether the scope of state standing should be adjusted so as to provide an additional check on the expansion of presidential power.

II. STATE STANDING TO SUE THE EXECUTIVE UNDER CURRENT LAW

A. The Law of State Standing

State suits against the president and other federal executive officials seeking to force compliance with the Constitution and federal law invariably raise questions of Article III standing.³⁷ Standing is one of the various doctrines that implement the "cases" and "controversies" provision in Article III.³⁸

Ordinarily, to have standing, a person must demonstrate that he has suffered, or is imminently about to suffer, an "injury in fact."³⁹ That injury must be to a "legally protected

³⁵ Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 786 (2013).

³⁶ See WRIGHT, ET AL., *infra* note 49 and accompanying text.

³⁷ Although the most heavily litigated, standing is not the only obstacle states face in suits against federal actors. For example, states must also demonstrate their claim is ripe and not moot. Although the United States and its officials also enjoy sovereign immunity in suits by states, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983), section 702 of the Administrative Procedure Act waives that immunity for suits seeking non-monetary damages against an "officer or employee" of the United States. 5 U.S.C. § 702. Accordingly, so long as a suit does not seek damages, sovereign immunity should not be an obstacle to state suits against federal officials.

³⁸ U.S. CONST. art. III, § 2.

³⁹ *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

interest”—for example, the interest against unwanted physical harm—and it must be “concrete and particularized.”⁴⁰ The injury must also be “fairly traceable” to the actions of the defendant, and it must be susceptible to “redress[] by a favorable decision.”⁴¹ Individuals who fail to satisfy these requirements cannot maintain suit in federal court.⁴²

But for states, things are different. States can establish standing by demonstrating an injury to the same sort of interests held by private individuals such as the interest in holding property. But because they are sovereigns, states also have sovereign and quasi-sovereign interests, and the violation of those interests can also support standing.⁴³ Thus, states have broader potential standing than private individuals.⁴⁴

A state’s sovereign interests include its interests in enforcing its criminal and civil laws. States can sue to enforce these sovereign interests even when they do not suffer an injury in fact.⁴⁵ A state has standing, for example, to prosecute Dan for assaulting Vicky in violation of state law, even though the assault does not hurt the state.⁴⁶ For similar reasons, states have sovereign standing to defend their laws against challenges that the laws are unconstitutional or preempted,⁴⁷ and they have standing to challenge federal laws pressuring the states to change their laws.⁴⁸

A state’s quasi-sovereign interests are less well defined.⁴⁹ They include the state’s interest “in the well-being of its populace,”⁵⁰ such as by protecting its residents from pollution,⁵¹ reducing unemployment in the state,⁵² preserving wildlife in the state,⁵³ and ensuring that the state is “not . . . discriminatorily

40 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

41 *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

42 *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–03 (1998).

43 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

44 Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004).

45 *See Maine v. Taylor*, 477 U.S. 131, 136 (1986) (finding state standing based on the “interest in the continued enforceability of its own statutes”).

46 *See Ann Woolhandler & Caleb Nelson, State Standing*, 81 VA. L. REV. 387, 392 (1995) (finding there is no standing problem when a state “prosecutes criminal and civil actions under its own laws in its own courts”).

47 *See Taylor*, 477 U.S. at 137.

48 *See West Virginia v. EPA*, 362 F.3d 861, 868 (finding state standing to challenge federal regulation requiring states to adopt new standards or to accept federal standards).

49 CHARLES ALAN WRIGHT ET AL., 13A FEDERAL PRACTICE AND PROCEDURE § 3531.11 (2d ed. 1984) (describing quasi-sovereign interests as “admittedly vague”).

50 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

51 *Id.* at 604–05.

52 *Id.* at 608 (finding *parens patriae* standing to reduce unemployment).

53 *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (noting “the quasi sovereign right of the State to regulate the taking of wild game within its borders”).

denied its rightful status within the federal system.”⁵⁴ States have *parens patriae* standing—so-called because a state asserting these interests is seeking to protect its residents and resources—to vindicate these quasi-sovereign interests.

B. State Suits against the Federal Executive

States’ standing in suits against the federal government, however, is more complex. Although states have standing to vindicate sovereign interests and *parens patriae* standing to vindicate quasi-sovereign interests in other contexts, neither form of standing provides a sound basis under current doctrine to sue federal officials to force compliance with a federal statute or the Constitution. States do not have a sovereign interest in federal compliance with a federal statute or the Constitution.⁵⁵ Federal law and the Constitution are not state law. Although states must enforce federal and constitutional law, it is because those laws trump state laws. The violation of federal law accordingly does not inflict injury on a state’s sovereignty. It is only if that violation *also* happens to violate, or interfere with, state law that a state suffers a sovereign injury supporting sovereign standing.⁵⁶

States also likely do not have *parens patriae* standing to sue the president to force him to comply with federal law or the Constitution. This is not because states do not have a quasi-sovereign interest in ensuring that their residents are governed by a law abiding federal government. They do. The failure of the federal government to obey federal law can threaten a state’s property, resources, stability, and population. Rather, the problem is that, according to the Supreme Court, states cannot assert those interests of its citizens against the United States.⁵⁷

The reason is that the point of a *parens patriae* suit is to allow a sovereign to protect its citizens, and the citizens of a state are also citizens of the United States.⁵⁸ According to the Court, the United States has the primary responsibility of managing the federal government and ensuring its compliance with federal

⁵⁴ *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607.

⁵⁵ Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 886–87 (2016).

⁵⁶ See *South Carolina v. Katzenbach*, 383 U.S. 301, 323–25 (1966) (upholding state’s standing to enforce state law against Attorney General).

⁵⁷ *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009) (“[A] State may not use [*parens patriae*] to sue the United States.”).

⁵⁸ *Mellon*, 262 U.S. 447, 485–86 (1923).

law.⁵⁹ Therefore, states cannot sue the federal government as *parens patriae* to protect state citizens from unconstitutional acts of the federal government.⁶⁰ For example, in *Massachusetts v. Mellon*, the Court held that Massachusetts lacked *parens patriae* standing to challenge, under the Tenth Amendment, a federal law giving money to states that took certain measures to protect mothers and infants.⁶¹

Under this logic, states likely do not have *parens patriae* standing to sue the president or other federal officers to force compliance with the Constitution or federal law. Such a suit seeks to protect state citizens from federal actions that violate federal law or the Constitution. To be sure, the suit targets executive actions instead of legislative ones, as in *Mellon*, but it is unclear why that distinction should matter. What matters is whether the suit challenges the acts of the federal government. One might argue the difference is that the suit is against an officer and not the United States. That difference, however, should not matter as to a state's *parens patriae* standing. The United States acts through its officers to protect its citizens as *parens patriae*. That is especially true for the president. Article II explicitly tasks him with seeing that federal law is enforced.⁶²

Given the difficulties with states establishing sovereign or quasi-sovereign standing against the president, it is no surprise that courts that have recently found that state standing to challenge presidential actions have avoided the sovereignty and quasi-sovereignty question, and have instead based standing on factual injuries alleged by the states.⁶³ Consider *Texas v. United States*.⁶⁴ There, the Department of Homeland Security adopted a policy of not enforcing immigration laws against a large swath of

⁵⁹ *Id.* (“[I]n respect of their relations with the [f]ederal [g]overnment[, it is] . . . the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.”).

⁶⁰ *Katzenbach*, 383 U.S. at 324 (“Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government.”); *accord* *Florida v. Mellon*, 273 U.S. 12, 18 (1927); *see also* WRIGHT ET AL., *supra* note 49, at § 3531.11.1 (“[I]t is settled that a state cannot appear as *parens patriae* to assert the rights of its citizens to be protected against unconstitutional acts of the federal government.”).

⁶¹ *Mellon*, 262 U.S. at 486.

⁶² U.S. CONST. art. II, § 1.

⁶³ *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015) (basing standing on increased costs from issuing licenses), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016); *Washington v. Trump*, 847 F.3d 1151, 1158–61 (9th Cir. 2017) (applying *Lujan* factors in analyzing state standing based on alleged harm to proprietary interests).

⁶⁴ *Texas v. United States*, 809 F.3d at 155–56 (basing standing on increased costs from issuing licenses).

individuals illegally in the United States,⁶⁵ deeming these individuals to be “lawfully present in the United States.”⁶⁶ Texas and twenty-six other states challenged the policy, claiming that the Department’s policy violated the Administrative Procedure Act. Texas argued it had *parens patriae* standing and that it had suffered an injury in fact.

In finding Texas had standing, both the district court and the Fifth Circuit avoided the question whether Texas had *parens patriae* standing. Instead, they concluded that Texas had suffered an adequate injury in fact. The courts pointed out that, because Texas law authorizes lawfully present individuals to obtain a Texas drivers license, Homeland Security’s policy expanded the number of individuals eligible for Texas licenses, and Texas would incur costs in issuing these licenses. According to the courts, these costs supported Texas’s standing, even though Texas could have eliminated those costs by amending Texas law to bar those immigrants from obtaining licenses.⁶⁷

The Ninth Circuit took a similar approach in *Washington v. Trump*.⁶⁸ There, Washington and Minnesota filed suit challenging President Trump’s Executive Order suspending entry of immigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The states argued the policy violated the Establishment Clause, Due Process under the Fifth Amendment, the Immigration and Nationality Act, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, the Administrative Procedure Act, and the Tenth Amendment.⁶⁹ Washington and Minnesota asserted standing based on both a violation of their quasi-sovereign interests and an injury in fact to their proprietary interests.

Like the Fifth Circuit in *Texas v. United States*, the Ninth Circuit avoided the question whether the states had standing based on their quasi-sovereign interests.⁷⁰ Instead, the Circuit

⁶⁵ *Id.* at 147 (“In November 2014, by what is termed the ‘DAPA Memo,’ DHS expanded DACA by making millions more persons eligible for the program and extending [t]he period for which DACA and the accompanying employment authorization is granted . . . to three-year increments, rather than the current two-year increments.”) (citing Memorandum from Jeh Charles Johnson, Sec’y Dep’t of Homeland Sec., to Leon Rodriguez, Dir. USCIS, et al. 3–4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/U2NJ-2J26>]).

⁶⁶ *Id.* at 148 (emphasis omitted).

⁶⁷ *See id.* at 155–56 (holding the “financial loss[es]” that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

⁶⁸ *See Trump*, 847 F.3d at 1157–61.

⁶⁹ *Id.* at 1157.

⁷⁰ *See id.* at 1161 n.5; *see also id.* at 1157 (concluding the States had Article III standing based on both proprietary and quasi-sovereign interests).

concluded the states had suffered an injury in fact. The court stated the executive order caused a concrete and particularized injury to the states' public universities by preventing nationals of the designated countries from entering the country to join the universities as faculty and students.⁷¹

III. THE SPECIAL ROLE OF STATES IN SUING THE FEDERAL EXECUTIVE

A. The Role of the States

States have a special role in ensuring the federal executive's compliance with the Constitution because of their interest in preserving federalism. Federalism defines the boundary between the states and the federal government.⁷² The federal government is one of limited powers.⁷³ For example, the Constitution empowers Congress to legislate in only a few designated areas.⁷⁴ States do not face comparable limitations. States have general government powers. They may broadly regulate in any area, including areas in which the federal government may also regulate,⁷⁵ and they may broadly enforce those laws.

States have an interest in protecting their domain from federal intrusion. That interest is most obvious when the federal executive takes actions that directly interfere with matters committed to the states.⁷⁶ An example is the promulgation of a rule by an executive agency that regulates completely local matters.⁷⁷

But the states' federalism interest in ensuring that the Executive complies with the constitution is not limited to the executive actions that directly invade the province of the states. States have a federalism interest in preventing all unlawful executive actions, even if those actions do not directly touch on an area reserved to the states.⁷⁸ That is so for two reasons.

First, states have a political interest in ensuring that the president not exercise powers allocated to Congress because of

⁷¹ *Id.* at 1161.

⁷² *See Alden v. Maine*, 527 U.S. 706, 748 (1999).

⁷³ *See United States v. Morrison*, 529 U.S. 598, 618 (2000).

⁷⁴ U.S. CONST. art. I, § 8.

⁷⁵ *But see* U.S. CONST. art. I, § 10 (the prohibition on states "coin[ing] [m]oney" is an example of how the Constitution imposes several discrete limits on state power).

⁷⁶ *See Grove, supra* note 55, at 887.

⁷⁷ *See id.*

⁷⁸ *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 359, 462 (2012) (observing that "cooperative federalism schemes provide a check on federal executive power" and that "[t]he very growth of the federal administrative state has swept states up as necessary administrators of federal law").

their better representation in Congress.⁷⁹ Although the president is elected through a nationwide election, he does not represent a particular state; he represents the nation collectively. By contrast, each state has representatives in Congress who can defend their state's interests. Pushing actions from the Executive to Congress thus gives states a larger say in federal policy decisions.⁸⁰

Second, states have a direct regulatory interest in preventing unlawful executive action because a declaration that a federal executive action is unlawful prevents that action from preempting state law or from otherwise affecting how states conduct themselves. Consider an executive order that regulates interstate commerce. That order does not impermissibly touch an area left to the states because the Constitution authorizes the federal government to regulate interstate commerce.⁸¹ Instead, the constitutional objection is that the order violates separation of powers because the Constitution commits to Congress, not the president, the power to regulate that commerce. But states have a federalism interest in challenging that executive order, because that executive order would preempt inconsistent state laws on commerce. Voiding the executive order removes the possibility for preemption and accordingly leaves the states in a better position to issue regulations on commerce.

The same argument applies to executive actions that fail to comply with the Administrative Procedure Act and other requirements imposed by statute. Those actions can preempt state law. Even when they do not preempt, those agency actions can influence the way states act—by, for example, administering spending programs that condition the disbursement of funds on the state's meeting requirements imposed by the agency.⁸² Because they interfere with state autonomy, states have a

⁷⁹ See Margaret H. Lemos & Ernest A. Young, *State Public Law Litigation in an Age of Polarization*, at 19 (manuscript on file with authors) (“[I]t’s terribly important for federalism that Congress make the laws, not executive actors.”).

⁸⁰ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954). To be sure, especially in recent times, Congress has not been particularly effective at policymaking because of gridlock. But that gridlock may be a function, at least in part, of the divergent views of states.

⁸¹ U.S. CONST. art. I, § 8, cl. 3.

⁸² See, e.g., Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 82 (2007) (acknowledging, in the context of environment agency action, that “federal agency actions can . . . have preclusive effect” and that “[t]he most straightforward way to encourage state activity is to offer financial support for state programs that meet federal requirements or to otherwise confer benefits on compliant state governments”).

federalism interest in challenging executive actions that violate the APA or other statutory procedures.⁸³

This state interest in limiting the federal government to protect the states' prerogatives is a critical part of the constitutional design. The principal reason for dividing power between state and federal government is to check abuses of federal power and to prevent the establishment of a federal tyranny.⁸⁴ The idea is not simply that sharing power with the states results in the federal government not having the complete authority necessary to establish a tyranny. It is also that state officials seeking to protect their own power "stand ready to check the usurpations"⁸⁵ of the federal government. As Madison put it in *Federalist* No. 51, the competition for power between the state and federal government ensures that the "different governments will control each other[.]"⁸⁶ The Constitution's design thus contemplates that the states stand as guardians against federal overreach.⁸⁷ All of these interests support enabling states to bring suits challenging unlawful executive actions.

In addition to having these federalism interests, states are particularly well suited to bring challenge to executive actions because of their democratic accountability. One reason for the standing doctrine is to prevent would-be litigants from undermining the political process by limiting their access to the courts. The premise of our Constitution is that the elected branches make policy, and elections are the appropriate mechanism to seek to change government policies. Permitting individuals to resort to the court to challenge government policies short-circuits this political process. Standing seeks to avoid this problem by permitting individuals to go to court only if they have suffered direct injuries from the government's

⁸³ This logic extends to federal executive actions that violate individual constitutional rights. A successful challenge to a federal action on the ground that it violates a constitutional right promotes federalism by barring federal action that preempts state law. To be sure, preventing the federal government from taking actions that violate rights would not let states take the same actions, because with only a few exceptions constitutional rights equally bar the federal government and the states. Still, removing the federal program would leave space for a state to regulate in that area.

⁸⁴ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

⁸⁵ THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁸⁶ THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

⁸⁷ A broad argument for state standing could be based on the premise that the Constitution should be viewed as a compact among the states. See John C. Calhoun, *Rough Draft of What Is Called the South Carolina Exposition*, in UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 350 (Ross M. Lence ed., 1992) (advocating the state-compact theory of the Constitution). If so, states could arguably have standing to challenge all ultra vires federal actions as a breach of contract. Because the premise of this argument is so contestable and its potential implications so far-reaching, however, we do not advance that argument here.

actions. Individuals cannot, in other words, base standing on generalized grievances.

Broad state standing does not threaten the political processes to the same degree because states themselves are political entities. They are unlikely to bring suits that are inconsistent with the majority views of their constituency. Consistent with this view, states do not face the same standing restriction for generalized grievances. For example, unlike individuals, states can bring suit to enforce state criminal laws, even when the violation of the criminal law does not directly harm the state.⁸⁸

There are also pragmatic reasons why states should enjoy broader standing than individuals. Unlike many individuals who might bring suit against the federal executive, states are prone to take a more deliberative and cautious approach to assessing when to bring suit. They are more likely to evaluate the merits more carefully to avoid spending their taxpayers' money on a suit that they cannot win. Moreover, unlike many individuals, states have the resources to launch and maintain a significant judicial challenge to executive actions.⁸⁹ As with any major litigation, pursuing a challenge to an executive action can be an expensive affair because of the scope of discovery, the breadth of the issues, and the intense motions practice. In addition, more than other types of suits, challenges to an executive action turn on sophisticated legal arguments that can be made most effectively by attorneys that specialize in the relevant field of law. Most private individuals lack the resources to maintain this type of litigation and to retain specialist attorneys who are more likely to prevail on a such a challenge.

To be sure, states are not the only ones with the interests and resources to challenge the federal executive. Congress also plays a significant role in constraining the federal executive. Just as with federalism, the reason that the Constitution divides power between Congress and the president is to prevent either branch from accumulating or abusing its power.⁹⁰ Conferring broader legislative standing on Congress to challenge federal executive actions would increase Congress's ability to play that role.⁹¹

⁸⁸ See Woolhandler & Collins, *supra* note 46, at 392.

⁸⁹ See Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. (forthcoming 2018).

⁹⁰ See *Gregory*, 501 U.S. at 458 (“[T]he separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch[.]”).

⁹¹ See, e.g., Campbell, *supra* note 15, at 603, 605 (arguing Congress should have broader standing to challenge executive decisions not to enforce the law).

Whether Congress should have greater standing to challenge the president is beyond the scope of this Article; but there are sound reasons to be cautious before proceeding too far down this route. The most significant is that broader congressional standing could threaten the balance of powers.⁹² Although Congress has largely abdicated its function of checking the president, Congress has the potential to be extremely powerful, not only because it holds the legislative and other powers, but also because it has more direct popular support than the other branches of government.⁹³ For this reason, the Constitution imposes various limits on Congress's power. One limitation is that the Constitution specifically enumerates Congress's power. Another limitation is that the Constitution prescribes procedures that Congress must follow to exercise those powers. For example, for Congress to create a law, the bill must pass both houses of Congress and be presented to the president for his approval before becoming a law.⁹⁴ Similarly, Article I prescribes a specific procedure that Congress must follow to remove a federal officer through impeachment.⁹⁵

Among the various powers given to Congress are a handful of tools with which Congress can respond to illegal executive action. The Constitution authorizes Congress to enact new legislation, bring impeachment proceedings, withhold appropriations, or refuse to confirm nominations. Conferring standing on Congress to challenge executive actions would add a new weapon to Congress's arsenal for challenging executive action. If Congress one day decided to begin using all of its tools for checking

⁹² The text of the Constitution does not explicitly answer whether Congress can bring lawsuits. On one hand, the Constitution specifically enumerates Congress's powers, such as the power to enact legislation, impeach federal officials, and approve treaties and nominations for various federal offices. U.S. CONST. art. I, §§ 3, 8, 10. One might argue that the enumeration of these powers implies that Congress cannot exercise powers not specifically enumerated, and bringing suit is not one of the powers enumerated in the Constitution. On the other hand, one might argue that the Necessary and Proper Clause authorizes Congress to enact legislation conferring standing on itself to challenge unlawful federal action. *But cf.* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 574 (2014) ("Congress may not delegate to itself the power to execute the laws.") (citing *INS v. Chadha*, 462 U.S. 919, 956 (1983)); *see also id.* at 577 (finding that "[t]he defense of federal statutes by [Congress]" offends the principle that "the Constitution carefully separates the enactment of federal law from its implementation, sharply constraining Congress's role in and control over the latter").

⁹³ *See* THE FEDERALIST NO. 48, at 309–10 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . [The legislature's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.")

⁹⁴ U.S. CONST. art. I, § 7.

⁹⁵ *Id.* § 3, cl. 6–7.

executive power, the additional tool of broad standing could disrupt the balance of power.⁹⁶

B. Concerns with State Standing

Although there are obvious benefits in granting states standing to bring suits to challenge separation of powers, there are some serious concerns. To begin with, even if states are well situated as an abstract matter to challenge exercises of federal executive power, states, in the abstract, do not file lawsuits. A state officer or entity (usually the state attorney general) must bring such claims in the name of the states. And therein lies the rub. Any ideal of the states acting as platonic guardians standing against federal executive excesses needs to be tempered by political reality.

There are often raw political reasons why state attorneys general pursue actions against the federal government beyond their having serious concerns about the scope of federal executive power.⁹⁷ Challenging a president of the other party leads to its own series of rewards.⁹⁸ State attorneys general can earn favor with their constituencies, position themselves for running for higher office, and enhance their leadership standing within their political party.⁹⁹ They can raise money for their offices and their states in the form of damages and attorneys' fees, and they can raise money for their own political campaigns in the form of campaign contributions from supporters pleased by their actions.¹⁰⁰ They can stop, delay, harass, or hinder the implementation of federal policies that they ideologically oppose.

It is therefore not surprising that one must look hard and long to find a lawsuit brought by the states challenging the federal government that is motivated by deep-founded concerns for separation of powers rather than by partisan preference. It is, after all, no accident that Republican attorneys general led the actions against the Obama Administration and that

⁹⁶ Moreover, while the checks provided by the Constitution can be politically costly for Congress to use, the filing of a lawsuit is relatively low cost. Expanding congressional standing could very well result in members of Congress using only lawsuits, and not the constitutionally prescribed procedures, to challenge executive actions.

⁹⁷ To be sure, not all suits by state attorneys general have partisan motivations. See Lemos & Young, *supra* note 79, at 25–26 (arguing that business interests and other considerations drive some state attorney general litigation decisions).

⁹⁸ See generally Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014) (arguing there are both personal and departmental incentives for state attorneys general to score significant legal victories, including political and reputational benefits, pleasing state constituencies for reelection purposes, and obtaining financial awards that can often be retained by enforcement agencies).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Democratic attorneys general prosecuted lawsuits against President Trump.¹⁰¹

It was not always this way. For many years, state attorneys general worked across party lines to protect state interests;¹⁰² including, on occasion, taking actions contrary to their own partisan interests.¹⁰³ No longer. Bipartisanship has become the rare exception¹⁰⁴ and institutional concerns have become subservient to partisan agendas.¹⁰⁵ The same polarization forces that once undermined Congress's ability to check the president now affect state attorneys general.¹⁰⁶

This is not to say a suit filed for partisan reasons is somehow illegitimate or cannot have a substantial effect in checking against separation of powers abuses.¹⁰⁷ It does suggest, however, the states may not have such a uniquely pristine role in patrolling federal executive action that they can be distinguished from other interested parties for the purpose of standing. It also suggests that even if states are granted standing, the credibility and gravitas of their claims may be diminished,¹⁰⁸ thus undercutting one of the central reasons for granting states expansive standing in the first place.¹⁰⁹

Expanded state standing may also bring to the forefront another difficult issue—determining who, for the purposes of such litigation, is the appropriate officer or entity to represent the state. Is it the state attorney general, the governor, the

¹⁰¹ See *supra* notes 9–10 and accompanying text (showing that Republican attorneys general and Republican states take action against Democratic presidents, while Democratic attorneys general and Democratic states take action against Republican presidents); see also Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General As Amici*, 90 N.Y.U. L. REV. 1229, 1251–52 (2015) (showing an overall increase in partisan amicus briefs filed by state attorneys general beginning in the 2000s).

¹⁰² Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. (forthcoming 2018) (manuscript at 20).

¹⁰³ Lemos & Quinn, *supra* note 101, at 1256.

¹⁰⁴ See PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015); see Johnstone, *supra* note 102, at 23 (suggesting the turning point of this may have been when then-Alabama Attorney General (now Judge William Pryor) created the Republican Attorneys General Association).

¹⁰⁵ See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1090–92 (2014) (noting that state objections to federal power are primarily based on partisan politics and not the protection of state prerogatives).

¹⁰⁶ *Id.*

¹⁰⁷ See Lemos & Young, *supra* note 79, at 30 (arguing that state litigation with partisan motivation still plays the useful role of checking federal power); Grove, *supra* note 55, at 897 (rejecting the notion that states should have expansive standing to sue the federal government but also noting that partisan motivations can lead “state officials to do a better job of representing the State in court”).

¹⁰⁸ Johnstone, *supra* note 102, at 22.

¹⁰⁹ See *supra* notes 36–71 and accompanying text.

leaders of the legislature, or even citizens who sponsor state initiatives? Should state attorneys general have the authority to bring such lawsuits on behalf of the state when the legislature or the governor opposes such actions? Should the attorneys general be required to bring such a claim if the governor or legislature presses her to do so, even if she opposes such action? And how, if at all, should a federal court hearing such a claim resolve this internal issue? Put simply, there is a Pandora's Box of state law issues underlying these lawsuits,¹¹⁰ and federal courts will have to insert themselves in the thicket of intra-state divisions of power to be able to hear these cases. It is a project, we suspect, federal courts might want to avoid.¹¹¹

Finally, expanded state standing to challenge federal executive action also means an expanded role for the courts. As discussed above, there are strong positive reasons why courts should be more involved in imposing constraints upon executive branch action, but also reasons to be cautious. After all, the theories that posit that disputes over federalism and separation of powers should be resolved by the political processes rather than the courts¹¹² presented more than just an abstract

¹¹⁰ See, e.g., William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2455–67 (2006) (discussing cases addressing which state officer represents the state); Joseph Kanefield & Blake W. Rebling, *Who Speaks for Arizona: The Respective Roles of the Governor and Attorney General When the State is Named in a Lawsuit*, 53 ARIZ. L. REV. 689 (2011) (discussing the various issues surrounding which state official should represent a state and concluding that, for the purpose of unity and clarity, the state attorney general should be subservient to the governor in any case involving the state); *but see* State *ex rel.* Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 642–45 (W. Va. 2013) (ruling that state attorney generals have common law powers that are not specified by statute, despite the fact other courts and legal scholars disagree on this point); *see also* Press Release, Georgia: Governor Lifts Block Against Syrian Refugees (Jan. 4, 2016), <https://www.nytimes.com/2016/01/05/us/georgia-governor-lifts-block-against-syrian-refugees.html> (describing when Georgia's Governor Nathan Deal rescinded an executive order to block the placement of Syrian refugees within his state, after his attorney general officially announced that Governor Deal did not have the authority to issue such an order in the first place); Press Release, Office of Attorney General Mark Brnovich, Terry Goddard Declines to Join Lawsuits Against Federal Health Care Law (Mar. 24, 2010), <https://groupwise.azag.gov/press-release/terry-goddard-declines-join-lawsuits-against-federal-health-care-law> [<http://perma.cc/39PX-8U4J>] (describing Democrat Attorney General Goddard's refusal to join the Republican-led health care suit for its lack of merit); State *ex rel.* McCollum v. U.S. Dep't of Health and Human Serv., No. 3:10-cv-91-RV/EMT, 2010 WL 2000518 (N.D. Fla. Apr. 8, 2010) (in which Republican Governor Jan Brewer represented Arizona in a suit when Arizona's attorney general publicly refused to join).

¹¹¹ *Cf.* Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 30 (1959) (holding the federal court should abstain in answering the question of whether a city had the power to initiate eminent domain proceedings under state law).

¹¹² See, e.g., JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980) (arguing the judiciary should not rule on constitutional questions regarding the allocation of powers between Congress and the president); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) (arguing the Supreme Court

affirmation of the role of politics as a constitutional constraint on the exercise of federal power. They also offered the tangible advantage of extricating the judiciary from particularly difficult and often highly politicized determinations. Setting a standard for when separation of powers is violated consistently presents the judiciary with concerns of judicial management, as well as with questions of judicial enforceability and the challenge of maintaining political capital when issuing politically charged decisions. Accordingly, fashioning doctrines that could keep the courts out of federalism and inter-branch disputes was attractive on a number of counts. As Alexander Bickel taught long ago, there are significant benefits that may be gained from a modest judiciary.¹¹³

The value of avoiding the courts as the arbiters of politically-laden issues surrounding the scope of presidential power may have even greater resonance in the current climate in which the dynamics of polarization and judicial selection have infected the courts as well as the other branches.¹¹⁴ First, if the courts' decisions regarding the exercise of presidential power are motivated by partisan concerns, they will hardly do much to constrain the Executive, particularly when the president is of the same party. Second, to the extent that court decisions seem to reflect partisan preferences, they will undercut the courts' legitimacy.¹¹⁵ Third, even if the judicial system as a whole is able to insulate itself against partisan decision-making, particular judges may not be so self-constrained. Already, the experience with states bringing actions challenging federal action has reflected a substantial amount of judge shopping, and there is no reason to assume that savvy attorneys general will cease using this tactic in later cases. But the potential costs to the national interest of a partisan decision by an errant judge could be considerable. A single judge, after all, can do significant mischief in interrupting presidential actions—even if that action later turns out to be perfectly legal.

must exercise restraint and neutrality, and that there must be limits on its ability to bind other branches and the states in its constitutional interpretation).

¹¹³ See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (advocating that the Supreme Court use discretion to avoid deciding controversial issues); see also Flaherty, *supra* note 2, at 1828 (advocating that courts revisit and incorporate Bickel's notions of "passive virtues").

¹¹⁴ See Johnstone, *supra* note 102, at 3–4.

¹¹⁵ *Id.* at 5.

IV. RELAXING INJURY IN FACT FOR STATES TO CHALLENGE EXECUTIVE ACTIONS

What should be clear by this point is that states are particularly well positioned to constrain expanding executive power. States have a unique federalism interest in ensuring that federal executive officers comply with the Constitution and federal laws, and they have the resources and sophistication to bring successful suits of this sort. At the same time, however, there are concerns with granting states plenary standing to bring any suit against the Executive. One way to balance these benefits and concerns about empowering states to challenge executive actions is to relax the injury in fact test for states, but impose prudential constraints on standing. Easing the injury in fact test would expand the power of the state to bring suit. But it would still require states to demonstrate some type of actual injury that would ensure that states do not meddle in affairs that truly do not affect them. Moreover, continuing to enforce prudential limitations, such as third-party standing, would prevent states from bringing suits that others are better positioned to litigate. Finally, in order to further guard against hyper-partisanship, we also propose requiring states to show some level of bipartisan support to maintain their actions against the Executive.

The injury in fact test requires that a plaintiff show he has suffered, or is imminently about to suffer, an “injury in fact.”¹¹⁶ That injury must be to a “legally protected interest,” and it must be “concrete and particularized.”¹¹⁷ Moreover, the injury must be traceable to the defendant and of the sort that courts could likely redress through a ruling in favor of the plaintiff.¹¹⁸ Ordinarily, a plaintiff satisfies this test by showing a loss of money or physical harm.¹¹⁹ However, this is not always the case. Although courts purport to apply the same injury in fact test in all cases, in practice, different tests apply to different types of cases.¹²⁰

For example, courts have often relaxed the injury requirement for Equal Protection Clause violations.¹²¹ Thus, in

¹¹⁶ *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009).

¹¹⁷ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

¹¹⁸ *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹¹⁹ *But see Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (defining injury in fact to include injuries to “[a]esthetic and environmental well-being” and “economic well-being”).

¹²⁰ *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1065 (2015).

¹²¹ *Id.* at 1075 (“[T]he Supreme Court does not always demand a redressable ‘Wallet Injury’ to ground standing . . . under the Equal Protection Clause.”); *see also* *Bowen v. Kendrick*, 487 U.S. 589, 618–19 (1988) (the Court notoriously relaxed standing for alleged Establishment Clause violations); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 328 (2002) (“[T]he Court often waves litigants complaining of government support for religious endeavor right past the injury hurdle.”).

Adarand Constructors, Inc. v. Pena, the Court held that a nonminority contractor had standing to challenge a government program that gave preference to minority businesses.¹²² In doing so, the Court dispensed with the “concrete” requirement for injury and the requirement of redressability because the plaintiff could not prove that it would have received any contracts if race were not considered.¹²³ Instead, the Court explained the denial of the opportunity “to compete on an equal footing” constituted a sufficient injury for standing.¹²⁴

At the other end of the spectrum, courts have been less willing to find standing in cases in which the plaintiff challenges government actions related to national security.¹²⁵ In *Clapper v. Amnesty International USA*, for example, the Court explicitly indicated the imminence requirement is particularly rigorous in suits challenging actions implicating national security.¹²⁶

Similarly, and more salient to this essay, federalism concerns appear to have led to restrictions on standing. Consider *City of Los Angeles v. Lyons*.¹²⁷ There, an individual who had previously been choked by police sued the police, alleging he might again be subject to a police chokehold.¹²⁸ The Court denied standing on the ground the injury was too speculative. Given the Court’s willingness to find standing based on other low-probability injuries, one explanation for the denial of standing in *Lyons* is the Court sought to avoid interfering with the inner workings of state’s government.¹²⁹

These decisions show that the rigor of the injury in fact test varies depending on certain considerations, such as separation of

But see id. at 311 (discussing how the Court has not always been so generous with Equal Protection standing and listing cases as examples).

¹²² *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–12 (1995).

¹²³ *See id.* at 211.

¹²⁴ *Id.* (“The injury in cases of this kind is that a ‘discriminatory classification prevent[s] the plaintiff from competing on an equal footing.’”) (quoting *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993)). For other examples of the same analysis, see *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667–68 (1993), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978).

¹²⁵ F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 725 (2017) (arguing the standing test is stricter for national security cases than Equal Protection Clause cases).

¹²⁶ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013); see Fallon, *supra* note 120, at 1079 (expanding on this point).

¹²⁷ 461 U.S. 95 (1983).

¹²⁸ *Id.* at 97–98.

¹²⁹ F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 76 (2012) (“The denial of standing in *Lyons* and the grant of standing in *Laidlaw* may reflect the Court’s unwillingness to interfere in the workings of state government.”).

powers, federalism, and the type of right asserted.¹³⁰ When a suit raises a challenge in an area that federal courts generally seek to avoid, such as national security or the military, the standing inquiry is more stringent.¹³¹ By contrast, when a suit seeks to vindicate rights that federal courts have regarded as particularly important, the standing test is relaxed.¹³²

In this light, the injury in fact test should be relaxed when a state sues to force executive officers to comply with the law.¹³³ As discussed above, states have a unique interest in preventing unlawful federal action. Permitting states to protect that interest is a fundamental component of the division of power in the Constitution. More pragmatically, state officials are prudent enough to bring only those suits that matter, that they may win, and that they have the resources to argue effectively. They accordingly should face a lower standing threshold when challenging unlawful executive action or inaction.

There are a variety of ways to operationalize a relaxed standing requirement. One way is to expand the types of injuries that suffice for state standing in such suits. For example, one could expand state standing to injuries for which the states are partly responsible. Courts have said individuals should not be permitted to base standing on injuries that are based on reactions to federal actions. Thus, in *Clapper*, the Court held that the costs that private individuals incurred to avoid federal surveillance was insufficient to confer standing on those individuals to challenge the surveillance program.¹³⁴ But one could discard this restriction when states sue the Executive.

The Fifth Circuit arguably adopted this approach in *Texas v. United States*.¹³⁵ There, the Republican Attorney General of Texas challenged President Obama's policies deeming various types of illegal immigrants to be lawfully present in the United

¹³⁰ *Id.* at 77 (noting that separation of powers, federalism, and docket size affect standing decisions).

