IMMUNITY AFTER *TRUMP*

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"All the officers of government," the Supreme Court said long ago, "from the highest to the lowest, are creatures of the law, and are bound to obey it." Despite that ringing and categorical language, however, the Court has held that the President—the "highest" and most powerful of all government officers—is "immune" from judicial oversight in several respects. Indeed, when the Court held last Term that former Presidents are immune from criminal prosecution, the dissenters warned: "In every use of official power, the President is now a king above the law."

This Article unpacks the various presidential immunities and assesses their collective significance for the basic project of constitutionalism: putting the state under law. It begins by asking what it has meant as a historical matter for the President to be "under law." Though the Court had immunized former Presidents from damages liability under Bivens*, it nevertheless routinely allowed suits for injunctive and declaratory relief challenging presidential actions to proceed. And while the Department of Justice had effectively conferred a temporary immunity from criminal prosecution on sitting Presidents, the near-universal assumption was that a* former *President could be indicted for illegal acts.*

Last Term's decision in Trump v. United States *destabilizes this balance. Most obviously, it immunizes former Presidents from criminal prosecution for a wide range of official conduct. This leaves no remedy in place—criminal or civil—for completed presidential wrongdoing. And the decision may be as troubling for what it portends as for what it holds. Its method of reasoning threatens to awaken a slumbering Reconstruction Era case,* Mississippi v. Johnson*, in which the Court disclaimed the power to "enjoin the president in the performance of his official duties." Although that case was implicitly overtaken by* Steel Seizure *and* United States v. Nixon*, it has never been formally repudiated, and is still routinely cited by the Department of Justice in litigation.*

Suits for injunctive and declaratory relief have been the backbone of American public law, and to revive immunity in that context could leave Presidents themselves impervious to judicial oversight, civil and criminal. The fix is simple. The Court should make clear that the President is not immune from injunctive or declaratory relief. Congress can and should also act to restore accountability in other contexts. This is important both practically and symbolically for confirming that all *officers of government—"from the highest to the lowest"—are indeed bound by law.*

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> [T]he King [James I] was greatly offended, and said, that he should then be under the Law, which was treason to affirm . . . ; To which [Chief Justice Coke] said, that Bracton saith, "*Quod Rex non debet esse sub homine, sed sub Deo & Lege*."[1]
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> After which his majesty fell into that high indignation as the like was never known in him, looking and speaking fiercely with bended fist, offering to strike him etc.; which the lord Coke perceiving fell flat on all fours, humbly beseeching his majesty to take compassion on him and pardon him if he thought his zeal had gone beyond his duty and allegiance.[2]
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> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[3]

INTRODUCTION

It is a basic postulate of American constitutionalism—perhaps *the* most basic postulate—that the state can be put under law.[4] The state is a creature of the Constitution; the Constitution is a species of law; and the activities of the state can be constrained by the law of the Constitution.[5] A society that does not conform to this postulate may have a "constitution" in the

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[1] *Prohibitions del Roy*, 12 Coke Rep. 63 (1608). The Latin means: "That the King should not be under man, but under God & Law."

[2] Letter from Sir Ralph Boswell to Dr. Milborne (Feb. 1609), quoted in JOHN BAKER, THE REINVENTION OF MAGNA CARTA 1216–1616, at 368 (2017).

[3] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

[4] *See* DARYL J. LEVINSON, LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE 23 (2024) ("The premise of constitutionalism is that states and governments are constituted by law and constrained to act in accordance with legal rights and rules.").

[5] U.S. CONST. art. VI, § 2 (referring to "[t]his Constitution" as "Law"); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–78 (1803).

ancient sense—a description of that society's political institutions.[6] But it would not have a constitution in the modern or American sense.[7]

This basic postulate implies another. Because the state is not an abstraction but is instead composed of officials who carry out its functions, these officials must themselves be subject to law. As the Supreme Court memorably put it:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.[8]

The Constitution purports to constrain the government; in order to carry out that role, it must also constrain the "officers of the government."[9]

Given these basic postulates, it may come as a rather jarring surprise that Presidents—the "highest" and most powerful of all government officers—enjoy a suite of immunities that would seem to allow them to "set th[e] law at defiance with impunity."[10] First, in *Mississippi v. Johnson* the Supreme Court said that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties."[11] Second, in *Nixon v. Fitzgerald* the Court recognized an "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[12] And third, in *Trump v. United States*, decided this past Term, the Court held that the President enjoys absolute immunity from criminal prosecution even after leaving office for the "exercise of his core constitutional powers," and enjoys presumptive immunity for all "official actions."[13] When it comes to the official acts of the President, no injunctions, no damages, and no criminal prosecutions. "Immune, immune, immune."[14]

Were the dissenters in *Trump v. United States* right that the President—surrounded by the protective nimbus of these immunities—inhabits a "law-free

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[6] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 769 (1988); CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 14 (1940) ("[T]he traditional notion of constitutionalism before the late eighteenth century was of a set of principles embodied in the institutions of a nation and neither external to these nor in existence prior to them."); *cf.* ARISTOTLE, THE ATHENIAN CONSTITUTION (P. J. Rhodes ed. & trans., 1984).

[7] *See* MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 32–35 (2023) (describing the "modern" idea of a "constitution as a written text that establishes and limits the powers of government"); SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 71 (1893) ("A constitution in the American sense of word is a written instrument by which the fundamental powers of the government are established, limited, and defined . . . .").

[8] United States v. Lee, 106 U.S. 196, 220 (1882).

[9] *Id.*

[10] *See id.*

[11] 71 (4. Wall.) U.S. 475 (1867).

[12] 457 U.S. 731, 756 (1982).

[13] 144 S. Ct. 2312, 2327 (2024).

[14] *Id.* (Sotomayor, J., dissenting).

zone"? And what do these immunities mean collectively for the aspiration to subordinate the state to law? Presidents, after all, are not just the most powerful officers of the state; they symbolize the state.[15] If the President cannot be constrained by the judicial system, it would seem to challenge a core tenet of American constitutionalism. This issue is particularly urgent at a time of rising presidential unilateralism and (at least globally speaking) authoritarianism.[16] At stake is whether the judiciary has the resources to check a law-breaking President.[17]

This Article analyzes presidential immunities after *Trump v. United States* and assesses their combined significance for constitutionalism.[18] Its first aim is descriptive. The dissenters in *Trump* charged that "[i]n every use of official power, the President is now a king above the law."[19] But what does it mean for an official to be "under law" in the first place, and what judicial mechanisms of accountability have been available against Presidents to date? The Court's

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[15] Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, to Att'y Gen. 30 (Sept. 24, 1973), https://fas.org/irp/agency/doj/olc/092473.pdf ("[T]he President is the symbolic head of the nation."); Alexander M. Bickel, *The Constitutional Tangle*, NEW REPUBLIC, Oct. 6, 1973, at 14, 15 ("In the presidency is embodied the continuity and indestructibility of the state."); *see generally* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

[16] *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State under Seige*, 131 HARV. L. REV. 1, 71 (2017) (noting "our current era of presidential unilateralism"); Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221 (2020) ("It is no secret that liberal democracy is in trouble around the world."); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 124 (2018) ("American democracy is at serious risk of erosion, even though the chance of autocratic collapse is small.").

[17] *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018) (describing autocrats who "use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state"). Indeed, one unsettling aspect of the *Trump* decision is its factual context: a leader determined to resist an electoral check on his power. *See* SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED 123 (2023) ("Perhaps the simplest form of judicial intervention is to defend the primacy of rotation in office as the key to democratic governance."). Tom Ginsburg and Aziz Huq suggest that judicial checks may be most efficacious in the early stages of democratic erosion, another reason for urgency. GINSBURG & HUQ, *supra* note __, at 96–97.

[18] For some helpful studies on aspects of presidential immunity prior to *Trump*, see Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701 (1995); Evan Caminker, *Democracy, Distrust, and Presidential Immunities*, 36 CONST. COMMENT. 255 (2021); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997); Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739 (1991); Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341 (1983); Kathleen Tipler, *The Law: The Contours of Presidential Immunity*, 49 PRESIDENTIAL STUD. Q. 449 (2019).

[19] *Trump*, 144 S.Ct. at 2371 (Sotomayor, J., dissenting).

general approach to official immunity has oscillated over time between two models: the "legality" model, which focuses simply on whether official action is lawful, and the "discretion" model, which focuses on the need to protect (and not to chill) an official's decisionmaking process.[20] These models could be redescribed in terms of "immunity": The legality model asks whether the official action was legal, and so confers no immunity on unlawful acts, while the discretion model asks whether an action falls within the outer perimeter of an official's responsibilities, and so could be understood as conferring immunity on unlawful actions within that perimeter.[21]

Before *Trump v. United States*, the Court and the legal system more broadly had come to rest on a blend of the legality and discretion models for the President. The discretion model dominated civil actions for damages. In *Nixon v. Fitzgerald*, the Court held that "the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress."[22] Immunity was necessary, the Court explained, because the "prospect of damages liability" could make the President "unduly cautious in the discharge of his official duties."[23] That holding was in keeping with the discretion model's protectiveness of official decisionmaking.

The legality model, however, had come to dominate civil actions for coercive or declaratory relief, with *Youngstown* as the paradigmatic case.[24] In *this* context, the Court explained, "when the President takes official action, the Court has the authority to determine whether he has acted within the law."[25] Often, as a formal matter, those suits proceeded against subordinates in the

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[20] *See* infra notes __ and accompanying text. This useful terminology comes from Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987).

[21] *See id.* at 412–13

[22] Nixon v. Fitzgerald, 457 U.S. 731, 749, n.27 (1982).

[23] *Id.* at 753 n.32.

[24] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). By "coercive" relief, I mean a judicial order compelling an executive official to perform or desist from certain acts. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 517 (1969) (classifying "injunctions" and "mandamus" as "coercive relief"). While in modern practice "coercive" relief usually comes in the form of an injunction, historically it could flow from common law writs like mandamus, certiorari, and prohibition. *See* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269 (2020). To be clear, I do not include damages in the category of "coercive" relief, even though some commentators on declaratory judgments have used the phrase in that more capacious sense. *See, e.g.*, Edwin M. Borchard, *The Declaratory Action as an Alternative Remedy*, 36 YALE L.J. 403, 405 (1927).