¹³¹ See Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 73 (1984) ("In fact the law of standing has become so disjointed that the danger now exists that the Court will come to accept it as a manipulable doctrine whose primary value lies in its ability to serve nonjurisdictional ends.")

¹³² See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 304 (2008) ("The Court has been hesitant to deny standing in cases involving the violation of a right that the Court deems particularly important even when the plaintiff has not suffered a perceptible injury.")

¹³³ See *Indiana v. EPA*, 796 F.3d 803, 810 (7th Cir. 2015) (suggesting that even though a state cannot sue the United States *parens patriae*, it should get "special solicitude" to sue the United States . . . if a quasi-sovereign interest of the state is at stake").

¹³⁴ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013).

¹³⁵ See *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

States. To establish standing, Texas argued that under Texas law, these immigrants could obtain driver's licenses, and Texas would incur costs in issuing these licenses. The Fifth Circuit held these costs supported Texas's standing, even though Texas could have eliminated those costs by amending Texas law to bar those immigrants from obtaining licenses.¹³⁶

This is not to say states should always be able to create an injury in fact. For example, Texas should not have had standing if it enacted its law authorizing immigrants to obtain driver's licenses *after* President Obama adopted his policies. In that situation, federal law would not have forced Texas to incur the costs of providing licenses to immigrants because, at that time of the adoption of the federal policy, Texas would not have been required to provide licenses to immigrants. Rather, Texas would have incurred the cost of providing licenses to immigrants through its own action of enacting the Texas law against the backdrop of the federal policy.

Nor is it fair to say that any federal action that conflicts with state law creates an injury in fact sufficient for the state's standing.¹³⁷ The state must point to some sort of factual effect on the state to establish an injury in fact.

Another way to soften the injury in fact test for state claims against the executive is to relax the requirement that the injury not be speculative,¹³⁸ requiring states to show only that there is a realistic possibility that they might suffer the threatened harm instead of a high probability. This approach finds support in the decision of the Supreme Court in *Massachusetts v. EPA*.¹³⁹ There, Massachusetts sued the EPA for failing to regulate carbon dioxide. Massachusetts claimed it had standing because federal law conferred a cause of action on the states to challenge the EPA's decision, and because the Environmental Protection Agency's failure to regulate carbon dioxide would result in global warming, which in turn would raise sea levels and erode

¹³⁶ See *id.* at 155–57.

¹³⁷ See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (concluding the preemption of Virginia law prohibiting individual mandates by the individual mandate provision of the Patient Protection and Affordable Care Act did not cause Virginia an injury in fact). It may be possible that federal preemption of state law creates standing based on the impairment of the state's sovereign interest, as opposed to being based on the state suffering an injury in fact. But we leave that issue for another day.

¹³⁸ *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992); see also *Diamond v. Charles*, 476 U.S. 54, 66 (1986) (rejecting standing based on “unadorned speculation”); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (denying standing because the plaintiffs had not demonstrated a “substantial probability” of harm).

¹³⁹ *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Massachusetts's land.¹⁴⁰ The Court concluded these considerations sufficed for standing, explaining when they have “quasi-sovereign interests” at stake, states are entitled to “special solicitude” in the standing analysis.¹⁴¹ The Court did not explain what it meant by “special solicitude.” One might think from the reference to “quasi-sovereign interests” that the special solicitude referred to *parens patriae* standing. But that is not so. The Court did not base standing on Massachusetts's role as *parens patriae*. Instead, the Court pointed to the factual injury of the erosion to Massachusetts's land.¹⁴²

Rather than referring to *parens patriae* standing, it appears that the special solicitude the Court afforded Massachusetts was to relax the restriction on speculative injuries. The erosion to Massachusetts's land would not occur for decades.¹⁴³ That distant and speculative injury would likely not suffice for standing.¹⁴⁴ The Court's conclusion that the possible erosion did suffice suggests that it applied the imminence requirement less rigorously. *Massachusetts v. EPA* thus supports the idea that, when a state alleges a quasi-sovereign interest, the standing inquiry should be relaxed, even when the state seeks to base standing on an injury in fact instead of *parens patriae* standing.¹⁴⁵

At the same time, we also suggest that even this relatively modest proposal of relaxing the injury in fact requirement for states should be further qualified. As pointed out previously, expanded state standing creates its own set of concerns—specifically that many of these actions will be driven more by a motivation for political disruption than by a true concern with executive branch overreach.¹⁴⁶ Some, of course, might suggest this is fine—that the use of highly partisan attorneys general as a check against highly partisan presidents is fully consonant with Madison's notion of ambition counteracting ambition.¹⁴⁷ Perhaps. Yet the use of excessive

¹⁴⁰ *Id.* at 518–22.

¹⁴¹ *Id.* at 520.

¹⁴² *Id.* at 521–24.

¹⁴³ *Id.* at 541–42 (Roberts, C.J., dissenting) (noting the possible loss of land as one harm supporting standing in the next few decades).

¹⁴⁴ As the Court explained in *Lujan v. Def. of Wildlife*, 504 U.S. 555, 565 n.2 (1992), the further off in time that an injury may occur tends to make the injury more speculative. *See id.* (stating the “purpose” of “imminence” is “to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘certainly impending’”) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

¹⁴⁵ For other instances in which federal courts have relaxed standing requirements for states, see Lemos & Young, *supra* note 79, at 11–12.

¹⁴⁶ *See supra* notes 36–71 and accompanying text.

¹⁴⁷ *See supra* note 1 and accompanying text.

partisanship as a method to reduce the effects of excessive partisanship does not seem to be the type of remedy that would help combat the polarization that lies at the heart of much of the dysfunction that has helped lead to the expansion of presidential power in the first place. More directly, the potential risk to the national interest engendered by overly partisan attorneys general bringing harassment or dilatory actions against the executive in front of overly partisan courts is not one that can be easily glossed over.

For this reason, we propose the courts demand some indicia of bipartisanship as a prudential matter before relaxing the injury in fact requirement for states.¹⁴⁸ To be clear, we are not suggesting that courts should deny standing if the state meets traditional injury in fact requirements.¹⁴⁹ But in cases in which the injury in fact requirement needs to be relaxed to find standing, there should be a showing that the action has some measure of bipartisan support to justify the “special solicitude” the Supreme Court had indicated may be warranted when a sovereign state is bringing the claim.¹⁵⁰ Thus, under our approach, both the state plaintiffs in *Massachusetts v. EPA*¹⁵¹ and in *United States v. Texas*¹⁵² would have had to demonstrate bipartisan support, since in both cases the injury in fact requirement was relaxed.¹⁵³ In *Washington v. Trump*,¹⁵⁴ on the other hand, no showing would have been needed because the state readily satisfied injury in fact requirements.¹⁵⁵

Anthony Johnstone and Michael Solimine, writing separately, have advocated for a similar approach in the context of amicus briefs, contending that the Supreme Court should only give deference to briefs from the states that reflect some level of bipartisan support.¹⁵⁶ In fact, the National Association of Attorneys General (“NAAG”) already requires bipartisan action by attorneys general in order to invoke the authority of the states. Its constitution requires that in order for a sign-on letter

¹⁴⁸ This does not necessarily mean more than one state will always be necessary to maintain an action. But if one state goes at it alone, it should be required to assert that the action has some bipartisan support.

¹⁴⁹ *E.g.*, *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

¹⁵⁰ *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *Indiana v. EPA*, 796 F.3d 803, 810 (7th Cir. 2015).

¹⁵¹ *Massachusetts v. EPA*, 549 U.S. at 518.

¹⁵² *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015).

¹⁵³ *See Massachusetts v. EPA*, 549 U.S. at 518; *Texas v. United States*, 809 F.3d at 155–56.

¹⁵⁴ *Trump*, 847 F.3d at 1158–61.

¹⁵⁵ *Id.*

¹⁵⁶ Johnstone, *supra* note 102, note at 29–30; Michael Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 166 n.86 (2016).

to become NAAG policy (appearing on NAAG letterhead as a result), the letter must have at least the support of thirty-six attorneys general (a two-thirds majority of NAAG's overall state and territorial membership).¹⁵⁷

These approaches make sense. As Johnstone indicates, the requirement of bipartisanship works to assure that the case is “a reliable signal of general state interests.”¹⁵⁸ Further, because such a requirement would force attorneys general to work across party lines, it may, in that respect, have the additional benefit of helping work against the tide of partisan polarization.¹⁵⁹

We also propose the courts should not allow states to maintain third-party standing cases absent a showing of cross party support. The Court has already held that whether a party can sue on behalf of the rights of third parties is a matter for prudential consideration.¹⁶⁰ Taking steps to assure that a lawsuit against the president brought by a state is more than only a partisan attack would seem to be a prudent exercise of judicial power.¹⁶¹

Finally, state standing should be allowed only upon a proper showing that the state officer or entity bringing the suit is the single correct party to maintain the action in the federal court. As noted previously, various state officials—the governor, attorney general, legislators, and even individuals who sponsor state initiatives—often dispute who has the authority to litigate on behalf of the state.¹⁶² Those disputes are exacerbated when the officers disagree on the merits of the action. Both the state attorney general who thinks the president has violated the Constitution and the state governor who thinks that the president's action is lawful may each claim that he alone has the power to bring suit on behalf of the state. To avoid the embarrassment of resolving a suit against the president improperly brought by the wrong state official, federal courts should closely examine whether the official bringing the case has the authority to do so under state law. If state law does not authorize the officer who brought the suit to do so, or even if the law is unclear, courts exercise their discretion to deny standing. Dismissing on that ground would prevent unnecessary conflict

¹⁵⁷ CONSTITUTION AND BYLAWS OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL art. VIII, § 2.

¹⁵⁸ Johnstone, *supra* note 102, at 29.

¹⁵⁹ *See id.*; Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 393 (2012).

¹⁶⁰ *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 504 (1975).

¹⁶¹ *Cf.* Elk Grove Unified School District v. Newdow, 542 U.S. 1, 11–12 (2004).

¹⁶² *See supra* note 115 and accompanying text.

with the president and avoid deciding many unnecessary constitutional questions.

V. CONCLUSION

The vast expansion of presidential power in the twentieth and twenty-first centuries, as well as the possibility of a runaway presidency, calls for new ways for thinking about how to constrain the Executive. Granting the states standing to challenge federal executive action is one avenue deserving exploration. Expansive state standing, however, raises its own set of concerns—including further exacerbating the over-politicization issues that are currently plaguing both the state offices of the attorneys general and the federal courts. There is thus a legitimate question as to whether liberalized state standing may raise more problems than it solves.

In this essay, we offer a modest solution. We propose the states should not have standing to raise purely abstract issues but that a more generous notion of injury in fact should be applied to them than to other entities. Such an approach allows states to maintain actions against the Executive that might otherwise not be justiciable. We further suggest, however, even this limited grant of standing should be subject to prudential review because of the potential problems that expanded state standing generates.

We end with a final word of caution from the opinion by Justice Jackson in *Youngstown* that is cited at the beginning of this essay. Although the Court in *Youngstown* found the president's action in that case to be unconstitutional, Justice Jackson's opinion in that case was not optimistic that the decision would effectively constrain the Executive. As he wrote:

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.¹⁶³

Expanded state standing to challenge federal executive action, in short, may be warranted; but it, by itself, will not be sufficient to seriously constrain presidential power. The broader solutions lie elsewhere.

¹⁶³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952).

Representative/Senator Trump?

Gary Lawson*

The 2016 presidential election sent many people, including many otherwise seemingly sensible people, completely over the edge. College and university campuses en masse set up counseling services for disappointed students, and I suspect that many faculty and administrators probably “used” those services at least vicariously. Former friends were ostracized—or, even worse, “unfriended” on Facebook—for the heinous sin of voting for Donald Trump. Ordinarily sober scholars describe President Trump’s election as a symptom of “constitutional rot.”¹ At my own institution, at a post-election panel on which I participated as the faculty’s token knuckle-dragger, student questions focused largely on how President Trump could be removed from office—several months before he actually assumed that office. A list of anecdotes of this kind could go on for quite a while.

In all fairness to my grieving colleagues and students, I feel their pain. A lot of us sucked it up, without any school-provided puppies, for the eight years of the Obama Administration, but it was a thoroughly miserable time for anyone concerned about individual freedom. And although I did not vote for George W. Bush in 2000—I voted for Libertarian Harry Browne—I vividly remember that, at one brief moment during election night, I actually felt physically ill when it looked like the execrable Al Gore might ride his fevered fantasies about feverish planets into the White House. Presidential elections seem to matter a great deal to a lot of people.

From a constitutionalist standpoint,² this is something of a puzzle. The United States Constitution simply does not appear to

* Philip S. Beck Professor, Boston University School of Law. This article was prepared for a symposium sponsored by the *Chapman Law Review* on “Constraining the Executive,” and I thank the editors for inviting me to participate. I am grateful to R.J. Pestritto and Joe Postell for helpful suggestions, though they bear no responsibility for anything that I say here.

¹ Jack M. Balkin, *Constitutional Rot and Constitutional Crisis*, 77 MARYLAND L. REV. (forthcoming 2018).

² By “constitutionalist” I mean nothing more linguistically complex than “by reference to and in accordance with the meaning of the United States Constitution.” That meaning was fixed—at least for the original Constitution and quite possibly for

make the president all that important of a figure. To be sure, in times of war, the president is commander-in-chief of the armed forces,³ but the Constitution gives Congress the powers to “declare War,” to “grant Letters of Marque and Reprisal,” to “make Rules regarding Captures,” to “raise and support Armies,” to “provide and maintain a Navy,” to “make Rules for the Government and Regulation of the land and naval forces,” and to provide for “calling forth” and “organizing, arming, and disciplining, the Militia.”⁴ Congress actually has most of the constitutional war powers—so much so that the Commander-in-Chief Clause was necessary to foreclose an inference that Congress also has the un-enumerated, but implied, power to control troop movements.⁵ Furthermore, while the president’s “executive Power”⁶ gives him⁷ control over the law enforcement machinery, that power is subject to duties to “take Care that the Laws be faithfully executed”⁸ and to carry out executive responsibilities in accordance with fiduciary principles.⁹ More fundamentally, executive power is, in all but a very small set of contexts, a purely implementational power that comes into play only to execute law that is provided from sources external to the executive.¹⁰ The president can also grant pardons,¹¹ convene and adjourn Congress,¹² and, with the advice and consent of the

amendments as well—in 1788, in the sense that the criteria for determining the referents of the concepts in the Constitution are determined by the cognitive framework of a reasonable reader in 1788. See Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, 1460–67 (2016); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

³ I believe that this authority comes from the Vesting Clause of Article I rather than from the more specific Commander-in-Chief Clause, U.S. CONST. art. II, § 2, cl. 1, which states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.” This simply confirms the president’s “executive Power” to command the military, but that point is incidental to the present argument.

⁴ U.S. CONST. art. I, § 8, cls. 11–16.

⁵ Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 29–30 (2006).

⁶ U.S. CONST. art. II, § 1, cl. 1.

⁷ The Constitution consistently refers to the president by a generic male pronoun. I therefore follow that practice, without endorsing it.

⁸ U.S. CONST. art. II, § 3.

⁹ For a book-length defense of the proposition that all constitutional powers, including the executive power, are fiduciary powers, see GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017). For an article-length defense of a duty of care on the part of federal officials, and therefore of a presidential duty of care in the execution of the laws, see Gary Lawson & Guy Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 FLA. L. REV. (forthcoming 2018).

¹⁰ See Gary Lawson, *Take the Fifth . . . Please! The Original Insignificance of the Fifth Amendment’s Due Process of Law Clause*, 2017 BYU L. REV. 611, 631 (2018).

¹¹ U.S. CONST. art. II, § 2, cl. 1.

¹² *Id.* § 3.

Senate, make appointments and treaties,¹³ but it is hard to see how powers of this kind could generate Caesarian nightmares.

The sum total of constitutional presidential powers is far from trivial; the American president is—and always was—a formidable constitutional figure.¹⁴ But it is not necessarily a life-altering huge sum either. Even if one believes, as I emphatically do, that the Article II Vesting Clause grants the president all power that falls within the conceptual category of “executive Power,”¹⁵ the conceptual lines of the power limit its scope. Possessing the “executive Power” does not allow the president to take over steel mills unilaterally in order to help a war effort,¹⁶ and it does not allow the president to order federal courts to dismiss pending cases in order to promote foreign policy goals.¹⁷ If one looks at the presidency through a constitutional lens, it is hard to see why people would get as emotionally charged as they do about who occupies that office. As a matter of original meaning, it just would not make that much of a difference in most people’s lives. It probably matters more who is mayor of one’s city—and perhaps even who is on the local zoning board.

As a matter of political and social reality rather than original meaning, of course, strong reactions to presidential elections are more understandable. The modern presidency bears little relationship to the office created by the Constitution of 1788.¹⁸ Presidents today matter far more than they should if one’s touchstone is the Constitution. For one thing, presidents have, with the blessing of Congress, assumed powers of at best dubious constitutional lineage on everything from uses of military force¹⁹

¹³ *Id.* § 2, cl. 2.

¹⁴ See generally SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015).

¹⁵ See Lawson & Seidman, *supra* note 5, at 22–43. For the most powerful rebuttal to that position, see Robert G. Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause”—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

¹⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (correctly so holding).

¹⁷ See *Dames & Moore v. Regan*, 453 U.S. 654, 675–76 (1981) (not doing quite as well as *Youngstown*, and indeed pretty much making a botch of everything).

¹⁸ It is conventional to use 1789 as the starting date for the United States Constitution. That is the correct date for when a fully functioning government under the Constitution, including a sworn-in Congress and president, first appeared. The Constitution, however, became law for the ratifying states on June 21, 1788 (or at most shortly thereafter), and at least some important portions of the Constitution were effective as of the summer of 1788. See generally Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001).

¹⁹ See Gary Lawson, *Inigo Montoya Goes to War*, 95 B.U. L. REV. 1355, 1364–67 (2015) (describing constitutional controversies over the scope of presidential power to initiate hostilities).

to the unilateral establishment of military governments in peacetime within the United States.²⁰ For another thing, federal courts have routinely assumed powers far beyond those plausibly attributable to the “judicial Power”²¹ conferred by the Constitution. Consequently, the power to appoint federal judges has acquired significance beyond anything contemplated in the eighteenth century. But most importantly, in modern times, the election of the American president effectively elects the federal legislature as well. That is because the executive has become, for all practical purposes, the legislative department (at least when the judicial department chooses not to assume that authority). Modern executive action, through regulations, adjudications, and enforcement decisions, creates law that often has far more effect on people’s lives than the entire mass of congressional legislation does. Congress has fostered that development by delegating—or, more precisely, subdelegating²²—much of its legislative authority to the executive department via open-ended statutes that essentially instruct executive actors to go forth and do good. A great many federal statutes make lawmakers, not laws. As a consequence, presidential elections determine far more than the Constitution of 1788 ever had in mind. It is no wonder that people get so invested in them.

That level of investment is potentially a bad thing in several respects. It is constitutionally bad because it reflects a perversion of the constitutional design. It is socially bad if one believes that politics should not matter so much that people turn on each other for supporting different candidates and policies. And it might be intellectually bad because people who care too much about something do not always think clearly and logically about it.

Part One of this essay very briefly catalogues the extent to which the American presidency has effectively become the American Congress through subdelegation of legislative authority. Part Two just as briefly explains why that is a constitutional perversion. Part Three suggests, contrary to the fears of many who are in the throes of Trump Derangement Syndrome, how the Trump presidency may present the best opportunity in generations to reverse the trend of subdelegation and begin the long process of reining in executive power.

²⁰ That happened? Yep, that happened. See Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing without Authority*, 95 NW. U. L. REV. 581, 617–24 (2001).

²¹ U.S. CONST. art. III, § 1.

²² See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377 (2014) (explaining that the constitutional “delegation” problem is really a subdelegation problem because Congress was delegated the legislative power in the first instance).

Ironically, the change agent, if any change actually happens, is likely to be President Trump.

In no event do I expect the presidency of 2020 to look anything like the presidency of 1788. But for the first time in a long time, there is a chance that one might see some movement on that front toward, rather than away from, the United States Constitution.

I. "MEET THE NEW BOSS"

The American presidency has grown in power since 1788 for many reasons, and it would require someone better versed than I in both history and political science to describe and analyze them all.²³ But one of those reasons obviously dwarfs in magnitude all of the others: Congress has essentially designated the president as its substitute legislature. The expansion of presidential power through subdelegation of legislative authority is so enormous that any attempt to restrain executive power that does not address the subdelegation problem head-on is like putting band-aids on Butch Cassidy and the Sundance Kid after their final encounter with the Bolivian police. The federal executive now functions as the federal legislature for many, and perhaps even most, practical purposes. Federal law, in the modern world, is largely an executive construct. The observation is common enough to be almost mundane. As Professor Mila Sohoni aptly summarized the conventional wisdom:

Due to gridlock and partisanship, Congress is less able to act as an effective lawmaker and hence as an institution that actually authorizes and controls agency action. With respect to some statutes . . . , Congress has conferred primary custodianship over the shape and structure of regulatory schemes on agencies by giving agencies the power to waive and alter key statutory requirements. In other areas . . . , the accretion of complex statutory schemes and the opacity of legislative intent have together produced a system of "de facto delegation" that effectively transfers lawmaking power to the executive branch.²⁴

²³ For an outstanding effort at such an account by someone better versed than I in both history and political science, see generally JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* (2017). Professor Postell's book is an indispensable supplement and, in some cases, antidote to Professor Jerry Mashaw's seminal book on early administrative law. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW* (2012).

²⁴ Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1701 (2017) (footnotes omitted).

Professor Adrian Vermeule put it even more succinctly: “[T]he executive and administrative sector of the state . . . often overshadows the classical institutions of the Constitution of 1789 altogether.”²⁵

There is no uniquely correct way to measure the relative influence of legislative and executive—and, for that matter, judicial—action in the creation of federal law. But even crude metrics tell an important story. At the end of 2012, the number of pages in the Code of Federal Regulations (“CFR”) exceeded the number of pages in the United States Code by a factor of nearly four.²⁶ Notwithstanding the numerous problems, vectoring in somewhat different directions, with this comparison—the Statutes at Large rather than the United States Code is the better measure of congressional lawmaking; many regulations simply parrot statutory language and thus add nothing to the legal baseline;²⁷ gross volume numbers do not convey information about relative importance; and an enormous amount of federal law is made through executive adjudication rather than executive rulemaking, and thus does not show up in measures of the CFR—there is something striking about the raw figures comparing statutes and regulations. At the very least, it constitutes a piece of concrete evidence, if any is actually needed, that executive lawmaking is central to modern governance.

Casual anecdotalism²⁸ sheds further light on the relative importance of executive and legislative action in the creation of federal law. Two of the most important statutes enacted during the Obama Administration—The Patient Protection and Affordable Care Act²⁹ and the Dodd-Frank Act³⁰—consume thousands of pages of text between them, but they are both toothless in important respects until implemented through significant regulatory action. As with most modern regulatory

²⁵ ADRIAN VERMEULE, LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE 3 (2016).

²⁶ See Tom Cummins, *Code Words*, 5 J. LEGAL METRICS 89, 98 (2015).

²⁷ Such “parroting” regulations could add to the legal baseline if they were given deference by courts. But regulations that simply repeat what is said in statutes do not receive deference. See *Gonzalez v. Oregon*, 546 U.S. 243, 257–58 (2006). To be sure, regulations do not seem to need to differ much from statutory language in order to avoid the “anti-parroting” rule of *Gonzalez*. See *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm’n*, 519 F.3d 1176, 1192–93 (10th Cir. 2008).

²⁸ Yes, it is a word. I looked it up.

²⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified primarily in scattered sections of 42 U.S.C.).

³⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

statutes, they frequently authorize executive agencies to make law rather than prescribe rules of conduct for executive agencies to implement.

Consider, as just one example, some interlocking provisions from the Affordable Care Act (“ACA”).³¹ One of the central concepts underlying the ACA is the “qualified health plan,” which is the only kind of plan that can be sold on the ACA exchanges. It is therefore vital under the statute to know what makes a health care plan “qualified.” The basic statutory definition of a “qualified health plan” is one that “has in effect a certification . . . that such plan meets the criteria for certification described in section 18031(c) of this title.”³² The criteria for certification prescribed by section 18031(c) are: “The Secretary [of Health and Human Services] shall, by regulation, establish criteria for the certification of health plans as qualified health plans.”³³ In other words, the statute does not establish the criteria but instructs an executive official to provide them. To be sure, the statute then sets out nine considerations that must be part of that executive prescription, but those considerations are basically drivel,³⁴ much as were the statutory “constraints” in the National Industrial Recovery Act³⁵ or the directions to the United States Sentencing Commission in the Sentencing Reform Act of 1984.³⁶ The ACA also makes clear that a qualified health plan must “provide[] the essential health benefits package described in section 18022(a).”³⁷ It is anticlimactic to point out that section 18022(a) reads in relevant part: “[T]he term ‘essential health benefits package’ means, with respect to any health plan, coverage that . . . provides for the essential health benefits defined by the Secretary [of Health and Human Services] under subsection (b).”³⁸

These provisions are noteworthy in modern times for being *more specific* than one has come to expect from major

³¹ For an interesting discussion of subdelegation of legislative authority under the Dodd-Frank Act and other securities laws, see Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L. J. 435, 437 (2017). See also Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 566 (2017) (noting that the Dodd-Frank Act contains “398 specific calls in the statute for regulatory agencies, including the newly created Consumer Financial Protection Bureau, to issue rules, interpreting vague concepts such as ‘unfairness’ by financial institutions, and ‘systemic risk’”) (footnote omitted).

³² 42 U.S.C. § 18021(a)(1)(A) (2012).

³³ *Id.* § 18031(c)(1).

³⁴ See *id.* § 18031(c)(1)(A)–(I).

³⁵ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534–35 (1935).

³⁶ See *Mistretta v. United States*, 488 U.S. 361, 374–77 (1989).

³⁷ 42 U.S.C. § 18021(a)(1)(B). The plan must also be provided by a properly licensed insurer. See *id.* § 18021(a)(1)(C).

³⁸ *Id.* § 18022(a)(1).

congressional legislation. The Emergency Economic Stabilization Act of 2008,³⁹ one of the most famous (or infamous) legislative legacies to emerge from the second Bush Administration, handed the Secretary of the Treasury three quarters of a trillion dollars with which to “purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.”⁴⁰ “Troubled assets,” in case anyone wonders, are mortgages and “any other financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial market stability”⁴¹ Throw on such old standards that populate the United States Code as the Communications Act of 1934⁴² and the Clean Air Act,⁴³ and one can see that much modern legislation does not make law, but instead merely designates executive agents as lawmakers.⁴⁴ The president, as the ultimate repository of all executive power, thereby becomes the de facto Congress. The president and other executive agents make the law. President Trump is thus also, over a staggeringly large range of cases, Representative Trump and Senator Trump to boot—with no requirements of quorums, cloture, or majority votes to stand in the way of his lawmaking.

To be sure, in the real world it is “other executive agents” far more than it is the president who makes the law. The federal executive apparatus is so enormous that even the most

³⁹ Pub. L. No. 110-343, 122 Stat. 3765 (2008) (codified in scattered sections of 12 & 26 U.S.C.).

⁴⁰ 12 U.S.C. § 5211 (2012).

⁴¹ *Id.* § 5202 (2012). The subdelegation problem was just one of many constitutional infirmities with the Troubled Assets Relief Program (“TARP”). See Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL’Y 55, 57–58 (2010).

⁴² 47 U.S.C. § 307 (2012) (providing that the Federal Communications Commission shall grant broadcast licenses to applicants “if public convenience, interest, or necessity will be served thereby”).

⁴³ 42 U.S.C. § 7409 (2012) (providing that the Administrator of the Environmental Protection Agency shall set primary air quality standards, “the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health”).

⁴⁴ For a less consequential, but no less legally significant, example, consider the law underlying the events in *Yates v. United States*, 135 S. Ct. 1074 (2015). Captain Yates threw overboard some undersized grouper that he had caught in the Gulf of Mexico, and he was prosecuted for concealing a “tangible object with the intent to impede, obstruct, or influence” a federal investigation. 18 U.S.C. § 1519 (2012). The *Yates* Supreme Court decision focused on whether fish were “tangible object[s]” within the meaning of this statute, *Yates*, 135 S. Ct. at 1077, but consider for a moment why Captain Yates felt the need to throw his fish overboard. What federal statute prescribed the maximum length of red grouper for American fishing vessels? There was no such statute; the only relevant statute made it illegal “to violate . . . any regulation or permit” issued by the National Marine Fisheries Services. 16 U.S.C. § 1857(1)(A) (2012). For a more detailed account of the federal “law”—all stemming from executive regulations—regarding the permissible size of Gulf of Mexico red grouper, see LAWSON & SEIDMAN, *supra* note 9, at 108–09.

committed president can control only a tiny fraction of what actually goes on within it. Congressional subdelegation thus creates an alternative multi-member Congress within the executive whose institutional functioning is too complex to be captured by any simple analogy. Nonetheless, as a formal matter, all executive power is lodged in the president, even if he cannot always effectively exercise it in the face of a “deep state” that has its own agenda(s).

Of course, there are serious limits even to this expanded executive power, as recent (as of July 2017) events concerning efforts to repeal or amend the ACA demonstrate. The president cannot simply wave a law into or out of existence. The legislature is not irrelevant. But the constitutional role of the legislature is not to be “not irrelevant.” It is to make the law, which is then executed by the president and other executive agents. Much of the time, that is simply not how it works.

II. “WHY SHOULD I CARE, WHY SHOULD I CARE?”

Is it really a constitutional problem if the president makes the law? To ask the question is to answer it, at least as a matter of original meaning. Indeed, there are few propositions of constitutional meaning as thoroughly overdetermined as the unconstitutionality of subdelegations of legislative authority. I have spent much of the past quarter century defending that claim, and I will not repeat those extensive arguments here beyond the brief references in this section.

One can discern a constitutional principle against subdelegation of legislative authority through any number of convergent lines of reasoning. The basic principle of enumerated powers reserves all “legislative powers herein granted” to Congress and thus denies them to executive (or judicial) agents,⁴⁵ whose enumerated powers do not include the power to legislate. A law subdelegating legislative power to the president or an executive official would not be “necessary and proper for carrying into Execution” federal powers.⁴⁶ To let the president make, rather than execute, law would violate the principle of legality that has been part of the Anglo-American legal tradition since the Magna Carta and that underlies the constitutional idea of due process of law.⁴⁷ And, most powerfully and fundamentally,

⁴⁵ See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 180–81 (7th ed. 2016).

⁴⁶ See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 *GEO. WASH. L. REV.* 235, 242–67 (2005); Gary Lawson, *Delegation and Original Meaning*, 88 *VA. L. REV.* 327, 345–52 (2002).

⁴⁷ See Lawson, *supra* note 10, at 618–26.

subdelegation violates the fiduciary principles that underlie the Constitution. The United States Constitution is most aptly characterized as a kind of fiduciary instrument,⁴⁸ and the background principles of interpretation for the document are therefore at least partially defined by the background rules for interpretation of eighteenth-century fiduciary instruments.⁴⁹ One of the best-established eighteenth-century fiduciary duties is the requirement that agents exercising delegated discretionary authority personally exercise rather than subdelegate that authority.⁵⁰ Accordingly, if a fiduciary instrument is to allow the agent to subdelegate discretionary authority,⁵¹ the instrument needs specifically to provide for such authority, at least where authority to subdelegate is not incidental to the granted power. The United States Constitution contains no specific authorization for the subdelegation of legislative—or, for that matter, of executive or judicial—power. As Guy Seidman and I have said:

There is no affirmative grant of power in the Constitution to subdelegate legislative authority. The necessary and proper clause, the only plausible source of such authority, only authorizes incidental powers, and the power to sub-delegate can be incidental only with respect to ministerial tasks, or where delegation is necessary in a strict sense, or where there was in the eighteenth century an established custom or usage of subdelegation. In other words, understanding the agency-law foundations of the Constitution confirms what textual, intratextual, and structural analysis all reveal: Congress may not delegate its legislative power to other actors, be they executive agents, judicial agents, state governments, foreign sovereigns, or private parties. The rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine.⁵²

Outside of governance of occupied territory during wartime⁵³ and the constitutionally specified power to make treaties,⁵⁴ the president is not supposed to make laws. That is the job of the constitutionally vested legislative authority. The president is supposed to execute (and faithfully execute) the laws provided by others.

⁴⁸ See LAWSON & SEIDMAN, *supra* note 9, at 49–75.

⁴⁹ See *id.* at 8–11, 76–78.

⁵⁰ See *id.* at 113–17.

⁵¹ Agents are generally free, absent specification in the governing instrument, to subdelegate the performance of ministerial tasks.

⁵² LAWSON & SEIDMAN, *supra* note 9, at 117.

⁵³ See GARY LAWSON & GUY I. SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 47–51 (2004).

⁵⁴ See U.S. CONST. art. II, § 2, cl. 2.

The real question is not whether Congress can subdelegate discretionary authority—the short answer is “no.” The real question is what constitutes an act of subdelegation. Surely Congress cannot subdelegate its formal Article I, Section 7 power to vote on bills, but suppose Congress exercises that formal power by enacting Article I, Section 7 laws that tell executive agents to go find problems and then fix them. Does the constitutional anti-subdelegation principle control the *content* of the laws that Congress can enact? Does it forbid granting executive (and judicial) agents a certain kind, quantity, and quality of discretion, even if those grants fulfill the formal procedural requirements for constitutional lawmaking?

Some say no. For example, in the early 2000s, Eric Posner and Adrian Vermeule argued that Congress can *only* be said to subdelegate its power when it transfers its formal authority under Article I, Section 7; it can *never* be said to subdelegate when it vests substantive authority in executive agents, no matter how open-ended the grant of authority may be.⁵⁵ I have an article-length response to that argument elsewhere,⁵⁶ and that response is both supported and supplanted by subsequent work on the fiduciary underpinnings of the Constitution.⁵⁷ Congress is not granted a general legislative power. It is charged with specific tasks and given tools with which to perform those tasks. Those charges call for the exercise of discretionary authority, and in the absence of specific authorization to subdelegate those authorities, Congress must exercise those powers itself. Under basic fiduciary principles, Congress cannot pass off the exercise of those discretionary acts to others, even by enactments that follow the form of Article I, Section 7:

Consider just the structure of Article I, Section 8. Its first seventeen clauses contain provisions that give Congress power to perform such actions as to “lay and collect,” “borrow,” “regulate,” “establish,” “coin . . . , regulate . . . , and fix,” “provide,” “establish,” “promote . . . by securing,” “constitute,” “define and punish,” “declare . . . , grant . . . , and make Rules concerning,” “raise and support,” “provide and maintain,” “make Rules for the Government and Regulation of,”

⁵⁵ See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003).

⁵⁶ See Lawson, *Discretion as Delegation*, *supra* note 46.

⁵⁷ See LAWSON & SEIDMAN, *supra* note 9, at 107–26. I would be remiss if I did not thank Robert Natelson for making me aware of the importance of understanding the fiduciary character of the Constitution. My long-time collaborator Guy Seidman saw that point before I did, and he pushed me a bit in that direction, but Mr. Natelson’s work is what really brought home to both me and Professor Seidman the need to bring fiduciary concepts to bear on constitutional interpretation across the board.

“provide for calling forth,” “provide for organizing, arming, and disciplining,” and “exercise exclusive Legislation in all Cases whatsoever, over” . . . Exactly who, in this governmental scheme, is supposed to be doing the lion’s share of the laying and collecting, borrowing, regulating, establishing, coining, regulating, fixing, providing, establishing, promoting by securing, constituting, defining and punishing, declaring, granting, making Rules concerning, raising and supporting, providing and maintaining, making Rules for the Government and Regulation of, providing for calling forth, providing for organizing, arming, and disciplining, and exercising exclusive Legislation in all Cases whatsoever, over?⁵⁸

Just as not everything done by presidents through procedurally proper means is necessarily a constitutionally valid exercise of “executive Power,” and not everything done by courts through procedurally proper means is necessarily a constitutionally valid exercise of “judicial Power,” not everything done by Congress through procedurally proper means is necessarily a constitutionally valid exercise of the various “legislative Powers herein granted” with which Congress is vested. The principle against subdelegation is substantive, not formal.