[25] Clinton v. Jones, 520 U.S. 681 (1997). Reviewing the lawfulness of executive action may encompass the question whether an agency complied with statutorily required procedures. *See, e.g.*, Interstate Nat. Gas Ass'n of Am. v. Pipeline & Hazardous Materials Safety Admin., 114 F.4th 744, 747 (D.C. Cir. 2024) (vacating several safety standards for natural gas pipelines because "the agency failed to adequately explain why the benefits of the final standards outweigh their costs").

executive branch rather than the President himself (like Charles Sawyer, the Secretary of Commerce, in *Youngstown*). But the naming of a subordinate was understood to be a fiction.[26] In substance the Court has routinely reviewed presidential action for legality, and the Court has even confirmed—despite *Mississippi v. Johnson*—that "that the President is subject to judicial process in appropriate circumstances."[27]

The practice in criminal cases before *Trump* had blended elements of both models. The discretion model had effectively ruled out prosecutions of *sitting* Presidents, though even that was controversial.[28] The near universal assumption, however, shared even by those who advocated a temporary immunity, was that *former* Presidents would be subject to criminal prosecution for illegal conduct.[29] As the Office of Legal Counsel put it, recognizing a temporary "immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over."[30] This backstop was important: There are certain forms of presidential malfeasance that cannot be anticipated and halted through a suit for prospective relief. With damages taken away by *Nixon v. Fitzgerald*, criminal liability was the only mechanism in place for that sort of misconduct.

This equilibrium—the "discretion" model for damages, the "legality" model for coercive relief, and a blend for criminal liability—allowed the courts to play their part in achieving a basic structural imperative: keeping the President generally within the bounds of the law.[31] To be sure, there were holes

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[26] A "fiction" because it was evident that in reality the action of the *President* was being challenged. *Cf.* LON FULLER, LEGAL FICTIONS (1967) (defining a legal fiction in part as "a statement propounded with a complete or partial consciousness of its falsity"); *see generally* Siegel, *supra* note __. *Youngstown* is a case about *presidential* power; it is not a case about the powers of the Secretary of Commerce.

[27] *Id.* at 703.

[28] *Compare* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 255 (2000) (arguing for temporary immunity from criminal prosecution); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, NEXUS, Spring 1997 (same), *with* Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55 (2021) (arguing against temporary immunity).

[29] *See* Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1329 (2018) ("[T]here is no uncertainty as to whether a former president can be convicted of a crime committed while in office.").

[30] A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 255; *see* Amar & Katyal, *supra* note __, at 708–09 (distinguishing temporary and permanent immunity, and noting that "the Framers would have been shocked by the notion that . . . executive officials could violate the Constitution and yet be held permanently immune").

[31] *See* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). The goal of this Article is not to propose some ideal model of presidential accountability in court as a matter of pure normative theory. Rather, the Article seeks to reconstruct the doctrine as it existed before *Trump v. United States*, along with the principles undergirding that doctrine, in

to judicial accountability, deriving largely from the fact that not all presidential decisions give rise to justiciable cases.[32] But these holes, by and large, were not unique to suits against the *President*, and therefore not a product of presidential immunity. The President did enjoy a somewhat greater immunity than lower officials, both in the bar on damages actions and the effective bar on prosecution of incumbents. But these bars were not absolute. *Fitzgerald* had left open the possibility that immunity from damages could be lifted by Congress, and lower-level officials could still be sued for damages. And the lack of a robust damages remedy against the President replicated the broader pattern of American public law: Equitable and declaratory relief is routinely available against executive officials, while damages suits are often cut off by cause-of-action and immunity problems.[33] One can certainly question that pattern, but it is not unique to the President. Moreover, the temporary immunity from criminal prosecution was backstopped by the possibility of prosecution after leaving office. In short: Presidential action has in practice been subject to meaningful judicial limits.

Trump v. United States unsettles this equilibrium. Most immediately, it recognizes a permanent though ill-defined immunity from criminal prosecution even after leaving office. More broadly, and perhaps more consequentially, the majority's analysis of immunity was not just an embrace of the discretion model, it was a bear hug. The driving force of the Court's reasoning was the need to protect a broad zone of "official" conduct in which the President can operate without fear of legal liability. That reasoning could spill over to non-criminal contexts. For one thing, the majority gave no indication, as the Court carefully did in *Fitzgerald*, that presidential immunity may be defeasible by Congress. It thus subtly removes Congress from the structural analysis. For another, the Court's analysis may be invoked to extend presidential immunity to suits for *coercive* relief—the most important stronghold of the "legality" model. *Trump* may jostle a slumbering countertradition embodied in *Mississippi v. Johnson*, which would place the President beyond the reach of judicial power even in suits for coercive relief. For that reason, *Trump* may be as troubling for what it portends than for what it narrowly holds, because suits for coercive relief challenging the legality of official action are the backbone of public law.

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their most attractive versions. *Id.* at 1737–38. It then explains how the *Trump* decision derogates from that reconstructed state of affairs, and suggests how our institutions might best recover.

[32] Perhaps the most obvious hole encompasses suits challenging presidential action in the domain of war and national security. *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1110 (2013) ("Judicial abstention is particularly common in the foreign affairs area."); Oona A. Hathaway, *For the Rest of the World, the U.S. President Has Always Been Above the Law*, FOREIGN AFFAIRS (July 16, 2024).

[33] Since the early twentieth century, the legality model has dominated suits for equitable relief, while suits for damages involves a combination of the two models, which Woolhandler calls "colorable legality."

For an official to be "under" law, in practice, has generally meant to be suable for coercive relief.

The fix is simple: The Court should make clear that the President is not "immune" from suits seeking injunctive or declaratory relief. It is remarkable that nearly two and a half centuries of experience have not yielded a clear answer to a question as basic as whether the President can be sued for official actions. It is time for clarity. Limiting *one* form of judicial recourse against the President, as in *Trump* or *Fitzgerald*, is one thing; limiting *all* forms is quite another.[34] In a system of constitutional self-government, the highest executive official should be amenable to at least one form of judicial oversight. And presidential "immunity" from injunctive relief rests on a vestigial and almost mystical idea of the President's dignity that is out of place in modern constitutional law.[35] Beyond this Court-centered fix, both *Trump* and *Fitzgerald* leave some for Congress to create remedies to ensure that presidential wrongdoing that cannot be remediated by coercive relief is not entirely immunized.

Making the President amenable to suit may seem like a formality, given that relief is usually available in suits against subordinates.[36] But the border between formality and reality can be porous. State sovereign immunity seemed like a formality in suits seeking coercive relief after *Ex parte Young*[37]—until Texas delegated the power to enforce its anti-abortion law to private plaintiffs, and the Court's decision in *Whole Women's Health v. Jackson*[38] showed plainly that state sovereign immunity could be utterly real. The stakes of presidential immunity could be similarly real: The Department of Justice routinely invokes *Mississippi v. Johnson*, and there are several contexts in which it is not clear that a subordinate official could successfully be sued. In those contexts, arguments for immunity—fortified by the recent *Trump* decision—could succeed, and render consequential executive actions impervious to any form of judicial review. In short, a device that may seem like an innocuous formalism can be turned into an escape hatch from judicial accountability in determined hands.

One immediate objection is that a court would be powerless to enforce a contempt sanction against the President. The President, however, is not unique

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[34] *Cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953) ("The denial of *any* remedy is one thing . . . . But the denial of one remedy while another is left open, or the substitution of one for another, is very different.").

[35] *See* Renan, *supra* note __, at 1165 ("[P]residential immunity appears vestigial in a legal landscape marked by judicial review of presidential action.").

[36] *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment) ("Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive . . . .").

[37] 209 U.S. 123 (1908).

[38] 595 U.S. 30 (2021).

in this respect.[39] If a President were determined to defy a court judgment, he could instruct a subordinate to do just that and fire her if she refused. *Any* time a court orders an executive branch official to do something, it raises one of the abiding mysteries of American constitutional practice: "Why would people with money and guns ever submit to people armed only with gavels?"[40]

The answer, at least historically, is not that the judiciary has its own resources of violence—its own "money and guns"—that it can deploy to enforce its judgments. As Nick Parrillo has painstakingly shown, the "judiciary as an institution—particularly the higher courts—has exhibited a virtually complete unwillingness to allow sanctions" against all federal officials for violation of injunctions.[41] Instead, the power of a contempt finding is its power to shame an official into compliance.[42] That same mechanism would work and indeed has worked against Presidents, who since the 1800s have observed an "unbroken" norm not to defy federal court orders.[43] Indeed, I am not aware of a single instance in American history of a President defying a judicial judgment.[44] The executive is kept "under law" not by the U.S. Marshal's Service but by a legal and political culture that demands respect for judicial judgments. There is no guarantee that such a culture will last forever, of course, but it has proved durable and the Court should not contribute to its erosion by profligate grants of "immunity."

Two preliminary points before diving in. This Article brackets debates about departmentalism and the President's authority to interpret the law.[45] Presidential accountability to law does not require judicial supremacy in its strong form. But, at least in our legal culture, it does require that the President comply with specific *judgments* of the courts.[46] Even a minimalist conception of

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[39] The problem of enforcing injunctions against the President simply replicates what Daryl Levinson has called "the positive puzzle of constitutional commitment." Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

[40] Matthew C. Stephenson, *"When the Devil Turns…": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003).

[41] *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697 (2018).

[42] *Id.*

[43] *See id.* at 694 & n.30.

[44] The most famous examples of presidential defiance in our constitutional lore—President Jackson's response to *Worcester v. Georgia* and President Lincoln's response to *Ex parte Merryman*—turn out not to be counterexamples. *See infra* Part __.

[45] *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending "*Cooper* and its assertion of judicial primacy without qualification"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225-26 (1994) ("The power to interpret law is . . . a divided, shared power not delegated to any one branch . . . .").

[46] *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1319 (1996) (noting that the President's "absolute obligation to obey and enforce judgments issued by the federal courts" is "taken for

the judicial power—which contests that the executive is bound by judicial *opinions*—would concede that the executive is bound by judicial judgments. This has been a bedrock norm of the constitutional system since at least the nineteenth century, and is the near-universal position of commentators.[47] This Article addresses immunity from *judgments*.