To be sure, the conceptual lines between the constitutionally vested legislative and executive powers are not always crisp. It does not necessarily violate the Constitution for Congress to pass a law that requires some measure of interpretation. Figuring out where the executive power ends and the legislative power begins “is a subject of delicate and difficult inquiry,”⁵⁹ and James Madison drily observed that “[q]uestions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.”⁶⁰

That adept-puzzling obscurity, however, did not stop Madison from categorically declaring that various powers of government are “in their nature . . . legislative, executive, or judiciary.” Nor did it stop John Adams from stating that the “three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial . . . ; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a separation of them in the frame of government . . .” Nor did it prevent many state constitutions of the founding era from including separation-of-powers clauses that expressly distinguished, again without express definitions, the legislative from the executive from the judicial powers. Nor did it prevent the United States Constitution from basing its entire scheme

⁵⁸ Lawson, *Discretion as Delegation*, *supra* note 46, at 263.

⁵⁹ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

⁶⁰ THE FEDERALIST NO. 37 (James Madison).

of governance on the distinctions among those powers. However difficult it may be at the margins to distinguish those categories of power from each other, the founding generation assumed that there was a fact of the matter about those distinctions and that one could discern that fact in at least a large range of cases. The communicative meaning of the Constitution of 1788 cannot be ascertained without reference to some such distinction, even if legal scholars or political scientists (adept or otherwise) find the distinction unhelpful or confusing.⁶¹

As Chief Justice John Marshall memorably put it:

The line has not been exactly drawn which separate those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.⁶²

But wherever and however that line is properly drawn, huge swaths of modern law go beyond any plausible boundaries. Going forth and doing good pursuant to a statute that instructs the executive to go forth and do good is not an exercise of “executive Power” under any sensible eighteenth-century understanding of that concept, and that simple observation is enough to sweep in many of the statutes at the core of modern law. Nor is enactment of such a law a valid exercise of legislative power. Congress, under the Constitution, must enact laws, not empty collections of words.

This is as good a place as any to respond to a recent critique of this argument from Adrian Vermeule. Professor Vermeule maintains that “*the institutional innovations that appall Lawson [such as subdelegation of legislative authority] were themselves generated by the very system of lawmaking-by-separation-of-powers that he wants to defend*. Lawson never comes to grip with the problem of abnegation, the brute fact that everything Lawson deems inconsistent with the Constitution of 1789 emerged *through and by means of* the operation of that very Constitution, not despite it.”⁶³ More broadly:

We have an administrative state that has been created and limited by the sustained and bipartisan action of Congress and the President over time; that is supervised and checked by the President as it operates; and that has been blessed by an enduring bipartisan consensus on the Supreme Court. The classical Constitution of separated powers, cooperating in joint lawmaking across all three

⁶¹ Lawson, *supra* note 10, at 623–34 (footnotes omitted).

⁶² *Wayman*, 23 U.S. (10 Wheat.) at 43.

⁶³ VERMEULE, *supra* note 25, at 42.

branches, *itself* gave rise to the administrative state. When critics of the administrative state call for a return to the classical Constitution, they do not seem to realize they are asking for the butterfly to return to its own chrysalis. If political legitimacy is not to be found in this long-sustained and judicially-approved joint action of Congress and the President, the premier democratically elected and democratically legitimate bodies in our constitutional system . . . and the real complaint of the critics is not that the administrative state is illegitimate, but that our whole constitutional order is intrinsically misguided.⁶⁴

This argument rests on a distressingly common error: it conflates arguments about textual meaning with arguments about political and moral legitimacy. I have in the past made, and am here making, *no* claims whatsoever about the political legitimacy vel non of the administrative state, the Constitution in general, or any form of governmental organization. As I have said elsewhere:

I have nothing interesting to say about such matters, and so I choose to say nothing about them. Legitimacy is a political and moral concept, and I am not a political or moral theorist To be sure, political legitimacy is an important thing about which to think. It just is not the province of legal theory, and I would prefer not to venture outside that relatively narrow zone of comfort in professional academic work.⁶⁵

My only claim, here and elsewhere, is that subdelegation of legislative authority is contrary to the meaning of the Constitution. I declare nothing about what any real-world person ought to do with that information or how any past, present, or future political actors should respond to it.⁶⁶ And I emphatically make *no* claim that constitutional infidelity is a distinctively modern phenomenon. The very first statute enacted by the very first Congress was wildly, flagrantly, and knowingly unconstitutional.⁶⁷ So are a great many statutes that have been enacted by past and present congresses, signed and enforced by past and present presidents, and upheld and applied by past and present judges. That is not “hubris.”⁶⁸ That is empirical fact, as all claims of constitutional meaning are claims of empirical fact. It may or may not be an intellectually interesting empirical fact, depending upon one’s intellectual interests, but it is an empirical fact. In other words, in my professional guise, I do not see myself

⁶⁴ *Id.* at 46 (citation omitted).

⁶⁵ Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1567 (2012) (footnotes omitted).

⁶⁶ For more on the oft-elided distinction between claims of *constitutional meaning* and claims of *political obligation*, see Gary Lawson, *Originalism without Obligation*, 93 B.U. L. REV. 1309 (2013).

⁶⁷ See Gary Lawson, *The Constitution’s Congress*, 89 B.U. L. REV. 399, 403–06 (2009).

⁶⁸ VERMEULE, *supra* note 25, at 45.

as a “critic[] of the administrative state.”⁶⁹ I see myself as a disinterested expositor of the Constitution.⁷⁰ As a straightforward interpretative matter, the Constitution forbids the subdelegation of legislative authority, no matter how socially inevitable, normatively desirable, or politically legitimate it may be. One can certainly elect to choose social inevitability, normative desirability, or political legitimacy over the Constitution, but that has no bearing on what the Constitution actually says.

III. “YOU NEED A NEW SONG”

Assuming that one regards unconstitutional subdelegation as a problem,⁷¹ it is beyond pointless to look to Congress for solutions to that problem. Congress created the problem by giving away its authority in the first place. Psychologists, historians, and political scientists are better situated than I to say why this has happened, but some fairly obvious considerations come to mind. “By delegating the ultimate decision to an agency, Congress can take credit for doing something while dodging the blame from disappointed constituents.”⁷² Realistically, though, can this kind of transparent ploy actually work to improve legislators’ electoral prospects? Evidently so: “[P]olitical scientists have documented the value of ‘credit-claiming’ and ‘position-taking’ in legislators’ efforts to maximize the probability of re-election.”⁷³ Moreover, subdelegation has efficiency benefits for legislators: “Legislators delegate authority in order to reduce various costs of legislating, which allows them to legislate more private goods. Stated differently, delegation reduces the legislator’s marginal cost of private-goods production[.]”⁷⁴ It also offers efficiency of access for interest groups: By “unbundling” specific items (such as energy regulation) from everything else on the legislative

⁶⁹ *Id.* at 23.

⁷⁰ Of course, anyone who knows me knows that, in my personal rather than professional guise, I am emphatically a critic of the administrative state. They also know, however, that in that guise I am emphatically a critic of *non*-administrative states as well. I dispute the moral legitimacy of all governments—big, small, state, federal, administrative, non-administrative, constitutional, and non-constitutional. That personal position has, I believe, no bearing whatsoever on my empirical scholarly claims regarding constitutional meaning, which stand or fall on the quality of the observations and arguments offered for them.

⁷¹ Because I do not maintain that anyone must so assume, everything beyond this point is in the form of a hypothetical imperative.

⁷² Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 369–70 (2010).

⁷³ David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135 (2000).

⁷⁴ Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56 (1982).

agenda (such as monetary policy, drug policy, and foreign trade) it allows parties with concentrated interests to focus their attention on institutions (agencies) wholly dedicated to their precise area of concern. It is not surprising that Congress and those who seek to influence Congress would find subdelegation very attractive.⁷⁵

To be sure, there are occasional token thrusts in Congress to gain some measure of legislative control over executive lawmaking. The Congressional Review Act, which is part of the Small Business Regulatory Enforcement Fairness Act of 1996,⁷⁶ provides a mechanism for fast-track legislative cancellation of major agency rules,⁷⁷ and the statute has been employed more than a dozen times in 2017 after being used only once in its first two decades.⁷⁸ A version of the so-called REINS (“Regulations from the Executive [I]n Need of Scrutiny”) Act, which would require Congress legislatively to approve major rules before they take effect, has made it farther through Congress in 2017 than it has ever gone before,⁷⁹ though its prospects for ultimate passage are dubious. Through all of this, however, the simple expedient of passing real statutes instead of vague mush and/or amending the old enactments that are really subdelegations masquerading as statutes is nowhere on the congressional agenda. Hence the first sentence of this section.⁸⁰

Nor can one plausibly rely on the courts to police legislative subdelegations. The Supreme Court’s complete retreat from the field of subdelegation is too well known to require elaborate summary.⁸¹ Liberal and conservative jurists disagree on

⁷⁵ For more background on the positive political science literature regarding rationales for congressional delegation, see Rodrigues, *supra* note 31, at 447–49.

⁷⁶ Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 857–74 (1996) (codified in scattered sections of Titles 5 and 15 of the United States Code).

⁷⁷ For a brief description of the statute, see LAWSON, *supra* note 45, at 173–74.

⁷⁸ See Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (July 22, 2017), <http://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congress/> [<http://perma.cc/Z8G4-HX5A>].

⁷⁹ See Eric Boehm, *Rand Paul’s REINS Act Finally Makes It to Senate Floor*, REASON.COM (July 17, 2017, 5:32 PM), <http://reason.com/blog/2017/05/17/rand-pauls-reins-act-finally-makes-it-to> [<http://perma.cc/BK83-85E8>].

⁸⁰ Cf. VERMEULE, *supra* note 25, at 9 (“Congress episodically rouses itself to enact framework statutes intended to constrain executive power in a global way But these statutes are mostly dead letters, for the spasm of congressional resolve that leads to their enactment is not sustained over time.”).

⁸¹ See Lawson, *Delegation and Original Meaning*, *supra* note 46, at 328–29 (“After 1935, the Court has steadfastly maintained that Congress need only provide an ‘intelligible principle’ to guide decisionmaking [sic], and it has steadfastly found intelligible principles where less discerning readers find gibberish.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“[T]he conventional [delegation] doctrine has had one good year, and 211 bad ones (and counting).”). To be

many things, but they have found common cause—or, more precisely, an overlapping consensus—in capitulation to congressional desire to subdelegate its authority. Some Justices fly the flag of surrender because, on policy grounds, they want to grease the wheels of the administrative state. As a near-unanimous Supreme Court said with admirable candor (if perhaps less admirable lack of regard for law): “[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job[?!] absent an ability to delegate power under broad general directives.”⁸² Others flee the battlefield because of an extra-constitutional concern about judicial discretion: “[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”⁸³ Although Justice Thomas has expressed some interest in enforcing a constitutional ban on subdelegations,⁸⁴ and Justice Gorsuch may be more receptive to such arguments than was Justice Scalia,⁸⁵ no one seriously expects the federal courts to rise up and smite major portions of the administrative state in the name of the Constitution of 1788.

That leaves, as the last line of constitutional defense, the president.⁸⁶ There is any number of tools available to presidents

sure, Professor Sunstein and I may both be overstating our cases. It is surely a mistake to gauge the effectiveness of a principle against subdelegation by how many laws get overturned by courts rather than by how closely legislatures hew to that principle without need for judicial invalidation. See Joseph Postell & Paul D. Moreno, *Not Dead Yet – or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUDIES (forthcoming 2017). And while the subdelegation doctrine has been dead in the Supreme Court for a long time, it has occasional sparks of life in the lower courts (and, quite possibly, has a new ally on the Supreme Court). See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

⁸² *Mistretta v. United States*, 488 U.S. 361, 372 (1989). And what, precisely, is Congress’s constitutional “job”? To regulate in a way and to a degree that is pleasing to the political sensibilities of a majority of the Supreme Court? One might think, looking at the Constitution, that Congress’s job is to legislate in accordance with the substantive and procedural norms prescribed by the Constitution. But, then again, one might think, looking at the Constitution, many things which are at odds with statements in Supreme Court opinions. The explanation, of course, is that statements in Supreme Court opinions almost never try to ascertain the meaning of the Constitution, so it is not at all surprising that they almost uniformly fail to do so.

⁸³ *Id.* at 415 (Scalia, J., dissenting). For an explanation of why this concern about judicial discretion is extra-constitutional, see Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014).

⁸⁴ See *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1240–52 (Thomas, J., concurring in the judgment).

⁸⁵ See *Gutierrez-Brizuela*, 834 F.3d at 1153–54.

⁸⁶ Technically, the last line of constitutional defense is an armed citizenry, but it would surely take more than some unconstitutional subdelegations to warrant outright revolution.

to resist unconstitutional subdelegations if they are inclined to use those tools. Most obviously, presidents can veto proposed legislation that fails to make law. Congress can override those vetoes with a two-thirds majority in each House, but a presidential veto can be a serious roadblock to subdelegation. Moreover, the president could issue a veto message communicating the constitutional grounds for the action and thereby raise public awareness of Congress's constitutional failure. The president could also recommend legislation amending or repealing past laws that unconstitutionally subdelegate authority. Appointing judges who take the Constitution seriously could also indirectly help in this regard. Finally, and most dramatically (and therefore least plausibly), the president could refuse to enforce laws that unconstitutionally subdelegate legislative power. Presidents have a power and duty of executive review that is equal to, and derives from the same source as, the collateral power of judicial review.⁸⁷ If courts are allowed, and indeed required, to refuse to give legal effect to unconstitutional laws, the same is true of presidents (and everyone else in the constitutional order). At this point, however, the shade of Andrew Johnson will surely begin whispering about the possible consequences of presidential nonenforcement of statutes on constitutional grounds. A genuine constitutionalist will respond that the president nonetheless has an unconditional obligation to the Constitution, consequences be damned.⁸⁸ Even if one does not take this extreme tack, however, there is no obvious reason why presidents cannot, and constitutionally should not, make use of the other tools at their disposal to resist subdelegation. All that is needed is the will to use those tools.

At first glance, it may seem even more absurd to rely on the president to police subdelegations of legislative authority than to rely on Congress or the courts. Don't such subdelegations by definition increase the power of the executive, both absolutely and relative to its chief institutional competitors? If Congress is willing to cede some, or even most, of its authority to the president, who would expect the president to decline the offer?

⁸⁷ For a lengthy explication of this position, see generally Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

⁸⁸ See U.S. CONST. art. II, § 1, cl. 8 (prescribing the presidential oath of office as: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States").

As with the Spanish Inquisition, no one expects it. But, as with the Spanish Inquisition, it just might appear anyway. To be sure, history is on the side of the skeptics. The Reagan Administration made a great fuss over constitutional fidelity, especially in the realm of separation of powers. In the 1980s, Attorney General Edwin Meese III gave voice to some monumental, and monumentally important, constitutional principles dealing with the separation of powers, such as departmentalism and the unitary executive.⁸⁹ The Justice Department was filled with constitutional originalists who understood quite well that the Constitution does not authorize subdelegation of legislative authority. With all of that intellectual and political firepower assembled, what was the number of bills vetoed by President Reagan on the ground that they unconstitutionally subdelegated legislative power to the president? That would be zero. The number of bills introduced or supported by the Reagan Administration to repeal or replace old statutes that unconstitutionally subdelegate legislative power to the president? That would also be zero. The number of such bills vetoed or championed, respectively, by either of the Bush Administrations? Yep, zero again. (I assume that no one finds it necessary for me to repeat these numbers for modern Democrat administrations.) All conventional grounds for judgment suggest that the executive department is a central part of the problem of subdelegation of legislative authority and likely the last place that one should look for a solution.

Enter Donald Trump. Exit conventional grounds for judgment. Whatever one thinks of Donald Trump (and I confess that I have a higher regard for him than do most of the people with whom I usually associate), one must acknowledge that the usual rules of politics do not apply to him. Indeed, his election was, at least for many who voted for him, precisely a pair of double-barreled middle fingers thrust into the face of political convention (with a loud razzberry added for good measure). The fact that invoking a constitutional principle against subdelegation of legislative authority would elicit shrieks of horror from the political and cultural establishment would not necessarily deter President Trump from doing it. Indeed, it just might be an added incentive.

The question is whether there is anything substantive that would or could motivate President Trump to take a stand against

⁸⁹ See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 701 (2005).

legislative subdelegation, perhaps by vetoing proposed legislation on constitutional subdelegation grounds and issuing a stinging veto message. Several considerations suggest—and I emphasize that I deliberately use the word “suggest” in its literal and modest sense—that there might be.

First, President Trump’s key appointments to legal offices speak to a commitment to constitutional first principles that exceeds that of any president in my lifetime. His first appointment to the Supreme Court was Neil Gorsuch, who, as a court of appeals judge, specifically raised the idea of reviving the subdelegation doctrine.⁹⁰ President Trump’s nominations to the lower federal courts thus far also have originalists cheering and maybe even salivating. And both of his appointees to top executive department legal positions—Attorney General Jeff Sessions and White House Counsel Don McGahn—are long-time advocates (if not necessarily consistent practitioners) of originalism. The pairing is significant. My recollection from three-plus decades ago is that the Reagan Justice Department was more than occasionally at odds with the White House Counsel’s Office, which had considerably less enthusiasm than did Attorney General Meese and his staff for picking fights about broad structural principles. That kind of internal conflict reduces the likelihood of bold action. If the Department of Justice and White House Counsel’s Office are both strongly committed to originalism, they can speak with a united front on subdelegation. No originalist can defend, with a straight face, the gross subdelegations of legislative power that pervade modern government as consistent with the Constitution.⁹¹

Second, all of the foregoing considerations suggest that President Trump is inclined to defer, on legal and constitutional matters, to those who he regards as reliable experts on those subjects. No one seriously believes that Donald Trump entered the political arena in 2015 with a well-formed theory of constitutional interpretation in mind. Obviously, he has decided that originalists are the go-to folks in this area. If, hypothetically, President Trump’s Attorney General and White House Counsel both recommend a veto on constitutional grounds, it is not

⁹⁰ See *Gutierrez-Brizuela*, 834 F.3d at 1153–54.

⁹¹ At the risk of repetition: They can certainly defend those subdelegations as consistent with all manner of things besides the Constitution, and those other things might well be more important to any given person than is the meaning of the Constitution. I am *not* saying unconditionally that originalists must urge the president to oppose subdelegations. I am only saying that they have good reason to do so if they regard the meaning of the Constitution as normatively relevant, and that they must do so if they regard the meaning of the Constitution as normatively decisive.

absurd to imagine that President Trump would take that recommendation very seriously.

Third, former White House strategist Steve Bannon declared in February 2017 that the Trump Administration was committed to “deconstruction of the administrative state.”⁹² The exact meaning of the phrase is not important here. The significance for present purposes is that the standard response to any attempt to revive a constitutional principle against subdelegation is to complain that it would be an assault on the administrative state.⁹³ That certainly seemed to be an important driver of the decision in *Mistretta*,⁹⁴ and I have heard something like it from my colleagues for decades. If Mr. Bannon truly speaks for the Administration on this point, it suggests that the standard establishment response will not resonate all that well with the current president. To be sure, there are nontrivial arguments to be made that the unbundling afforded by subdelegation increases democratic responsiveness in some respects,⁹⁵ but these do not seem like arguments that will carry much weight with a constitutionalist who wants to deconstruct the administrative state.

Fourth, every force in the legal universe is currently aligned to jump at the chance to constrain executive power. The political, legal, and cultural establishments all despise the current occupant of the White House. If there is ever going to be a time for limits on executive power, this is it. And if those limits come from the White House itself, would the establishment really find it within themselves to resist?

Perhaps there never will be a time for such limits. Certainly, those who think of President Trump as a swaggering, overbearing, tin-plated dictator with delusions of godhood (or perhaps even as a Denebian slime devil)⁹⁶ will regard as laughable the idea that he would turn down power. I am more inclined than many to think that Donald Trump cannot be written off as a power-mad autocrat, but maybe the many are

⁹² See Tim Hains, *Stephen Bannon: Core of Trump's Platform Is "Deconstruction of the Administrative State,"* REAL CLEAR POLITICS (July 17, 2017), https://www.realclearpolitics.com/video/2017/02/23/stephen_bannon_pillar_of_trumps_platform_is_deconstructi_on_of_the_administrative_state.html [<http://perma.cc/F7RS-MWES>].

⁹³ See, e.g., Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327–28 (1987). I use this citation only because I happen to have it on hand when writing this footnote. I am sure that any reader will have favorite examples of their own.

⁹⁴ See generally *Mistretta v. United States*, 488 U.S. 361 (1989).

⁹⁵ See generally David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985).

⁹⁶ With apologies to David Gerrold.

right. Maybe Adrian Vermeuele is right about the inevitability of the administrative state; it certainly would not surprise me if he was right about that. Perhaps, as with every other modern president before him, Donald Trump will choose expanded executive power over the Constitution, and perhaps the establishment's love for the administrative state is stronger than its hatred for President Trump. But maybe, just maybe, an odd combination of originalism, swamp draining, and the looming specter of Trump-as-Congress will lead to something that no one expects—maybe even something constitutionally more significant than a comfy chair.

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.

** W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

*** Regents Professor, University of Maryland Carey School of Law.

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 Dysfunctional 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-WPD8>].

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-Publian 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 Publican institutions are generating Publican or quasi-Publican 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. Myers*, 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/2v9MUUnk>.

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. Hoeper*, 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=.10c28cfcdf40 [<http://perma.cc/ST96-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 POCKOCK, *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-Publican president, or changes in the constitutional text that generated the anti-Publican president.

War Powers Litigation After *Zivotofsky v. Clinton*

*Michael D. Ramsey**

INTRODUCTION

In modern times, judicial opinions have been largely absent from the debate over constitutional war powers. Among other things, it is widely assumed—especially in light of the courts’ avoidance of the issue during the Vietnam War—that the political question doctrine would preclude judicial determination of war-initiation powers. In *Zivotofsky v. Clinton*,¹ however, the Supreme Court appeared to re-characterize and limit the political question doctrine in a way that might allow wider litigation of war powers issues. According to *Zivotofsky*, the doctrine does not preclude courts from determining the meaning of statutes and the Constitution in separation of powers disputes, even when substantial foreign affairs issues are at stake.²

The actual subject of the *Zivotofsky* litigation was, however, relatively modest as foreign affairs controversies go. The courts’ willingness to retreat from the political question doctrine will be more severely tested in matters of greater foreign affairs significance, such as war powers. This essay considers the implications of *Zivotofsky* for war powers litigation, including by revisiting the Vietnam-era decisions. It first asks whether *Zivotofsky*, if taken at face value, does indeed suggest a renewed viability of war powers litigation. Second, it asks whether, as a practical matter, courts can comfortably undertake the task of war powers adjudication. Third, it considers the value of more aggressive war powers adjudication, including whether a *Zivotofsky*-inspired approach to war powers disputes is consistent with the courts’ constitutional role.

* Hugh and Hazel Darling Foundation Professor of Law and Faculty Director of International and Comparative Law Programs, University of San Diego Law School. Thanks to Curtis Bradley, Tom Campbell, Michael Glennon, Martin Lederman, Saikrishna Prakash, Lisa Ramsey, Michael Rappaport, Stephen Vladeck, Ingrid Wuerth, and participants in the Yale-Duke Foreign Relations Law Roundtable for helpful comments.

¹ 566 U.S. 189 (2012).

² *Id.* at 194–96.

I. ZIVOTOFSKY AS DOCTRINAL CHANGE

Zivotofsky v. Clinton appears to signal a major shift in thinking about justiciability in separation of powers disputes.³ Briefly, the case concerned a statute allowing U.S. citizens born in Jerusalem to request passports reflecting birth in “Jerusalem, Israel.”⁴ The U.S. executive branch refused to apply the statute, invoking the president’s supposedly exclusive control of foreign affairs and the diplomatically sensitive nature of Jerusalem’s political status. In a suit to enforce the statute, brought by the parents of Zivotofsky, a U.S. citizen born in Jerusalem, the D.C. Circuit found the case to be a non-justiciable political question.⁵ Chief Justice Roberts’ opinion for six Justices reversed, emphasizing the central role of the judiciary in determining the meaning of the Constitution.⁶ Roberts’ opinion acknowledged that a political question might exist (a) if the Constitution’s text committed the decision to another branch or (b) if there were no judicially manageable standards by which to decide. But it found neither circumstance to exist in the passport dispute; to the contrary, the opinion emphasized that the case involved determining the constitutionality of a statute, which is “what courts do.”⁷

Prior to *Zivotofsky*, political question analysis had been dominated by Justice Brennan’s six-factor test in *Baker v. Carr*.⁸ *Baker* had been cited repeatedly by lower courts in political question cases⁹ (including the lower courts in *Zivotofsky*), and by then-Justice Rehnquist’s influential concurring opinion in *Goldwater v. Carter*, an opinion that seemed strongly to disfavor justiciability in separation of powers cases.¹⁰ But *Zivotofsky*

³ See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1925–26 (2015) (describing *Zivotofsky* as having “far-reaching significance” for justiciability of foreign relations law cases).

⁴ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228, § 213(d), 116 Stat. 1350, 1366, § 214(d) (2002).

⁵ See *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1232–33 (D.C. Cir. 2009) (principally concluding that decisions regarding recognition are textually committed to the executive branch); see also *id.* at 1240, 1244–45 (Judge Edwards, concurring) (finding on the merits that Section 214(d) unconstitutionally interfered with the president’s executive power).

⁶ *Zivotofsky*, 566 U.S. at 191. Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan joined Chief Justice Roberts’ opinion. Justice Sotomayor concurred in part and in the result, and Justice Alito concurred in the result. Justice Breyer was the sole dissenter.

⁷ *Id.* at 201.

⁸ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁹ See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 544, 549–58 (9th Cir. 2005) (sequentially applying each of *Baker*’s six factors).

¹⁰ *Goldwater v. Carter*, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., joined by Burger, C.J., Stewart, J., & Stevens, J., concurring).

barely mentioned *Baker*, citing it only in passing.¹¹ More importantly, *Zivotofsky*—although rejecting a political question challenge—mentioned only two of *Baker*'s six factors (the ones noted above); it did not at any point describe the political question doctrine as resting on a six-factor test or acknowledge that *Baker* had suggested a six-factor test.¹² And even more notably, the *Baker* factors *Zivotofsky* failed to mention were the most open-ended, the most easily invoked to defeat justiciability, and the most apparently relevant to *Zivotofsky* itself in particular: “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; “an unusual need for unquestioning adherence to a political decision already made”; or “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹³

Also of note, the *Zivotofsky* majority opinion did not discuss Rehnquist’s concurring opinion in *Goldwater*—and Rehnquist’s analysis in *Goldwater* seems inconsistent with it. *Goldwater* involved the question whether the president had to obtain the Senate’s approval before terminating a treaty in accordance with the treaty’s terms.¹⁴ Although it involved the constitutionality of an executive action rather than the constitutionality of a statute, in other respects the dispute in *Goldwater* fit with Roberts’ description of a question of constitutional law directed to the courts. As in *Zivotofsky*, *Goldwater* did not question the merits of the president’s policy; the question was not what decision should be made, but which branch, constitutionally, should make the decision.

In sum, *Zivotofsky* appears to reaffirm and extend the view that foreign affairs controversies involving only the interpretation of statutes or the Constitution are not qualitatively different from ordinary statutory and constitutional questions. In disregarding *Goldwater* and much of *Baker*, it appears substantially to narrow the grounds upon which a

¹¹ See *Zivotofsky*, 566 U.S. at 195, 197, 201 (citing *Baker* directly only once, and indirectly only as quoted—incompletely—in *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

¹² Compare *Zivotofsky*, 566 U.S. at 195, 197, with *id.* at 202 (Sotomayor J., concurring in the judgment) (“In *Baker*, this Court identified six circumstances in which an issue might present a political question . . .”).

¹³ See *Baker*, 369 U.S. at 217.

¹⁴ See *Goldwater*, 444 U.S. at 996. There was no opinion of the Court in *Goldwater*, so *Zivotofsky* was under no obligation to cite it—but the *Zivotofsky* majority’s decision not to discuss Justice Rehnquist’s concurrence, which attracted four votes and had been seen as an important statement of the political question doctrine, seems significant.

political question can be found, and thus to open more separation of powers controversies to judicial resolution.

The question remains, however, whether *Zivotofsky* is an isolated decision or a meaningful shift. *Zivotofsky* involved a relatively minor—even obscure—dispute about the wording of the passports of (one assumes) a very small number of people. Little evidence existed of major foreign policy disruption.¹⁵ *Zivotofsky*'s viability when the Court confronts more momentous matters seems open to doubt.

To think about that question, consider the justiciability of war powers disputes. Under the *Baker* formulation—especially as applied in *Goldwater*—conventional wisdom has been that questions of the president's unilateral ability to use military force are likely non-justiciable. But *Zivotofsky* calls that assumption into doubt, first by suggesting that constitutional disputes in foreign affairs are matters granted to the judiciary for resolution, and second by apparently dispensing with *Baker*'s concern for “respect due coordinate branches” and “embarrassment” arising from “multifarious pronouncements” on foreign affairs.¹⁶ *Zivotofsky*'s viability, however, may itself depend on the ability to construct a framework of justiciability for war powers disputes that is manageable and plausible.

II. POLITICAL QUESTIONS AND VIETNAM-ERA WAR POWERS LITIGATION

To make more concrete the questions posed above, this section considers the most extensive modern litigation of constitutional war powers. During the Vietnam War era, from 1967 through 1974, lower courts heard multiple challenges to the war's constitutionality. None of these challenges was successful in limiting the war, and none reached the Supreme Court apart from a single unexplained affirmance of a three-judge district court.¹⁷ Nonetheless, these cases provide a concrete historical example of war powers litigation.

To begin, there is something of a myth that the Vietnam-era cases declared all war powers questions to be political questions. Some cases did, but others found some war powers issues to be political questions and others not to be. The diversity of questions and answers in the Vietnam-era thus offers a way to

¹⁵ *Zivotofsky*, 566 U.S. at 191–94.

¹⁶ *Baker*, 369 U.S. at 216–17, 225. These were the principal *Baker* factors not discussed in *Zivotofsky*.

¹⁷ *Atlee v. Richardson*, 411 U.S. 911 (1973).

start thinking about what a post-*Zivotofsky* war powers justiciability analysis might involve.

Courts in the Vietnam era pursued at least three different approaches. Two major cases found war powers litigation broadly to be political questions. The D.C. Circuit, in one of the early cases, reached this conclusion almost without analysis, resting principally on the proposition that foreign affairs matters were for the president to determine.¹⁸ Somewhat later, a three-judge district court in Pennsylvania reached a similar conclusion after much more extended analysis; the Supreme Court affirmed this decision without opinion.¹⁹

The Second Circuit pursued an intermediate course in a series of cases. It found the basic question whether congressional authorization was needed for war initiation to be justiciable; on the merits, it found that congressional authorization was constitutionally required and had been given.²⁰ However, ostensibly on political question grounds, it held that the method of authorization was up to Congress (thus rejecting, for example, the proposition that an actual formal declaration was required and accepting congressional authorization via the Gulf of Tonkin Resolution and appropriations in support of the military effort).²¹ In further litigation, the Second Circuit invoked the political question doctrine to avoid deciding two specific challenges. First, plaintiffs contended that the president's decision to bomb North Vietnam and mine North Vietnamese harbors after a ceasefire lacked congressional approval.²² At this point, Congress had repealed the Gulf of Tonkin Resolution and indicated that the war should be wound down. Plaintiffs argued that the president's actions were unapproved escalations, while the president argued that renewed bombing to enforce the ceasefire was the best way to achieve Congress's goals.²³ The court, on political question grounds, refused to second-guess the President's strategic

¹⁸ *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (“The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.”).

¹⁹ *Atlee v. Laird*, 347 F. Supp. 689, 698–707 (E.D. Pa. 1972) (relying heavily on *Baker v. Carr*), *aff'd without opinion sub nom.*, *Atlee v. Richardson*, 411 U.S. 911 (1973); *see also* *Commonwealth of Mass. v. Laird*, 451 F.2d 26, 32–33 (1st Cir. 1971) (finding the whole matter of war powers to be a political question, at least in the absence of an objection by Congress to the president's actions).

²⁰ *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971).

²¹ *Id.* at 1043; *accord* *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971); *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970).

²² *Orlando*, 443 F.2d at 1041.

²³ *Id.*

assessment.²⁴ In a subsequent case, plaintiffs argued that the President's bombing of Cambodia—ostensibly a neutral country—was not authorized by Congress. The President similarly claimed that the bombing was the best way to wind down U.S. involvement, and the court (this time over a dissent by Judge Oakes) refused to decide on political question grounds.²⁵

A third group of opinions showed greater willingness to reach the merits. In a subsequent case in the D.C. Circuit, a divided panel followed the Second Circuit in finding that congressional authorization for the war was constitutionally required, and then, rejecting the Second Circuit's analysis, concluded that Congress's authorization could not be found merely from appropriations and other statutes passed to support the war effort.²⁶ (Like most of the Second Circuit opinions, this case came after Congress's repeal of the Gulf of Tonkin Resolution.) As a remedy, however, the court found injunctive relief inappropriate because at that point, the president (at Congress's direction) appeared to be ending the U.S. involvement in any event.²⁷ In addition, two dissenting opinions from the cases mentioned above argued for reaching the merits. Judge Lord dissented at length from the three-judge panel's political question conclusion.²⁸ In the Second Circuit, Judge Oakes would have found the Cambodian bombing unauthorized (at least after

²⁴ *DaCosta v. Laird*, 471 F.2d 1146, 1152–53 (2d Cir. 1973).

²⁵ *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). The district court ruled on the merits that the Cambodia bombing was unconstitutional and directed that it cease. In a once-famous flurry of motions, the court of appeals stayed the district court order, and the plaintiffs asked Justice Thurgood Marshall, as circuit justice, to vacate the stay. When Marshall refused, plaintiffs asked Justice Douglas to lift the stay, and he did. See *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Justice Marshall); *id.* at 1320 (Justice Douglas). On a motion from the government, Justice Marshall, with the concurrence of the full Court apart from Justice Douglas, overturned Justice Douglas's order. See *Schlesinger v. Holtzman*, 414 U.S. 1321, 1322 (1973). Ultimately, as noted in the text, the Second Circuit reversed the district court on political question grounds and the Supreme Court denied certiorari. See *Holtzman*, 484 F.2d at 1315, *cert. denied*, 416 U.S. 936 (1974).

²⁶ *Mitchell v. Laird*, 488 F.2d 611, 615–16 (D.C. Cir. 1973) (concluding that “none of the legislation drawn to the court's attention [including appropriations and extension of the military draft] may serve as a valid assent to the Vietnam war”). As noted in the opinion, Judge Tamm would have found appropriations an adequate authorization. *Id.* at 615. Four judges, including Judge Tamm, favored rehearing the case en banc on the grounds that appropriations were a proper mode of authorization. *Id.* at 616 (statement of Judge MacKinnon, joined by Judges Tamm, Robb, and Wilkey).

²⁷ *Id.* at 616 (finding it to be a political question whether the president was proceeding appropriately to end the war).

²⁸ *Atlee v. Laird*, 347 F. Supp. 689, 709, 712 (E.D. Pa. 1972) (Judge Lord, dissenting) (“This case does not involve second guessing the wisdom of the Executive in a matter committed by the Constitution to that branch of the Government. It is rather a constitutional question concerning the division of power within our system, involving a determination of whether the executive branch has exceeded the scope of its constitutional power.”).

repeal of the Gulf of Tonkin Resolution) because it had been secret and because it constituted a fundamental change in the scope of the war by involving an additional country in hostilities.²⁹

These cases suggest at least three types of questions in war powers litigation: (1) whether Congress's authorization of military action is required; (2) if so, whether Congress has authorized it; and (3) the scope of Congress's authorization. They further suggest, as developed in the next section, that some of these questions are more susceptible to judicial resolution than others.

III. WAR POWERS LITIGATION AFTER *ZIVOTOFSKY*

This section considers the extent to which *Zivotofsky* vindicates the stronger view of war powers litigation in the Vietnam era. I conclude that it does, with significant limitations.

A. Standing

At the outset, it is worth noting that narrower modern views of standing would change the dynamics of the Vietnam-era litigation. Several of the major cases depended on theories of standing that are likely no longer viable: citizen suits, suits based on remote possibilities, and suits based on the standing of members of Congress.³⁰ However, the litigation also reflected at least one theory of standing likely still available: suit by a member of the military challenging deployment into combat.³¹ It is also possible that people overseas affected by the conflict might have standing if U.S. citizens are in the war zone³² or if the Court recognizes the ability of non-citizens abroad to sue to enforce constitutional provisions.³³ Further, it remains an open question whether Congress as a whole or one of its Houses (as opposed to individual members) can bring suit to protect congressional powers.³⁴ Thus, modern standing law is likely to limit, but not foreclose, the possibility of war powers litigation.