Finally, a note on the word "immunity." It has a wide variety of meanings: An official might be "immune" in the sense that a court will not imply a cause of action against her, or that a particular remedy is not available against her,[48] or that her action was lawful on the merits, or that some heightened showing of liability must be made before a remedy is imposed. And next to official immunity are allied concepts of sovereign "immunity," Fourteenth Amendment "immunities," or certain private law "immunities." The word immunity, then, does not so much denote a particular idea as roughly mark off a conceptual thicket. As a result, the word can easily lead to analytic confusion.[49] Take, for instance, Trump's argument in *Trump*: "just as a President is absolutely immune from civil damages liability for acts within the outer perimeter of his official responsibilities, he must be absolutely immune from criminal prosecution for such acts."[50] Framed that way, the argument holds a specious

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granted in our legal culture"). As a conceptual matter, one can imagine a system in which the executive is both bound by law and not subject to judicial review at all. And there are internal checks in the executive branch that can constrain the president. *See generally* JACK GOLDSMITH, POWER AND CONSTRAINT (2012); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). But as an institutional matter, an independent judiciary available to review executive action has long been taken as an important ingredient of constitutionalism and the rule of law. Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789 (1991) ("What would be intolerable is a regime of public administration that was systematically unanswerable to the restraints of law, as identified from a relatively detached and independent judicial perspective."); Thomas W. Merrill, *The Essential Meaning of the Rule of Law*, 17 J.L. ECON. & POL'Y 672, 690 (2022) ("Perhaps the most common theme in the literature on the rule of law, in the sense of predictability about government coercion, is the importance of an independent judiciary."). Moreover, internal checks may depend on judicial case law for their efficacy. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 685 (2005).

[47] Parrillo, *supra* note __, at 694 n.30 ("Even in academia, there has long been near-total consensus that the President is bound to obey a federal court judgment.").

[48] Qualified immunity for officers, for instance, only applies to damages, not to coercive relief. An immunity might also apply only in a particular court; a federal officer, for instance, may be immune from prosecution in *state* court for actions authorized by federal law. *See* In re Neagle, 135 U.S. 1, 75 (1890); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003).

[49] Justice Barrett's concurrence in *Trump* proceeds in a similar spirit. 144 S. Ct. at 2352 (Barrett, J., concurring in part) (describing the term "immunity" as "shorthand for two propositions").

[50] 144 S. Ct. at 2326 (citation omitted).

attraction, and the Court's opinion largely tracked Trump's logic.[51] Stripped of the language of "immunity," however, one can see that the argument is a non-sequitur. *Fitzgerald* held that a court should not allow a suit for damages to proceed against the President *in the absence of a congressional law*. It does not follow that the President is (presumptively) immune to an attempt *by Congress* to constrain him through criminal law. *Trump*'s grounding in precedent was shaky, and the word "immunity" was an agent of obfuscation. This Article endeavors to be precise and disciplined in its use of that word, and urges courts and commentators to do the same.[52]

I. IMMUNITY BEFORE *TRUMP*: TWO MODELS OF ACCOUNTABILITY

Clashes between the judiciary and the President are nothing new. Indeed, *Marbury v. Madison* was a suit to compel action by a high-ranking executive official, and was in substance a suit against President Jefferson himself.[53] Over American history, courts reviewing the actions of executive branch officials have tended toward two different approaches, depending upon the time and context. Ann Woolhandler labels these two approaches the "legality" model and the "discretion" model.[54]

The "legality" model focuses the lawfulness of the official's actions and the resulting harm to the plaintiff. The critical question is "whether the official's behavior is legal, and hence could be described as no immunity at all."[55] Following the "legality" model, if a court finds that an official has acted unlawfully and the plaintiff has been harmed, it should grant a remedy. The "discretion" model, by contrast, focuses on the need to protect the official and the official's decisionmaking process.[56] The most common justification for the "discretion" model was the concern that judicial scrutiny would "chill fearless decisionmaking," because the official would be too worried about legal liability to pursue the public good.[57] The basic question when judging a claim under the discretion model is "whether the official acted within the outer perimeter of his duties."[58]

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[51] *Id.* at 2330–31.

[52] The imprecision of the word makes me wary of statutory or constitutional fixes that also rely on the word. *Cf., e.g.*, No Kings Act, S. 4973, 118th Cong. (2024); *infra* Part __.

[53] AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1864, at 484 (2022).

[54] *See* Woolhandler, *supra* note __. These models are helpful heuristics, though they were not always applied in pure form. In practice, they often "incorporated elements of each other." *Id.* at 413.

[55] *Id.* at 412–13.

[56] *Id.* at 410.

[57] *Id.* at 410–11.

[58] *Id.* at 413. One can see traces of both of these models in *Marbury* itself. On the one hand, Chief Justice Marshall wrote that a "government of laws" ought to furnish a "remedy for the violation of a vested legal right," and proclaimed the "duty of the

The two models have vied for dominance over the course of American history. But modern American public law, broadly speaking, has settled on a particular balance. Suits for coercive relief tend to follow the legality model.[59] When a plaintiff has standing to seek an injunction or declaratory judgment challenging some federal or state program, the question a court asks is simply whether it is lawful or not.[60] In suits for injunctive relief, there is no qualified immunity and the Court tends to be generous in "implying" causes of action. Damages suits, by contrast, tend to incorporate elements of the discretion model and, as a result, are harder to win. Executive officials sued for damages enjoy qualified immunity.[61] Moreover, after *Bivens*—which recognized an implied cause of action for damages against federal officials who violate the Fourth Amendment—the distinct trend on the modern Court has been to insist on an express legislative cause of action before imposing damages liability.[62] To be "under" law, from a modern judicial perspective, has generally meant to be subject to injunctive and declaratory relief.[63]

So much for general principles—what about the President? This Part canvasses how the courts have approached presidential accountability before *Trump v. United States*. In short, the *status quo ante* was (1) the Court had embraced the "discretion" model for damages actions against the President for official acts, (2) the Office of Legal Counsel and executive branch practice had settled upon the discretion model for criminal cases against a *sitting* President, but it was almost universally assumed that the President could be prosecuted after leaving office, and (3) the Court had generally embraced the "legality" model for suits seeking coercive relief, announcing sweepingly that "when the President takes official action, the Court has the authority to determine whether he has acted within the law."[64] At the same time, though, the Court had at times disclaimed the power to "enjoin the President" directly, and the legal status of those disclaimers was uncertain.[65]

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judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 163, 177 (1803). On the other hand, he forswore the power to "inquire how the executive, or executive officers, perform duties in which they have a discretion." *Id*. at 170. Where an executive official has discretion, "nothing can be more perfectly clear than that their acts are only politically examinable." *Id*. at 166.

[59] Woolhandler, *supra* note __, at 409–10 ("Early in the twentieth century, however, the legality model came substantially to dominate the field of coercive relief."). On the rise of the injunction as a tool of public law, see Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1, 14.

[60] RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1039 (7th ed. 2015) [hereinafter HART & WECHSLER].

[61] *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Kisela v. Hughes, 584 U.S. 100 (2018).

[62] *See, e.g.*, Egbert v. Boule, 596 U.S. 482 (2022).

[63] Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 65 (2019).

[64] Clinton v. Jones, 520 U.S. 681, 703 (1997).

[65] Mississippi v. Johnson, 71 (4. Wall.) U.S. 475 (1867).

A. Damages Actions

Historically, there have been very few suits for damages against a President for acts taken in his official capacity. Before the Supreme Court's 1971 decision in *Bivens* (which recognized an implied cause of action for damages against federal officials),[66] there had been only a "handful" of damages actions against a President and none "appears to have proceeded to judgment."[67] But suits against *inferior* executive officers were routine.[68] This pattern roughly resembled English practice. As Blackstone put it, because it was "a necessary and fundamental principle of the English constitution" that the "king" could "do no wrong," no action could "lie against the sovereign."[69] But an action could proceed against inferior officers, "for whom the law in matters of right entertains no respect or delicacy."[70] Indeed, very early on the Supreme Court confirmed that an inferior officer could be liable in a suit for damages even where the officer was carrying out a presidential order.[71]

It was not until 1982 that the Supreme Court overtly embraced the "discretion" model in for damages suits against the President (in the absence of a statutory cause of action).[72] Ernest Fitzgerald was a whistleblower who testified to Congress about cost overruns in the procurement of army planes.[73] He had been an analyst in the Air Force, but his job was eliminated after his testimony.[74] He sued various federal officials for damages, alleging that his discharge had been retaliation for truthful testimony to Congress.[75] By the time the case reached the Court, there were three defendants left—former President Nixon, and two former White House aides.[76] Fitzgerald sought damages directly under the First Amendment and two federal statutes that did not "expressly confer[] a private right to sue."[77]

The Supreme Court held that the President was entitled to absolute immunity from the damages action. As for method, the Court was candid in its

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[66] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[67] Nixon v. Fitzgerald, 457 U.S. 731, 750 n.31 (1982).

[68] *See* HART & WECHSLER, *supra* note __, AT 880–82.

[69] 3 Blackstone *254–55. A "personal immunity from suit" was one of the royal prerogatives of the British king. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1224 (2019).

[70] *Id.* at *255; Locke, Second Treatise § 205.

[71] Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

[72] *Fitzgerald*, 457 U.S. 731. The issue had come up the previous Term, but with Justice Rehnquist recused the Court split 4-4. *See* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 318–19 (2016).

[73] *Fitzgerald*, 457 U.S. at 733–34

[74] *Id.*

[75] *Id.* at 739.

[76] *Id.* at 740.

[77] *Id.* at 740 & n.20.

reliance on "concerns of public policy."[78] Because English common law furnished no precedents for presidential immunity, "any historical analysis must draw its evidence primarily from our constitutional heritage and structure."[79] As a result, "[h]istorical inquiry thus merges almost at its inception with the kind of 'public policy' analysis appropriately undertaken by a federal court."[80] To answer the immunity question, then, the Court looked to "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."[81]

The core of the Court's policy-inflected structural reasoning, put simply, was that the President's job is extremely important and demanding, and that the threat of civil liability would be too distracting. The President is "the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including law enforcement, foreign affairs, and personnel management.[82] "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."[83] Indeed, the "sheer prominence" of the President would make him an "easily identifiable target" for lawsuits.[84] And the "prospect of damages liability" could make the President "unduly cautious in the discharge of his official duties."[85] Putting this together, the Court "recognize[d] absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[86]

But the Court's decision was limited in an important respect. The Court went out of its way to note more than once that the suit before it had not been expressly authorized by Congress; rather, Fitzgerald was relying on *Bivens* for his constitutional claim and implied rights of action for his statutory claims.[87] As a result, the Court did "not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States."[88] Its "holding," then, was limited to that

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[78] *Id.* at 748. For a rebuttal of the historical evidence the Court did adduce, *see* Amar & Katyal, *supra* note __, at 715–21.