²⁹ *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315–18 (2d Cir. 1973) (Judge Oakes, dissenting).

³⁰ See, e.g., *id.* at 1307, 1315 (congressional standing); *Mitchell*, 488 F.2d at 613–14 (congressional standing); *Atlee*, 347 F. Supp. at 691 (taxpayer standing).

³¹ See, e.g., *Berk v. Laird*, 429 F.2d 302, 306–07 (2d Cir. 1970).

³² See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515–21 (D.C. Cir. 1984) (finding U.S. citizen had standing to challenge U.S. military actions on his land in Honduras), *vacated and remanded on other grounds*, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985).

³³ A possibility suggested by *Boumediene v. Bush*, 553 U.S. 723, 795–98 (2008).

³⁴ See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 66–77 (D.D.C. 2015) (generally finding the question of the standing of the House of Representatives to be unresolved by prior cases, and concluding in the particular case that the House as an institution had standing to challenge some actions of the president); see also *Ariz. State*

B. Questions Involving Congressional Approval

Whether Congress must authorize a military action has two components: (1) whether the declare war clause gives Congress exclusive authority over initiating war; and (2) if so, whether the conflict at issue is a “war” that requires Congress’s authorization. In *Zivotofsky*’s terms, the first question seems clearly one for the courts. It is a question of the Constitution’s meaning in the abstract; it does not require attention to any particular factors of any particular conflict. It is not meaningfully different from the question, for example, whether the president has authority to seize steel mills to avert a strike, or whether the president has authority to terminate treaties without Senate approval. True, it might lead to a decision that a particular executive-initiated conflict is unauthorized—quite possibly running afoul of the *Baker* factors of embarrassment and multifarious pronouncements—but *Zivotofsky* appears to discount those factors, at least where a pure question of law is presented. True also, the constitutional question may be a hard one (at least for some types of conflicts), but *Zivotofsky* makes clear that even a difficult question of constitutional meaning is for the courts to decide.³⁵

As a result, a post-*Zivotofsky* analysis confirms the view of the Second and D.C. Circuits in the Vietnam era that the need for congressional authorization is (or at least can be) a judicial question. The decisions that instead found a political question on this point rested on the proposition that the scope of the president’s foreign affairs powers is broadly nonjusticiable³⁶—a proposition rejected in *Zivotofsky*. Nor is it clear that judicial engagement with the question is problematic: courts managed it in the Vietnam era³⁷ as well as in earlier times.³⁸

The second part of the authorization question is more problematic. Hostilities exist on a scale from minor skirmishes to total war. Some line must be drawn unless one thinks

Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2663, 2665 n.12 (2015) (finding that Arizona legislature had standing to contest allegedly unconstitutional diminution of its powers, but expressly reserving the question of whether the U.S. Congress would have standing to challenge actions of the president).

³⁵ See *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (acknowledging difficulty of the case but finding it to “demand[] careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers”).

³⁶ See, e.g., *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967).

³⁷ See, e.g., *DaCosta v. Laird*, 448 F.2d 1368, 1369–70 (2d Cir. 1971).

³⁸ See *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 665–67 (1863) (deciding on the merits whether President Lincoln’s naval blockade of the South during the Civil War was constitutional); see also *infra* Part IV (discussing additional cases).

(implausibly) that either all military actions must be authorized by Congress or none must be. The difficulty of drawing the line in some circumstances should not preclude adjudication when the line is clear, however, as the Second Circuit found in the Vietnam-era cases.³⁹ Further, the issue can be made more manageable if courts approach it categorically, finding that the presence of certain circumstances do or do not bring a conflict within the need for approval. For example, in the 2011 Libya conflict, the President argued that congressional approval was not required because U.S. military actions consisted wholly of airstrikes, were of limited duration, and did not involve major threats to U.S. personnel.⁴⁰ With these descriptions being largely uncontested as a factual matter, a court could decide as a matter of constitutional interpretation whether a conflict so described requires congressional authorization.

On the other hand, some situations may resist categorical assessment because they depend on disputed or uncertain facts or subjective characterizations. For example, the U.S. military action in Iraq and Syria against the Islamic State seems challenging to describe categorically: the nature of the Islamic State, the extent of the U.S. role, and the U.S. objectives seem sufficiently unsettled that judicial assessment would be, at minimum, a qualitatively different task than the one envisioned in *Zivotofsky*.⁴¹

C. Questions Involving the Type of Congressional Approval

A second major issue in the Vietnam era was whether Congress could authorize hostilities either by appropriations or by the vaguely worded Gulf of Tonkin Resolution. Courts divided on whether that question was justiciable.⁴² *Zivotofsky* suggests that it should be. A court's analysis here would not seem to depend on factual assessments or subjective characterizations. For example, the D.C. Circuit held that appropriations do not

³⁹ *E.g.*, *DaCosta*, 448 F.2d at 1369 (concluding that the Vietnam conflict was a war for constitutional purposes).

⁴⁰ Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6–14 (2011); *see also* Michael D. Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AMER. J. INT'L L. 701, 701–07, 711–13 (2016) (discussing the constitutional debate over the Libya action). Compare Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 980–98 (2016) (defending the constitutionality of the U.S. military action), with Saikrishna Bangalore Prakash, *Military Force and Violence but Neither War nor Hostilities*, 64 DRAKE L. REV. 995, 998–1005 (2016) (finding the Libya action unconstitutional).

⁴¹ *See infra* Part VI (discussing post-*Zivotofsky* litigation challenging U.S. military action against the Islamic State).

⁴² *See supra* Part II.

count as approval for constitutional purposes.⁴³ Whether this is correct or not is a question of constitutional interpretation separate from the facts, policies, and descriptions of any particular conflict; the analysis would be analogous to the way the Court described *Zivotofsky* as requiring “careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers.”⁴⁴

One might conclude—as the Second Circuit did—that the Constitution delegates to Congress the decision how to authorize military conflict. Perhaps that makes it a political question (textually committed to another branch), as the Second Circuit described it.⁴⁵ But *Zivotofsky* indicates that it is better understood as a decision on the merits: if the Constitution does not require any particular method of authorization, plaintiffs’ challenge to Congress’s method of authorization fails on the merits. Similarly, one might say in *Zivotofsky* that the president’s recognition power is exclusive and gives the president power to decide how to describe the status of Jerusalem. But as the decision in *Zivotofsky* (and the subsequent litigation)⁴⁶ indicates, that is a question on the merits—*whether* the Constitution (as interpreted by the judiciary) gives the president that exclusive authority.

In sum, courts should be able to decide, post-*Zivotofsky*, whether the Constitution requires Congress’s authorization to be given in particular ways.

D. Questions Involving the Scope of Congressional Approval

The most difficult of the Vietnam-era cases appear to be challenges to the scope of congressional approval. These are almost necessarily fact-intensive—both what Congress approved and what is going on in a particular conflict. For example, if one concluded that after repeal of the Gulf of Tonkin Resolution, Congress had approved only actions designed to wind down the war, it is (as the Second Circuit found) hard to say what activities are designed to wind down the war.⁴⁷ The decision of

⁴³ *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973). In doing so, the court famously relied on “what every schoolboy knows”: that once hostilities begin, Congress will feel an obligation to fund them. *Id.*

⁴⁴ *Zivotofsky v. Clinton*, 566 U.S. 189, 200 (2012).

⁴⁵ *See DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971).

⁴⁶ *See Zivotofsky v. Sec’y of State*, 725 F.3d 197, 204–05, 219–20 (D.C. Cir. 2013) (on remand, finding Section 214(d) unconstitutional as infringing the president’s recognition power), *aff’d*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

⁴⁷ *See DaCosta v. Laird*, 471 F.2d 1146, 1147–48 (2d Cir. 1973).

how to wind down the war seems within the category of presidential discretion Chief Justice Marshall identified in *Marbury v. Madison*, in the earliest formulation of the political question doctrine.⁴⁸ And it calls for a political solution: if Congress wanted to narrow presidential discretion, it could write a narrower statute.

The modern example of the conflict against the Islamic State is also illustrative. Arguably, Congress authorized U.S. military action against the Islamic State, either through the 2001 Authorization for the Use of Military Force against the perpetrators of the 9/11 attacks, or the 2003 Authorization for the Use of Military Force in Iraq. But reaching either conclusion requires inquiry into difficult facts: to what extent the Islamic State was connected to al Qaeda, or to what extent the Islamic State was connected to prior Iraqi insurgent groups against whom military action was clearly authorized.⁴⁹ Adjudication of these questions seems problematic and beyond *Zivotofsky's* direction. The inquiry would involve not merely the ordinary tools of constitutional interpretation, but also resolution of factual disputes and characterizations that may be less judicially manageable.

Of course, often there will be no arguable congressional authorization of a military conflict—as with the U.S. action in Libya in 2011.⁵⁰ And sometimes no plausible argument will stretch an authorization to cover a remote conflict. Judge Oakes' opinion in the Cambodian bombing case⁵¹ may be an example of this: as the bombing was secret (and indeed the war had been fought on the premise that Cambodia was neutral), Congress's appropriations for winding down the war it knew about seem inadequate to approve the Cambodian bombing, without requiring any inquiry into disputed facts or characterizations.⁵²

Nonetheless, it seems likely that some disputes over the scope of congressional authorization will depend on how one characterizes the nature and purpose of the hostilities. Adjudication thus runs substantial risk of infringing the

⁴⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–67 (1803); see also *infra* Part IV (discussing *Marbury*).

⁴⁹ See generally Prakash, *supra* note 40 (considering these issues); see also *infra* Part VI (discussing litigation related to military action against the Islamic State).

⁵⁰ See Prakash, *supra* note 40, at 999.

⁵¹ *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315–18 (2d Cir. 1973) (Judge Oakes, dissenting).

⁵² See John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1137–38, 1147–48 (1990).

president's war-fighting discretion or of involving the judiciary in the finding or characterization of facts for which it is manifestly unsuited. Both of these lines of the political question doctrine remain viable after *Zivotofsky* and should foreclose some aspects of war powers adjudication.

E. Implications

In sum, real and hypothetical war powers litigation indicate that the issues sometimes are largely questions of constitutional or statutory meaning and sometimes turn on disputed facts or subjective characterizations. A *Zivotofsky*-inspired approach suggests that the former are not political questions while the latter may be. Interpretation of statutes and the Constitution as a general matter is, *Zivotofsky* said, entrusted to the courts,⁵³ and courts do not lack standards to decide such cases even where finding the right answer may be difficult or pose potential embarrassment to the president. The second category of cases, however, raises difficulties on both prongs of the political question doctrine that *Zivotofsky* left intact. Where there are conflicting views as to how to fight a war or how to characterize an enemy or a U.S. objective, the Constitution commits the discretion to the president, and the president should not be second-guessed by the courts (per *Marbury*).⁵⁴ Situations where the facts are disputed, rapidly evolving, and difficult to characterize, suggest a lack of judicially manageable standards (or, to put it another way, a practical need to defer to the president's assessment of the hostile situation).

IV. ZIVOTOFSKY AND THE HISTORICAL ROLE OF THE COURTS

This section considers whether an expanded role for courts in war powers adjudication is consistent with the Constitution's original meaning and the Constitution's implementation in the early post-ratification era. It finds that *Zivotofsky*'s distinction between interpreting legal texts, on one hand, and second-guessing the exercise of executive discretion, on the other, has strong roots in post-ratification practice and is supported by the Constitution's text.

To begin with the text, the Constitution does not suggest any difference in the courts' role in war powers adjudication (and other foreign affairs-related adjudication) as compared to

⁵³ See *Zivotofsky v. Clinton*, 566 U.S. 189, 200–02 (2012).

⁵⁴ See generally Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004).

ordinary constitutional litigation.⁵⁵ The judiciary's powers and duties with respect to adjudication are conveyed in general terms, without reservation as to war or foreign affairs powers.⁵⁶ The grants of war and military powers to other branches of government are intermingled within the Constitution's text with other grants of—and limits on—governmental powers without singling them out for special nonjusticiability. In contrast, some particular subjects may seem to be textually reserved to other branches. For example, “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members;”⁵⁷ “[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member”;⁵⁸ and “[t]he Senate shall have the sole Power to try all Impeachments.”⁵⁹ But there is no similar language relating to war powers controversies. Further, leading contemporaneous assessments of the text do not indicate any war-related exception to the courts' decisional authority. Most notably, Hamilton's *Federalist* No. 78, setting out the theory of judicial review later substantially adopted by *Marbury v. Madison*, does not refer to non-justiciability of war powers controversies.⁶⁰

Modern assessments of the political question doctrine typically associate its origins with Chief Justice Marshall's opinion in *Marbury*.⁶¹ An examination of *Marbury* and its subsequent applications indicate that *Zivotofsky* is consistent with early practice. *Marbury*'s discussion of the issue was as follows:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used,

⁵⁵ See MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 321–41 (2007).

⁵⁶ See U.S. CONST. art. III.

⁵⁷ *Id.* art. I, § 5, cl. 1.

⁵⁸ *Id.* art. I, § 5, cl. 2.

⁵⁹ *Id.* art. I, § 3, cl. 6.

⁶⁰ See RAMSEY, *supra* note 55, at 330–31.

⁶¹ See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002).

still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.⁶²

Marshall then gave as an example: “The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion.”⁶³ In contrast, he said, once the appointment is made, the president lacks discretion to revoke it (in the case of an officer not removable at will by the president).⁶⁴

One might conclude from this discussion that Marshall’s idea of political questions was tautological: that is, where the president had discretion unbounded by law, courts—whose power is to “say what the law is”⁶⁵—had no role. (This would be the case, for example, in the nomination/appointment illustration Marshall invoked.) But Marshall might also have had in mind situations in which the president exercised discretion bounded by law; for example, where the president made factual assessments or military judgments in support of the president’s constitutional powers. In any event, *Marbury*’s concept of political questions

⁶² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

⁶³ *Id.* at 167.

⁶⁴ *Id.* at 162.

⁶⁵ *Id.* at 177.

arising from executive discretion would not displace the judicial role in interpreting legal texts, even where those texts relate to the extent of executive discretion. As *Zivotofsky* explained, there is a difference between asking whom the Constitution empowers to make a decision and asking whether the correct decision was made.

This distinction runs implicitly through post-*Marbury* cases in the war and foreign affairs areas. *Little v. Barreme*, decided the next year, challenged the legality of the president's order to seize ships sailing to or from French possessions during the naval hostilities with France.⁶⁶ A statute authorized seizure of ships sailing "to"—but not "from"—French possessions; the Court read the statute literally and exclusively, finding the challenged seizure to be unlawful.⁶⁷ The Court did not consider whether the case presented a political question. Similarly, in *Murray v. Schooner Charming Betsy*, the Court considered whether the U.S. Navy's seizure of a ship was authorized by the Non-Intercourse Act; the Court found it was not authorized because the ship was not American-owned (in doing so, giving rise to the "*Charming Betsy* canon" that statutes should, if possible, be construed not to violate international law).⁶⁸ As in *Little*, the Court did not consider whether the issue was a political question. Finally, in *Brown v. United States*, the Court again found a seizure unconstitutional—in that case, the executive branch's seizure of British-owned timber during the War of 1812.⁶⁹ Writing for the Court, Marshall found the seizure unconstitutional because it was not authorized by Congress's declaration of war and therefore it was beyond the president's constitutional powers.⁷⁰ Thus, all three cases found executive branch action in wartime to be illegal without expressing any reservations about justiciability. That view is consistent with *Marbury* because in each case, the question was not whether the president or the executive branch had properly exercised discretion, but whether the president or the executive branch had

⁶⁶ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804).

⁶⁷ *Id.* at 178–79.

⁶⁸ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18 (1804).

⁶⁹ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 150–52 (1814).

⁷⁰ *See id.* at 122–25; *see also* David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7, 40–41 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011). Specifically, *Brown* was an application of the *Charming Betsy* canon: the Court found that international law generally allowed enemy aliens a period after a declaration of war to withdraw their property to avoid confiscation, and that the 1812 declaration of war, because it lacked language to the contrary, should be read not to violate this practice. *Id.*

been granted discretionary power by the Constitution or applicable statutes.

In contrast, the Court did appear to invoke a form of the political question doctrine in its early cases to avoid reviewing executive branch factual determinations or other discretionary determinations, or to avoid making such determinations for itself. In *United States v. Palmer*, for example, the Court refused to assess the legitimacy of a rebellious government in the Spanish colonies.⁷¹ Marshall wrote for the Court:

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

As it is understood that the construction which has been given to the act of congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.⁷²

Similarly, in *Rose v. Himely*, Marshall wrote for the Court: “It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining

⁷¹ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818).

⁷² *Id.*

unaltered”⁷³ Notably, none of these cases involved a question of executive or congressional authority under the Constitution or a statute, and thus they did not involve pure questions of interpretation of legal texts as emphasized in *Zivotofsky*.⁷⁴

The historical litigation most similar to potential modern war powers litigation is *The Prize Cases*, decided in 1863. The issue was whether President Lincoln’s naval blockade of the South during the Civil War was unconstitutional as beyond presidential power.⁷⁵ Despite the wartime setting, the Court decided the case on the merits. As a co-author and I previously described it:

The most immediately striking aspect of the *Prize Cases* is that the Court considered a constitutional challenge to the President’s military actions during wartime and very nearly ruled against the President. And this attention came despite strong arguments by the President’s counsel for judicial abstention (including, apparently, the suggestion that deciding the merits would make the Court “an ally of the enemy”). . . .

But although the Court made a show of deciding the cases on their merits, the majority opinion contained language of substantial deference to the executive. The Court was quite willing to accept the President’s characterization of the situation as war (even though, at the time the blockade was proclaimed, shots had been fired only at a single fort, and no one had been killed by hostile fire). Indeed, [Justice] Grier [in the majority opinion] asserted that the President’s determination on this ground was conclusive on the Court

⁷³ *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272 (1808). For later cases, see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) (“In a controversy between two nations concerning national boundary . . . the Court [must] conform its decisions to the will of the legislature”); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 419–20 (1839) (finding that the executive determination that Falkland Islands were not part of the territory of Buenos Aires was conclusive on the judiciary); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 51 (1852) (finding that executive determination regarding status of Texas after the Texas revolution was conclusive on judiciary); *Doe v. Braden*, 57 U.S. (16 How.) 635, 635 (1854) (holding that whether the King of Spain had authority to annul land grants made to Spanish citizens was not a judicial question); and *Jones v. United States*, 137 U.S. 202, 212 (1890) (“Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments . . . conclusively binds the judges”). See also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1909–15 (2015) (reviewing cases); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 592 (2007) (“[A]n important branch of [the political question] doctrine [in the nineteenth century] operated to identify factual questions on which courts would accept the political branches’ determinations as binding.”).

⁷⁴ See Grove, *supra* note 73, at 1918 n.41 (concluding that “the traditional [political question] doctrine did not encompass constitutional questions (that is, the determination whether a statute or other governmental action complied with the Constitution)”).

⁷⁵ *The Prize Cases*, 67 U.S. (2 Black) 635, 640–41 (1863).

On the other hand, notwithstanding the language of deference, on the crucial question whether the insurrection had progressed to the level of a full-blown civil war the Court also referred to contemporaneous recognition of a state of war by foreign nations, the comparatively amorphous and evolving nature of civil war, the disruption of the courts, and the commonsense obviousness of its conclusion before making the point about deference. Indeed, one could easily argue that the executive deference point . . . was a throwaway claim of little consequence placed late in the opinion.⁷⁶

Thus, while the decision can be read to support varying levels of deference to executive factual determinations, it strongly supports the basic justiciability of war powers claims. To be sure, the decision came long after the immediate post-ratification period, and so may not be strongly indicative of the original view of the courts' role in such controversies. But it indicates that, at least in the nineteenth century, constitutional war powers questions were not regarded as categorically beyond the reach of courts.

V. POLICY

The foregoing discussion suggests that *Zivotofsky* can be applied to war powers litigation to produce a manageable but not excessive role for courts. This section briefly considers whether it should be as a matter of contemporary policy.

To begin, I assume courts—if they reach the merits—might plausibly find significant instances where congressional approval of hostilities is constitutionally required. The most obvious concern is that this conclusion would interfere with national security by preventing necessary U.S. military action. This concern might arise from at least three circumstances: (1) courts might require the president to desist from needed action; (2) the president might not take action after concluding that Congress would not approve or when Congress in fact refuses to approve; and (3) the president might not take action because it appears Congress would not be able to approve in time to make the action meaningful.

As to the first category, the president's most evident recourse in the event of an adverse judicial decision is not to stop hostilities, but to gain Congress's approval. If the military action is truly necessary, Congress can be expected to approve. If

⁷⁶ Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 86–87 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

Congress does not approve, that at least raises the possibility that the action is not necessary (so the president's inability to pursue it would not be a material downside to adjudication). Whether Congress is, in the general case, likely to mis-assess the need for military action seems speculative. The second category involves similar analysis. The president's inability to act due to Congress's actual or anticipated failure to approve is problematic only if one thinks Congress is systematically likely to disapprove military actions the president favors and are needed.⁷⁷ It is not clear that is the case. As to the third category, Congress has shown—for example, in approving the post-9/11 Authorization for the Use of Military Force (“AUMF”)⁷⁸—that it can act relatively quickly. In any event, in the face of a time-sensitive emergency, the president has the option of acting quickly and seeking retroactive approval—a course followed by presidents in various circumstances.⁷⁹

A related concern is that if courts find an ongoing war unconstitutional, it may be difficult and dangerous for the United States to disengage. Of course, Congress can solve the problem by authorizing the war, but suppose Congress does not approve of the war. Arguments for finding a political question in the Vietnam-era cases in part reflect this concern: even if Congress did not approve the war, the war could not be easily discontinued at judicial direction.

This concern, while substantial, may be overstated. First, many conflicts may be relatively easy to discontinue.⁸⁰ Second, even without a broad political question doctrine, courts will have various methods of restraint. For example, the D.C. Circuit in the Vietnam-era litigation found the war's initiation to have been unconstitutional due to lack of congressional authorization, but refused to order any remedy.⁸¹ Third, and perhaps most importantly, if courts begin more active adjudication of war

⁷⁷ For example, in 2013 President Obama considered military action against Syria in response to the Syrian government's use of chemical weapons against rebel forces. However, the U.S. Congress appeared unlikely to approve, and the President decided not to proceed without Congress's approval. See Ramsey, *supra* note 40, at 714–15 (discussing this episode). It is not clear whether this is an example of Congress impeding a needed military action or constraining an unwise one.

⁷⁸ The 2001 AUMF was approved on September 18, 2001, seven days after the 9/11 attack. See Authorization for the Use of Military Force, Pub. Law No. 107–40, 115 Stat. 224 (2001).

⁷⁹ For example, by President Lincoln at the start of the Civil War. See Lee & Ramsey, *supra* note 76, at 53.

⁸⁰ One could easily imagine prompt U.S. disengagement from a conflict such as the 2011 Libya intervention.

⁸¹ Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973).

powers disputes, presidents would be less likely to undertake substantial commitments without Congress's approval. Relatedly, courts can use situations in which they uphold presidential action to establish a framework for when Congress's approval is required. For example, in *The Prize Cases*, decided during the Civil War, the Court upheld the challenged presidential action (imposing a blockade on the South); the majority emphasized that the blockade was a defensive response to hostilities begun by the other side, while noting that the president could not begin offensive hostilities without Congress's approval.⁸² Similarly, the Second Circuit in the Vietnam-era cases found that Congress's approval was required, but that approval had been given.⁸³

A further potential problem with enhanced adjudication is that courts, nervous about the downsides discussed above, might give the president more authority than the Constitution allows, and thus license greater presidential adventurism by giving it formal judicial approval. This concern cannot be entirely discounted, but seems speculative in light of the remedy of subsequent congressional authorization (that is, in most cases, courts would be able to ascribe any bad consequences to Congress's failure to authorize the military action).

On the other hand, some material advantages seem to arise from more aggressive war powers adjudication. First, as discussed above,⁸⁴ a *Zivotofsky*-inspired approach seems most consistent with the judiciary's original constitutional role. *Marbury*—echoing Hamilton's *Federalist* No. 78—called for the judiciary to say what the law is, without exception for cases affecting foreign affairs or cases that might involve embarrassment or multifarious pronouncements.⁸⁵ The expansive *Baker* factors were a modern invention. In the early post-ratification period⁸⁶ (and throughout the nineteenth century⁸⁷) courts adjudicated the legality of military force without invoking political question concerns. It is true, of course, that *Marbury* acknowledged a category of political questions

⁸² *The Prize Cases*, 67 U.S. (2 Black) 635, 668–69 (1863); Lee & Ramsey, *supra* note 76, at 72–78, 85.

⁸³ See, e.g., *DaCosta v. Laird*, 448 F.2d 1368, 1369–70 (2d Cir. 1971).

⁸⁴ See *supra* Part IV.

⁸⁵ See RAMSEY, *supra* note 55, at 321, 329–34.

⁸⁶ See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176–79 (1804); RAMSEY, *supra* note 55, at 332–33 (listing further examples).

⁸⁷ See *The Prize Cases*, 67 U.S. at 668–69; see also *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 115 (1851) (allowing a claim against military officer for seizure of property in Mexico in connection with war effort despite claims of military necessity).

outside judicial competence.⁸⁸ But that category does not extend to matters of constitutional and statutory interpretation.

Second, enhanced judicial involvement would likely provide a greater check on the president. Currently it is largely left to Congress to provide a political check. However, Congress's practical ability to check the president in war powers matters seems open to doubt. Congress may lack the incentives and political will to contest the president in war powers controversies except in extreme circumstances. Although one may debate whether more checks upon the president in war powers are desirable, they seem consistent with the Constitution's original design. Multiple framers argued that the president's excessive tendency to war required congressional involvement in the war-initiation decision.⁸⁹

Third, modern war powers authority suffers from the perception that it lacks a rule of law. That is, with regard to any presidential military action, there is debate in commentary (and sometimes in Congress) whether it is constitutional, often with multiple voices claiming the president is acting illegally.⁹⁰ However, without an authoritative decision maker to resolve these claims, the law remains unsettled and contested. Even if (as was likely true in the Vietnam conflict) the president acts with adequate approval, constitutional questions may cloud his authority. The president (and the country) likely would have benefitted from a clear, prompt judicial ruling that the Vietnam conflict was constitutional.

Finally, the likely result of greater judicial involvement would be greater cooperation between the president and Congress in war powers matters. In many modern conflicts in which congressional approval was not sought, approval likely would have been forthcoming: the president might choose not to seek approval because there might seem no immediate gain from doing so, not because there is a major disagreement between the president and Congress. It seems plausible, for example, that Congress would have approved military strikes in Libya, and it

⁸⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803); *see also* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818) (referring to “questions [that] are generally rather political than legal in their character”); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (finding that the president had constitutional power to protect U.S. citizens abroad, and that whether the use of force was necessary in the particular circumstances was a matter of executive discretion and thus was a “public political question” unreviewable under *Marbury*).

⁸⁹ *See* RAMSEY, *supra* note 55, at 235–37.

⁹⁰ *See, e.g.*, PRAKASH, *supra* note 40.

seems likely Congress would approve continuing military action against the Islamic State. In the long term, the president would be in a stronger position directing a unified rather than a unilateral military action.

VI. POST-*ZIVOTFSKY* WAR POWERS LITIGATION IN THE LOWER COURTS

This section reviews post-*Zivotofsky* war powers litigation in the lower courts, focusing on two leading cases: *Jaber v. United States*⁹¹ and *Smith v. Obama*.⁹² Although both decisions found a political question barrier to the particular dispute, their application of *Zivotofsky* follows the discussion above and confirms the justiciability of some war powers disputes.

In *Jaber*, the plaintiffs' relatives were killed by a U.S. drone strike in Yemen.⁹³ The relatives were not targets of the strike but unfortunately were in the vicinity of al Qaeda members who were targeted. The plaintiffs made various claims under two U.S. statutes, the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA"), that the strike violated international law.⁹⁴ The D.C. Circuit affirmed the district court's dismissal of the claim on political question grounds, with this assessment of *Zivotofsky*:

Zivotofsky confirms no *per se* rule renders a claim nonjusticiable solely because it implicates foreign relations. Rather, it recognizes that, in foreign policy cases, courts must first ascertain if "[t]he federal courts are . . . being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination" or, instead, merely tasked with, for instance, the "familiar judicial exercise" of determining how a statute should be interpreted or whether it is constitutional. In the latter case, the claim is justiciable. Therefore, if the court is called upon to serve as "a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security[.]" then the political question doctrine is implicated, and the court cannot proceed.

Zivotofsky sought only to enforce a statute alleged to directly regulate the Executive, and the reviewing court needed to determine only "if *Zivotofsky's* interpretation of the statute [was] correct, and whether the statute [was] constitutional." The Court was not called upon

⁹¹ 861 F.3d 241 (D.C. Cir. 2017).

⁹² 217 F. Supp. 3d 283 (D.D.C. 2016).

⁹³ *Jaber*, 861 F.3d at 243.

⁹⁴ *Id.* The plaintiffs did not claim that the strike was unconstitutional, presumably because they thought the 2001 AUMF had authorized hostilities against al Qaeda personnel in Yemen.

to impose its own foreign policy judgment on the political branches, only to say whether the congressional statute encroached on the Executive's constitutional authority. This is the wheelhouse of the Judiciary, and accordingly, it does not constitute a nonjusticiable political question. Here, however, Plaintiffs assert claims under the TVPA and the ATS that would require the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target—to determine, among other things, whether “an urgent military purpose or other emergency justified” a particular drone strike. Indeed, Plaintiffs' request is more analogous to an action challenging the Secretary of State's independent refusal to recognize Israel as the rightful sovereign of the city of Jerusalem, a decision clearly committed to executive discretion.⁹⁵

This assessment seems correct and consistent with some justiciability of war powers claims. The key is the court's characterization of the claims as “requir[ing] the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target—to determine, among other things, whether an ‘urgent military purpose or other emergency justified’ a particular drone strike.”⁹⁶ This situation-specific analysis, which does seem to render justiciability problematic even under a broad view of *Zivotofsky*, would not be present in the more typical constitutional dispute over presidential war initiation. Where the question is simply whether the president has independent constitutional authority to act in response to a set of undisputed events, the situation is analogous to the one described by the court as justiciable: where the court is “tasked with, for instance, the ‘familiar judicial exercise’ of determining how a statute should be interpreted or whether it is constitutional.”⁹⁷ In the war powers situation, typically the court would be assessing whether an executive action (rather than a statute) is unconstitutional, but that should not be a material distinction in many cases. As in *Zivotofsky* (and in contrast to *Jaber*), the question for the court would be which branch has decision-making authority under the Constitution, not what decision should be made.

Smith v. Obama involved a service member's constitutional challenge to the president's use of force against the Islamic State in Iraq and Syria.⁹⁸ The central claim was that neither the 2001 AUMF nor the 2002 authorization of the action against Saddam Hussein in Iraq provided congressional authorization for military

⁹⁵ *Id.* at 248–49 (citations omitted).

⁹⁶ *Id.* at 249 (citation omitted).

⁹⁷ *Id.* at 248 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

⁹⁸ See *Smith v. Obama*, 217 F. Supp. 3d 283, 284 (D.D.C. 2016).

action against the Islamic State.⁹⁹ The district court dismissed the claim on political question grounds after a careful assessment of *Zivotofsky*.¹⁰⁰ Acknowledging that not all questions relating to war are nonjusticiable, the court stated:

[T]he Court begins by clarifying the precise questions posed by Plaintiff's claims. Plaintiff's claims are premised on the notion that Congress has not previously authorized the use of force against [the Islamic State]. Defendant disputes this. Resolving this dispute would require the Court to determine whether the legal authorizations for the use of military force relied on by President Obama—the 2001 and 2002 AUMFs—in fact authorize the use of force against [the Islamic State]. With regard to the 2001 AUMF, the Court would have to determine whether the President is correct that [the Islamic State] is among “those nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,” and that Operation Inherent Resolve represents “necessary and appropriate force” against that group. With regard to the 2002 AUMF, the Court would have to determine whether the President is correct that operations against [the Islamic State] are “necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.” For the reasons set out below, the Court finds that these are political questions under the first two *Baker* factors: the issues raised are primarily ones committed to the political branches of government, and the Court lacks judicially manageable standards, and is otherwise ill-equipped, to resolve them.¹⁰¹

The court then elaborated:

Plaintiff's attempts to analogize his case to *Zivotofsky* are strained. Although, as in *Zivotofsky*, statutes are *involved* in this case—in particular, the War Powers Resolution, the 2001 AUMF and the 2002 AUMF—this case does not present nearly the same fundamental legal issues as were at issue in *Zivotofsky*. The questions posed in this case go significantly beyond interpreting statutes and determining whether

⁹⁹ See Charlie Savage, *An Army Captain Takes Obama to Court Over ISIS Fight*, N.Y. TIMES (May 4, 2016), <https://www.nytimes.com/2016/05/05/us/islamic-state-war-powers-lawsuit-obama.html?mcubz=0>; Bruce Ackerman, *Is America's War on ISIS Illegal?*, N.Y. TIMES (May 4, 2016), <https://www.nytimes.com/2016/05/05/opinion/is-americas-war-on-isis-illegal.html?mcubz=0>. The statutes, rather than independent presidential power, were the president's principal bases for authority to take military action against the Islamic State. See Ramsey, *supra* note 40, at 710–11.

¹⁰⁰ See *Smith*, 217 F. Supp. 3d at 297. The court also found that Smith lacked standing as an independent ground for dismissal. *Id.* at 285. The case is currently on appeal to the Court of Appeals for the D.C. Circuit, where the standing issue has taken a central role after the plaintiff's departure from active service in the military. See Brief for Appellee at 17–25, *Smith v. Obama* (No. 16-5377), <https://www.scribd.com/document/351181196/DOJ-Response-to-Nathan-Michael-Smith-Appeal> [<http://perma.cc/3G5S-LSDK>].

¹⁰¹ *Smith*, 217 F. Supp. 3d at 298 (citations omitted).

they are constitutional. Plaintiff asks the Court to second-guess the Executive's *application* of these statutes to specific facts on the ground in an ongoing combat mission halfway around the world. For example, the Court is not asked simply to "interpret" the 2001 AUMF, or to determine its constitutionality. It is asked to determine whether the President is correct that [the Islamic State], as it exists today, is an appropriate target under that resolution based on the nature and extent of [the Islamic State]'s relationship and connections with the terrorist organization that the President has determined was responsible for the September 11, 2001 attacks. The Court would also have to go further than simply "interpreting" the 2002 AUMF. It would have to determine whether the President is correct that the ongoing military action against [the Islamic State] is in fact "necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."

The reality, then, is more nuanced than Plaintiff suggests. Plaintiff's claims raise mixed questions of both discretionary military judgment *and* statutory interpretation. The Court does not read *Zivotofsky* as foreclosing the application of the political question doctrine under this scenario.¹⁰²

Again, the court's emphasis is on the claim involving "mixed questions of both discretionary military judgment *and* statutory interpretation."¹⁰³ As discussed above, one can imagine many situations in which war-initiation disputes are such mixed questions; but one can also imagine many situations in which such disputes are *not* mixed questions and involve only questions of constitutional interpretation. Consistent with *Zivotofsky*, the *Smith* court's analysis suggests that the latter disputes might be justiciable.

The court then focused on the key *Zivotofsky* factors: textual commitment and judicially manageable standards:

First, certain aspects of the questions posed by this case are indisputably and completely committed to the political branches of government. Both the 2001 and 2002 AUMFs authorize only that force that the President determines is "necessary and appropriate." The necessity and appropriateness of military action is precisely the type of discretionary military determination that is committed to the political branches and which the Court has no judicially manageable standards to adjudicate.

Second, . . . [b]ased on the pleadings thus far alone, the Court can easily discern that this case raises factual questions that are not of a type the Court is equipped to handle with traditional judicially

¹⁰² *Id.* at 299–300 (citations omitted).

¹⁰³ *Id.* at 300.

manageable standards. The President and Department of Defense officials apparently believe that [the Islamic State] is connected with al Qaeda and that, despite public rifts, some allegiances between the groups persist and [the Islamic State] continues to pursue the same mission today as it did before allegedly splintering from al Qaeda. Plaintiff disputes these factual assertions, relying on an affidavit from scholars of Islamic Law that argue that as of today, the groups are in fact sufficiently distinct, and potentially even antagonistic, that they can no longer be viewed as the same terrorist organization. Resolving this dispute would require inquiries into sensitive military determinations, presumably made based on intelligence collected on the ground in a live theatre of combat, and potentially changing and developing on an ongoing basis. *See Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 45 (D.D.C. 2010) (“The difficulty that U.S. courts would encounter if they were tasked with ‘ascertaining the ‘facts’ of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question [posed] is a ‘political’ one.”) (quoting *DaCosta v. Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973)).¹⁰⁴

Thus, if a war powers claim did not involve such factual determinations (and some plausibly might not), this reasoning suggests that the claim would be justiciable.¹⁰⁵ As a result, the

¹⁰⁴ *Id.* at 300–01 (some citations omitted).

¹⁰⁵ The court added a further consideration that might pose a broader barrier to war powers litigation, but that also seems unsupported by either *Zivotofsky* or the Constitution:

Finally, an additional factor makes judicial intervention particularly inappropriate on the specific facts of this case. Unlike the situation presented in *Zivotofsky*, the Court in this case is not presented with a dispute between the two political branches regarding the challenged action. In fact, Congress has repeatedly provided funding for the effort against [the Islamic State]. For example, on November 10, 2014, President Obama sent a letter to the Speaker of the House of Representatives requesting that Congress consider proposed amendments to the 2015 Budget to provide funding for Operation Inherent Resolve. The letter explained that “[t]hese amendments would provide \$5.6 billion for OCO activities to degrade and ultimately defeat the Islamic State of Iraq and the Levant (ISIL)—including military operations as part of Operation Inherent Resolve.” President Obama also attached a letter from the Director of the Office of Management and Budget, which explained in some detail the military operations that the additional budget would be used to fund. In December 2014, Congress passed the Consolidated and Further Continuing Appropriations Acts of 2015, in which it appropriated the funds the President had sought. . . .

The Congressional budget activity cited above by Defendant, and relied on by the Court, demonstrates that the Court can discern no impasse or conflict between the political branches on the question of whether [the Islamic State] is an appropriate target under the AUMFs cited by the President as authority for Operation Inherent Resolve.

This lack of conflict is relevant to the *justiciability* of Plaintiff’s claims under the political question doctrine because judicial intervention into military affairs is particularly inappropriate when the two political branches to whom

leading post-*Zivotofsky* war powers cases indicate that not all war powers questions are political questions even though some of them are.

CONCLUSION

In sum, a post-*Zivotofsky* analysis in separation of powers cases implies a distinction between, on the one hand, cases that involve legal interpretation, resting on traditional textual and historical materials, and on the other hand, cases that involve disputed facts, policies or characterizations. Applied to war powers litigation, this distinction seems both manageable and useful; it suggests that some war powers disputes are justiciable while others are not. More generally, the viability of *Zivotofsky*-inspired analysis in the especially difficult area of war powers suggests its broad potential for lasting influence in separation of powers and foreign affairs disputes.

war-making powers are committed are not in dispute as to the military action at issue.

Id. at 301–02 (footnotes and citations omitted). For this conclusion, the court cited only pre-*Zivotofsky* cases and Justice Sotomayor’s concurrence in *Zivotofsky*. *Id.* at 302–03. Although it is true that *Zivotofsky* involved a conflict between Congress and the president, the majority opinion did not suggest that such a conflict was essential to its finding of justiciability (and no other Justice joined Justice Sotomayor’s suggestion that it should be). Further, as the Court has emphasized elsewhere, the structural provisions of the Constitution exist not merely to protect the powers of particular branches of government, but principally to protect individual liberty by assuring checked and divided powers among all the branches. See *Bond v. United States*, 564 U.S. 211, 223 (2011).

Franklin Roosevelt and Presidential Power

*John Yoo**

Along with George Washington and Abraham Lincoln, Franklin D. Roosevelt is considered by most scholars to be one of our nation's greatest presidents. FDR confronted challenges simultaneously that his predecessors had faced individually. Washington guided the nation's founding when doubts arose as to whether Americans could establish an effective government. FDR radically re-engineered the government into the modern administrative state when Americans doubted whether their government could provide them with economic security. Lincoln saved the country from the greatest threat to its national security, leading it through a war that cost more American lives than any other. FDR led a reluctant nation against perhaps its most dangerous foreign foe—an alliance of fascist powers that threatened to place Europe and Asia under totalitarian dictatorships. To bring the nation through both crises, FDR drew deeply upon the reservoir of executive power unlike any president before or since—reflected in his unique status as the only chief executive to break the two-term tradition.¹

* Emanuel S. Heller Professor of Law; Visiting Scholar, American Enterprise Institute. Thanks to Jeffrey Senning for outstanding research assistance.

¹ There are a great number of works on Roosevelt, with more appearing all the time. I have relied on general works for the background to this chapter. *See generally* JOHN YOO & JULIAN KU, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* (2012); CONRAD BACK, *FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM* (2003); 1 JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX 1882–1940* (1956); JAMES MACGREGOR BURNS, *ROOSEVELT: SOLDIER OF FREEDOM* (1970); KENNETH S. DAVIS, *FDR: THE BECKONING OF DESTINY 1882–1928* (2004); FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* (1991); GEORGE MCJIMSEY, *THE PRESIDENCY OF FRANKLIN DELANO ROOSEVELT* (2000); 1 ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER 1919–1933* (1957); ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 1933–1935* (1958); 3 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* (1960); GEOFFREY C. WARD, *A FIRST-CLASS TEMPERAMENT: THE EMERGENCE OF FRANKLIN ROOSEVELT* (1989). Similarly, there are a multitude of works on the New Deal. Some that have been particularly helpful are ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, & THE GREAT DEPRESSION* (1983); ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1996); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945* (1999); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940* (1963); SIDNEY M. MILKIS, *THE PRESIDENT AND THE*

FDR came to office in the midst of the gravest challenges to the nation since the Civil War. The most obvious and immediate crisis was the Great Depression. FDR placed the president in the role of a legislative leader and produced a dramatic restructuring of the national government, even though the Depression, as a breakdown of the domestic (and global) economy, fell within the constitutional authority of Congress. Large Democratic majorities in Congress expanded federal regulation of the economy beyond anything before seen in peacetime. Regulation of prices and supply, product quality, wages and working conditions, the securities markets, and pensions became commonplace where they had once been rare. Social Security was not just one of the New Deal's most important planks, but an expression of the whole platform.

The federal government would declare responsibility to coordinate and regulate economic activity to provide stability. It had always exercised broad economic powers during wartime, but FDR made management of the economy by a bureaucracy of experts a permanent feature of American life. While the Republican presidents who had dominated elections since the Civil War had left economic decisions to the market, FDR pushed the federal government to provide for economic as well as national security.

FDR's revolution radically shifted the balance of power among the three branches of government, as well as between the nation and the states. Under the New Deal, Congress delegated to the executive branch the discretion to make the many decisions necessary to regulate the economy. Congress did not have the time, organization, or expertise to make the minute decisions required. The New Deal did not just produce a federal government of broad power—it gave birth to a president whose influence over domestic affairs would expand to match his role in foreign affairs. When the Supreme Court stood in the way of the new administrative state, FDR launched a campaign to increase the membership of the Court to change the meaning of the Constitution. When political parties challenged the New Deal, FDR concentrated power in the executive branch, which undermined their ability to channel benefits to their members. The New Deal produced a presidency that was more institutionally independent of Congress and more politically free of the parties than ever before.²

PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL (1993); and G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

² See, e.g., MILKIS, *supra* note 1, at 98–124; THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1985).

The Great Depression spawned foreign threats, too. Economic instability in Europe set the conditions for the rise of fascism first in Italy, then in Germany and Japan. Roosevelt realized early that American interests would be best served by supporting the democracies against the Axis powers, but he was confronted by a nation wary of another foreign war and a Congress determined to impose strict neutrality. FDR used every last inch of presidential power to bring the nation into the war on the side of the Allies, including secretly coordinating military activities with Britain, attempting to force an incident with Germany in the North Atlantic, and pressuring Japan until it lashed out in the Pacific. FDR's steady leadership in the face of stiff congressional resistance stands as one of the greatest examples of presidential leadership in the last century, one that redounded to the benefit of the United States and the free world.

This Article will review FDR's approach to executive power by examining three dimensions of his presidency: domestic policy, foreign policy, and civil liberties in wartime. First, it will examine FDR's expansion of presidential power by leading Congress, in the throes of the Great Depression, to create a vast administrative state. He followed with a claim of presidential independence in interpreting the Constitution, which he enforced with a Court-packing plan that eventually forced the Justices to agree. As the administrative state grew in leaps and bounds, FDR expanded the power of the White House in a failing effort to maintain centralized, rational control of the bureaucracy. Second, it will examine FDR's aggressive use of executive authority to face the rise of Imperial Japan and Nazi Germany. FDR stretched existing laws barring U.S. involvement in World War II to the breaking point, and then went even further with claims of sole executive power to assist the Allies. Third, this Article will examine FDR's attitude toward civil liberties in wartime by focusing on three decisions: the use of military commissions to try Nazi saboteurs, the internment of Japanese-American citizens, and the widespread interception of electronic communications.

FDR had a vision of the office in keeping with his great predecessors, Washington and Jefferson. He took full advantage of the independence of the presidency and vigorously exercised its constitutional authorities. In order to respond to crises, both in peace and war, he contested the Constitution's meaning with the other branches of government. He challenged the Supreme Court's effort to stop the New Deal with his Court-packing plan. To meet the rise of Germany and Japan, he relied on a robust reading of the Commander-in-Chief power—even if it meant ignoring the Neutrality Acts—to bring the United States into the

war. FDR understood Berlin and Tokyo's existential threat. He would set the example for the Cold War presidents to follow in both managing the vast regulatory state at home and meeting the challenges of dire threats abroad.

I. THE NEW DEAL AND THE COURTS

FDR entered office in the midst of the worst economic contraction in American history. Between the summer of 1929 and the spring of 1933, nominal gross national product dropped by fifty percent.³ Prices for all goods fell by about a third; income from agriculture collapsed from \$6 billion to \$2 billion; industrial production declined by thirty-seven percent;⁴ and business investment plummeted from \$24 billion to \$3 billion. About one-quarter of the workforce, thirteen million Americans, remained consistently unemployed, and the unemployment rate would remain above fifteen percent for the rest of the decade.⁵ More than 5000 banks failed, with a loss of \$7 billion in deposits.⁶ From the time of the crash in October 1929 to its low in July 1932, the Dow Jones Industrial Average fell more than seventy-five percent.⁷ It was not a problem caused by famine or drought, dwindling natural resources, or crippled production; crops spoiled and livestock were destroyed because market prices were too low.

Americans were losing faith in their political institutions to solve the crisis. Though the causes of the Depression were complex, some (FDR included) blamed "economic royalists," financiers and speculators, and the rich. Economists and historians have argued ever since over the causes of the Depression. Little evidence seems to support the claim that the stock market crash triggered the Depression—stock markets have sharply declined since then, most recently in 1987, with no underlying change in economic growth.

³ See MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 1867–1960, at 299–301 (1963).

⁴ *Id.* at 301.

⁵ *Id.*

⁶ *Id.* at 317, 330.

⁷ To understand the economics of the Great Depression and the New Deal, see 1 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE, 1913–1951 (2003); Peter Temin, *The Great Depression*, in 3 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 301 (Stanley Engerman & Robert Gallman, eds., 2000); THOMAS E. HALL & J. DAVID FERGUSON, THE GREAT DEPRESSION: AN INTERNATIONAL DISASTER OF PERVERSE ECONOMIC POLICIES (1998); RICHARD K. VEDDER & LOWELL E. GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA (N.Y. Univ. Press rev. ed. 1997); BARRY EICHENGREEN, GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919–1939 (1995); and FRIEDMAN & SCHWARTZ, *supra* note 3, at 299–301. JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929 (2d ed. 1988), remains a classic treatment, but one that has been surpassed by more recent work.

In their classic *Monetary History of the United States*, Milton Friedman and Anna Schwartz argued that a normal recession deepened into the Great Depression because the Federal Reserve mistakenly responded to the banking panic by restricting the money supply.⁸ A deflation in prices followed, which led to a steep drop in economic activity. Ben Bernanke, the current Chairman of the Federal Reserve, elaborated on this theme by arguing that the Fed's deflationary banking policies tightened the credit available to businesses and households, further suppressing economic activity.⁹ Others argue that the Great Depression must be understood within the context of the international economy, which witnessed bank failures and recession in Germany and France, defaults on World War I loan and reparation payments, abandonment of the gold standard, and the dumping of agricultural products on world markets.

While our understanding of the Great Depression has improved thanks to the scholarship of the last forty years, a clear consensus of its causes has yet to emerge. Unsurprisingly then, to the Americans who lived through it, the collapse of the economy was bewildering, confusing, and without precedent. The Hoover administration's policies did not help and might have made matters even worse. As historians have realized, Hoover did not adopt the aloof, hands-off attitude that his political opponents charged. During his administration, Congress doubled public works spending, and the federal budget deficit rose to \$2.7 billion, at that time the largest in American peacetime history. He pressed business executives to maintain employment and wages, and experimented with policies, such as the Reconstruction Finance Corporation's emergency loans to businesses, which would set important examples for the New Dealers.¹⁰

But Hoover's initiatives were mere stopgaps that were swamped by other policy mistakes. Though he had initially asked for tariff reductions, Hoover signed the notorious Smoot-Hawley Act, which raised rates and killed international trade flows. Following the conventional economic wisdom of the day, Hoover sought to balance the budget with tax increases at a time when the economy needed fiscal stimulus. As Milton Friedman and Allan Meltzer have separately argued, the Federal Reserve pursued a deflationary strategy, cutting off the economy's oxygen, when increases in the money supply were called for.¹¹

⁸ FRIEDMAN & SCHWARTZ, *supra* note 3, at 240–42.

⁹ BEN S. BERNANKE, *ESSAYS ON THE GREAT DEPRESSION* 51 (2000).

¹⁰ KENNEDY, *supra* note 1, at 164–65.

¹¹ See FRIEDMAN & SCHWARTZ, *supra* note 3, at 299–301; MELTZER, *supra* note 7, at 271.

Some of Hoover's failure stems from his vision of the presidency. As president, he refused to assume the role of legislative leader, resisted the expansion of the federal agencies, and opposed national welfare legislation—all on constitutional grounds.¹² FDR's vision of the office could not have created a sharper contrast. FDR led the nation through a frenzy of experimentation in policies and government structure without parallel in American history. There appeared to be no comprehensive philosophy behind the New Deal, which comes as little surprise, given the confusion that prevailed at the time over the causes of the Depression.

Without any true understanding of the reasons for the collapse, the New Dealers tried anything and everything. Thinking that overproduction was the culprit, some recommended the cartelization of industries to reduce supply and increase prices. Others who blamed under-consumption advocated public jobs programs and welfare relief. Some believed that the budget deficit was the problem, and urged an increase in taxes and cuts in spending. Some thought international trade was a cause, and advocated both more flexibility in trade negotiations and the dumping of excess agricultural production overseas. Pragmatic and political (he had been a professional politician for most of his life), and unsure about the true causes of the Depression, Roosevelt flittered from idea to idea. Some had the effect of canceling each other out—public works projects sponsored by the National Recovery Administration had to buy raw materials at prices inflated by controls imposed by the Department of Agriculture.

Throughout all the experimentation and expansion of government, the one thing that did not change was the focus on the presidency. FDR became the father of the modern presidency by moving the chief executive to the center of the American political universe. FDR drafted the executive's wartime powers into peacetime service, but without calling for any formal change in the Constitution. In his First Inaugural Address, he declared that "our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."¹³ What FDR wanted was access to the constitutional powers granted to the president during time of emergency. He promised

¹² Ellis W. Hawley, *The Constitution of the Hoover and Franklin Roosevelt Presidency During the Depression Era, 1930–1939*, in *THE CONSTITUTION AND THE AMERICAN PRESIDENCY* 83, 90–91 (Martin Fausold & Alan Shank eds., 1991).

¹³ 2 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 15 (Samuel I. Rosenman ed., 1938).

to seek from Congress “broad executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe.”¹⁴ FDR’s expansion of the powers of the presidency, both political and constitutional, would grow from this basic theme—the economy and society would henceforth be regulated in ways that were once considered suitable only for war.

The nation got a taste of what FDR meant when, on his second day in office, he issued the second emergency proclamation in American history. During the period between FDR’s election and his inauguration, a massive run on banks had forced many to close their doors or stop lending. Invoking the Trading with the Enemy Act,¹⁵ FDR imposed a national banking holiday and prohibited all gold transactions.¹⁶ Roosevelt’s use of the Act was questionable, to say the least. Congress had passed the Act in 1917 to give the president broad economic powers during wartime or national emergency, but not to regulate the domestic economy in the absence of a foreign threat. Without the statute, FDR was left to act under an unspecified presidential emergency power. At the end of the banking moratorium, Congress convened in special session and passed the Emergency Banking Act, which gave the federal government powers to control gold and currency transactions, to own stock in banks, and to regulate the re-opening of the banks.¹⁷ Because the Roosevelt administration had only finished drafting the legislation the night before, a rolled-up newspaper substituted as a prop for an actual copy of the bill’s text, and the House spent only thirty minutes discussing the legislation.

Roosevelt set a precedent for his successors by rushing a torrent of legislation through Congress in his first 100 days. The National Industrial Recovery Act (“NRA”), the Agricultural Adjustment Act (“AAA”), the Emergency Banking Act, the Emergency Railroad Transportation Act (“ERTA”), and the Home Owners Loan Act (“HOLA”) all granted FDR extraordinary economic powers to fight the Depression. Their enactment signaled the breakdown of the previously sharp distinction between the executive and legislative branches. The executive branch took the primary responsibility for drafting bills, Congress passed them quickly with minimum deliberation

¹⁴ *Id.*

¹⁵ Trading with the Enemy Act of 1917, 50 U.S.C. §5 (2000).

¹⁶ Robert Jabaily, *Bank Holiday of 1933*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/bank_holiday_of_1933 [<http://perma.cc/PQN4-UDFU>].

¹⁷ Emergency Banking Relief Act of 1933, Pub. L. 1, 48 Stat. 1.

(sometimes sight unseen), and the laws themselves delegated broad authority to the president or the administrative agencies.¹⁸

Through the agencies, the executive branch would impose an unprecedented level of centralized planning over the peacetime economy. The AAA, for example, gave the executive the power to dictate which crops were to be planted.¹⁹ Under the NRA, agencies enacted industry-wide codes of conduct, usually drafted by the industries themselves, to govern production and employment.²⁰ New Dealers sought to address falling prices for commodities by setting higher prices, reducing competition, and limiting production.²¹

Little attention was given to constitutional problems with the legislation, which threatened to exceed the Supreme Court's limitations on federal power. Laws like the NRA or the AAA pressed the Constitution's grant of authority to Congress to make laws "to regulate Commerce . . . among the several States."²² Other laws, such as the new public employment and unemployment relief programs, raised constitutional issues about the national government's taxing and spending authority, but again these were only problems of federalism, not of presidential power. They mirrored the steps that the national government had taken to mobilize the economy for military production while reducing domestic consumption—many of the early programs of the New Deal were modeled on World War I efforts. As William Leuchtenburg has observed, war became a metaphor for the calamity brought on by the Depression, and FDR and his advisers turned to their wartime experience for solutions.²³ "Almost every New Deal act or agency derived, to some extent, from the experience of World War I."²⁴

FDR's legislative whirlwind set in motion a series of events that culminated in confrontation with the Supreme Court. Even though the President would suffer politically and constitutionally, he would eventually prevail. The roots of the conflict stretched back to the Progressive Era, when the Justices held that the Interstate Commerce Clause did not allow regulation of manufacturing or agriculture within a state. Under the theory of dual federalism, the Court blocked antitrust

¹⁸ HAWLEY, *supra* note 12, at 92.

¹⁹ Agricultural Adjustment Act of 1933, 7 U.S.C. ch. 26, § 601 *et seq.*

²⁰ HALL & FERGUSON, *supra* note 7, at 124.

²¹ *Id.* at 124–26.

²² U.S. CONST. art. 1, § 8, cl. 3.

²³ WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY* 41–53 (1995).

²⁴ *Id.* at 53.

enforcement against a sugar-refining monopoly in 1895 because the refining itself did not cross interstate lines.²⁵ In 1918, it held unconstitutional a federal law that prohibited the interstate transportation of goods made with child labor.²⁶ Even though the federal ban applied only when the product moved across state lines, the Court held that “the production of articles, intended for interstate commerce, is a matter of local regulation.”²⁷ When Congress attacked child labor again with a ten percent excise tax, the Court blocked that too, on the ground that Congress could not use a tax to achieve a prohibited end.²⁸

The Court matched its limits on federal authority to regulate the economy with similar restrictions on the states. Where Congress could only exercise the powers carefully enumerated in Article I, states enjoyed a general “police power” over all conduct within their borders. The courts, however, read the Fourteenth Amendment—which forbids states from depriving individuals of life, liberty, or property without due process²⁹—to block a great deal of state business regulation. In *Lochner v. New York*, the Court struck down a state law that prohibited bakers from working more than sixty hours a week or ten hours per day.³⁰ According to the majority, the Constitution protected the bakers’ individual right to contract to work as much as they liked.³¹ The state could not adopt economic legislation to redistribute income within the industry (the law favored established bakeries at the expense of immigrant bakers), or infringe the rights of free labor.³² In dissent, Justice Oliver Wendell Holmes famously accused the majority of following its preferences rather than the law.³³ “[A] Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*,” Holmes memorably wrote.³⁴ “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”³⁵ From the time of *Lochner* to the New Deal, the Court invalidated 184 state laws governing working hours and wages, organized labor, commodity prices, and entry into business.³⁶

²⁵ See *United States v. E.C. Knight*, 156 U.S. 1, 17–18 (1895).

²⁶ See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

²⁷ *Id.* at 272, 276.

²⁸ See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 35–36, 43–44 (1922).

²⁹ U.S. CONST. amend. XIV, § 1.

³⁰ *Lochner v. New York*, 198 U.S. 45, 64 (1905).

³¹ *Id.* at 64.

³² *Id.* at 62.

³³ *Id.* at 75 (Holmes, J., dissenting).

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 271, 311 (1932) (striking down a state legislative bar requiring a demonstration of necessity for licensing and

Legislation enacted during FDR's first 100 days in office virtually dared the Justices to block the New Deal. The NRA did not just attempt to ban a single product or manufacturing process—it placed all industrial production in the nation under federal regulation. The AAA did the same with agriculture, and another law with coal mining. Laws passed later in FDR's term, such as the National Labor Relations Act and the Public Utility Holding Company Act, set nationwide rules on unions and utilities, while the Social Security Act created a universal system of unemployment compensation and old age pension.³⁷

FDR was following in the footsteps of presidents who dared to interpret the Constitution at odds with the other branches. FDR himself appeared to have held few constitutional doubts. New Deal theorists believed, for example, that the Interstate Commerce Clause pertained to almost all economic activity in the nation because all goods manufactured or grown within a state traveled through the channels of interstate commerce to reach the market.³⁸ While the federal government might usually defer to the states on many matters, the Depression was so grave that the states were powerless to control a nationwide problem.

Roosevelt recognized early on that his program risked antagonizing the federal courts, which were filled with Republican judges.³⁹ He could count on the opposition of Justices James McReynolds, Willis Van Devanter, George Sutherland, and Pierce Butler, known as “The Four Horsemen,”⁴⁰ for their skepticism toward government regulation of the economy and their defense of individual economic rights. But FDR believed he could expect the general support of progressives Justices Louis Brandeis, Harlan Fiske Stone, and Benjamin Cardozo. Chief Justice Charles Evans Hughes and Justice Owen Roberts held the swing votes. FDR hoped that the Court would grant the political branches more constitutional leeway to respond to the

business entry); *Williams v. Standard Oil Co.*, 278 U.S. 235, 239 (1929) (finding legislature may not authorize state agencies to set gasoline prices sold in the state); *Adkins v. Children's Hospital*, 261 U.S. 525, 560 (1923) (finding state mandated minimum wages, for women and children, interfered with an individual's constitutional liberty to contract); *Adair v. United States*, 208 U.S. 161, 180 (1908) (holding a federal labor law prohibiting employee termination or discrimination based on labor organization membership unconstitutional); JESSE H. CHOPER, ET AL., *CONSTITUTIONAL LAW – CASES, COMMENTS, QUESTIONS* 292 (9th ed. 2001).

³⁷ National Labor Relations Act, 29 U.S.C. §§ 151–69 (1935); Public Utility Holding Company Act, 15 U.S.C. § 79 (1935); Social Security Act, 42 U.S.C. § 7 (1935).

³⁸ Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 683 (1946).

³⁹ WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 83–84 (1995).

⁴⁰ *Id.* at 3.

national crisis of the Great Depression. In previous national security emergencies, the courts had allowed the federal government to mobilize the economy with little objection. FDR had reason for these hopes in early 1934, after 5–4 majorities of the Court upheld state laws setting milk prices and delaying mortgage payments.⁴¹

Those hopes were dashed with the opening of the Court's business in January 1935. In its first case examining a New Deal law, an 8–1 majority of the Court invalidated the NRA's "hot oil" provision, which allowed the executive branch to prohibit the interstate transportation of petroleum produced in violation of quotas.⁴² Chief Justice Hughes wrote that the provision unconstitutionally delegated legislative power to the president.⁴³ That decision was only a preview to May 27, 1935—known as "Black Monday" to New Dealers⁴⁴—when the Court struck down three New Deal laws. The centerpiece was the Court's unanimous rejection of the NRA in the "Sick Chicken" case, *A.L.A. Schechter Poultry v. United States*, in which the owners of a chicken slaughterhouse were prosecuted for violating industrial codes of conduct.⁴⁵

In finding the NRA unconstitutional, the Justices threatened the two core features of the New Deal. *Schechter Poultry* held that the Constitution prohibited Congress from delegating legislative power to the president, especially when rulemaking authority was then sub-delegated to private industry groups.⁴⁶ The NRA also violated the Constitution's limits on the reach of federal economic power.⁴⁷ The owners of the slaughterhouse sold their chickens into a local market, which did not directly impact interstate commerce, even though a high percentage of chickens came from out of state. If the Court were to keep to its precedent that intra-state manufacturing and agriculture lay outside federal authority, more pillars of the New Deal—perhaps even the whole program itself—might collapse. In pointed language, the Court specifically rejected the Roosevelt administration's overarching approach to the Great Depression: "Extraordinary conditions do not create or enlarge constitutional power."⁴⁸

⁴¹ See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425–28 (1934); see also *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

⁴² *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 405, 433 (1935).

⁴³ *Id.* at 431–33.

⁴⁴ LEUCHTENBURG, *supra* note 39, at 89.

⁴⁵ *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 508 (1935).

⁴⁶ *Id.* at 550.

⁴⁷ *Id.*

⁴⁸ *Id.* at 528.

FDR responded with a political attack on the Court. In a ninety-minute press conference, the President declared *Schechter Poultry* to be the most significant judicial decision since *Dred Scott*.⁴⁹ While critical of the Court's ruling on executive power, he believed that those problems could be fixed by re-writing the statutes to give more direction and less delegation.⁵⁰ It was *Schechter's* narrow view of the Commerce Clause that posed the real threat to the New Deal. If Congress could not regulate the activities of the butchers because they were local in nature, it would be unable to police most other manufacturing or agricultural enterprises. "The whole tendency over these years has been to view the interstate commerce clause in the light of present-day civilization," Roosevelt told the press. "We are interdependent—we are tied together."⁵¹ To Roosevelt, the Justices' way of thinking failed to take account of the national character of the economy. "We have been relegated to a horse-and-buggy definition of interstate commerce."⁵²

FDR considered a variety of proposals if the Court were to continue ruling against the New Deal: increasing the number of Justices (giving the president enough new appointments to change the balance on the Court), reducing the Court's jurisdiction, or requiring a supermajority of Justices to declare a federal law unconstitutional. He rejected them all as premature, but he had been prepared to respond to a potential rejection of the prohibition on gold transactions with a declaration of a national emergency, a fixed price for gold, and an attack on the Court for "imperil[ing] the economic and political security of this nation."⁵³ But the Court upheld the gold regulations, causing Roosevelt to shelve his plans.⁵⁴

The administration continued to work with Congress to expand federal intervention in the economy. Known as the Second New Deal, these laws went beyond the simple, sweeping delegations of authority to the president in the NRA or the AAA. New laws such as the National Labor Relations Act and the Social Security Act created specialized bureaucracies to handle discrete areas of economic regulation. While the First New Deal vested the president with emergency powers to handle the Depression, the Second New Deal of 1935–1936 promised

⁴⁹ THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 13, at 221.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 351–54 (1966).

⁵⁴ See *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 316 (1935).

permanent government intervention in the economy. One of FDR's political achievements was to transform the social contract so that government benefits became understood as rights—rights just as real to many Americans as those in the Constitution itself. But they did nothing to avoid the constitutional problems of the First New Deal: Their very success depended on their ability to regulate all economic activity, rather than just trade that crossed interstate borders.

The Court, however, stuck to its guns. Rather than cower before this second outburst of lawmaking, in the spring of 1936, it declared unconstitutional more elements of the New Deal. In *United States v. Butler*, the Court held unconstitutional the AAA's use of taxes and grants to regulate agricultural production, which lay within the reserved powers of the states.⁵⁵ *Butler* threatened the Social Security Act, which used a combination of taxes and spending to provide relief and pensions to the unemployed and elderly.

In *Carter v. Carter Coal Co.*, a 5–4 majority struck down a 1935 law that set prices, wages, hours, and collective bargaining rules for the coal industry.⁵⁶ The Court found that the production of coal did not amount to interstate commerce, but instead fell within the reserved powers of the states.⁵⁷ “[T]he effect of the labor provisions . . . primarily falls upon production and not upon commerce,” Justice Sutherland wrote for the majority.⁵⁸ “Production is a purely local activity.”⁵⁹ *Carter* made clear that the sick chicken case was not a fluke; any federal regulation of intra-state industrial production or agriculture was now in constitutional doubt. In *Jones v. SEC*, the Justices attacked the proceedings of the Securities and Exchange Commission as “odious” and “pernicious” and compared it to the “intolerable abuses of the Star Chamber.”⁶⁰ *Morehead v. Tipaldo* held that New York's minimum wage law violated the Due Process Clause, just as it had earlier found that such laws interfered with the right to contract.⁶¹ As the Court had already found a federal minimum wage in the District of Columbia unconstitutional in the 1920s, it had made the regulation of wages, in FDR's words, a “no-man's land” forbidden to both the federal and state governments.

⁵⁵ *United States v. Butler*, 297 U.S. 1, 78 (1936).

⁵⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 316–17 (1936).

⁵⁷ *Id.* at 303.

⁵⁸ *Id.* at 304.

⁵⁹ *Id.*

⁶⁰ *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1, 27–28 (1936).

⁶¹ *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587, 618 (1936).

In the space of just two years, the Court had ripped apart the central features of the First New Deal and was promising the same for the Second. Roosevelt stopped discussing the Court's decisions publicly and did not make any proposals about the Court during his re-election campaign. He attacked business and the rich as "economic royalists" and the "privileged princes of these new economic dynasties."⁶² Roosevelt proposed a new economic order that would provide stability and security through new forms of government-provided rights. FDR reconceived rights from the negative—preventing the state from intruding on an individual liberty—to the positive—a minimum wage, the right to organize, national working standards, and old-age pensions. Running against the lackluster Republican Alf Landon, FDR secured one of the great electoral victories in American history: 523 electoral votes to Landon's eight (the largest advantage ever recorded in a contested two-party election in American history), every state but Maine and Vermont, more than sixty percent of the popular vote, and a Democratic Congress with two-thirds majorities in both Houses, including seventy-five of the ninety-six seats in the Senate.⁶³ Observers could legitimately question whether the Republican Party would shortly disappear as a political force.

Fresh off his victory, FDR proposed a restructuring of the Court that would eliminate it as an opponent of the New Deal. On February 5, 1937, he sent Congress a judiciary "reform" bill that would add a new Justice to the Court for every one over the age of seventy. Because of the advanced age of several Justices, Roosevelt's proposal would have allowed him to appoint six new Court members. Rather than criticize the Court for its opposition to the New Deal, Roosevelt disingenuously claimed that the elderly Justices were delaying the efficient administration of justice.⁶⁴ In his message to Congress, FDR pointed out that the Court had denied review in 695 out of 803 cases.⁶⁵ How can it be "that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants?"⁶⁶

⁶² President Franklin D. Roosevelt, Acceptance Speech for the Renomination for the Presidency, THE AMERICAN PRESIDENCY PROJECT (June 27, 1936), <http://www.presidency.ucsb.edu/ws/?pid=15314> [<http://perma.cc/L5AP-L8NL>].

⁶³ Election of 1936, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1936> [<http://perma.cc/XQ93-MFHY>].

⁶⁴ 81 Cong. Rec. 878 (1937) (reprinting FDR's message to Congress).

⁶⁵ *Id.*

⁶⁶ *Id.*

Only indirectly did FDR imply a link between the advanced age of the Justices and their opposition to the New Deal. “Modern complexities call also for a constant infusion of new blood in the courts,” FDR wrote.⁶⁷ “A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation.”⁶⁸ FDR declared that the remedy would bring a “constant and systematic addition of younger blood” that would “vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.”⁶⁹ The President’s purpose could not have been clearer. He submitted the plan on the Friday before the Court would hear Monday arguments challenging the constitutionality of the National Labor Relations Act, one of the pillars of the Second New Deal.

Despite his electoral success, FDR’s court-packing plan—the first domestic initiative of his second term—suffered a humiliating defeat. Mail and telegrams to Congress went nine-to-one against the plan, and polling showed a majority of the country opposed.⁷⁰ Elements of the New Deal coalition, such as farmers and some unions, attacked the plan early. Senate Republicans unified in opposition shortly after the President announced his proposal, and conservative Senate Democrats came out against the plan within days. Several liberal supporters of the New Deal followed. Hatton Sumners, the chairman of the House Judiciary Committee, organized a majority of his committee against the bill, saying “[b]oys . . . here’s where I cash in my chips.”⁷¹ Various college and university presidents, academics, and the American Bar Association opposed the plan. The coup de grace was delivered by none other than Chief Justice Hughes, in a letter made public during Senate Judiciary Committee hearings, who rebutted point by point FDR’s claims that the Court was overworked and that the older Justices could not perform their duties. Both Brandeis and Van Devanter approved the letter, which most historians believe ended the court-packing plan for good. Upon its release, Vice President Garner called FDR in Georgia to tell him, “We’re licked.”⁷²

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 212 (1994).

⁷¹ *Id.* at 214.

⁷² *Id.* at 220.

Historians and political scientists have argued ever since over how, or even whether, FDR still won the war. On March 29, 1937, a week after the release of the Hughes letter, the Court handed down a 5–4 decision upholding a Washington state minimum wage law for women.⁷³ In *West Coast Hotel Co. v. Parrish*, the lineup of votes for and against New York’s minimum wage, which had been struck down in *Tipaldo* the year before, remained the same—except for Justice Roberts, who switched sides to uphold the law.⁷⁴ Overruling the earlier bans on minimum wage laws, *Parrish* made clear that the Due Process Clause would no longer stand in the way of government regulation of wages or hours.

Two weeks later, the Court upheld the National Labor Relations Act, which had been challenged on the same grounds raised in the Sick Chicken and *Carter* cases.⁷⁵ In *NLRB v. Jones & Laughlin Steel Corp.*, Chief Justice Hughes led a 5–4 majority in rejecting the doctrine that manufacturing did not constitute interstate commerce. Jones & Laughlin Steel was the fourth-largest steel company in the nation, with operations in multiple states. As the Court observed, “the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce.”⁷⁶ “It is obvious,” the Court found, that the effect “would be immediate and might be catastrophic.”⁷⁷ Henceforth, the Court would allow federal regulation of the economy, even of wholly intrastate activity, because of the interconnectedness of the national market. To do otherwise would be to “shut our eyes to the plainest facts of our national life” and to judge questions of interstate commerce “in an intellectual vacuum.”⁷⁸ Justice Roberts again switched positions to make the 5–4 majority possible.