[79] *Id.*

[80] *Id.*

[81] *Id.* The dissent was particularly biting on the question of method. *See id.* at 770 (White, J., dissenting) ("This is policy, not law, and in my view, very poor policy."); id. at 769 ("[T]he judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.").

[82] *Id.* at 750.

[83] *Id.* at 751.

[84] *Id.* at 753.

[85] *Id.* at 753 n.32.

[86] *Id.* at 756.

[87] *See id.* at 741 n.20, 748-49 & n.27, 754-55 n.37.

[88] *Id.* at 748 n.27.

circumstance: "[T]he President is absolutely immune from civil damages liability for his official acts *in the absence of explicit affirmative action by Congress*."[89]

This was an important caveat. It meant that the Court's ruling on immunity was potentially defeasible by Congress.[90] The immunity holding was constitutional common law, in Henry Monaghan's sense.[91] In effect, *Fitzgerald* held only that you could not sue the President in the absence of an express cause of action—or, put another way, that the Court would not recognize a *Bivens* or an implied statutory action against the President. This fact may explain why the Court's opinion is so pervaded by policy considerations. As Justice Harlan acknowledged in his *Bivens* concurrence, when a court is assessing an implied remedy under the Constitution, "the range of policy considerations [it] may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy."[92] As for implied causes of action under statutes, the Court has framed the question as whether a damages remedy is "necessary to make effective the congressional purpose."[93] Whether to imply a cause of action, then, is a question that often involves an element of policy judgment—which is why the Court has generally *forsworn* implied causes of action in recent years.[94] The fact that the Court in *Fitzgerald* was in effect considering whether to imply a cause of action for damages against the President may explain its policy-soaked reasoning.[95]

In short, *Fitzgerald* embraced the "discretion" model for damages actions against the President—but only in the absence of a congressional law. The opinion also recognized implicitly that suits for injunctive relief are different. It called it "settled law" that "the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States," citing *Youngstown*.[96]

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[89] *Id.* at 749 n.27 (emphasis added); *id.* ("We decide only this constitutional issue, which is necessary to disposition of the case before us.").

[90] *See* Carter, *supra* note __, at 1345.

[91] *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

[92] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).

[93] J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). *But see* Cort v. Ash.

[94] *See* Alexander v. Sandoval, 532 U. S. 275, 286-87 (2001); Egbert v. Boule, 142 S.Ct. 1793, 1803 (2022) ("Unsurprisingly, Congress is 'far more competent than the Judiciary' to weigh such policy considerations.").

[95] The author of *Bivens* perceived the connection between an "immunity" issue and a "cause of action" issue in a subsequent case. *See* United States v. Stanley, 483 U.S. 669, 691–92 (1987) (Brennan, J., concurring in part and dissenting in part) ("As a practical matter, the immunity inquiry and the 'special factors' inquiry [under *Bivens*] are the same; the policy considerations that inform them are identical, and a court can examine these considerations only once.").

[96] Nixon v. Fitzgerald, 457 U.S. 731, 753–54 & n.36 (1982).

B. Coercive Relief

Before the twentieth century, the "basic judicial remedy for the protection of the individual against illegal official action" was typically "a private action for damages against the official."[97] The courts of equity in England were concerned mostly with private law.[98] In the United States, though, bills in equity became an important source of public law litigation after the Civil War, especially after Congress gave general federal question jurisdiction to the federal courts in 1875.[99] This subpart traces the use of a coercive remedies like injunctions as tools of presidential control.[100]

1. Mississippi v. Johnson: Intimations of Immunity

An early attempt to enlist equity for public law functions was *Mississippi v. Johnson*.[101] After the Civil War, Mississippi filed an original action in the Supreme Court to enjoin President Andrew Johnson and a military commander "from executing, or in any manner carrying out, . . . the Reconstruction Acts."[102] The first of the two Reconstruction Acts in question divided the former rebel states into five military districts "under commanders empowered to employ the army to protect life and property."[103] And it specified that the rebel states would be readmitted to Congress when they ratified the Fourteenth Amendment and established new state constitutions allowing Black men to vote.[104] The second of the Reconstruction Acts at issue in *Mississippi v. Johnson* was a "supplemental measure authorizing military commanders to register voters and hold elections."[105]

The procedural posture of *Mississippi v. Johnson* was unusual. Mississippi's representative walked into the Supreme Court on April 5, 1867 and moved "for an injunction on behalf of the State of Mississippi against Andrew Johnson and others."[106] President Johnson had been notified of the motion in advance, and at a special cabinet meeting that morning had "directed" his Attorney General

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[97] Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S.Doc. No. 8, 77th Cong, 1st Sess. 81 (1941); HART & WECHSLER, *supra* note __, at 881.

[98] Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2079 (2022).

[99] Schmidt, *supra* note __, at 14; Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

[100] On the meaning of "coercive relief," see *supra* note __.

[101] 71 (4. Wall.) U.S. 475 (1867).

[102] *Mississippi*, 71 U.S. at 497.

[103] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 276 (1988).

[104] *Id.*; *see* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2349–50 (2021).

[105] FONER, *supra* note __, at 276–77.

[106] CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION, 1864–88, pt. 1, at 379 (1971) (quoting a stenographic report from *National Intelligencer*).

Henry Stanbery "to object to the motion" on the ground that "the President, as the representative of the United States, cannot be sued."[107] Attorney General Stanbery dutifully rose to object to the motion in the Court, and argued that the case should be dismissed at the threshold: Because Mississippi was seeking to file an "original" action directly in the Supreme Court, it was required to obtain "leave of the court," and leave should be denied (he argued) because the Court could not "entertain[ ] jurisdiction" over the case at all.[108] The Court scheduled a hearing a week later, on April 12, 1867, and Chief Justice Chase announced the unanimous Court's decision on Monday April 15, 1867.[109]

The technical issue before the Court was thus whether to grant leave to Mississippi to file an original action. And the Court said the answer to that question turned on a "single point": "Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?"[110] The Court's answer—no—interwove several strands.

First, the Court drew a distinction between "ministerial" and "executive" acts, which traces to *Marbury v. Madison*. "A ministerial duty," the Court explained, "the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion."[111] In *Marbury*, for instance, Madison's duty to deliver the commission had been ministerial. But, the Court said, the President's duty to enforce the Reconstruction Acts was "purely executive and political." For that reason, President Johnson could not be restrained under the logic of *Marbury*.[112]

Second, the Court analogized Congress and the President as heads of their respective branches. Just as the Court could not restrain Congress from *enacting* an unconstitutional law, the Court reasoned, so it could not restrain the President from *executing* one.[113] "The Congress is the legislative department of the government; the President is the executive department." Both the legislature and the President are constitutional principals. "Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."[114]

Third, the Court emphasized the "possible consequences" of its intervention. If it granted an injunction, the Court noted, the President could refuse to obey it and the Court would be "without power to enforce its process." If the President *did* obey the injunction (after all, President Johnson had tried to veto the Reconstruction Acts), there could be a "collision" between "between the executive and legislative departments of the government."

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[107] 3 DIARY OF GIDEON WELLES (1911); FAIRMAN, *supra* note __, at 378. Johnson's opposition to the motion was notable, given that he had vetoed and "bitterly opposed" the Reconstruction Acts on constitutional grounds. *Id.* at 382.

[108] FAIRMAN, *supra* note __, at 381.

[109] *Id.*

[110] Mississippi v. Johnson, 71 (4. Wall.) U.S. 475, 498 (1867).

[111] *Id.*

[112] *Id.* at 499.

[113] *Id.* at 500.

[114] *Id.*

> May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These rhetorical questions were far from fanciful—indeed, less than a year later, Chief Justice Chase would preside over the impeachment trial of Andrew Johnson (again represented by Henry Stanbery, no less), and Johnson's administration of the Reconstruction Acts was at the root of the proceeding.[115]

For these three reasons, the Court announced its seemingly categorical conclusion: "[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."[116] But how are we to understand the significance of this conclusion in the context of the case? Did the Court mean that it had no power to enjoin the President in any circumstance? Or just *this* President in the context of *this* case? Several considerations point to the latter, narrower reading.

To begin, much of the Court's reasoning was not unique to the *President*. *Marbury*'s distinction between ministerial and discretionary acts is applicable to *all* executive branch officials. Indeed, the distinction was articulated in the context of a suit against the Secretary of State. And Chief Justice Marshall was quite clear in *Marbury* that the propriety of judicial relief turned upon the nature of the underlying *act* challenged, not the status of the officeholder: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined."[117] On that logic, it should not matter whether the defendant is the President or a low-level official; the question is the "nature" of the challenged act. Further, *Mississippi v. Johnson* reserved the question whether the President "may be required, by the process of this court, to perform a purely ministerial act." That reservation would not make sense if coercive relief against the President were categorically barred.

The best evidence that the Court's holding was not unique to the President is the fact that the President was not the only defendant in the case. The

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[115] The articles of impeachment focused on the removal of army officers and defying the authority of Congress. FONER, *supra* note __, at 334–35. But the Republicans' "real reasons" for impeaching Johnson were "his political outlook, the way he had administered the Reconstruction Acts, and his sheer incompetence." *Id.*

[116] Mississippi, 71 U.S. at 501. In an echo of what Daphna Renan has termed the President's two bodies, *see* Renan, *supra* note __, Mississippi also argued that "if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee." *Id.* The Court rejected that end-run around its holding: "A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State." *Id.*

[117] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Mississippi's bill also named "E.O.C. Ord, general commanding in the District of Mississippi and Arkansas." There would have been no basis also to dismiss the case against *Ord* if the Court's reasoning was limited to the President. Indeed, the Court also dismissed a subsequent case, filed by Georgia, which sought to enjoin Secretary of War Edwin Stanton, General Ulysses S. Grant, and one other official from carry out the Reconstruction Acts. Even though President Johnson was not a named defendant, the Court again tossed the case on the ground that it called "for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character."[118]

In all, the language in the Court's opinion forswearing "jurisdiction to enjoin the President" should not be taken at face value. The Court's opinion was not driven by a categorical immunity for the President, but by a set of factors that we would now recognize as the province of the political question doctrine.[119] The Civil War had just ended; the South was under military rule and its (putative) representatives were still not readmitted to Congress; the Nation's first presidential impeachment was imminent. It is hard to imagine a more difficult and delicate environment for the Court. The Court's analysis in *Johnson* "subsumed the question of presidential immunity under concerns involving the scope of unreviewable executive discretion and the hazards of creating a direct conflict between Congress and the President—hazards that may have achieved a historical zenith in the face-off between President Johnson and a Republican-dominated Reconstruction Congress."[120] As a result, *Mississippi v. Johnson* should be understood as a political question case, rather than a categorical bar against injunctive relief against the President. The concerns about interposing on executive discretion, and the concerns about the "possible consequences" articulated by the Court, both sound in the political question doctrine. This reading has been the consensus among commentators, and has even been embraced by the Court.[121]

2. Steel Seizure: The Triumph of Legality

Mississippi v. Johnson was not cited in a majority opinion of the Supreme Court for the proposition that the President has a special status when it comes to coercive relief until *Nixon v. Fitzgerald* in 1982. But it was slumbering not far

[118] Georgia v. Stanton, 73 U.S. 50, 77 (1868).