The Court’s about-face sapped the strength from FDR’s court-packing campaign. By May 1937, it appeared that an outright majority of the Senate opposed the proposal, and opinion polls showed that only one third of the public supported it.⁷⁹ At the end of the month, the Senate Judiciary Committee reported

⁷³ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

⁷⁴ *Id.* at 379.

⁷⁵ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Assoc. Press v. NLRB*, 301 U.S. 103 (1937); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).

⁷⁶ *Jones & Laughlin Steel Corp.*, 301 U.S. at 41.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ TOM S. CLARK, *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 140 (Bruce Peabody eds., 2011).

the bill out with an unfavorable recommendation.⁸⁰ Two more events finished things. Justice Van Devanter announced his retirement, timed for the same day as the Judiciary Committee vote, giving Roosevelt his first Supreme Court appointment. His departure would give the New Deal a secure majority on the Court. The Court also upheld the Social Security Act from attack as an unconstitutional spending measure or an invasion of state sovereignty.⁸¹ The court-packing bill lost all momentum, never emerged from the House Judiciary Committee, and never reached a floor vote.

While FDR lost in Congress, he had won his larger objective. The Court would not strike down another regulation of interstate commerce for almost sixty years. Journalists and political scientists immediately attributed the “switch in time that saved nine” to FDR’s threat to pack the Court.⁸² Even today, a few creative scholars like Bruce Ackerman defend the sweeping constitutional changes of the New Deal—which, unlike Reconstruction, were never written into a constitutional amendment—with the 1936 electoral landslide and the attack on the Court.⁸³ More recent work claims that the Court’s jurisprudence was evolving in a more generous direction toward federal power anyway.⁸⁴ The Court, this work points out, had confidentially voted to uphold the minimum wage in *West Coast Hotel* on December 19, 1936, six weeks before FDR sprung his proposal on the nation.⁸⁵ The court-packing legislation could not have pressured the Court because it obviously had little chance of passage. The argument that the 1936 elections prodded the Justices to switch positions on the New Deal also suffers from the absence of the Court as an issue during the campaign.⁸⁶ If anything, FDR suffered politically from his confrontation with the Court. A growing bipartisan coalition against the New Deal and another sharp recession in 1938 stalled FDR’s domestic agenda for the rest of his presidency.

Nonetheless, if FDR is considered a great president because of the New Deal, critical to his success was his willingness to

⁸⁰ Cushman, *supra* note 70, at 222–23.

⁸¹ *See, e.g.*, Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 598 (1937); *Helvering v. Davis*, 301 U.S. 619, 645 (1937).

⁸² *See, e.g.*, JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); MERLO J. PUSEY, *THE SUPREME COURT CRISIS* (1937).

⁸³ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105–30 (First Harv. Univ. Press 1993).

⁸⁴ *See generally* CUSHMAN, *supra* note 1.

⁸⁵ *Id.* at 18.

⁸⁶ *See, e.g.*, Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1159 (2005–2006); Leuchtenburg, *supra* note 53, at 379.

advance his own understanding of the Constitution. FDR never accepted the Court's right to define the powers of the federal government to regulate the economy. While FDR did not join Lincoln's blatant defiance in declining to obey a judicial order, his administration regularly proposed laws that ran counter to Supreme Court precedent, and FDR openly questioned the competence of the judiciary to review the New Deal.⁸⁷ He sought to change the Court's composition and size as a means to pressure it to change its rulings. With the retirement of the Four Horsemen, Roosevelt would appoint Hugo Black, Stanley Reed, Felix Frankfurter, and William O. Douglas to the Court, and by 1941, eight of the nine Justices were his appointees. While they would fight about the application of the Bill of Rights against the states, among other issues, they would unanimously agree that Congress's powers to regulate the economy were almost without limit.⁸⁸

In its call for a peacetime state of emergency, the New Deal went beyond changes to the balance of powers between the federal and state governments. Times of war inevitably shift Constitutional power and responsibility to the president as commander and chief. FDR and the New Deal Congress created an administrative state that had the same effect in times of peace, but which would be permanent, rather than temporary. Laws enacted in the first 100 days and in the years after vested sweeping legislative powers in the executive branch. The executive branch, in turn, became the fount of legislative proposals. FDR's bills to cut federal spending and veterans' benefits to balance the budget passed with alacrity.

The effort to engage in rational administration made the executive branch the locus of regulation—issued through agency rulemaking, rather than acts of Congress—as the federal government took on the job of regulating the securities markets, banks, labor unions, industrial working conditions, and production standards. Victory, in the context of the Depression, was all the more difficult because, whereas war requires the rationing of scarce resources in favor of military production, ending the Depression required stimulating demand and production of all manner of goods, essentially altering millions of market decisions made every day.

⁸⁷ President Franklin D. Roosevelt, 46 – Fireside Chat, THE AMERICAN PRESIDENCY PROJECT (Mar. 9, 1937), <http://www.presidency.ucsb.edu/ws/?pid=15381> [<http://perma.cc/9SVA-LHFJ>].

⁸⁸ *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941).

The New Deal's resemblance to mobilization relied upon a government bureaucracy more typical of wartime. America's administrative state had grown in ebbs and flows, with the early Hamiltonian vision of a state centered around the Treasury Department and the Bank, Jefferson's embargo machinery, and the massive departments of the Civil War representing the high-water marks. With the creation of the Interstate Commerce Commission in 1887, the American administrative state started to grow in earnest. Progressive-era efforts to create national administration to manage discrete economic and social issues culminated in the World War I mobilization effort, which included everything from production quotas to press censorship.⁸⁹ Between 1887 and 1932, Congress created a few new agencies to oversee aspects of the economy, such as railroad rates, business competition, and the money supply.⁹⁰ These early examples set the precedent of delegating lawmaking authority to the executive branch to set the actual rules governing private conduct.

FDR supplemented the New Deal's delegation of legislative authority to the executive branch by further enshrining the presidency as the focal point of political life. Even before his election, FDR had made clear that the candidate, not the party, would be the center of the campaign by renting a small plane to fly to Chicago to accept his nomination in person—the first nominee of either major party to do so.⁹¹ Once in office, he used new technology to reach over the heads of Congress and the media. Radio allowed the President to forge a direct relationship with the American electorate that went unfiltered by the newspapers. His famous “fireside chats,” the first delivered on the day before the government reopened the banks on March 13, 1933, allowed FDR to campaign for his policies directly with the people. Roosevelt did not neglect the press either; he held twice-a-week, off-the-record press conferences in the Oval Office, where reporters could ask him any question they liked.⁹² He

⁸⁹ See, e.g., DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* (1980); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (1966).

⁹⁰ Following the creation of the Interstate Commerce Commission in 1887, Congress authorized the creation of the Department of Labor and Commerce, the Food and Drug Administration, The Bureau of Investigation (later the Federal Bureau of Investigation), the Federal Reserve, and the Federal Trade Commission.

⁹¹ Thomas Hardy, *FDR's Nomination*, CHICAGO TRIBUNE, <http://www.chicago.tribune.com/news/nationworld/politics/chi-chicagodays-fdrnomination-story-story.html> [<http://perma.cc/5ZAE-JFC2>] (last visited Nov. 19, 2017).

⁹² Jean Edward Smith, *Obama, F.D.R. and Taming the Press*, N.Y. TIMES (Feb. 2, 2009, 6:15 PM), <https://100days.blogs.nytimes.com/2009/02/02/obama-fdr-and-taming-the-press/>.

employed his ample charm to win over the reporters, who burst out in applause after the first press conference on March 8, 1933.⁹³

FDR used these tools to marshal support for his legislative program and to change the political culture. Under Roosevelt, the president became the driving force for positive government, rather than the leader of a political system where power was dispersed among the branches of government, the states, and the political parties.⁹⁴ If the presidency were to play this leading role, it had to strengthen its control over the executive branch itself. In order to fulfill the promise of economic stability, the President wanted full command over the varied programs and policies of the government. This challenge was compounded by the New Deal's blizzard of new commissions and agencies, such as the National Recovery Administration, the Securities and Exchange Commission, and the Federal Communications Commission, as well as the lack of a rational government structure that matched form to function. When Congress enacted New Deal legislation, it rarely reduced the size or shape of federal agencies, often simply creating an additional agency or layer of bureaucracy on top of the existing ones.

Roosevelt sought to master the executive branch in various ways, with limited success. He expanded the use of aides attached to the White House to develop and implement policy instead of governing through the cabinet. FDR brought in a "Brain Trust," many of them academics who had advised him during the 1932 campaign to develop legislation, draft speeches, and manage policy. Some were located in the White House, and others were spread in appointed positions in the agencies, but they all worked for the President.

Cabinet meetings became primarily ceremonial occasions. Rather, policy development evolved into the form familiar today, with meetings between the president and chosen advisors—be they White House staff, cabinet officers, agency staff, or special committees including some combination of the former—assuming a central role.⁹⁵ The cabinet as a whole no longer represented leaders of important factions within the president's party, nor did there seem to be a guiding principle behind individual appointments. As James MacGregor Burns has observed, "[t]he real significance of the cabinet lay in Roosevelt's leadership role. He could count on loyalty from his associates; almost everyone was 'FRBC'—for Roosevelt before Chicago" (where the Democratic

⁹³ *Id.*

⁹⁴ MARC LANDY & SIDNEY MILKIS, PRESIDENTIAL GREATNESS 153–54 (2000).

⁹⁵ BURNS, *supra* note 1, at 174.

Party nominated FDR in 1932).⁹⁶ The declining importance of the cabinet, both in its corporeal form and in its individual members, naturally enhanced the control of the White House over the government.

FDR used his removal power to direct policy, following the examples set by Lincoln, Jackson, and Washington. He fired the head of the Federal Power Commission, whom Hoover had appointed, and replaced him with his own man, even though legislation appeared to give the Commission itself the authority to choose the chairman.⁹⁷ As the United States came closer to entry into World War II, he summarily dismissed his Secretaries of War and Navy and replaced them with internationalist Republicans without serious opposition from Congress or his own party.

FDR also used his removal power to seek control over the independent agencies. Unlike the core departments, such as State, War, Treasury, and Justice, independent agencies were designed by Congress to be less amenable to presidential direction.⁹⁸ Their organizing statutes usually create a multi-member commission at the top with a required balance between the political parties. In some cases, Congress shields the commission members from presidential removal except for cause (for malfeasance in office or for violating the law). Congress uses these devices to delegate the power to make legislative rules, while keeping the ability to influence its exercise and preventing its direct transfer to presidential control. Until FDR, presidents were generally understood to have the constitutional ability to freely remove commissioners even in the presence of these “for cause” protections against removal, though it is unclear to what extent previous presidents, in fact, used this authority.⁹⁹

Upon taking office, FDR decided to replace the head of the Federal Trade Commission (“FTC”), William Humphrey, a Hoover administration appointee. The FTC had a potential role in overseeing important New Deal programs due to its responsibility to investigate “unfair methods of competition in

⁹⁶ *Id.* at 150.

⁹⁷ Christopher Yoo, Steven Calabresi & Laurence Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 83–84 (2004).

⁹⁸ The classic work on the origins of the independent agencies remains ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* (1941). For more recent analysis, see Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); and Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779 (1986).

⁹⁹ STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 284–88 (2008).

commerce,”¹⁰⁰ a broad jurisdictional grant of authority that allowed it to sue companies for monopolistic activity. The statute establishing the FTC allowed removal of a commissioner only in cases of “inefficiency, neglect of duty, or malfeasance in office.”¹⁰¹ FDR decided to remove Humphrey only because he wanted to have his own man in the job. FDR wrote Humphrey: “You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission[.]”¹⁰² When Humphrey refused to leave, FDR fired him. Congress did not complain, and instead promptly confirmed FDR’s nomination of a new FTC chairman. Humphrey, however, remained undaunted and sued to recover his pay for the rest of his term.

Four years later, Humphrey’s estate eventually took his case to the Supreme Court, which dealt Roosevelt and the presidency a serious blow.¹⁰³ The Justice Department argued that the FTC statute was an unconstitutional infringement on the president’s removal power and his constitutional duty to faithfully execute the laws.¹⁰⁴ Roosevelt’s lawyers relied on *Myers v. United States*, a nine-year-old case that had struck down a law requiring Senate consent before a president could fire a postmaster.¹⁰⁵ In *Myers*, Chief Justice (and former president) William Howard Taft wrote: “The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”¹⁰⁶ Taft concluded that the president’s duty to implement the laws required that “he should select those who were to act for him under his direction” and that he must also have the “power of removing those for whom he cannot continue to be responsible.”¹⁰⁷ Based on this precedent, FDR seemed on safe ground.

On the same day that it decided *Schechter Poultry*, May 27, 1935, the Court substantially revised its removal jurisprudence. With Justice Sutherland writing, the majority held that the FTC “cannot in any proper sense be characterized as an arm or an eye of the executive.”¹⁰⁸ Creating a wholly new category of

100 Robert E. Freer, The Work of the Federal Trade Commission, FEDERAL TRADE COMMISSION (Mar. 23, 1936), https://www.ftc.gov/system/files/documents/public_statements/675261/19360323_freer_the_work_of_the_ftc.pdf.

101 *Humphrey’s Executor v. United States*, 295 U.S. 602, 620 (1935).

102 *Id.* at 619.

103 *See generally id.*

104 Yoo, Calabresi & Nee, *supra* note 97, at 85.

105 *Myers v. United States*, 272 U.S. 52, 176 (1926).

106 *Id.* at 117.

107 *Id.*

government, Sutherland described the FTC's functions as "quasi legislative or quasi judicial" because it investigated and reported to Congress and conducted initial adjudications on claims of anti-competitive violations before a case went to federal court.¹⁰⁹ The FTC acted "as an agency of the legislative or judicial departments," and was "wholly disconnected from the executive department[.]"¹¹⁰ *Myers*, and the president's discretionary removal authority, only applied to "purely executive" officers such as the Secretary of State or a postmaster.¹¹¹

The decision has long been puzzling, especially its recognition of a fourth branch of government that falls outside the three mentioned in the Constitution. Further, the reasoning in *Humphrey's Executor* has shriveled on the vine. Recent cases continue to recognize Congress's authority to shield certain government agents (such as the independent counsel) from removal even when they fall within the executive branch, not because they perform quasi legislative or judicial functions, but because their independence is critical to their functions.¹¹² Another oddity is that FDR's loss in *Humphrey's Executor* came at the hands of Justice Sutherland and the conservatives on the Court, who were (as we shall see), otherwise strong supporters of executive power, albeit in foreign affairs.

As they demonstrated in other decisions, the Justices were concerned with the New Deal's great expansion of federal power. They may have believed that one way to blunt the progressive centralization of power in the national government was to force the executive to disperse that power once at the federal level.¹¹³ Not surprisingly, Congress found the Court's approach quite congenial. It could delegate authority to the executive branch while preventing the president from exercising direct control over the agency. With the executive branch thus defanged, independent agencies naturally became more responsive to congressional wishes, which controlled their funding and held oversight hearings into their activities. And since the agencies were still formally within the executive branch, Congress could have its cake and eat it too, disclaiming any official responsibility for unpopular regulatory decisions. After *Humphrey's Executor*, Congress added "for cause" limitations on removal for members

¹⁰⁸ *Humphrey's Executor*, 295 U.S. at 628.

¹⁰⁹ *Id.* at 628–29.

¹¹⁰ *Id.* at 628.

¹¹¹ *Id.* at 632.

¹¹² See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

¹¹³ See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 37 (1994).

of the National Labor Relations Board, the Civil Aeronautics Board, and the Federal Reserve Board.¹¹⁴

Creation of the permanent administrative state strained the presidency. With the Supreme Court and Congress limiting the main constitutional tool of executive control, independent agencies might be able to pursue policies at odds with the president's understanding of federal law. Or they might press policy mandates in a way that caused conflict with other agencies, created redundancies, or ran counter to other federal policies. A number of methods for taming the behemoth were possible. Presidents could impose order by forcing the menagerie of departments, commissions, and agencies to act according to a common plan, and thereby coordinate the activities of the government rationally; the administrative state could be freed of direct control by either the president or Congress, and instead be subject to a variety of checks and balances by all three branches; or the agencies could work closely with private business and interest groups, which would raise objections to agency action with the courts, Congress, and the White House.

FDR rejected the idea that the administrative state should float outside the Constitution's traditional structure, and he continued to fire the heads of agencies even when Congress had arguably limited his power of removal. FDR, for example, removed the chairman of the Tennessee Valley Authority in 1938, even though Congress had established that he could only be fired for applying political tests or any other standards but "merit and efficiency" in running the agency.¹¹⁵ The chairman had attacked his Tennessee Valley Authority colleagues and had declared that he took orders from Congress, not the president. FDR removed him on the ground that the Executive Power and Take Care Clauses of the Constitution required that he control his subordinates.¹¹⁶ FDR established various super-cabinet entities with names like the Executive Council, the National Emergency Council, and the Industrial Emergency Committee, composed of cabinet officers, commission heads, and White House

¹¹⁴ Yoo, Calabresi & Nee, *supra* note 97, at 88–89.

¹¹⁵ Franklin D. Roosevelt, *The President Transmits to the Congress the Record of the Removal of the Chairman of the Tennessee Valley Authority* (Mar. 23, 1938), in 7 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 151–53, 162–63 (Samuel I. Rosenman ed., 1942).

¹¹⁶ The federal courts upheld FDR's decision, ultimately holding that Congress had failed to clearly prevent the President from firing on other grounds in addition to criteria it listed. *See Morgan v. Tenn. Valley Auth.*, 28 F. Supp. 732, 737 (E.D. Tenn. 1939), *aff'd*, 115 F.2d 990 (6th Cir. 1940); *see also* Yoo, Calabresi & Nee, *supra* note 97, at 89–90.

staff.¹¹⁷ None of these improvisations provided a structural solution to the challenge posed by the administrative state, as these various bodies proved a poor forum for rational planning and control over the varied arms of the federal government.

FDR's last thrust to control the administrative state required the cooperation of Congress. In 1936, the President asked a commission, headed by administration expert Louis Brownlow, to recommend institutional changes for the improved governance of the administrative state.¹¹⁸ A year later, it reported: "the President needs help."¹¹⁹ Its bottom line was clear. "[M]anagerial direction and control of all departments and agencies of the Executive Branch," Brownlow wrote, "should be centered in the President[.]"¹²⁰

According to Brownlow, the President's political responsibilities dwarfed his formal authorities. "[W]hile he now has popular responsibility for this direction," the committee reported, "he is not equipped with adequate legal authority or administrative machinery to enable him to exercise it[.]"¹²¹ Brownlow and FDR, who approved the report, held the usual concern that the administrative state was wasteful, redundant, and contradictory, but more importantly, they worried that it would become so independent as to lose touch with the people.¹²² The administrative state suffered from a democracy deficit.

The Brownlow Committee concluded that Congress must give the president more management resources, while keeping the chief executive at the center of decision-making. It advised that to make "our Government an up-to-date, efficient, and effective instrument for carrying out the will of the Nation," presidential control must be enhanced.¹²³ It recommended the creation of a new entity, the Executive Office of the President (which would house the Bureau of the Budget), six new White House assistants to the president, centralization of the government's budgets and planning, and the merger of independent agencies into the cabinet departments.¹²⁴ Brownlow's report did not call for a professional secretariat that would

¹¹⁷ See Exec. Order No. 6202-A, Appointing the Executive Council (July 11, 1933); Exec. Order No. 6433-A, Creation of the National Emergency Council (Nov. 17, 1933); Exec. Order No. 6770, Creating the Industrial Emergency Committee (June 30, 1934).

¹¹⁸ PERI ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996, at 94 (1986).

¹¹⁹ *Id.* at 81.

¹²⁰ *Id.* at 103.

¹²¹ *Id.*

¹²² *Id.* at 104–07.

¹²³ *Id.* at 104.

¹²⁴ *Id.*

supervise the activities of the government, as existed in Great Britain. Rather, the new assistants to the president and the Bureau of the Budget would provide information to the president and carry out his orders, with Roosevelt still making all critical policy decisions.¹²⁵ By centralizing the administrative state under the presidency, it would become directly accountable to Congress and the American people. “Strong executive leadership is essential to democratic government today,” the report concluded.¹²⁶ “Our choice is not between power and no power, but between responsible but capable popular government and irresponsible autocracy.”¹²⁷

FDR had the report’s recommendations distilled into a bill he presented to the congressional leadership in January 1937. In a four-hour presentation, FDR personally laid out the plan and declared: “The President’s task has become impossible for me or any other man. A man in this position will not be able to survive White House service unless it is simplified. I need executive assistants with a ‘passion for anonymity’ to be my legs.”¹²⁸ Even though the 75th Congress began with a two-thirds Democratic majority, it was wary of FDR’s plans and less than thrilled at the prospect of greater presidential influence over the New Deal state. Roosevelt’s plan undermined the benefits to Congress of delegation because it would weaken Congress’s influence over agency decisions while expanding the president’s authority over what was essentially lawmaking.

Brownlow’s report landed before Congress at the same time as FDR’s court-packing plan. While the two plans addressed different problems, they fed the same fear of presidential aggrandizement at the expense of the other branches. Key congressional leaders had not been consulted or briefed on the reorganization plan, which they proceeded to attack as another step toward despotism, or a power grab by the university intellectuals who no doubt would run the new agencies. At a time when totalitarianism was raising its ugly head in Europe, fears of consolidated executive power were particularly salient. In 1938, the bill failed in the House and was replaced by a more modest bill that gave FDR a limited ability to reorganize government.¹²⁹ Under that authority, FDR still managed to

¹²⁵ See MATTHEW DICKINSON, BITTER HARVEST: FDR, PRESIDENTIAL POWER, AND THE GROWTH OF THE PRESIDENTIAL BRANCH 104–10 (1996).

¹²⁶ THE OXFORD HANDBOOK OF AMERICAN DEMOCRACY 106 (Robert F. Durant ed., 2010).

¹²⁷ *Id.*

¹²⁸ DICKINSON, *supra* note 125, at 111.

¹²⁹ LEUCHTENBURG, *supra* note 1, at 277–80.

locate the Bureau of the Budget within a new Executive Office of the President. As the Office of Management and Budget, it today exercises central review over the economic costs and benefits of all federal regulation, one of the president's most powerful tools for rationalizing the activities of the administrative state.¹³⁰

FDR also expanded the resources within the White House, an institution now separate from the Executive Office of the President, which enabled him to gain more information and control over the cabinet agencies. Still, the independent agencies remained outside the cabinet departments. FDR never successfully established any single entity to coordinate the activities of the entire administrative state, and his failed bill demonstrates the enduring constitutional checks on the presidency. Despite FDR's growing power, only Congress could pass the laws needed to reorganize the cabinet departments, re-shape the jurisdiction and structure of the independent agencies, and provide the funds and positions in a new, revitalized White House.¹³¹

While FDR suffered defeats at the hands of Congress, he continued to claim and exercise inherent executive authority that went beyond mere control of personnel. He signed statements to object to riders inserted into needed spending bills, which he believed to be unconstitutional. Congress, for example, attempted to force the President to fire three bureaucrats it believed were "subversives" by specifically barring any federal funds to pay their salaries.¹³² Roosevelt signed the bill but objected to its unconstitutional end run around the president's power over the removal of executive branch officials. Ultimately, the officials left within months, but they sued for their back pay all the way to the Supreme Court, which agreed that Congress had violated the Constitution.¹³³

President Roosevelt also followed Lincoln's example in using his executive power to fight racial discrimination. Although Lincoln had relied on his power as Commander-in-Chief to free

¹³⁰ See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Decisionmaking*, 99 HARV. L. REV. 1075 (1986); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); TERRY EASTLAND, ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY 163 (1992); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹³¹ On the way that presidents today manage policy development through the White House and the Executive Office of the President, see ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMATION* 18–62 (2002).

¹³² See Urgent Deficiency Appropriation Act, ch. 218, §304, 57 Stat. 431, 450 (1943).

¹³³ *United States v. Lovett*, 328 U.S. 303, 315 (1946).

the slaves, the southern states imposed racial segregation in the years after the Civil War, ultimately with the approval of the Supreme Court.¹³⁴ While FDR did not take segregation head on, he issued an executive order in 1941 to prohibit racial discrimination in employment on federal defense contracts.¹³⁵ Roosevelt had no statutory authority to order the federal government to provide fair treatment in employment to all, regardless of race. He could rely only upon his constitutional authority as president to oversee the management of federal programs. Once war began, President Roosevelt could clarify that his orders were taken under his power as both Chief Executive and Commander-in-Chief in wartime.¹³⁶ FDR's orders would not be the first time, nor the last time, that the cause of racial equality would depend on a broad understanding of presidential power.

The New Deal depended upon broad theories of the presidency and the role of the federal government in national life. What remains less clear is whether FDR's fundamental re-orientation of the government into a positive, active instrument of national policy was worthwhile. Contemporary critics of the modern presidency question whether chief executives, acting alone, have led the nation into disastrous wars.¹³⁷ We need also ask, but rarely do, whether the expansion of executive power domestically has benefited the nation. To the extent we debate the desirability of the administrative state, most American scholars today bemoan the fact that the New Deal did not go far enough. They argue that the New Deal failed because it did not achieve a full-fledged European welfare state, or that FDR's coalition fragmented and failed to follow through on the promise of liberal reform.¹³⁸ These critics, often the most vocal detractors of the muscular executive action in foreign affairs, cry out for more executive power domestically.

Vesting the president with more authority to control the government's regulation of the economy may make sense during an emergency, but it did not work in solving the Great Depression. Economists recognize today that the New Deal

¹³⁴ *Plessy v. Ferguson*, 163 U.S. 537, 543, 548 (1896).

¹³⁵ Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

¹³⁶ Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943).

¹³⁷ See, e.g., Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 188 (1988); Margaret Weir & Theda Skocpol, *State Structures and the Possibilities for "Keynesian" Responses to the Great Depression in Sweden, Britain, and the United States*, in BRINGING THE STATE BACK IN 107-08 (Peter B. Evans et al. eds., 1985); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 5 (1995).

¹³⁸ See RUDALEVIGE, *supra* note 131.

neither put an end to high rates of unemployment nor restored consistent economic growth.¹³⁹ FDR's monetary and fiscal policy were often counterproductive. Full employment would return only with American rearmament in the first years of World War II. Other New Deal policies were similarly confused, such as allowing industry to set production quotas, reduce production to raise prices, and restrict employment by raising minimum wages. Economists similarly doubt whether the creation of national regulation of the securities markets and other industries contributed to the eventual economic recovery, even though it was certainly valuable for postwar prosperity. If, as Milton Friedman argues, the Great Depression would have proven to be only a normal recession with some deft monetary policy from the Federal Reserve,¹⁴⁰ it bears asking whether the expansive, permanent bureaucracy was needed at all.

Decades later, American presidents would campaign against the burdensome regulations made possible by the New Deal. The administrative state we have today failed to end the Great Depression. There is little doubt that the explosion in the size and power of the administrative state has transformed the nature of American politics. Considering this, was the administrative state worth the price?

The federal government has dramatically expanded the scope of regulation to include not only national economic activity, such as workplace conditions and minimum wages and hours, but also the environment and endangered species, educational standards, state and local corruption, consumer product safety, communications technology and ownership, illegal narcotics and gun crimes, and corporate governance. It has produced less deliberation in Congress, which now delegates sweeping powers to the agencies, and has placed the initial authority to issue federal law affecting private individuals in administrative agencies. Those agencies are not directly accountable to the people through elections, except for the thin layer of presidential appointees at the very top. Special-interest groups have come to play a significant role in influencing both congressional committees and agencies, gaining economic "rents" for their members at the expense of the broader public.

¹³⁹ See, e.g., David M. Kennedy, *What the New Deal Did*, 124 POL. SCI. Q. 251, 252 (2009); Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779, 813 (2004); BERNANKE, *supra* note 9; ARTHUR I. BLOOMFIELD, CAPITAL IMPORTS AND THE AMERICAN BALANCE OF PAYMENTS 1934–39 (1950).

¹⁴⁰ See FRIEDMAN & SCHWARTZ, *supra* note 3, at 249–69.

This is not a plea to return to the laissez-faire capitalism of the nineteenth century variety. The modern administrative state no doubt has produced social benefits, and there are important areas where the greater information and expertise held by the executive agencies improves government policy, but it remains an open question whether the centralization of economic and social regulation in the national government has been, on balance, a success. It is undeniable that the requirement of minimum national standards, most especially in the area of civil rights, was a necessary and long-overdue change. Equality under law should not have been a matter of legislative or executive discretion, but a requirement of the Reconstruction Amendments to the Constitution. National control of other economic and social issues, however, may not have been worth the cost in increased government spending, larger budget deficits, a permanent government apparatus of unprecedented size (at least in the American experience), the rise of interest-group politics, and interference with efficient market mechanisms.

Federal agencies may impose uniform rules, but they may not impose the best rules. In the absence of broad national regulation, states could enact a diversity of policies on issues such as the economy, environment, education, crime, and social policy. People could vote with their feet by moving to states that adopt their preferred package of policies, while experimentation could identify the most effective solutions to economic and social problems. The New Deal's concentration of regulatory authority in Washington, D.C. sapped the vitality of the states, whose powers are only a pale imitation of those they held in the nineteenth century.¹⁴¹ FDR certainly deserves credit for restoring Americans' optimism and faith in government, and for alleviating the suffering inflicted by the Depression, but it remains doubtful whether the great wrenching in the fabric of our federal system of government and the expansion in the president's constitutional powers in the domestic realm can be justified by any limited advance in triggering a recovery. Despite its revolution in domestic presidential power and government structure, the New Deal appears to have had little impact on ending the worst economic collapse in American history.

¹⁴¹ For a more extensive discussion of the transformation of American politics wrought by the New Deal, see MILKIS, *supra* note 1, at 21–51, 149–83; and THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 273–74 (2d ed. 1979).

II. THE GATHERING STORM

FDR's claim to greatness lies not in the New Deal, but in his defeat of one of the greatest external threats our nation has faced: fascist Germany and imperial Japan. FDR exercised farsighted vision in preparing the nation for a necessary war unwanted by a large minority, and at times a majority, of Congress and the American people. In the process, the President skirted, stretched, and broke a series of neutrality laws designed to prevent American entry into World War II. Sometimes he went to Congress and the American people to seek support for his actions. Other times he did not. But, regardless of the where, or if, FDR sought support for his actions in the lead up to war, FDR firmly established that the power to make national security policy resided in the Oval Office.¹⁴²

Debate has raged for decades over whether the Japanese attack on Pearl Harbor was a surprise, or whether FDR or the American government had advance knowledge of the attack. Some have suspected that FDR believed the only way to rouse a reluctant American public to war was for the United States to be attacked first. In this respect, FDR had the same instincts as Lincoln. The conventional wisdom today attributes more of the blame for Pearl Harbor to incompetence by the field commanders and complacency in Washington, and has put to rest the idea that FDR actually knew that the Japanese would attack Pearl Harbor.¹⁴³

Recent scholarly work suggests that FDR managed events to maneuver the Japanese into a corner, with a strong possibility that the Japanese would attack American interests somewhere in the Pacific, most likely the Philippines. Roosevelt's imposition of

¹⁴² See ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-1945*, at 530-31 (1979). Important historical works on FDR and American entry into World War II include: ROBERT DIVINE, *THE ILLUSION OF NEUTRALITY* (1962); WALDO HEINRICH, *THRESHOLD OF WAR: FRANKLIN D. ROOSEVELT AND AMERICAN ENTRY INTO WORLD WAR II* (1988); PATRICK HEARDEN, *ROOSEVELT CONFRONTS HITLER: AMERICA'S ENTRY INTO WORLD WAR II* (1987); WARREN F. KIMBALL, *THE JUGGLER: FRANKLIN ROOSEVELT AS WARTIME STATESMAN* (1991); FREDERICK W. MARKS III, *WIND OVER SAND: THE DIPLOMACY OF FRANKLIN ROOSEVELT* (1988); DAVID REYNOLDS, *THE CREATION OF THE ANGLO-AMERICAN ALLIANCE 1937-1941: A STUDY IN COMPETITIVE CO-OPERATION* (1982); and AKIRA IRIYE, *THE ORIGINS OF THE SECOND WORLD WAR IN ASIA AND THE PACIFIC* (1987). The day-to-day events of American entry into World War II are traced in WILLIAM L. LANGER & S. EVERETT GLEASON, *THE UNDECLARED WAR: 1940-1941* (1953), and the events leading up to World War II are described in DONALD C. WATT, *HOW WAR CAME: THE IMMEDIATE ORIGINS OF THE SECOND WORLD WAR, 1938-1939* (1990); and JOHN KEEGAN, *THE SECOND WORLD WAR* (2005). U.S. diplomacy in the war itself is discussed by AKIRA IRIYE, 3 *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE GLOBALIZING OF AMERICA, 1913-1945* (1993).

¹⁴³ For a summary of these debates, see GORDON PRANGE, ET. AL., *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* 474-76 (2001).

an arms, steel, and oil embargo against the Japanese Empire was designed to force Tokyo to either withdraw from China or attack American, British, and Dutch possessions in Asia for natural resources.¹⁴⁴ FDR pressed Japan in order to bring the United States to bear against the greater threat of Germany.¹⁴⁵ FDR could not have walked the United States to the brink of war without an expansive interpretation of the president's constitutional powers and the willingness to exercise them.

Roosevelt had laid claim to sweeping executive authority in foreign affairs even before war with Germany and Japan looked certain. He was assisted, at times, from an unlikely source: Justice Sutherland. While Sutherland believed the New Deal state unconstitutionally trampled on the natural rights of individuals, as Hadley Arkes has argued, he still strongly supported presidential power in foreign affairs.¹⁴⁶ This became clear in the case *United States v. Curtiss-Wright Export Corp.*¹⁴⁷

In 1934, Congress had delegated to the president the authority to cut off all U.S. arms sales to Bolivia and Paraguay, which were fighting a nasty border war, if he found the ban would advance peace in the region.¹⁴⁸ FDR proclaimed an arms embargo in effect on the same day Congress passed the law,¹⁴⁹ and the next day the Justice Department prosecuted four executives of the Curtiss-Wright Export Corporation for trying to sell fifteen machine guns to Bolivia.¹⁵⁰ Curtiss-Wright, which traced its roots to the Wright brothers, would supply the engines for the DC-3 air transport and the B-17 Flying Fortress and build the P-40 fighter.¹⁵¹ Taking its case all the way to the Supreme Court, the company argued that the law had delegated unconstitutional authority over international commerce to the president.¹⁵² If Congress wanted to impose an arms embargo, it would have to do it itself, not just hand the authority to FDR.

In a remarkable and controversial opinion, Justice Sutherland declared that the constitutional standards that ruled the government's actions domestically did not apply in the same

¹⁴⁴ See MARC TRACHTENBERG, *THE CRAFT OF INTERNATIONAL HISTORY: A GUIDE TO METHOD* 79–139 (2006).

¹⁴⁵ See MARKS III, *supra* note 142, at 163.

¹⁴⁶ See ARKES, *supra* note 113, at 198–99.

¹⁴⁷ 299 U.S. 304, 319–20 (1936).

¹⁴⁸ *Id.* at 312.

¹⁴⁹ *Id.* at 313.

¹⁵⁰ *Id.* at 311.

¹⁵¹ *History*, CURTISS-WRIGHT CORPORATION, <http://www.curtisswright.com/company/history/> [<http://perma.cc/SB9A-XC8W>] (last visited Sept. 14, 2017).

¹⁵² *Curtiss-Wright Export Corp.*, 299 U.S. at 314–15.

way to foreign affairs.¹⁵³ The Constitution's careful limitation of the national government's powers, so as to preserve the general authority of the states, did not extend beyond the water's edge. In the arena of foreign affairs, Sutherland maintained, the American Revolution had directly transferred the full powers of national sovereignty from Great Britain to the Union. "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties," Sutherland wrote, "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."¹⁵⁴ In words that could have been cribbed from Abraham Lincoln, the Court declared that the "Union existed before the Constitution," and therefore the Union could exercise the same powers over war and peace as any other nation.¹⁵⁵

An argument in favor of exclusive federal power over national security and international relations, however, does not dictate which branch should exercise it. Sutherland located that authority in the president for inherently practical considerations. The dangers posed by foreign nations required the structural ability to act swiftly and secretly, unique to the executive branch. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."¹⁵⁶ Echoing Hamilton and Jefferson, and quoting then Congressman John Marshall, Sutherland declared, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁵⁷

Justice Sutherland notably eschewed the opportunity for a narrow holding in conferring wide latitude to the executive branch. It did not matter that, on the facts of *Curtiss-Wright*, FDR was acting pursuant to congressional delegation. "We are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President," which does not "require as a basis for its exercise an

¹⁵³ See *id.* at 315–22.

¹⁵⁴ *Id.* at 318. Scholars have not been kind to Justice Sutherland's analysis. For a critical discussion of *Curtiss-Wright*, see David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); and LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 19–20 (2d ed. 1996).

¹⁵⁵ *Curtiss-Wright Export Corp.*, 299 U.S. at 316.

¹⁵⁶ *Id.* at 319.

¹⁵⁷ *Id.*

act of Congress.”¹⁵⁸ Sutherland found great advantages to the United States in vesting these powers in the executive, rather than the legislature. The president, not Congress, “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has confidential sources of information.”¹⁵⁹

Another case gave Justice Sutherland the opportunity to deliver a second blessing to FDR’s vigorous use of his presidential powers. In 1933, Roosevelt ended American efforts to isolate the Soviet Union and unilaterally recognized its communist government. As part of an executive agreement with the Soviets, the United States took on all rights and claims of the USSR against American citizens, such as those involving the expropriation of property.¹⁶⁰ The federal government sued to recover money and property held by Russians in the United States, which were allegedly owed to the Soviet government.¹⁶¹ What made the recognition of the Soviet Union so remarkable was that FDR not only had set the policy of the United States and entered into an international agreement on his own, but the government used that unilateral agreement to set aside state property and contract rules previously considered sacrosanct—all without any action of Congress or the Senate.

Property owners resisted. Augustus Belmont, a New York City banker, refused to turn over deposits held on behalf of the Petrograd Metal Works after the nationalization of all Russian corporations in 1918.¹⁶² FDR’s executive agreement with the Soviets required that legal ownership of the profits transferred to the United States government. Belmont’s estate refused to turn the money over because, it claimed, the property law of New York state protected it.¹⁶³

In *United States v. Belmont*, the Supreme Court again sided with the executive. It found that the recognition of the USSR, the international agreement, and the pre-emption of state law all fell within the president’s constitutional powers to the exclusion of the states.¹⁶⁴ “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state

¹⁵⁸ *Id.* at 319–20.

¹⁵⁹ *Id.* at 320.

¹⁶⁰ *See United States v. Belmont*, 301 U.S. 324, 326 (1937).

¹⁶¹ *Id.*

¹⁶² *Id.* at 326.

¹⁶³ *Id.* at 326–27; *see also* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 693 (1998); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 146 (1998).

¹⁶⁴ *Belmont*, 301 U.S. at 330.

lines disappear. As to such purposes the State of New York does not exist.”¹⁶⁵ Presidents since have used this power to make literally thousands of international agreements with other countries without the Senate’s advice and consent—from 1939 to 1989, the United States entered into 11,698 executive agreements and only 702 treaties.¹⁶⁶ The courts have upheld sole executive agreements several times since, including an agreement ending the Iranian hostage crisis and another pre-empting the state law claims of Holocaust survivors against German companies.¹⁶⁷

The Supreme Court did not grant the president these powers in foreign affairs; only the Constitution could do that. Presidents from Washington onward had interpreted the Constitution’s vesting of the executive and Commander-in-Chief authorities to give them the initiative to protect the national security, set foreign policy, and negotiate with other nations. Sutherland’s opinions gave judicial recognition to decades of presidential practice; what had been the product of presidential enterprise and congressional acquiescence became formal constitutional law. Roosevelt would draw on these authorities as he maneuvered to send aid to the Allies and bring the United States into the war against the fascist powers.

Facing existential threats in the combination of a looming global conflict and domestic isolationism, FDR drew deeply from his well of presidential powers. As early as 1935, Roosevelt had concluded that Hitler’s Germany posed a threat to the United States.¹⁶⁸ As the Axis powers increased the size, strength, and quality of their militaries while launching offensives against their neighbors, the President became convinced that military force would be necessary to protect American interests. Neutrality offered a false promise of safety. FDR’s approach represented something of a revolution in American strategic thought. No longer would American national security depend on the safety provided by two oceans and control of the Western Hemisphere, where it had felt no reluctance to launch wars of its own.¹⁶⁹ A German defeat of Great Britain would remove a valuable buffer that had prevented European nations from naval

¹⁶⁵ *Id.* at 331.

¹⁶⁶ CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRT. 106–71, at 39 (2001).

¹⁶⁷ *Dames & Moore v. Regan*, 453 U.S. 654, 672–74 (1981); *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414–15 (2003).

¹⁶⁸ DALLEK, *supra* note 142, at 102–03.

¹⁶⁹ *See, e.g.*, ROBERT KAGAN, DANGEROUS NATION: AMERICA’S FOREIGN POLICY FROM ITS EARLIEST DAYS TO THE DAWN OF THE TWENTIETH CENTURY 3 (2007); JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 45 (2005).

and air access to the Americas. And if Hitler succeeded in gaining complete control of the resources of the European continent, Germany would become a superpower with the means to threaten the United States.¹⁷⁰ A central objective of American strategy was to maintain a balance of power in Europe and Asia to contain expansionist Germany and Japan, but if war came, FDR and his advisors identified Hitler as the primary threat.¹⁷¹

By December 1940, FDR could be relatively open with the public about his broader goals. In his famous “Arsenal of Democracy” speech, he accused the fascist powers of conquering Europe as a prelude to larger aims that threatened the United States. Never since “Jamestown and Plymouth Rock has our American civilization been in such danger as now,” FDR warned.¹⁷² “The Nazi masters of Germany have made it clear that they intend not only to dominate all life and thought in their own country,” FDR told the nation by radio, “but also to enslave the whole of Europe, and then to use the resources of Europe to dominate the rest of the world.”¹⁷³ He rejected the idea that the “broad expanse of the Atlantic and of the Pacific” would protect the United States.¹⁷⁴ It was only the British navy that protected the oceans from the Nazis. The United States had to begin massive rearmament and provide arms and assistance to the free nations that were bearing the brunt of the fighting. FDR did not tell the public that he was already taking action to bring the nation closer to war, first against Europe to stop Hitler, while holding off Japanese expansion in Asia.

FDR’s strategic vision required several elements to succeed. The United States had to send military and financial aid to Britain and France, help those supplies cross the Atlantic Ocean, and build up the United States military (especially the Navy and Army Air Corps). If the Allies’ fortunes fell far enough, the nation would have to be prepared to intervene militarily. Resistance to these steps was widespread. Many Americans believed that President Wilson had erred in entering World War I; they wanted to avoid American involvement in another internecine squabble in Europe. Between 1939 and 1941, a majority of Americans grew to support aid to the Allies, but that was as far as they would go. As late as May 1941, almost eighty percent of

¹⁷⁰ TRACHTENBERG, *supra* note 144, at 118.

¹⁷¹ *Id.* at 118–19.

¹⁷² Franklin D. Roosevelt, Fireside Chat 16: On the “Arsenal of Democracy,” MILLER CENTER UNIVERSITY OF VIRGINIA (Dec. 29, 1940), <https://millercenter.org/the-presidency/presidential-speeches/december-29-1940-fireside-chat-16-arsenal-democracy> [<http://perma.cc/U3JM-3JGJ>].

¹⁷³ *Id.*

¹⁷⁴ *Id.*

the public wanted the United States to stay out of the conflict.¹⁷⁵ Seventy percent felt that FDR had gone too far or had helped Britain enough.¹⁷⁶ Isolationists blamed American entry into World War I on President Wilson's use of his executive powers to tilt American neutrality toward Britain and France.¹⁷⁷ Worried about a re-run, they pressed for strict limitations on presidential power to keep the United States out of the European war.¹⁷⁸

Opposition to American intervention took more concrete form than public opinion polls. Congress enacted Neutrality Acts in 1935, 1936, 1937, and 1939 to prevent the United States from aiding either side. Congress passed the 1935 Act after Germany repudiated the disarmament requirements of the Treaty of Versailles and Italy threatened to invade Ethiopia in defiance of the League of Nations. It required the president to proclaim, after the outbreak of war between two or more nations, an embargo of all arms, ammunition or "implements of war" against the belligerents.¹⁷⁹ It gave FDR the authority to decide when to terminate the embargo, but it left him little choice as to when to begin one.

The Act prohibited the United States from helping a victim nation and punishing the aggressor, instead requiring a complete cut-off for both. FDR had privately opposed the law's mandatory terms, fought to keep his discretionary control over foreign affairs, and in signing the bill predicted that its "inflexible provisions might drag us into war instead of keeping us out."¹⁸⁰ Later acts prohibited the extension of loans or financial assistance to belligerents,¹⁸¹ extended the embargo to civil wars,¹⁸² and allowed the ban to cover only arms and munitions, but not raw materials. In 1939, Congress enacted an even tougher prohibition that sought to prevent belligerents from "cash-and-carry" transactions for raw materials by prohibiting American vessels from transporting anything to nations at war.

Domestic resistance required FDR to adopt an approach that gave the appearance that the United States was being dragged into the war. By 1941, with Hitler in control of Europe and Japan

¹⁷⁵ DALLEK, *supra* note 142, at 267.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 109.

¹⁷⁸ *Id.*

¹⁷⁹ Neutrality Act of 1935, ch. 837, 49 Stat. 1081 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

¹⁸⁰ DALLEK, *supra* note 142, at 110.

¹⁸¹ Neutrality Act of 1936, ch. 106, 49 Stat. 1152 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

¹⁸² Neutrality Act of 1937, ch. 146, 50 Stat. 121 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

occupying large parts of China, FDR wanted to find a way for the United States to enter the war on the side of Britain. In August 1941, for example, FDR told Prime Minister Winston Churchill that he could not rely on Congress to declare war against Germany.¹⁸³ Instead, FDR “would wage war, but not declare it.”¹⁸⁴ According to Churchill’s account of their conversation at the Atlantic Conference, FDR said “he would become more and more provocative” and promised that “everything would be done to force an incident” that would “justify him in opening hostilities.”¹⁸⁵

Roosevelt’s plans to move the United States toward war depended in part on Congress. The Constitution gives Congress control over international and domestic interstate commerce, as well as the money and property of the United States. FDR could lay little claim to constitutional authority to dictate arms-export policies or to provide financial and material aid to the Allies. FDR initially hoped that the United States could provide enough assistance to Britain and France—the United States would prove the “great Arsenal of Democracy,”¹⁸⁶ in his famous words—to postpone the need for American military intervention in Europe. After the fall of France, FDR realized that Great Britain could not hold off the Nazis on its own, but he hoped to send enough aid to keep Britain alive while he prepared the American public for war.

FDR pressed Congress for several changes to the Neutrality Acts that would send more help to the Allies. In the 1936 and 1937 Acts, for example, the administration won more presidential discretion to determine when a foreign war had broken out.¹⁸⁷ By 1939, it succeeded in changing the law to allow the president to put off a proclamation of neutrality if necessary to protect American peace and security.¹⁸⁸ This effectively allowed Britain and France, which controlled the sea routes to the Americas, to continue to receive aid.

FDR used this flexibility to continue supplying arms and money to China by declining to find a war to exist there, even

¹⁸³ DALLEK, *supra* note 142, at 285.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Franklin Delano Roosevelt, The Great Arsenal of Democracy, AMERICAN RHETORIC, <http://www.americanrhetoric.com/speeches/fdrarsenalofdemocracy.html> [<http://perma.cc/6Z6S-RLAF>] (last updated Mar. 15, 2017).

¹⁸⁷ See Neutrality Act of 1936, ch. 106, 49 Stat. 1152 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33); Neutrality Act of 1937.

¹⁸⁸ Neutrality Act of 1939, ch. 2, 54 Stat. 4 (repealed by Lend-Lease Act of 1941, Ch. 11, 55 Stat. 31, 33).

after Japan had attacked Beijing and Nanjing.¹⁸⁹ Similarly, Roosevelt refused to invoke the Neutrality Acts when Germany invaded Czechoslovakia in 1939, or Russia in 1941, because a blanket embargo would have prevented American aid from flowing to the Allies.¹⁹⁰ Manipulating the embargo rules to affirmatively support one side of various conflicts, FDR showed little respect for the spirit of the Neutrality Acts. But Congress would not allow him to go farther. FDR's proposals throughout 1939 and 1940 to reform the Neutrality Acts to allow for direct military aid to the Allies repeatedly failed.

As his efforts to modify the Neutrality Acts flagged, FDR became more aggressive in invoking his inherent constitutional authority. He asked Attorney General Robert Jackson, "How far do you think I can go in ignoring the existing act—even though I did sign it?"¹⁹¹ Vice President John Nance Garner and Secretary of the Interior Harold Ickes argued that the President's constitutional authority in foreign affairs allowed him to act beyond the Acts.¹⁹² Instead of overriding them, however, Roosevelt simply became more creative in interpreting them. On May 22, 1940, as German armies swept through France, FDR ordered the sale of World War I-era equipment to the Allies; on June 3rd, he ordered the transfer of \$38 million in weapons to U.S. Steel, which promptly sold them at no profit to the British and French.¹⁹³ The administration argued that these sales did not violate the Neutrality Acts because the arms were "surplus."¹⁹⁴ Three days later (just after the British had evacuated 300,000 soldiers from the German noose around Dunkirk), the Navy sold fifty Hell Diver bombers, which had been introduced to service only in 1938, to Britain because they were "temporarily in excess of requirements."¹⁹⁵ The sales occurred at a time when the United States army could field only 80,000 combat troops in five divisions, while the German army in western Europe deployed two million men in 140 divisions.¹⁹⁶ The U.S. Army Air Corps had only 160 fighter planes and fifty-two heavy bombers.¹⁹⁷ Announcing the decision on June 8th, FDR told a news conference that "a plane can get out of date darned

189 Aaron X. Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935–1941*, 3 *BUFF. J. INT'L L.* 414, 451 (1996–97).

190 *Id.* at 457–59.

191 DALLEK, *supra* note 142, at 190.

192 *Id.*

193 *Id.* at 222, 227.

194 *Id.* at 222–23.

195 Fellmeth, *supra* note 189, at 464.

196 DALLEK, *supra* note 142, at 221.

197 *Id.* at 222.

fast.”¹⁹⁸ Two days later, in a speech at the University of Virginia, FDR declared isolationism an “obvious delusion” and called for an allied victory over “the gods of force and hate” to prevent a world run by totalitarian governments.¹⁹⁹

American aid came too little, too late; France requested an armistice on June 17, 1940.²⁰⁰ In the midst of a presidential campaign for an unprecedented third term, FDR sought bipartisan support for his policies and replaced isolationists in his cabinet with two internationalist Republicans: Henry Stimson as Secretary of War and Frank Knox as Secretary of the Navy.²⁰¹ Both favored repealing the neutrality laws, boosting the U.S. military through a draft, and sending large amounts of aid to Great Britain.²⁰² Britain’s destroyer fleet, which had suffered almost fifty percent losses, needed reinforcements to block a German invasion force and safeguard its trade lifelines.²⁰³ Churchill wrote to Roosevelt that acquiring American destroyers was “a matter of life and death.”²⁰⁴ FDR reacted by planning to send two-dozen PT-boats immediately, and said that Navy lawyers who thought the sale illegal should follow orders or go on vacation.²⁰⁵ After word of FDR’s plans leaked, Congress enacted a law forbidding the sale of any military equipment “essential to the defense of the United States” as certified by the Chief of Naval Operations or the Army Chief of Staff, and reasserted a World War I ban on sending any “vessel of war” to a belligerent.²⁰⁶

Congress’s tightening of neutrality delayed FDR for two months. While the Battle of Britain raged in the skies, Churchill begged FDR for additional destroyers. “The whole fate of the war,” the Prime Minister wrote in July, “may be decided by this minor and easily remediable factor,” and he urged that “this is the thing to do now.”²⁰⁷ FDR and his advisors planned a transfer to Britain of fifty World War I destroyers declared to be “surplus,” even though similar warships from the same era were

¹⁹⁸ *Id.*

¹⁹⁹ Franklin D. Roosevelt, Address at University of Virginia (June 10, 1940), in *THE PUBLIC PAPERS OF THE PRESIDENTS OF FRANKLIN D. ROOSEVELT* 259, 261–62 (MacMillan ed., 1941).

²⁰⁰ DALLEK, *supra* note 142, at 232.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 243.

²⁰⁴ *Id.*

²⁰⁵ Fellmeth, *supra*, note 189, at 467–68.

²⁰⁶ Act of June 28, 1940, § 14, 54 Stat. 676, 681 (requiring additional approval prior to sale of military equipment); Espionage Act of 1917, ch. 30, 40 Stat. 222 (codified as amended in scattered sections of 18 U.S.C.).

²⁰⁷ DALLEK, *supra* note 142, at 244.

being activated for Navy service.²⁰⁸ In exchange, Britain would provide basing rights in its Western Hemisphere territories to the United States. In August, the President concluded an executive agreement with Britain, kept secret at first and without congressional approval, to make the trade.²⁰⁹

FDR's advisors divided over the deal's legality. One legal advisor believed it violated the June 28th statute and the Espionage Act of 1917, which forbade sending an armed vessel to any belligerent while the United States remained neutral; State Department and Justice Department lawyers agreed.²¹⁰ But Dean Acheson, then Undersecretary of the Treasury, argued that the June 28th law implicitly recognized the president's constitutional power to transfer any military asset in order to improve national security, while others recommended that the government first sell the destroyers to private companies that could then resell them to the British.²¹¹ Acheson even went further. He argued that the 1917 law applied only to ships that were built specifically on order for a belligerent and not to existing ships originally built or used for the Navy.²¹²

Attorney General Jackson drew on these ideas in his legal opinion blessing the deal, but also relied on the president's Commander-in-Chief power. "Happily there has been little occasion in our history for the interpretation of the powers of the President as Commander-in-Chief," Jackson wrote to FDR.²¹³ "I do not find it necessary to rest upon that power alone."²¹⁴ Nevertheless, "it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations" for the most effective use of the armed forces.²¹⁵ The perilous circumstances facing the United States reinforced the Commander-in-Chief's power. "It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable."²¹⁶ Any statutory effort by Congress to prevent the

²⁰⁸ *Id.* at 222.

²⁰⁹ *Id.* at 245.

²¹⁰ Fellmeth, *supra* note 189, at 473.

²¹¹ *Id.* at 475–77.

²¹² *Id.*

²¹³ Opinion on Exchange for Over-Age Destroyers, 39 OP. ATT'Y GEN. 484 (1940), reprinted in H. JEFFERSON POWELL ED., THE CONSTITUTION AND THE ATTORNEYS GENERAL 307–08 (1999) [hereinafter Opinion on Exchange for Over-Age Destroyers].

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 307–08.

president from transferring military equipment to help American national security would be of “questionable constitutionality.”²¹⁷

Jackson defended the exclusion of Congress. He thought that the deal could take the form of an executive agreement because it required neither the appropriation of funds nor an obligation to act in the future.²¹⁸ Justice Sutherland’s opinion in *Curtiss-Wright*, which the Attorney General extensively quoted, supported the argument.²¹⁹ Jackson had a more difficult time with the Neutrality Acts. He read the June 28th law to recognize the president’s authority to transfer naval vessels to Britain, subject only to the requirement that they be surplus or obsolete. It did not prohibit the transfer of property “merely because it is still used or usable or of possible value for future use,” but only if the transfer weakened the national defense.²²⁰ The “over-age” destroyers, as he called them, could be found to fall outside the statute and hence within the president’s authority, which must have derived from the Commander-in-Chief power, to exchange them for valuable military bases.²²¹ Jackson, however, advised that transferring brand-new mosquito boats would violate Congress’s ban on sending ships to a belligerent.

Jackson issued an even broader reading of the Commander-in-Chief power in May 1941, when FDR allowed British pilots to train in American military schools. Under the Commander-in-Chief power, the president “has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States.”²²² The president could “command and direct the armed forces in their immediate movements and operations” and “dispose of troops and equipment” to promote the national security.²²³ Jackson read the passage of Lend-Lease as support for FDR’s judgment that helping Britain was important to the national defense.²²⁴ If the president had full constitutional authority to use the armed forces, even to use military force, to protect the nation by helping Britain, then he must also have the lesser power to train British airmen. “I have no doubt of the President’s lawful authority to

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Training of British Flying Students in the United States, 40 OP. ATT’Y GEN. 58 (1941), reprinted in H. JEFFERSON POWELL ED., THE CONSTITUTION AND THE ATTORNEYS GENERAL 316–17 (1999).

²²³ *Id.*

²²⁴ *Id.*

utilize forces under his command to instruct others in matters of defense which are vital to the security of the United States.”²²⁵ It “would be anomalous indeed,” Jackson observed, if the military could provide Britain with arms but could not train the British how to use them.²²⁶

Reaction to the destroyers-for-bases deal, announced in early August, attacked FDR’s methods more than his goals. Roosevelt worried that his energetic use of executive power would feed fears that he was becoming an autocrat, worries punctuated by his nomination that summer for an unprecedented third term as president. Leaks of secret Anglo-American staff talks and announcement of a joint U.S.–Canadian defense board already had isolationists attacking FDR for pushing the United States towards war.²²⁷ FDR predicted that revelation of the executive agreement would “raise hell with Congress” and lead to accusations he was a “warmonger” and “dictator,” and might torpedo his re-election hopes.²²⁸

FDR’s first two predictions quickly came true. His Republican opponent, Wendell Willkie, supported the policy but declared that FDR’s unilateral action was “the most dictatorial and arbitrary act of any president in the history of the United States.”²²⁹ Edwin Borchard, a Yale professor of international law, argued that Roosevelt had assumed dictatorial powers, placed himself above the law, and threatened to “break down constitutional safeguards.”²³⁰ The Constitution, Borchard wrote, “does not give the President *carte blanche* to do anything he pleases in foreign affairs.”²³¹ The nation’s leading scholar of constitutional law, Edward Corwin of Princeton, attacked Jackson’s opinion as “an endorsement of unrestrained autocracy in the field of our foreign relations, neither more nor less.”²³² In *The New York Times*, Corwin asked “why may not any and all of Congress’s specifically delegated powers be set aside by the President’s ‘executive power’ and the country be put on a totalitarian basis without further ado?”²³³

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ DALLEK, *supra* note 142, at 245.

²²⁸ *Id.*

²²⁹ KENNETH S. DAVIS, *FDR: INTO THE STORM 1937–1940*, at 611 (1993).

²³⁰ Edwin Borchard, *The Attorney General’s Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT’L L. 690, 691 (1940).

²³¹ *Id.*

²³² Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES (Oct. 13, 1940).

²³³ *Id.*

Despite these ringing attacks on presidential power, the destroyers-for-bases deal proved remarkably popular—Gallup polls showed sixty-two percent in favor—encouraging even bolder steps.²³⁴ By October 1940, FDR asked for and received appropriations of \$17.7 billion for national defense—his administration’s original estimate for the year had been \$1.84 billion—and defense spending doubled the following year.²³⁵ In June 1940, he called for the first peacetime draft in American history, which Congress enacted in September only after Willkie publicly agreed. A Wall Street lawyer and former Democrat, Willkie was a dark-horse candidate who had won the nomination without ever having occupied public office. His attacks on the New Deal had gained little traction during the campaign, so Willkie pivoted, painting FDR as a “warmonger” and dictator who had made “secret agreements” to enter a war that would kill thousands of young Americans. “If [Roosevelt’s] promise to keep our boys out of foreign wars is no better than his promise to balance the budget,” Willkie said on the stump, “they’re already almost on the transports.”²³⁶ By the end of October, Willkie came within four points of the President, and Roosevelt went on a speaking tour to reassure mothers in a speech at Boston Garden on October 30, 1940, that “[y]our boys are not going to be sent into any foreign wars.”²³⁷ Though the polls showed the election close, FDR prevailed by twenty-seven million to Willkie’s twenty-two million and an Electoral College majority of 449–82.

After the election, FDR redoubled his efforts to send aid to Britain. He authorized secret staff talks between American and British military planners, who recommended a grand strategy of defeating Germany first while holding Japan to a stalemate.²³⁸ In November, FDR ordered the army to make B-17 bombers immediately available to the British, to be replaced by British planes on order in American factories, and he discussed making half of all American arms production available to the British. British finances collapsed in late November; the country could no longer pay for the material it needed to continue the war. Britain’s ambassador to the United States, Lord Lothian, appealed to the American public on November 23rd by saying to

²³⁴ DAVIS, *supra* note 229, at 608.

²³⁵ *Id.* at 603–04.

²³⁶ *Id.* at 614.

²³⁷ Franklin Delano Roosevelt, Campaign Address at Boston, Massachusetts (Oct. 30, 1940), in 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 514, 517 (Haddon Craftsman, Inc. ed., 1941).

²³⁸ HEARDEN, *supra* note 142, at 192.

a group of journalists, “[w]ell, boys, Britain’s broke; it’s your money we want.”²³⁹

Lothian’s report of Britain’s functional bankruptcy shocked the White House into action. FDR approved the sale of \$2.1 billion in weapons that the British could not pay for, as well as the diversion of \$700 million in Reconstruction Finance Corporation funds to underwrite the factory expansions needed for the increased arms sales.²⁴⁰ The President hit upon one of his most artful evasions of neutrality, Lend-Lease, which would “get away from the dollar sign,” as he told reporters at a December 17, 1940, press conference.²⁴¹ The United States would “lend” Britain weapons and munitions and, rather than demand immediate payment, would expect their return after the war’s end. Of course, the idea was a complete fiction; war would consume the arms. Ever canny in his presentations to the public, FDR deployed a homey analogy: If a house were on fire, a neighbor would lend a garden hose with the expectation that it would be returned later, rather than demanding \$15 for the cost of the hose.²⁴²

Lend-Lease required congressional action. In his famous “Arsenal of Democracy” speech on December 29th, Roosevelt defended Lend-Lease and broader aid to the allies with his most stirring language.²⁴³ FDR declared that the Nazis posed the most direct threat to the security of the United States since its founding.²⁴⁴ To avoid war, the United States would have to become the great “arsenal of democracy” for the free nations carrying on the fight.²⁴⁵ The United States would be less likely to get into war “if we do all we can now to support the nations defending themselves against attack by the Axis,” rather than “if we acquiesce in their defeat.”²⁴⁶

Disclaiming any intention to send a new “American Expeditionary Force” outside the United States, FDR declared that “the people of Europe who are defending themselves do not ask us to do their fighting.”²⁴⁷ All they sought were “the

²³⁹ KENNETH S. DAVIS, *FDR: THE WAR PRESIDENT, 1940–1943*, at 63 (2000).

²⁴⁰ *Id.* at 65.

²⁴¹ See Franklin Delano Roosevelt, The Seven Hundred and Second Press Conference (Dec. 17, 1940), in 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 604, 607–08 (Haddon Craftsman, Inc. ed., 1941).

²⁴² *Id.*

²⁴³ See Franklin Delano Roosevelt, Fireside Chat on National Security (Dec. 29, 1940), in 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 633 (Haddon Craftsman, Inc. ed., 1941).

²⁴⁴ *Id.* at 634.

²⁴⁵ *Id.* at 643.

²⁴⁶ *Id.* at 640.

²⁴⁷ *Id.*

implements of war.”²⁴⁸ Increasing national defense production and sending it to Britain would “keep war away from our country and our people.”²⁴⁹ It was one of the most popular speeches of FDR’s presidency: roughly eighty percent of the public agreed.²⁵⁰ Congress waited until March 1941 to give its approval to Lend-Lease,²⁵¹ but FDR decided to move forward during that critical time anyway. He authorized British purchase of 23,000 airplanes in November 1940, and rifles and ammunition in February 1941. He ordered the U.S. military to purchase munitions factories but diverted the production to Britain.²⁵²

In spring 1941, FDR turned to the protection of the supplies that would begin to flow across the Atlantic, and took unilateral action that provoked the Nazis and drew the United States ever closer to war. In March, FDR moved to place Greenland under American military protection, and in April he gave orders to the Navy to extend its security zone as far as Greenland and the Azores, and to begin locating German submarines and reporting their positions to the Royal Navy. In May, he transferred one-quarter of the Pacific fleet to the Atlantic to deter any German effort to seize Atlantic islands for bases. He declared an “unlimited national emergency” at the end of the month and told the nation that helping Britain win the battle of the Atlantic was critical to keeping the Nazis out of the Western Hemisphere.²⁵³ “[I]t would be suicide to wait until they are in our front yard,” Roosevelt argued.²⁵⁴ He followed his speech with a June deployment of a Marine brigade to occupy Iceland (which is about 1200 miles from London and 2800 miles from Washington, D.C.), which freed up a British division and extended the American security zone even further. In July, he announced that the Navy would begin escorting ships between the United States and Iceland.

FDR did not seek or receive congressional approval for any of these deployments, which made clear, if earlier aid had not, that the United States was no longer a true neutral. Still, Congress retained ample checks on presidential power. FDR could send

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See DALLEK, *supra* note 142, at 257.

²⁵¹ See 55 Stat. 31 (1941); see DAVIS, *supra* note 239, at 92–136 (providing lengthy congressional discussions on Lend-Lease).

²⁵² See Fellmeth, *supra* note 189, at 485–86.

²⁵³ Franklin Delano Roosevelt, “We Choose Human Freedom” — A Radio Address Announcing the Proclamation of an Unlimited National Emergency (May 27, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 181, 193 (Samuel I. Rosenman ed., 1950).

²⁵⁴ *Id.* at 189.

only 4000 Marines to Iceland because of the small size of the regular armed forces, and he could not send any of the new draftees because Congress had attached a provision to the conscription act forbidding their deployment outside the Western Hemisphere.²⁵⁵ Congress had also limited the terms of service of the 900,000 draftees to one year, requiring FDR to go to Congress to win an extension.²⁵⁶ Even with America occupying Iceland and Greenland and escorting ships in the North Atlantic, only fifty-one percent of Americans supported the draft extension, and Congress narrowly approved it.²⁵⁷

Meanwhile, FDR pursued measures to check Japan's expansion and perhaps provoke it into a conflict. Japan had been waging war in China since the 1931 Manchuria crisis and had launched an invasion to conquer the whole nation in 1937. Japanese military and civilian leaders sought to create a "Greater East Asia Co-Prosperity Sphere" that would supply the raw materials for the Japanese economy and the war in China.²⁵⁸ In 1940, Japan had intensified its attacks in China and had moved into Indochina. In September 1940, it entered into the Axis agreement with Germany and Italy.²⁵⁹

Roosevelt launched a campaign of economic warfare, without reliance on legal authority. In July 1940, for example, FDR blocked aviation gasoline exports to Japan.²⁶⁰ Chiang Kai-shek had sent an urgent message to Roosevelt that without more aid, the Nationalist Chinese resistance to Japan would fail.²⁶¹ FDR responded by banning the export of iron and steel to Japan. In November, he sent \$100 million and 100 warplanes to the Chinese Nationalist government, and in the Spring he authorized volunteers—Colonel Chennault's Flying Tigers—to fly fighters for China.²⁶² FDR had never found China and Japan to be at war under the 1939 Neutrality Act, so he had no statutory authority to impose the materials embargo on Japan or to send money and arms to China.²⁶³ Roosevelt simply undertook the actions as president in order to protect the national security.

²⁵⁵ See DALLEK, *supra* note 142, at 276.

²⁵⁶ *Id.* at 277.

²⁵⁷ *Id.* at 275–77.

²⁵⁸ See, e.g., William L. Swan, *Japan's Intentions for Its Greater East Asia Co-Prosperity Sphere as Indicated in Its Policy Plans for Thailand*, in 27 *JOURNAL OF SOUTHEAST ASIAN STUDIES* 139–49 (Mar. 1996); JOHN TOLAND, *THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE, 1936–1945*, at 447 (1970).

²⁵⁹ See DALLEK, *supra* note 142, at 277.

²⁶⁰ See Fellmeth, *supra* note 189, at 466.

²⁶¹ *Id.* at 467.

²⁶² *Id.*

²⁶³ See *id.* at 466–67.

Japan's expansion south toward Indochina and Thailand increased the potential for conflict. On July 26, 1941, FDR ordered a freeze of Japanese assets in the United States, reduced U.S. oil exports to pre-war levels, and prohibited the sale of high-octane aircraft gasoline to Japan.²⁶⁴ By mistake, administrators executed a complete oil embargo against Japan, which FDR did nothing to correct. FDR opened negotiations to reach a settlement with the Japanese government, though he knew because of American code-breaking success that Tokyo was, at the least, considering an attack on American, British, and Dutch possessions in Asia.

Some historians believe that FDR's goal was to hold off Japan while resources could be devoted against the dire challenge in Europe—a view held by many of his military and civilian advisors. Marc Trachtenberg, however, has convincingly argued that FDR deliberately painted the Japanese into a corner.²⁶⁵ In the course of negotiations, Roosevelt demanded that Tokyo end its war in China in exchange for a resumption of U.S. oil and steel exports, yet FDR and his advisors knew that Japan would not willingly give up its territorial gains in China. “[T]he United States had been waging preventive economic warfare against Imperial Japan for at least 18 months prior to Pearl Harbor,” Colin Gray writes.²⁶⁶ “U.S. measures of economic blockade left Japan with no alternative to war consistent with its sense of national honor. The oil embargo eventually would literally immobilize the Japanese Navy. So Washington confronted Tokyo with the unenviable choice between de facto complete political surrender of its ambitions in China, or war.”²⁶⁷

As FDR squeezed Japan, he expanded political and military assistance to the British. On August 9th, he met Churchill in Placentia Bay, off Newfoundland, where the two leaders issued the Atlantic Charter.²⁶⁸ It declared Anglo-American principles in the war to be: no Anglo-American aggrandizement, opposition to undemocratic changes in territory, self-government for all peoples, equal access to trade and natural resources, international economic cooperation, a guarantee of security and

²⁶⁴ See *id.* at 413.

²⁶⁵ See TRACHTENBERG, *supra* note 144, at 80–139.

²⁶⁶ COLIN S. GRAY, THE IMPLICATIONS OF PREEMPTIVE AND PREVENTIVE WAR DOCTRINES: A RECONSIDERATION 23 (2007), <https://ssi.armywarcollege.edu/pdffiles/PUB789.pdf> [<http://perma.cc/436B-SSS6>].

²⁶⁷ *Id.*; see also Hew Strachan, *Preemption and Prevention in Historical Perspective*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 23 (Henry Shue & David Rodin eds., 2007) (“For Japan itself the choices by 1941 seemed to be economic strangulation and geopolitical imprisonment on the one hand, or war on the other.”).

²⁶⁸ See DALLEK, *supra* note 142, at 281.

freedom to all nations, freedom of the seas, disarmament of aggressors and reduction in armaments, and plans for a collective system of international security.²⁶⁹ During the discussions, FDR made clear to Churchill his desire to bring the United States into the war by forcing an incident with Germany,²⁷⁰ and set out to make his wish come true by ordering full naval escorts for British convoys between the United States and Iceland, which put the Germans in the position of either firing on U.S. warships or conceding the Battle of the Atlantic. Without input from Congress, FDR had joined together the fates of the United States and Britain.

An undeclared shooting war soon broke out. On September 4th, a German submarine fired on the destroyer USS *Greer*, which FDR used to publicly justify “shoot-on-sight” orders for naval escorts in the Atlantic.²⁷¹ Only later did Congress learn that the *Greer* had been hunting the submarine with British airplanes and had dropped depth charges on the Germans. FDR declared the Nazis to be the equivalent of modern-day pirates and compared German subs and commerce raiders to “rattlesnakes of the Atlantic.”²⁷² As he put it, “when you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him.”²⁷³

FDR won broad support for the Navy’s new rules of engagement in the Atlantic, but at the price of deliberately deceiving the public about the facts.²⁷⁴ He followed with an October speech claiming that captured Nazi plans envisioned the division of North and South America into five dependent states and the abolition of the freedom of religion.²⁷⁵ The shooting war led to German submarine attacks on two American destroyers, the USS *Kearny* and the USS *Reuben James*, with the deaths of eleven and 115 sailors, respectively.²⁷⁶ FDR responded by seeking amendment of the neutrality laws to allow merchantmen to arm and carry goods directly to British ports.