[119] On the development of the political question doctrine, see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015).

[120] HART & WECHSLER, *supra* note __, at 1059.

[121] *See, e.g.*, Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 6–7 n.30 (1993) ("Jurisdiction was declined . . . not because the President was a defendant but because the issues raised by the litigation were thought to be essentially political in nature."); John Harrison, *The Political Question Doctrines*, 67 AM. U.L. REV. 457, 484 (2017) (describing *Mississippi v. Johnson* as "a leading nineteenth century political question case"); *see also* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 496 (1971) (characterizing *Mississippi v. Johnson* as a political question case)

below the surface, appearing in several briefs and lower court opinions. The most notable appearance, unsurprisingly, was the canonical case about judicial review of presidential action: *Steel Seizure*.[122]

At 10:30 p.m. on April 8, 1952, President Truman announced by radio and television that he had ordered his Secretary of Commerce, Charles Sawyer, to seize and operate most of the nation's steel mills.[123] Truman's justification was that the production of steel was "indispensable" to the Korean War, and that the seizure of the mills was necessary to avert a strike by the United Steelworkers of America.[124] A group of steel companies challenged the order immediately, and a TRO hearing was convened the following morning. The presiding judge quickly homed in on the *Mississippi* issue:

> THE COURT: These actions are nominally directed against the Secretary of Commerce. . . . But the Secretary of Commerce is acting pursuant to a directive of the President, a specific directive, or a specific order of the President.
>
> Aren't you indirectly seeking a restraining order against the President though not nominally so? And, if so, does the Court have the power to issue an injunction against the President of the United States?
>
> I do not know of any case on record in which a Federal Court, or any other court, has issued an injunction against the President of the United States.[125]

The lawyers for the steel companies could not produce a case, but argued that the court could sidestep the question because they were only seeking relief against a cabinet officer, not the President.[126]

The judge denied the TRO. His oral ruling—issued after a brief recess following the argument—reiterated his concern about enjoining the President:

> Although, nominally, and technically, the injunction, if granted, would run solely against the defendant, Sawyer, actually and in essence it would be an injunction against the President of the United States. . . . It is doubtful, to say the least, whether a Federal Court has authority to issue an injunction against the President [citing and quoting *Mississippi v. Johnson*] . . . . The Court, it seems to me, should not do by indirection what it could not to directly . . . .[127]

The judge also pointed to the lack of irreparable harm to the steel companies. In the opening round of the *Youngstown* bout, the *Mississippi* dictum prevailed.

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

[123] *Id.* at 582; MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 80 (1994).

[124] *Youngstown*, 343 U.S. at 590-91 (reprinting Truman's executive order).

[125] THE STEEL SEIZURE CASE, H.R. REP. NO. 82–534, at 246 (1952) [hereinafter *Steel Seizure Proceedings*].

[126] *Id.* at 246–50.

[127] *Id.* at 264–65.

After the TRO was resolved, the full case was assigned to a new district judge, David Pine, and the steel companies moved for a preliminary injunction. At the hearing, the government, represented by Assistant Attorney General Holmes Baldridge, came out swinging on the *Mississippi* point: "Our position is that there is no power in the Courts to restrain the President and, as I say, Secretary Sawyer is the alter ego of the President and not subject to injunctive order of the Court."[128] Judge Pine skeptically shot back: "If the President directs Mr. Sawyer to take you into custody, right now, and have you executed in the morning you say there is no power by which the Court may intervene even by habeas corpus?" Clearly ruffled, Baldridge suggested that there would only be a "remedy" if there were "statutes protecting me," but then could not produce a statute that would.[129]

Judge Pine continued to press Baldridge on the claimed presidential immunity from injunctive relief. He asked whether the upshot of the government's position was that the President has "unlimited" power in a "great" emergency. Baldridge replied that was "true" if its argument were carried "to its logical conclusion," but tried to reassure the court by offering the "ballot box" and "impeachment" as checks. Baldridge insisted, though, that a court could not review the President's judgment that an emergency exists. When asked for "any case that sustains such a proposition as that," Baldridge cited *Mississippi v. Johnson*.

Baldridge added that it did not matter that the defendant was Sawyer rather than Truman, because Sawyer was "the alter ego of the President."[130] If the Court enjoined Sawyer, the "President could immediately appoint somebody else to operate the steel mills, or he could undertake that himself."[131] Lest the import of this argument was lost on anyone, Judge Pine laid bare its implications the following day:

> THE COURT: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive.
>
> Is that what you say?
>
> MR. BALDRIDGE: That is the way we read Article II of the Constitution.

In short, the Department of Justice's position was that a court had no power to review a President's actions during an emergency for compliance with law. Indeed, it suggested that "Article II" did not "limit the powers of the Executive" at all. The only checks were impeachment or the political process.

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[128] *Id.* at 362.
[129] *Id.* at 362-63.
[130] *Id.*
[131] *Id.* at 372.

The backlash in the press and in Congress to the government's argument was immediate and severe.[132] Indeed, one White House staffer called Baldridge's argument the "legal blunder of the century," because it had touched the "ever-sensitive nerve of 'constitutionalism.'"[133] Newspapers trumpeted that the Department of Justice had said that the President's powers were unlimited; even the President's defenders in Congress distanced themselves from the Department of Justice's position.[134] The uproar was such that President Truman felt compelled to make a public statement clarifying his position.[135]

A few days after the hearing Judge Pine ruled. As foreshadowed by his skeptical questioning, he rejected the government's contention of an unlimited inherent power in the President to respond to emergencies.[136] And he distinguished *Mississippi v. Johnson*:

> [I]n this case the President has not been sued. Charles Sawyer is the defendant, and the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment.[137]

Hence, Judge Pine entered a preliminary injunction prohibiting Sawyer "from acting under the purported authority" of Truman's order.[138] As a "direct consequence" of Pine's decision, the United Steelworkers of American went on strike.[139] Judge Pine's distinction—between orders binding the President by name and orders formally directed only to subordinates—was the rock upon which judicial review of presidential action would be built.[140]

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[132] MARCUS, *supra* note __, at 124-25.

[133] *Id.*

[134] *Id.* at 125.

[135] *Id.* at 125-26.

[136] Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 573 (D.D.C), aff'd, 343 U.S. 579 (1952).

[137] *Id.* at 576. Nor was the President an "indispensable" party. *Id.*

[138] *Id.* at 577.

[139] MARCUS, *supra* note __, at 132-33.

[140] The press was much kinder to Judge Pine's order than it had been to Baldridge's argument. Newspapers "showered encomiums on him for upholding the traditional concept of constitutional government." *Id.* at 130; *see also id.* at 132 ("Very little criticism of the Pine decision appeared in the press."). This buoyant "popular reaction," Maeva Marcus suggests, "as a practical matter became an important element in the legal decision-making process" as the case made its way up the judicial hierarchy. *Id.* at 130. Indeed, William Rehnquist, who was Justice Jackson's law clerk the year *Youngstown* was decided, would later write: "I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence on the Court." WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 95 (1987).

The next stop—albeit very brief—was the D.C. Circuit. The government sought a stay the day after Judge Pine ruled, reiterating that the district court "was without power, under the circumstances of this case, to enjoin Presidential action."[141] The D.C. Circuit convened *en banc* for an emergency oral argument that very afternoon. It ruled 5-4 to stay Judge Pine's injunction for 48 hours in order to enable the government to appeal to the Supreme Court.[142] Both sides swiftly cross-petitioned for certiorari.[143] On May 3, 1952—less than a month after Truman's seizure order—the Court took the case by a vote of 7–2, and scheduled oral argument for May 12.[144]

The steel companies (represented by John Davis) devoted 8 pages of their brief to the *Mississippi* issue,[145] and closed by observing that the government was "rely[ing] on a doctrine of Executive immunity from constitutional limitations and judicial restraints."[146] "Our system of government has no place for any such concept of arbitrary power which, if once established, must be fatal to our liberties."[147] Interestingly, the Solicitor General downplayed the immunity argument in his merits brief in the Supreme Court, confining his discussion of *Mississippi* to a somewhat tentative footnote.[148] There he argued:

> It is by no means clear that department heads can be enjoined from carrying out the President's express orders . . . . [Such a theory] cannot cope with the problem which would exist if the President personally performed the duties which he here directed Mr. Sawyer to perform. It would seem, therefore, that the issue is sufficiently uncertain and delicate as to constitute a compelling reason for leaving the plaintiffs to their legal remedy for damages.

In other words, the government gestured toward presidential immunity from injunctive relief that would extend even to subordinates. But it invoked the argument as a reason to favor a legal remedy rather than a discretionary injunctive remedy.

The Court, of course, affirmed the district court's injunction. Notably—given the starring role *Mississippi v. Johnson* had played in the litigation to that point—no justice cited the case and there was virtually no overt discussion of presidential immunity. Justice Black's opinion for the Court glided by the

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[141] *Steel Seizure Proceedings*, *supra* note __, at 443.

[142] MARCUS, *supra* note __, at 136-40.

[143] *Id.* at 143–44.

[144] *Id.* at 147. Only Justices Burton and Frankfurter voted to deny certiorari, on the ground that the Court should await further proceedings in the lower courts. "The need for soundness in the result outweighs the need for speed in reaching it," they wrote in a statement. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937, 938 (1952) (Burton, J., memorandum concerning certiorari).

[145] *Steel Seizure Proceedings*, *supra* note __, at 668-75.

[146] *Id.* at 675.

[147] *Id.* at 676.

[148] Perhaps the government was chastened by the outraged public reaction to Baldridge's oral argument in district court, or perhaps it anticipated a cold reception from the Justices.

issue, taking for granted that a presidential act in excess of constitutional or statutory authority should be halted by the Courts.[149] Chief Justice Vinson, in his dissent for three Justices, "assume[d]" without deciding "that defendant Charles Sawyer is not immune from judicial restraint and that plaintiffs are entitled to equitable relief if we find that the Executive Order under which defendant acts is unconstitutional."[150]

The larger significance of the decision, however, was clear.[151] Earl Warren, then Governor of California but not far from the Court's center seat, lauded the Court for upholding "the basic American principle" that "everyone in the nation, including the President, is subject to the written provisions of law."[152] Paul Freund, in his *Foreword* in the *Harvard Law Review*, said that the Court had "echoed, through its majority, the ancient voices of Bracton and Coke proclaiming that not even the King is above the law."[153] Maeva Marcus summed up the constitutional significance of *Youngstown* in a similar way: It "breathed new life into the proposition that the President, like every other citizen, is 'under the law.'"[154] Truman was stung—indeed, "very emotional"—after the Court's ruling, but immediately instructed Secretary Sawyer to comply.[155]

It seemed that *Mississippi v. Johnson* had been interred.

3. After Steel Seizure: The Uneasy Slumber of Immunity

But not too deep for President Nixon to dig the case up in his showdown with the special prosecutor investigating Watergate. *United States v. Nixon* arose from the special prosecutor's attempt to subpoena Nixon for tapes recording conversations in the oval office.[156] Nixon argued that the President was immune from judicial process under *Mississippi v. Johnson*, and that a court could not order the President to disclose evidence that the President deemed to be privileged. District Judge John Sirica made quick work of this argument:

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[149] Notably, the opinion of the Court framed the case as a question of the "*President's* power"—not the Secretary's. Youngstown, 343 U.S at 585. Justice Jackson made a passing reference to immunity in his concurrence. *Id.* at 654 ("I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.").

[150] *Id.* at 677-78 (Vinson, C.J., dissenting).

[151] For a summary of reactions in the press and Congress, see MARCUS, *supra* note __, at 212-13.

[152] *Id.* at 213.

[153] Paul A. Freund, *The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 89 (1952).

[154] MARCUS, *supra* note __, at 228; *see also* WILLIAM M. WIECEK, 12 HISTORY OF THE SUPREME COURT: THE BIRTH OF THE MODERN CONSTITUTION, 1941–1953, at 395 (2006) ("[T]he *Steel Seizure* opinion endures today as a reminder of the limits on presidential authority.").

[155] *Id.* at 197, 214.

[156] 418 U.S. 683 (1974); *see* GRAETZ & GREENHOUSE, *supra* note __, at 325–38.

> It is true that *Mississippi v. Johnson* left open the question whether the President can be required by court process to perform a purely ministerial act, but to persist in the opinion, after 1952, that he cannot would seem to exalt the form of the *Youngstown Sheet & Tube Co.* case over its substance.[157]

The *en banc* D.C. Circuit agreed. It acknowledged that *Youngstown* had technically proceeded against a subordinate. But the Supreme Court had made clear that its ruling would "effectively . . . restrain the President," and there was "not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party."[158] The court of appeals concluded:

> If *Youngstown* still stands, it must stand for the case where the President has himself taken possession and control of the property unconstitutionally seized, and the injunction would be framed accordingly. The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own.[159]

In short, the D.C. Circuit declined to read *Mississippi* as providing a blanket immunity from judicial process, and understood *Youngstown* to reject implicitly any suggestion to the contrary. While acknowledging that certain discretionary acts of executive officials are unreviewable, "[n]o case holds that an act is discretionary merely because the President is the actor."[160]

In the Supreme Court, Nixon renewed his immunity argument vigorously.[161] Indeed, his reply brief began with a long quotation from *Mississippi v. Johnson*.[162] In its unanimous opinion, the Court (again) did not discuss *Mississippi* expressly, but in substance it rejected any claim of categorical presidential immunity: "[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[163] Indeed, the Court pointed out, "exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution"[164] (citing

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[157] In re Subpoena to Nixon, 360 F. Supp. 1, 8 (D.D.C.), modified sub nom. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973)

[158] Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc) (per curiam).

[159] *Id.* at 709.

[160] *Id.* at 712 (citing and distinguishing *Mississippi*).

[161] He dedicated large portion of his brief to the propositions that claims of privilege are not "reviewable" and that courts cannot compel disclosure, quoting *Mississippi v. Johnson* at length. Brief for Respondent, Cross-Petitioner Richard M. Nixon at 48-86, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834), 1974 WL 174855.

[162] Reply Brief for Respondent, Cross-Petitioner Richard M. Nixon at 1-2, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834), 1974 WL 159435.

[163] United States v. Nixon, 418 U.S. 683, 706 (1974).

[164] *Id.* at 703.

Youngstown and *Powell v. McCormack*[165]). This seemed like the final nail in the *Mississippi* coffin.[166]

Two other nails, perhaps superfluous, followed. In *Clinton v. Jones*, the Court held that the President is not immune from judicial process in a civil lawsuit concerning his unofficial conduct.[167] The Court reiterated two basic propositions: "First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law."[168] And "[s]econd, it is also settled that the President is subject to judicial process in appropriate circumstances."[169] Those are the two maxims of the *Youngstown* "legality" paradigm. The second case is *Trump v. Vance*.[170] There, the Court rejected President Trump's claim of absolute immunity from *state* criminal subpoenas.[171]

And yet… for all the implicit repudiations of *Mississippi v. Johnson*, the case reared its tenacious head in 1992. *Franklin v. Massachusetts* was a challenge to the reapportionment of Congress after the 1990 census.[172] Under the reapportionment statutes, the Secretary of Commerce takes the census and submits a report with the results to the President.[173] The President then "transmit[s] to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled."[174] Under the law, each state "shall be entitled . . . to the number of Representatives" specified in the President's report, and the Clerk of the House sends the executive of each state a certificate with the number.[175] After the 1990 census, Massachusetts lost a seat in the House, and sued the President, the Secretary of Commerce, Census Bureau officials, and the Clerk of the

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[165] 395 U.S. 486 (1969).

[166] MARCUS, *supra* note __, at 248 ("The decision in *United States v. Nixon* endorsed the principle that the President is subject to judicial review, not only by legal challenge to the actions of his subordinates but, if necessary, by suits against the President himself."). Even in *Nixon v. Fitzgerald*, which recognized Presidential immunity from damages actions, the Court wrote: "It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." 457 U.S. 731, 753–54 (1982). Of *Youngstown*, the Court noted: "Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order." *Id.* at 754 n.36. In *Fitzgerald*, Court cited *Mississippi* only for the proposition that "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." *Id.* at 753.

[167] 520 U.S. 681 (1997).

[168] *Id.* at 703.

[169] *Id.*

[170] 140 S. Ct. 2412 (2020).

[171] *Id.* at 2431.

[172] 505 U.S. 788 (1992). John Roberts argued the case for the federal officials. *Id.* at 790.

[173] *Id.* at 792.

[174] 2 U.S.C. § 2a(a) (unchanged in relevant part).

[175] *Id.* § 2a(b).

House of Representatives before a three-judge district court, challenging the manner of counting federal employees located overseas.[176] Massachusetts claimed that the reapportionment was arbitrary and capricious in violation of the APA,[177] and violated the Constitution's requirement that apportionment be based on an "actual Enumeration" of persons "in each State."[178] The district court agreed with the APA claim, and ordered "the Secretary to eliminate the overseas federal employees from the apportionment counts, directed the President to recalculate the number of Representatives per State and transmit the new calculation to Congress, and directed the Clerk of the House of Representatives to inform the States of the change."[179]

The Court reversed. On the APA claim, it held that the Secretary's action was not "final agency action," for APA purposes, and that the President was not an "agency" under the APA at all.[180] As a result, the apportionment could not be challenged under the APA's standards. The Court considered the constitutional challenge on the merits and rejected it. The question of presidential immunity came up in the context of standing to pursue the constitutional claim—specifically, whether Massachusetts' injury was "redressable" by a court to the extent a court lacked power to enjoin the President. In a part of the opinion joined only by a plurality, the justices said that "the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows."[181] The plurality affirmed that "in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" quoting *Mississippi*. The plurality noted, though, that *Mississippi* left "open" the question of injunctive relief for "ministerial" acts and that *Nixon* had approved "a subpoena to provide information relevant to an ongoing criminal prosecution."[182]

Though the plurality seemed to accept *Mississippi* as good law, it ended up dodging the question of the President's amenability to injunctive relief, because it found that declaratory relief against the *Secretary* would suffice for redressability. It reasoned: "[W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination."[183] In other words, even though the President was not formally bound by the order, he probably would follow it, and that was enough for

[176] 505 U.S. at 790-91.
[177] 5 U.S.C. § 701 *et seq*.
[178] U.S. Const. art. I, § 2, cl. 3; U. S. Const. amdt. 14, § 2.
[179] 505 U.S. at 791.
[180] *Id*. at 796.
[181] *Id*. at 802.
[182] *Id*. at 802–03.
[183] *Id*. at 803.

standing. Eight Justices embraced the plurality's standing analysis in a later case.[184]

Justice Scalia wrote separately. He would have dismissed the constitutional claims for lack of standing. He took a broad and confident view of presidential immunity: "I think it clear that no court has authority to direct the President to take an official act."[185] He read *Nixon* narrowly, as applicable only to a subpoena in an ongoing criminal prosecution; that case "did not require [the President] to exercise the 'executive Power' in a judicially prescribed fashion."[186] Indeed, he wrote, in *Mississippi* the Court had "emphatically disclaimed the authority to do so."[187] That said, presidential actions could "ordinarily" be *reviewed* in suits against subordinate officers—*Youngstown* was still good law to that extent.[188] As for standing, Justice Scalia rejected the idea that "redressability" was satisfied because the President would probably go along with whatever the Court said. "Redressability requires that the court be able to afford relief *through the exercise of its power*," not through the persuasiveness of its opinions.[189]

The upshot of *Franklin* was that five Justices—the O'Connor plurality plus Scalia—seemed to regard *Mississippi v. Johnson* as good law: that "in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'"[190] The apparent embrace of the legality model in *Youngstown* may not have been as stable as it seemed.

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[184] Utah v. Evans, 536 U.S. 452, 459-64 (2002); *id.* at 489 (Thomas, J., concurring in part and dissenting in part). The D.C. Circuit performed a similar dodge in a case after *Franklin*, which involved the validity of President Clinton's attempt to remove a member of the Board of the National Credit Union Administration. *See* Swan v. Clinton, 100 F.3d 973 (D.C. Cir. 1996). Though the plaintiff had sued the President, the D.C. Circuit decided it could award a remedy by requiring the other Board members to treat the plaintiff as if he were still in office. *Id.* at 980. The court suggested, however, that a President's duty to comply with a statute would always be "ministerial" and therefore potentially subject to injunctive relief. *Id.* at 977. Specifically, the court said that the duty to comply with "removal restrictions" in a statute "is ministerial and not discretionary, for the President is bound to abide by the requirements of duly enacted and otherwise constitutional statutes." *Id.* Judge Silberman, concurring in the judgment, was "uncertain" about the latter point and argued that the majority should not have reached it. *Id.* at 990 (Silberman, J., concurring in the judgment).

[185] *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part and concurring in the judgment).

[186] *Id.*

[187] *Id.* at 827. Justice Scalia also thought that a declaratory judgment against the President would be inappropriate. Relying on *Fitzgerald*, he wrote that "[i]t is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court." *Id.*

[188] *Id.* at 828 (citing *Youngstown* and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).

[189] *Id.* at 825.

[190] *Id.* at 803 (plurality opinion) (quoting Mississippi v. Johnson, supra, at 501). Justice Scalia was even more categorical, omitting the "in general." *Id.* at 827 (Scalia, J., concurring in part and concurring in the judgment). The Court clarified the scope of *Franklin* in *Dalton v. Specter*. 511 U.S. 462 (1994). That suit sought "enjoin the

One final note: This subsection has focused on injunctive, rather than declaratory relief. Technically, a declaratory judgment is a "statutory remedy rather than a traditional form of equitable relief," but as a practical matter it can often "result in precisely the same interference with" government action.[191] Justice Scalia thought that *Mississippi*'s bar on equitable relief against a President also applied to declaratory judgments.[192] But the Court's subsequent decision in *Clinton v. City of New York*, which concerned the constitutionality of the Line Item Veto Act, seemed to indicate the opposite.[193] As the caption indicates, President Clinton was a named defendant in one of the consolidated actions.[194] The plaintiffs sought only declaratory relief, and not injunctive relief.[195] The district court entered a declaratory judgment, with the President as one of the defendants.[196] The Court was well aware of this fact,[197] and affirmed the district court's judgment anyway.[198] No Justice raised a problem under *Franklin* or *Mississippi* (even though Justice Breyer, in his dissent, cited

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Secretary of Defense (Secretary) from carrying out a decision by the President to close the Philadelphia Naval Shipyard." *Id.* at 464. The statute at issue in that case gave authority to the Secretary of Defense to submit recommendations for military base closures to a commission, which then submitted a report to the President. The President could approve and submit recommendations Congress, who had 45 days in which to disapprove the President's recommendations by joint resolution. The Court held, under this scheme, that neither the Secretary's nor the commission's action was "final" under the APA, and reiterated that the President was not an "agency" under the APA, meaning that no review was available under the APA. *Id.* at 468–71. The Court then acknowledged that *Franklin* had "identified" an "exception" for "review of constitutional claims." *Id.* at 474. But it rejected the "the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution." *Id.* at 472. So the plaintiffs could not convert a statutory claim into a constitutional one. Nonetheless, the Court "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." *Id.* at 474 (citing Dames & Moore v. Regan, 453 U. S. 654, 667 (1981)). But it held that the "statute in question" had "commit[ted] the decision to the discretion of the President," and was unreviewable for that reason. *Id.* (citing Dak. Central Tel. Co. v. S. Dak. *ex rel.* Payne, 250 U. S. 163, 184 (1919)).

[191] Samuels v. Mackell, 401 U.S. 66, 70, 72 (1971). Declaratory and injunctive relief are often sought together in practice. *See* 28 U.S.C. § 2202 (providing that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted"); Fed. R. Civ. P. 8(a)(3) (providing that plaintiffs may seek "relief in the alternative or different types of relief").

[192] *Franklin*, 505 U.S. at 827.

[193] 524 U.S. 417 (1998).

[194] *Id.* at 417.

[195] *Id.* at 429 n.9.

[196] J.A. at 2a, *Clinton v. City of New York*, 524 U.S. 417 (1998) (No. 97-1374) 1998 WL 34082172 (reproducing civil docket sheet).

[197] 524 U.S. at 429 n.9.

[198] *Id.* at 449.

Franklin for a different proposition[199]). This is strong, though implicit, support for the proposition that a declaratory judgment against the President is appropriate.

C. Habeas Corpus

Another context in which the question of coercive relief against federal executive officials arises is habeas corpus. Unlike the injunction, habeas originated as a legal rather than equitable remedy,[200] but it can present a similar structural concern around judicial coercion of executive officers. The writ of habeas corpus, formally speaking, is a command to produce the body of a prisoner before a judge in order to contest the legality of the prisoner's confinement.[201] Although its function in modern federal practice is primarily to review the legality of state court convictions,[202] the "original office" of habeas corpus "focused instead on whether extra-judicial detention—most often by the executive—was authorized by law."[203] Habeas corpus has occasionally fulfilled that office over American history, and in this context has led to clashes with executive authorities. Indeed, the most famous (supposed) instance of presidential defiance of a court order—in our constitutional lore, anyway—involved a writ of habeas corpus.[204]

Confederate rebels attacked Fort Sumter on April 12, 1861.[205] Within days, responding to mob attacks on Union troops in Baltimore, Lincoln authorized military leaders to suspend the writ of habeas corpus between Philadelphia and Washington, D.C.[206] Lincoln did this without congressional approval (Congress was not in session at the time). John Merryman was believed to have played a role in destroying bridges to impede Union troops, and to be an officer

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[199] *Id.* at 490 (Breyer, J., dissenting).

[200] HART & WECHSLER, *supra* note __, at 335.

[201] *Id.* at 1193; AMANDA L. TYLER, HABEAS CORPUS IN WARTIME (2017) (discussing the history of the writ and noting that "the privilege . . . imported into the American legal tradition functioned to limit dramatically the causes for which the executive could legally detain persons").

[202] This function traces to Reconstruction. *See* Act of February 5, 1867, 14 Stat. 385.

[203] HART & WECHSLER, *supra* note __, at 1194.

[204] *See, e.g.*, Sonia Sotomayor, Katzmann Lecture, *Reflections About Judicial Independence*, 97 N.Y.U. L. REV. 872, 881 (2022) (citing *Ex parte Merryman* as one of two instances "in our history" that "presidents" have "ignored Supreme Court rulings"). For a challenge to the lore, see Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481 (2016). The second instance cited by Justice Sotomayor was President Jackson's defiance of the Court's ruling in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). From a presidential immunity point of view, *Worcester* was a different sort of case: The federal government was not a party to that ruling, and "no formal request for executive enforcement was ever made." Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 n.9 (1993).

[205] Daniel Farber, Lincoln's Constitution.

[206] Farber; Tyler.

in a secessionist group in Baltimore.[207] Acting on orders from an army general, Union troops arrested Merryman in his home in the middle of the night, and imprisoned him at Fort McHenry, which was under the command of General George Cadwalader.[208]

Merryman filed a petition for a writ of habeas corpus with Roger Taney, Chief Justice of the Supreme Court and Circuit Justice for the area covering Baltimore.[209] Taney ordered that a writ of habeas corpus be issued to General Cadwalader, requiring him to appear before Taney and to "produce the body of John Merryman."[210] Cadwalader did not come at the appointed time, and did not produce Merryman. Instead, he sent a representative to deliver a written statement, which explained that Merryman was being held for treason, and that the President had authorized Cadwalader "to suspend the writ of habeas corpus, for the public safety."[211] Cadwalader "respectfully request[ed] that you will postpone further action upon this case, until he can receive instructions from the president."[212] This was not an unreasonable request in the circumstances, but Taney responded by summarily holding Cadwalader in contempt and sending out a marshal with a writ of attachment to arrest Cadwalader. The marshal went to Fort McHenry but was turned away "by a force too strong for [Taney] to overcome."[213] When Taney learned this, he ruled that it was "very clear that John Merryman . . . is entitled to be set at liberty" and promised a written opinion.

The opinion followed a few days later. In it, Taney opined that the President did not have the power to suspend habeas corpus, because that power was lodged exclusively in Congress. But Taney did not attempt to order Cadwalader again. Instead, he only noted that he had "exercised all the power which the constitution and laws confer upon me" by ordering Cadwalader to produce Merryman and then by trying to arrest him for contempt. He also did not technically order President Lincoln to do anything; indeed, Lincoln had not formally been made a party. Instead, he directed the clerk "to transmit a copy" of his opinion to the President.[214] "It will then remain for that high officer, in fulfilment [sic] of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause

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[207] Tyler

[208] Tyler.

[209] Section 14 of the Judiciary Act empowered all federal judges to grant writs of habeas corpus. 1 Stat. 81-82 ("[E]ither of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."). The case report notes that Taney was "sitting at chambers." *See* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 280 & n.126 (2005).

[210] Ex parte Merryman, 17 Fed. Cas. 144, 146 (1861) (Taney, J., in chambers).

[211] *Id.*

[212] *Id.*

[213] *Id.* at 153.

[214] *Id.* at 153.

the civil process of the United States to be respected and enforced."[215] In other words, Taney declared his understanding of the law in his opinion—as a justice sitting alone in chambers—and appealed to Lincoln to heed it. To repeat: Lincoln was not bound personally and formally by Taney's order.[216]

President Lincoln did not release Merryman. In a July 4 address to Congress, he explained that his decision was required by his oath to "preserve, protect, and defend the Constitution" and that he had only acted to address an emergency while Congress was not even in session.[217] Lincoln's attorney general, Edward Bates, followed up with a formal legal opinion shortly after. He opined that the President, "when the very existence of the nation is assailed, by a great and dangerous insurrection," has the power to arrest and hold in custody the insurrectionists.[218] He also "has lawful power to *suspend the privilege* [of habeas corpus] in such circumstances."[219] Bates also asserted that the President could refuse to obey a writ of *habeas corpus* issued by a judge.[220] The "President and the judiciary are co-ordinate departments of government," he explained, and hence a President could not be made to "submit" to the judgment of a court. Nor could the writ run against presidential subordinates: "The President, in the arrest and imprisonment of men, must, almost always, act by subordinate agents, and yet the thing done is no less his act than if done by his own hand."[221] These were strong claims of immunity that prefigured *Mississippi v. Johnson*.

But the lore of *Merryman*—that Lincoln defied a court judgment—is not entirely accurate. Cadwalader reasonably asked for a postponement of proceedings when the order to produce Merryman was served upon him, so that he could communicate with the President, but he was refused by Taney. Taney then sent a marshal to hold him in contempt, who was turned away, but it is unclear from the case report whether Cadwalader was even aware. Finally, this whole episode transpired before Lincoln had been notified, and the ultimate decision issued by Taney was not accompanied by an order requiring Cadwalader or Lincoln to do anything. And it bears repeating that Taney did this sitting alone in "chambers"; none of the foregoing was the formal act of the Supreme Court (or even the circuit court).

That said, Cadwalader did arguably defy the original writ by not showing up with Merryman. And Lincoln's Attorney General did assert that both the President and his military subordinates could defy writs of habeas corpus, and

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[215] *Id.*

[216] Taney's hand-written order accompanying his opinion is stored in the Archives of Maryland, and a copy is available online. *See* https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/order1june61.pdf. It orders the clerk to file the opinion and "transmit a copy" to Lincoln; it does not order Cadwalader or Lincoln to do anything themselves.

[217] For a defense of Lincoln's actions, see Farber.

[218] 10 Op. Att'y Gen. 74, 81 (1861).

[219] *Id.* at 90.

[220] *Id.* at 85-86.

[221] *Id.*

that assertion likely chilled any future attempts at judicial meddling in the war through habeas corpus. For these reasons, *Merryman* can fairly be regarded as the high-water mark of executive defiance of judicial judgments. In the end, though, *Merryman* was very much a product of its uniquely troubled times. (The same could be said of *Mississippi v. Johnson*.) As Henry Monaghan has observed, "[a] bloody Civil War, an event wholly unforeseen by the founding generation, may not be a fruitful source for deriving constitutional lessons."[222] *Merryman*'s value as a precedent in circumstances of peace is dubious. And since at least the Civil War, the executive branch has adhered to an "unbroken" norm to comply with federal judgments.[223]

The issue of judicial power over the President in the habeas context arose again during the second Bush Administration. That administration was not exactly known for shrinking away from broad claims of executive power during the war on terror. It is notable, therefore, that in the habeas cases challenging detentions in the wake of 9/11 there was no resurgence of *Merryman*-type arguments about the President's power to defy judicial orders.[224] To be fair, everyone seems to have assumed in the war on terror cases that entering relief directly against the President was not necessary, given the presence of subordinates. In *Rumsfeld v. Padilla*, for instance, the Court noted that the district court had "dismissed President Bush as a respondent," a ruling Padilla did not challenge.[225] Attorney General Bates, though, had rejected even that workaround in habeas cases during the Civil War.[226] Moreover, in several cases that reached the Supreme Court, President Bush was one of the named respondents, and no one seems to have objected to Bush's presence as a party.[227] In short, the status of habeas relief against the President is similar to injunctive and declaratory relief: a broad assertion of immunity during the Civil War era that has been implicitly repudiated by subsequent judicial practice.

D. Criminal Liability

As a general matter, the Court has recognized that official immunities applicable in the damages context do not apply in the *criminal* context. "[T]he judicially fashioned doctrine of official immunity does not reach 'so far as to

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[222] Monaghan, *supra* note __, at 27.

[223] Parrillo, *supra* note __, at 694 n.30.

[224] Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (book review).

[225] Rumsfeld v. Padilla, 542 U.S. 426, 433 n.4 (2004); *cf.* al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004) (Easterbrook, J.) ("Naming the President as a respondent was not only unavailing but also improper, and we have removed his name from the caption. Suits contesting actions of the executive branch should be brought against the President's subordinates.").

[226] Bates, 86.

[227] Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008); *see* Hart & Wechsler, 1264.

immunize criminal conduct proscribed by an Act of Congress.'"[228] Before *Trump v. United States*, the debate around a special *presidential* immunity from criminal prosecution focused on a single issue: Whether a *sitting* President could be prosecuted while in office. The Office of Legal Counsel had addressed the issue a few times, concluding that a sitting President could not be indicted or prosecuted.[229] Legal scholars had also weighed in, some agreeing with OLC's analysis and some arguing that there was no constitutional basis for such an immunity.[230]

It was widely assumed, though, that a President could be prosecuted after leaving office for violating a federal criminal law.[231] The OLC memorandum that recognized a temporary presidential immunity from prosecution while in office *also* acknowledged that this immunity would "not preclude such prosecution once the President's term is over."[232] President Ford's pardon of Richard Nixon was premised on the understanding that some official acts may be prosecuted.[233] Indeed, to my knowledge, even Richard Nixon never asserted any kind of permanent immunity in the litigation over the oval office tapes.[234] And Trump's lawyers at his second impeachment hearing assured the Senate that a former President "is like any other citizen and can be tried in a court of law."[235] Two scholars summed up the state of play in 2018: "[T]here is *no*

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[228] O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (quoting Gravel v. United States, 408 U.S. 606, 627 (1972)).

[229] Hemel & Posner, *supra* note __.

[230] *See id.* at 1328–29; Amar & Katyal, *supra* note __; Prakash, *supra* note __.

[231] Caminker, *supra* note __, at 267 ("It's widely assumed that Presidents lack a corresponding permanent immunity from criminal liability and sanctions."). Former Justice Abe Fortas wrote during Watergate: "[E]ven as to acts related to the conduct of his office, the President and his staff are subject to the law, including the prohibitions of the criminal code." Abe Fortas, *The Constitution and the Presidency*, 49 WASH. L. REV. 987, 995 (1974). As if foreseeing Trump's efforts in 2020 and subsequent legal arguments, he added: "Certainly it would be preposterous to argue that a President or his staff may engage in unlawful conduct in order that he may be re-elected." *Id.*

[232] OLC 255; *see also* Whether a Former President May Be Indicted and Tried for the Same Offences for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 110 (Aug. 18, 2000), https://www.justice.gov/file/19386/download.

[233] Trump v. United States, 144 S. Ct. 2312, 2360 (2024) (Sotomayor, J., dissenting).

[234] This is confirmed by Philip Lacovara, who briefed and argued *United States v. Nixon* in the Supreme Court on behalf of the special prosecutor. *See The Supreme Court's Dangerous Immunity Decision: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 2, 10 (2024) (statement of Philip Allen Lacovara) ("It is notable that, even while President Nixon and his lawyers were claiming expansive constitutional prerogatives for the presidency during the Watergate investigation, they never were so brazen as to suggest that the president enjoys constitutional immunity from prosecution for crimes committed while in office.").

[235] 2 Proceedings of the U. S. Senate in the Impeachment Trial of Donald John Trump, S. Doc. 117–2, p. 144 (2021).

uncertainty as to whether a former president can be convicted of a crime committed while in office."[236]

That assumption was consistent with—indeed reinforced by—the immunity recognized in *Fitzgerald*. *Fitzgerald* held Presidents immune from civil damages in the absence of a congressional cause of action. But it did not imply any immunity from criminal liability. For one thing, the majority acknowledged that there is a greater public interest "in criminal prosecutions" than in civil suits.[237] For another, in prior cases the Court had held that even immunity for legislators—which, unlike presidential immunity, is enshrined the constitutional text[238]—did not extend to criminal cases.[239] And lastly, the dissent had flatly called the idea of absolute immunity from criminal prosecution "not credible," in light of the Constitution's express recognition that officials may be prosecuted after impeachment proceedings.[240]

II. *TRUMP V. UNITED STATES*: AN ASSESSMENT

That assumption was upended last Term.

A. The Decision

Trump v. United States stemmed from Special Counsel Jack Smith's criminal case against Donald Trump in Washington, D.C. The core of the indictment that Trump conspired to overturn the results of the 2020 election by spreading "knowingly false claims of voter fraud."[241] In particular, the indictment alleged that Trump "spread lies that there had been outcome-determinative fraud in the election"; "pushed officials in certain states to ignore the popular vote"; "organized fraudulent slates of electors" to "transmit false certificates" to be counted on January 6; attempted to use the Justice Department "to conduct sham election crime investigations; attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results"; directed a crowd of supporters to the Capitol to "obstruct the certification proceeding"; and then, when the crowd "violently attached the Capitol and halted the proceeding," "exploited the

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[236] Hemel & Posner, *supra* note __, at 1329 (emphasis added).

[237] Nixon v. Fitzgerald, 457 U.S. 731, 754 & n.37 (1982).

[238] U.S. Const. art. I, § 6 ("The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . .").

[239] *See* Gravel v. United States, 408 U.S. 606, 614 (1972) ("History reveals, and prior cases so hold, that this part of the [Arrest] Clause exempts Members from arrest in civil cases only."); Williamson v. United States, 207 U.S. 425, 436-46 (1908).

[240] U.S. Const. art I, 3 (a party convicted in impeachment proceedings "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law").

[241] Trump v. United States, 144 S.Ct. 2312, 2324 (2024).

disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification."[242]

Trump moved to dismiss the case on the ground that he was protected by presidential immunity.[243] The district court denied the motion, and the D.C. Circuit affirmed.[244] The Court granted certiorari, and expedited the briefing schedule so it could hear argument in April.[245] On the last day of the Term, the Court embraced a broad presidential immunity from criminal prosecution and sent the case back to the lower courts.

The Court keyed the level of immunity to the nature of the underlying presidential action, and identified three basic categories. First, the parties and the Court all agreed that there is no immunity from prosecution for *unofficial* acts.[246] That was uncontroversial. The Court's second category was "core" powers. Borrowing a phrase from Justice Jackson's *Youngstown* opinion, the Court noted that sometimes the President's authority to act stems from the Constitution and is "conclusive and preclusive."[247] In this category, the President "may act even when the measures he takes are 'incompatible with the expressed or implied will of Congress.'"[248] As examples of powers in this category (which the Court called "core constitutional powers"), the Court listed the pardon power, the removal power, and the recognition power.[249] And the Court held that "the President is *absolutely* immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority."[250] The Court did acknowledge, though, that "[i]f the President claims authority to act but in fact exercises mere 'individual will' and 'authority without law,' the courts may say so."[251]

The third and more capacious category was "official" but non-core presidential acts. Leaning heavily on *Fitzgerald*, the Court held that the

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[242] Indictment paras. 2, 10. Trump was charged with "(1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371, (2) conspiracy to obstruct an official proceeding in violation of § 1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation of § 1512(c)(2), § 2, and (4) conspiracy against rights in violation of § 241." 144 S. Ct. at 2325.

[243] *Id*. at 2325.

[244] *