²⁶⁹ See Franklin Delano Roosevelt, The Atlantic Charter (Aug. 14, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 314 (Samuel I. Rosenman ed., 1950).

²⁷⁰ See DALLEK, *supra* note 142, at 285.

²⁷¹ *Id.* at 287.

²⁷² Franklin Delano Roosevelt, Fireside Chat to the Nation (Sept. 11, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 384, 390 (Samuel I. Rosenman ed., 1950).

²⁷³ *Id.*

²⁷⁴ See DALLEK, *supra* note 142, at 288–89.

²⁷⁵ See FRANKLIN DELANO ROOSEVELT, Navy and Total Defense Day Address (Oct. 27, 1941), in 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 438, 439 (Samuel I. Rosenman ed., 1950).

²⁷⁶ See DALLEK, *supra* note 142, at 291.

The changes passed Congress by small majorities because about seventy percent of the public told pollsters they opposed American entry into the war.²⁷⁷ FDR concluded that the public, influenced by the memory of the way Wilson had led the country into World War I, would not rally behind a war waged in response to these isolated incidents. Rising tensions with Japan, however, provided other opportunities. After the Atlantic Conference, FDR informed the Japanese ambassador that any further expansion in Southeast Asia would force him to take any and all measures necessary “toward insuring the safety and security of the United States.”²⁷⁸ FDR’s attempts at a negotiated solution were, perhaps, less than genuine. He offered to undertake formal negotiations with Prince Konoye, the Japanese Prime Minister, only if Japan suspended its “expansionist activities” and openly declared its intentions in the Pacific.²⁷⁹ FDR asked that Japan terminate the Axis alliance, withdraw from China, and open up its trading system. He consciously demanded terms he knew that the Japanese were unlikely to accept.

Japanese cabinet meetings on September 3rd through 6th concluded that unless the government reached a settlement with the United States by October, its military would attack American, British, and Dutch possessions in Asia.²⁸⁰ Tokyo decided its terms must include the freedom to conclude matters in China, an end to Anglo-American military action in the Pacific, and secure access to raw materials for the economy. FDR refused to negotiate on these conditions and instead ordered the reinforcement of the Philippines. By October 15th, FDR and his advisors believed that they needed more “diplomatic fencing” to create the image “that Japan was put into the wrong and made the first bad move—overt move.”²⁸¹

Thanks to electronic intercepts of Japanese communications, FDR knew that the Japanese would attack if no settlement were reached, and he tried to string out negotiations to give the armed forces time to strengthen its position in the Philippines. On November 24, 1941, FDR discussed with his advisors the chances of a Japanese sneak attack and asked “how we should maneuver them into the position of firing the first shot without allowing too much danger to ourselves.”²⁸² He also told the British that he

²⁷⁷ *Id.* at 285.

²⁷⁸ *Id.* at 300.

²⁷⁹ *Id.* at 301.

²⁸⁰ *Id.* at 302.

²⁸¹ *Id.* at 303–04.

²⁸² *Id.* at 307.

would respond to any attack on their possessions in Asia. Still, FDR realized that without an enemy attack on the United States, his other measures would not convince the American people to support entry into World War II.

On December 7, 1941, the Japanese solved FDR's conundrum.²⁸³ No evidence supports the theories that FDR knew that Pearl Harbor was the target, nor that he willfully ignored the possibility of devastating losses to the Pacific Fleet. FDR did not consciously know about any specific attack on the United States—rather, he placed the Japanese in the position of choosing between war and giving up their imperial ambitions in China and the rest of the Pacific. The most that can be said is that if war were to come, FDR had tried for more than a year to maneuver the Axis powers into firing a first shot, while preparing the armed forces and American public for that eventuality. Pearl Harbor guaranteed the unity of the American people, just as Fort Sumter had eight decades before. As FDR told the American people the next day, December 7th was a “day which would live in infamy,” and he asked Congress for a declaration of war, which it promptly granted.²⁸⁴

Hitler further obliged by declaring war on the United States three days later. FDR exercised foresighted leadership in recognizing the Axis threat to the United States and the free nations of the West. But faced with a recalcitrant Congress and a reluctant public, FDR had to use his constitutional powers to move the nation into a war that he knew, as perhaps no one else did, was in the country's best interests. If he had faithfully obeyed the Neutrality Acts, American entry into the war might have been delayed by months, if not years. A president who viewed his constitutional authorities as narrowed to executing the will of Congress might well have lost World War II.

III. WARTIME CIVIL LIBERTIES

It is commonplace today to read the argument that war reduces civil liberties too much. We can gain a useful perspective on the question by examining Roosevelt's wartime measures. FDR responded to the devastating Pearl Harbor attack with domestic policies, such as the use of military commissions, the internment of Japanese-Americans, and the widespread use of electronic surveillance. As in the Civil War, the federal courts deferred to the political branches until the war ended, and Congress went along with the president for the most part.

²⁸³ *Id.* at 311.

²⁸⁴ *Id.* at 312.

A. Military Commissions

Military commissions are a form of tribunal used to try captured members of the enemy for violations of the laws of war. American generals have used them from the Revolutionary War through World War II, and, as we have seen, the Lincoln administration deployed them during the Civil War to try Confederate spies, irregular guerrillas, and sympathizers. Military commissions are neither created nor regulated by the Uniform Code of Military Justice, which is enacted by Congress and governs courts-martial; instead, they were established by presidents as Commander-in-Chief and by military commanders in the field.²⁸⁵

World War II witnessed the use of military commissions on a par with the Civil War, but primarily for the administration of postwar justice. While the Nuremberg trials were the most well known, military commissions heard charges of war crimes against many former German and Japanese leaders at the end of the war. But the first commission was set up well before those, more famous examples, to hear the case of “The Nazi Saboteurs.” In June 1942, eight German agents covertly landed in Long Island and Florida with plans to attack factories, transportation facilities, and utility plants.²⁸⁶ All had lived in the United States before the war, and two were American citizens. One of them turned informer; after initially dismissing his story, the FBI arrested the plotters and revealed their capture by the end of June.²⁸⁷ Members of Congress and the media demanded the death penalty, even though no statutory provision established capital punishment for non-U.S. citizens.²⁸⁸

Roosevelt wanted a trial outside the civilian judicial system. On June 30th, he wrote to his Attorney General, Francis Biddle (Jackson having been elevated to the Supreme Court), supporting the idea of using military courts because “[t]he death penalty is called for by usage and by the extreme gravity of the war aim and the very existence of our American Government.”²⁸⁹ Roosevelt already thought they were guilty, and the punishment was not in doubt: “Surely they are just as guilty as it is possible to be . . . and it seems to me that the death penalty is almost

²⁸⁵ For a critical review of the history, compare JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON Terror* 204–30 (2006), with LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 253–56 (2005).

²⁸⁶ See David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 61 (1996).

²⁸⁷ See *id.* at 65.

²⁸⁸ *Id.* at 61–65.

²⁸⁹ *Id.* at 65.

obligatory.”²⁹⁰ Two days earlier, Biddle and Secretary of War Henry Stimson had worried that the plot was not far enough along to win a conviction with a significant sentence—perhaps two years at most. Stimson was surprised that Biddle was “quite ready to turn them over to a military court” and learned that Justice Felix Frankfurter also believed a military court preferable.²⁹¹

On June 30th, Biddle wrote to Roosevelt summarizing the advantages of a military commission.²⁹² It would be speedier and easier to prove violations of the laws of war, and the death penalty would be available. Biddle also believed that using a military commission would prevent the defendants from seeking a writ of habeas corpus. “All the prisoners . . . can thus be denied access to our courts.”²⁹³ He did not commit to writing another important consideration: secrecy. According to Stimson, Biddle favored a military commission because the evidence would not become public, particularly that the Nazis had infiltrated U.S. lines with ease and had been captured only with the help of an informant.²⁹⁴ Biddle recommended that FDR issue executive orders establishing the commission, defining the crimes, appointing its members, and excluding judicial review.²⁹⁵

On July 2, 1942, Roosevelt issued two executive orders.²⁹⁶ The first created the commission and gave it the authority to try any “subjects, citizens, or residents of any nation at war with the United States,” who attempt to “enter the United States or any territory or possession thereof, through coastal or boundary defenses,” with an effort to “commit sabotage, espionage, hostile or warlike acts, or violations of the law or war.”²⁹⁷ The commission would try the defendants for violations of the laws of war, which mostly took the form of unwritten custom. FDR prohibited any appeals to the civilian courts, unless the Secretary of War and the Attorney General consented.²⁹⁸ His second order, in one paragraph, established the rules of procedure. The military judges were to hold a “full and fair trial” and could admit any evidence that would “have probative value to a

²⁹⁰ *Id.*

²⁹¹ *Id.* at 65–66.

²⁹² *Id.* at 66.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 66–67.

²⁹⁶ *Id.* at 67.

²⁹⁷ Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).

²⁹⁸ *See id.*; *see also* FISHER, *supra* note 285, at 98–99.

reasonable man.”²⁹⁹ The concurrence of two-thirds of the judges was required for sentencing, and any appeals had to run directly to the President himself.³⁰⁰

As structured by FDR, the commissions subjected the Nazi saboteurs to a form of justice very different from that normally applied in civilian courts. The most striking departure was the absence of a jury, as guaranteed by the Sixth Amendment to the Constitution. Neither civilian criminal procedure nor the normal rules of evidence applied, and FDR made no allowances for a right to legal counsel, a right to remain silent, or a right of appeal. Another important difference was that the laws of war, which at that time remained mostly unwritten, would define the crimes. Unlike the civilian system, which requires that the government prosecute defendants for crimes that are clearly defined and written, the saboteurs would be charged with war crimes upon which even legal experts would struggle to agree.

FDR’s order was of uncertain constitutionality under the law of the day. At that time, the governing case was still *Ex parte Milligan*. *Milligan* held that the government had to use civilian courts when the defendant was not a member of the enemy armed forces and the courts were “open to hear criminal accusations and redress grievances.”³⁰¹ FDR created military commissions to avoid *Milligan*, to charge the defendants with violations of the laws of war, and to preclude any form of judicial review. Military counsel for the Nazi saboteurs challenged the constitutionality of the trial on the ground that courts were open, the defendants were not in a war zone, violations of the laws of war were not subject to prosecution under federal law. Military commissions, they argued, violated the Articles of War enacted by Congress.³⁰²

FDR was undeterred when the Supreme Court agreed to hear the defendants’ case. As the Justices gathered in conference before oral argument, Justice Roberts reported that Biddle was worried that FDR would order the execution of the saboteurs regardless of the Court’s decision. Chief Justice Stone, whose son was working on the defense team, said “[t]hat would be a dreadful thing.”³⁰³ While Stone did not recuse himself, Justice Murphy—who was in uniform as a member of the army

²⁹⁹ Commander in Chief of the Army and Navy: Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).

³⁰⁰ See *id.*; see also FISHER, *supra* note 285, at 99–100.

³⁰¹ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866).

³⁰² Danelski, *supra* note 288, at 68–69.

³⁰³ *Id.* at 69.

reserve—did.³⁰⁴ Justice Byrnes, who had been serving as an informal advisor to the administration, did not. Biddle himself argued the case and urged the Court to overrule *Milligan*, but after two days of oral argument, the Justices decided to uphold the military commission.³⁰⁵ The great pressure on the Court is reflected in its decision to deliver a brief *per curiam* opinion the day after oral argument, with an opinion to follow months later.

Commission proceedings began the day after the Supreme Court issued its order. The commission convicted and sentenced the defendants to death in three days.³⁰⁶ Five days later, FDR approved the verdict but commuted the sentences of two defendants.³⁰⁷ Roosevelt's two executive orders remained the only guidance for the commission on the rules of procedures and the definition of the substantive crimes. There was no written explanation, for example, of the elements of the violations of the laws of war, nor were procedures given, aside from the votes required for conviction and the admission of evidence.

When the Supreme Court finally issued its opinion, it carefully distinguished *Milligan*.³⁰⁸ Chief Justice Stone's unanimous opinion for the Court found that *Milligan* applied to a civilian who had never associated himself with the enemy.³⁰⁹ The Nazi saboteurs, by contrast, had clearly joined the German armed forces. Neither the Bill of Rights nor the separation of powers barred FDR from using military courts during wartime to try enemy combatants. Congressional creation of the courts martial system and the absence of any criminal provisions to punish violations of the laws of war presented no serious obstacle. Chief Justice Stone read the Article of War recognizing the concurrent jurisdiction of military commissions as congressional blessing for their existence.³¹⁰ The Justices decided not to address the issue that had divided them behind the scenes—whether Congress could require the president to provide the saboteurs with any trial at all, civilian or military—because they did not read any congressional enactment as prohibiting military commissions.³¹¹ If the United States was at war, and it captured members of the enemy armed forces, it could try the prisoners for war crimes outside the civilian or court martial systems.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 70–71.

³⁰⁶ *Id.* at 71.

³⁰⁷ *Id.* at 72.

³⁰⁸ *See id.* at 73–75.

³⁰⁹ *Id.* at 72–73.

³¹⁰ *Id.* at 73.

³¹¹ *Id.* at 72.

B. Detention

In the wake of Pearl Harbor, President Roosevelt ordered sweeping military detentions that, in absolute numbers, far eclipsed Lincoln's policies in the Civil War. After the Japanese attack and the German and Italian declarations of war, FDR authorized the Departments of War and Justice to intern German, Japanese, and Italian citizens in the United States. In February 1942, for example, the government detained approximately 3000 Japanese aliens.³¹² Detention of the citizens of an enemy nation had long been a normal aspect of the rules of war, and was authorized by the Alien Enemies Act (on the books since 1798).³¹³ That same month, FDR went even further and authorized the detention of American citizens suspected of disloyalty. On February 19, 1942, FDR signed Executive Order 9066, allowing the Secretary of War to designate parts of the country as military zones "from which any or all persons may be excluded."³¹⁴ By the end of 1942, the government moved 110,000 Japanese-Americans to ten internment camps because of the possibility that they might provide aid to the enemy.³¹⁵ Recent historical work suggests that Roosevelt took a far more active role in the detention decision than has been commonly understood.³¹⁶

There was substantial disagreement within the military and the administration on the internments.³¹⁷ General John DeWitt, commander of the Fourth Army on the West Coast, initially opposed the mass evacuations of Japanese-Americans, as did officials in the Justice Department and several prominent White House aides, but by late January 1942, thinking had changed.³¹⁸ A popular movement on the West Coast demanded removal of the Japanese-Americans to the nation's interior. This sentiment gathered momentum as the United States suffered a string of military defeats in the Pacific. The precipitating factor in the eventual internment decision appears to be the release of the Roberts Commission report on the Pearl Harbor attacks.³¹⁹ While the commission only briefly mentioned that some Japanese in the

³¹² See PETER IRONS, *JUSTICE AT WAR: THE HISTORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 19 (1983).

³¹³ See Alien Enemies Act, c. 66, §1, 1 Stat. 577 (July 6, 1978).

³¹⁴ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

³¹⁵ IRONS, *supra* note 312, at vii.

³¹⁶ See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 79, 92-95, 98-99, 104, 106-07, 127 (2003).

³¹⁷ See, e.g., IRONS, *supra* note 312, at 29-30, 33-35; ROBINSON, *supra* note 316, at 76-78, 85-86; ERIK YAMAMOTO ET AL., *RACE, RIGHTS & REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 100 (Richard A. Epstein et al. eds., 2001).

³¹⁸ See ROBINSON, *supra* note 316, at 3.

³¹⁹ *Id.* at 95.

Hawaiian Islands, along with Japanese consular officials, had provided intelligence on military installations before the attacks, the public response was tremendous. The Roberts Commission report “attracted national attention and transformed public opinion on Japanese Americans.”³²⁰ Newspapers, California political leaders, and military officials demanded that the Roosevelt administration intern Japanese-Americans out of fear of further sabotage and espionage.³²¹ Some in the War Department discounted the effect of espionage on the West Coast, and FBI Director J. Edgar Hoover dismissed claims of disloyalty.

Cabinet members raised the issue twice with the President before the final executive order. Biddle met FDR for lunch in early February 1942 to express doubts about the need for internment. While FDR did not make a decision at that time, he concluded the lunch by saying he was “fully aware of the dreadful risk of Fifth Column retaliation in case of a raid.”³²² A few days later, Stimson called Roosevelt after learning that General DeWitt would recommend removal of Japanese-Americans on the West Coast.³²³ News that Singapore had fallen arrived the day before Stimson’s call, making it unlikely that FDR would second-guess claims of military necessity. Nonetheless, Stimson—who had his own doubts about the necessity and legality of the evacuations—proposed three options: massive evacuation, evacuation from major cities, or evacuation from areas surrounding military facilities.³²⁴ Roosevelt responded that Stimson should do what he thought best, and that he would sign an executive order giving the War Department the authority to carry out the removals.³²⁵ DeWitt soon found the evacuations necessary on security grounds, and Stimson and Biddle agreed on a draft of the executive order based on Roosevelt’s constitutional authorities as Chief Executive and Commander-in-Chief.³²⁶ It appears that FDR’s decision rested solely on the military’s claim of wartime necessity.

Several scholars have observed that Roosevelt was not vigilant in protecting civil liberties, and in this case, according to one biographer, the decision was easy for him.³²⁷ FDR believed that the military “had primary direct responsibility for the achievement of war victory, the achievement of war victory had

³²⁰ ROBINSON, *supra* note 316, at 95.

³²¹ *Id.* at 95–96.

³²² *Id.* at 104.

³²³ *Id.* at 106.

³²⁴ *Id.* at 100–01.

³²⁵ *Id.* at 106.

³²⁶ *Id.*

³²⁷ *See* DAVIS, *supra* note 239, at 424.

top priority, and ‘victory’ had for him a single simple meaning” of defeating Germany and Japan; victory, for Roosevelt, “was prerequisite to all else.”³²⁸ There was no great outcry from liberal leaders, there was no cabinet meeting or forum for debate within the administration, and the Attorney General came to agree with the War Department that the measure was legal. Recent historical work argues that the internment decision did not arise solely because of misinformation about Japanese-Americans or the pressure of events early in the war.³²⁹ The internments happened, in part, because FDR was ready to believe the worst about the potential disloyalty of Japanese-Americans.³³⁰

Presidential consultation with Congress did not improve national security decision-making. Both Congress and the Court approved FDR’s actions. In March 1942, Congress passed a bill establishing criminal penalties for those who refused to obey the evacuation orders.³³¹ Support for the law was so broad that it was approved in both the House and Senate by voice vote with only a single speech, by Republican Senator Robert Taft of Ohio, in opposition.

The Supreme Court did not directly address the constitutionality of the detentions until *Korematsu v. United States*, decided on December 18, 1944.³³² According to the Court, the mass evacuation triggered “strict” scrutiny under the Equal Protection Clause because it discriminated on the basis of race.³³³ Nonetheless, the Court agreed that these wartime security measures advanced a compelling government interest, and the Court deferred to the military’s judgment of necessity. According to Justice Black’s 6–3 majority opinion, “[the court was] unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”³³⁴ While not disputing the deprivation of individual liberty involved, the majority recognized that “the military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion.”³³⁵ As with an earlier case upholding a nighttime curfew on Japanese-Americans in the western military region, the Court concluded, “we cannot reject as unfounded the judgment of the

³²⁸ *Id.*

³²⁹ ROBINSON, *supra* note 316, at 118.

³³⁰ *Id.*

³³¹ 56 Stat. 173, 77 Cong. Ch. 191 (Mar. 21, 1942).

³³² See *Korematsu v. United States*, 323 U.S. 214 (1944).

³³³ *Id.* at 216.

³³⁴ *Id.* at 217–18.

³³⁵ *Id.* at 218.

military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”³³⁶

The Court’s majority stressed that the Constitution afforded leeway to the executive branch during time of emergency.³³⁷ Justice Black agreed that while the government generally could not detain citizens based solely on their race, such motivation was not present in the instant case. The exclusion order was necessary, Black wrote, because “the properly constituted military authorities feared an invasion of our West Coast,” and their judgment was that “the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily[.]”³³⁸ Although it observed that Congress supported the military’s power “as inevitably it must” during wartime, the Court attached no special importance to the authorization.³³⁹

The press of circumstances required deference to military judgment. “There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.”³⁴⁰ Perhaps most important, Justice Black concluded that decisions taken during the emergency itself had to be understood in light of the information known at the time. “We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”³⁴¹

Korematsu remains one of the most criticized decisions in American history, considered second only to *Dred Scott* on the list of the Court’s biggest mistakes. The three dissenters believed that the Constitution clearly protected Japanese-American citizens from what we today would call racial profiling. The government, Justice Roberts wrote, was “convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.”³⁴² The dissenters did not challenge the proposition that “sudden danger” might require the suspension of a citizen’s right to free movement, or that the Court owed the military broad deference

³³⁶ *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

³³⁷ *Id.* at 220.

³³⁸ *Id.* at 223.

³³⁹ *Id.*

³⁴⁰ *Id.* at 223–24.

³⁴¹ *Id.*

³⁴² *Id.* at 226 (Roberts, J., dissenting).

during wartime, but that the chosen hypothetical did not represent the true facts of the case. Any “immediate, imminent, and impending” threat to public safety was absent.³⁴³ Justice Murphy wrote in dissent that “this forced exclusion was the result in good measure of [an] erroneous assumption of racial guilt rather than bona fide military necessity.”³⁴⁴ The dissenters pointed out that the government presented no reliable evidence that Japanese-Americans were generally disloyal or had done anything that made them a threat to the national defense. The exclusion order relied simply on unproven racial and sociological stereotypes.

Justice Jackson used his dissent to harmonize the role of the executive and the courts during wartime. “It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality.”³⁴⁵ For a Commander-in-Chief and the military, “the paramount consideration is that its measures be successful, rather than legal.”³⁴⁶ In words that echoed Lincoln and Jefferson, Jackson declared that the “armed services must protect a society, not merely its Constitution,” and observed that “defense measures will not, and often should not, be held within the limits that bind civil authority in peace.”³⁴⁷ That said, Jackson did not want to provide constitutional legitimacy to the exclusion order. There might be no limit to what military necessity would allow when courts are institutionally incapable of second-guessing the decisions of military authorities. “But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.”³⁴⁸ Upholding the Japanese-American internment would create a dangerous precedent for the future. “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”³⁴⁹ A one-time-only action is only an “incident,” but once upheld by the Court, it becomes “the doctrine of the Constitution.”³⁵⁰ In a solution many have found unsatisfying, Jackson wanted the Court neither to bless nor block the military’s enforcement of the exclusion.

³⁴³ *Id.* at 234 (Murphy, J., dissenting).

³⁴⁴ *Id.* at 235–36 (Murphy, J., dissenting).

³⁴⁵ *Id.* at 244 (Jackson, J., dissenting).

³⁴⁶ *Id.* (Jackson, J., dissenting).

³⁴⁷ *Id.* (Jackson, J., dissenting).

³⁴⁸ *Id.* (Jackson, J., dissenting).

³⁴⁹ *Id.* at 246 (Jackson, J., dissenting).

³⁵⁰ *Id.* (Jackson, J., dissenting).

Historical research has revealed that some government officials doubted whether any real security threat justified the exclusion order. Nonetheless, the Justice Department chose in *Korematsu* to assert that military authorities believed the evacuations necessary because of an alleged threat against the West Coast. A companion case, *Ex parte Endo*, however, found that the government could not detain a Japanese-American citizen whom the government had conceded was “loyal and law-abiding.”³⁵¹ To this day, the debate over the necessity of the measures continues, but regardless of which side one falls on in that debate, it seems clear that the internment of the Japanese-Americans in *Korematsu* represents a far more serious infringement of civil liberties than that which occurred in the Civil War. The first and most obvious difference is one of magnitude. FDR interned—without trial—about 110,000 Japanese-Americans on suspicion of disloyalty to the United States.³⁵² Lincoln ordered the detention of about 12,600.³⁵³

The second difference is one of justification. FDR ordered the detention of the Japanese-Americans not because any had been found to be enemy combatants. They were interned because of their *potential* threat due to loyalty to an enemy nation imputed from their ethnic ancestry. FDR could have pursued a narrower policy that detained individuals based on their individual ties to a nation with which the United States was at war. The citizens of Japan, Germany, and Italy could be interned as a matter of course, and anyone fighting or working for the enemy, regardless of citizenship, could be detained. With regard to aliens, FDR could have relied upon the Alien Enemies Act to detain natives or citizens of a hostile nation during wartime.³⁵⁴ FDR’s internment policy did neither—instead, it presumed disloyalty, sweeping in 110,000 American’s of Japanese ancestry based solely on their ethnicity.

C. Electronic Surveillance

Roosevelt has been described by one historian as the president most interested in covert activity other than

³⁵¹ *Ex Parte Endo*, 323 U.S. 283, 294 (1944); *see also* *Korematsu v. United States*, 323 U.S. 214 (1944), *reprinted in* PHILLIP B. KURLAND AND GERHARD CASPER, *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 197 (1975); ROBINSON, *supra* note 316, at 210.

³⁵² IRONS, *supra* note 312, at vii.

³⁵³ MARK E. NEELY JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 10 (1991).

³⁵⁴ Act of July 6, 1798, ch. 66, §1, 1 Stat. 577 (codified at 50 U.S.C. § 21); *see also* *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (upholding the use of the Alien Enemies Act during World War II in the case of a German national detained in the United States).

Washington, who personally managed spies and directed the interception of British communications. During World War I, Roosevelt had served as assistant secretary of the Navy, with responsibility for intelligence. During World War II, his interest in covert operations led to the establishment of the Office of Strategic Services, the forerunner of the Central Intelligence Agency.³⁵⁵

Less well known are Roosevelt's actions with regard to the interception of electronic communications. The Administration initially had not engaged in any wiretapping for national security purposes, as Attorney General Jackson believed that electronic surveillance without a warrant violated the Federal Communications Act of 1934.³⁵⁶ In March 1940, he issued an order prohibiting the FBI from intercepting electronic communications without a warrant. As Europe plunged into war, however, J. Edgar Hoover grew increasingly concerned about the possibility of Axis spies within the United States. Aware of Jackson's order, Hoover went to Treasury Secretary Henry Morgenthau and asked him to speak to Roosevelt to authorize the interception of the communications of potential foreign agents who might sympathize with Germany.³⁵⁷

Roosevelt had long been concerned with the potential threat of a "fifth column" inside the United States. The spectacular 1916 sabotage of an American munitions plant remained vivid in his memory. As early as 1936, Roosevelt authorized the FBI to investigate "subversive activities in this country, including communism and fascism."³⁵⁸ When World War II broke out, Roosevelt ordered the Bureau to "take charge of investigative work in matters relating to espionage, sabotage, and violations of neutrality regulations," and commanded state and local law enforcement officers to "promptly turn over" to the FBI any information "relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality laws."³⁵⁹ What "subversive activities" meant was left undefined.

France's collapse in May 1940 had a profound effect. At the time, Germany's smashing victory seemed inexplicable as a feat of arms alone, lending credence to the theory that collaborators

³⁵⁵ CHRISTOPHER ANDREW, *FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH 6-9*, 76 (1996).

³⁵⁶ Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

³⁵⁷ See Richard Caplan & Neal Katyal, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1049-50 (2008).

³⁵⁸ ANDREW, *supra* note 355, at 89.

³⁵⁹ *Id.* at 91.

and spies were also responsible. Roosevelt increasingly spoke of his concern that the United States, too, might suffer from Axis sympathizers or covert agents' intent on undermining its war preparations. Even before Hoover came to make his request, FDR had encouraged amateur surveillance efforts. His friend, publisher, and real estate developer, Vincent Astor, had set up a private group he had called "the Room," which included leading figures in New York City.³⁶⁰ As a director of the Western Union Telegraph Company, Astor ordered the covert interception of telegrams.³⁶¹ He and his friends also arranged for the monitoring of radio transmissions in New York. Using its connections, the group gathered the private banking records of companies connected to foreign nations to determine whether they were supporting espionage within the United States.³⁶² While there is no direct record of a presidential order authorizing this surveillance, historical evidence suggests that the group was acting in response to a request by Roosevelt.³⁶³

Given his suspicions, Roosevelt quickly agreed with Morgenthau and Hoover that the wiretapping of suspected Axis agents or collaborators was necessary to protect national security. The next day, he issued a memorandum to Jackson to allow the FBI to wiretap individuals who posed a potential threat to the national security.³⁶⁴ After Pearl Harbor, FDR released the handbrake and authorized the interception of *all* international communications. Even though some Justices had criticized wiretapping, the Court held in 1928 in *Olmstead v. United States*, that the Fourth Amendment did not require a warrant to intercept electronic communications.³⁶⁵ It would not be until 1967, in *Katz v. United States*, that the Supreme Court would hold that electronic communications were entitled to Fourth Amendment privacy protections.³⁶⁶

Congress, however, appeared to have prohibited the interception of electronic communications in the Federal Communications Act of 1934. It declared that "no person" who receives or transmits "any interstate or foreign communication by wire or radio" can "divulge or publish" its contents except through "authorized channels of transmission" or to the recipient.³⁶⁷ In *United States v. Nardone*, decided in 1937, the

³⁶⁰ *Id.* at 83.

³⁶¹ *Id.*

³⁶² *Id.* at 92.

³⁶³ *See id.*

³⁶⁴ *United States v. U.S. District Court*, 444 F.2d 651, 669–70 (6th Cir. 1971).

³⁶⁵ *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

³⁶⁶ *Katz v. United States*, 389 U.S. 347, 359 (1967).

³⁶⁷ Communications Act of 1934, 47 U.S.C. § 151 (1934).

Supreme Court interpreted this language to prohibit wiretapping by the government as well as by private individuals.³⁶⁸ In a second *Nardone* case, the Court made clear that the government could not introduce in court any evidence gathered from wiretapping.³⁶⁹

FDR recognized that his wiretapping order of May 1940 violated the text of the statute, or at least the Supreme Court's reading of it, but the President claimed that the Supreme Court could not have intended "any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation."³⁷⁰ Administration supporters in Congress introduced legislation to legalize wiretapping, but the House rejected the bill 154–147.³⁷¹ FDR continued the interception program throughout the war despite the Federal Communications Act and *Nardone*. FDR's pre-war interception order applied to anyone "suspected of subversive activities" against the U.S. government, which included individuals who might be sympathetic to, or even working for, Germany and Japan.³⁷² At that time, however, the United States was not yet at war. While FDR wanted the FBI to limit the interceptions to the calls of aliens, his order did not exclude citizens. Most importantly, it was not limited only to international calls or telegrams, but included communications that took place wholly within the United States.

IV. CONCLUSIONS

War and emergency demand that presidents exercise their constitutional powers far more broadly than in peacetime. That was never more true than under President Franklin Roosevelt. FDR tackled the Great Depression by treating it as a domestic emergency that called for the centralization of power in the federal government and the presidency. But he could not act alone, because the Constitution gives Congress the authority to regulate the economy and create the federal agencies. Under Roosevelt's direction, Congress enacted sweeping legislation vesting almost complete power over industry and agriculture in the executive branch, which repeatedly sought to centralize power over the plethora of New Deal agencies in the presidency.

³⁶⁸ See *United States v. Nardone*, 302 U.S. 379, 384 (1937).

³⁶⁹ *Id.* at 338.

³⁷⁰ ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68–69 (2003).

³⁷¹ See Caplan & Katyal, *supra* note 357, at 1060.

³⁷² *United States v. U.S. District Court*, 444 F.2d 651, 670 (6th Cir. 1971).

Roosevelt responded to the looming threat of fascism by bringing the United States into World War II, and he made all the significant decisions of foreign and domestic policy once the war began. Historians rarely, if ever, mention any role for Congress in the prosecution of the war against Germany and Japan, aside from the provision of money and arms. It was the President, for example, who decided that the United States would allocate its resources to seek victory in Europe first, and Roosevelt alone who declared that the Allies would demand unconditional surrender as the only way to end the war.

FDR, not Congress, made the critical decisions about the shape of the postwar world. He wanted a world policed by four major countries: the United States, Great Britain, China, and the Soviet Union. He agreed with Great Britain and the Soviet Union to divide Germany—the “German question” was the fundamental strategic problem at the root of both World Wars. At Yalta, FDR agreed that the Soviet Union would control a sphere of influence extending over Eastern Europe, and in return, those nations would be allowed to hold democratic elections.

While some believe that Stalin had hoodwinked him, FDR may have recognized the reality of the balance of power in Europe after the war. He may have hoped that his reasonableness in agreeing to Stalin’s demands would win, in exchange, Soviet support of the United Nations. Roosevelt also demanded that Britain and France give up their colonies. FDR wanted to forestall a return to both the isolationism and the international disorder of the interwar period. Historians argue today whether Roosevelt truly believed in collective security, or whether he was a realist who accepted the balance of power at the end of World War II. Either way, it was the President who took the initiative to set the policy, although it was one where he could not act alone. Without the Senate’s approval, the United Nations would have gone the way of the League of Nations.

Too often, we focus on mistakes of commission—a decision to go to war gone bad, or a law that has unintended consequences—known as *Type I* errors. FDR showed that the presidency may be far more effective than the other branches in preventing a failure to take action—errors of omission, or *Type II* errors. Left to its own devices, Congress would have blocked aid to the Allies and delayed American entry into World War II by several months, if not years. This may be a result of the internal structure of Congress, which suffers from, at times crippling, collective action problems. The passage of legislation through both Houses with many members is fraught with such difficulty that the Constitution can be understood to favor inaction and,

therefore, maintenance of the status quo. The status quo may be best for a nation when it enjoys peace and prosperity, where threats come more often from ill-advised efforts at reform or revolutionary change. But maintaining the status quo may harm the nation when long-term threats are approaching, or unanticipated opportunities present themselves and must be seized rapidly before vanishing.

In the area of domestic affairs, whether the New Deal or internal security programs, Roosevelt worked hand-in-hand with Congress. He had to: the Great Depression's economic nature brought it squarely within the enumerated powers of Congress. Nevertheless, the emergency of the Depression illuminated the natural advantages of presidential leadership in the legislative process. A complex economy beset by a mysterious, but dangerous, ailment required administrative expertise for a cure, and Congress willingly cooperated by transferring massive legislative authority to the agencies.

FDR deserves praised for trying every reasonable idea, including this transformation of executive-legislative relations, to reverse the sickening drop in economic activity. Crucially, neither he, nor anyone else, affirmatively knew how to end the Depression. Only now do we know that the New Deal, combined with the Federal Reserve's tight monetary policy and the government's restrictive fiscal policies, prolonged the Great Depression itself. Rather, it was World War II, not the New Deal, which ended the persistent unemployment levels of the 1930s. When the smoke cleared in 1945, the New Deal's true legacy endured in the form of bloated, independent bureaucracies that future presidents would struggle to control. Plainly, presidential cooperation with Congress provides no guarantee of success, and, in fact, can prove quite malignant.

Throughout FDR's astounding presidency, a theme unites both his success in foreign policy and the appearance of such in domestic policy. FDR believed deeply in the independence of the presidency and a vigorous use of its constitutional authorities. He did not shrink from constitutional confrontations with the other branches. To pursue the policies he believed to be in the national interest such confrontation was often required. He openly disagreed with the Supreme Court's limitations on the New Deal and publicly sought to manipulate its membership. He pushed his powers as Commander-in-Chief beyond their perceived limits, refusing to abide by the spirit, and sometimes the letter, of the Neutrality Acts in order to involve the United States in a war that neither Congress nor a clear majority of Americans favored. FDR correctly judged the threat to the nation's existence posed

by the rise of fascism. The nation and the world are better off today because he pushed a reluctant nation into war. His broad understanding of his executive powers created the foundation for policies that secured freedom in the twentieth century.

The *Chapman Law Review* is published by its student members at Chapman University Dale E. Fowler School of Law. The *Chapman Law Review* can be reached by phone at (714) 628-2582, online at www.chapmanlawreview.com, or by e-mail at chapmanlawreviewonline@gmail.com. The office of the *Chapman Law Review* is located in Donald P. Kennedy Hall on the campus of Chapman University, One University Drive, Orange, CA 92866.

Except where noted, all authors in this issue have granted permission for copies of their articles to be used in the classroom, provided that (1) copies are distributed at or below cost, (2) the author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the user obtains permission to make copies from the *Chapman Law Review* or the author.

The views expressed in the *Chapman Law Review* are solely those of the authors and in no way reflect the views of the *Chapman Law Review*, Chapman University Dale E. Fowler School of Law, or Chapman University.

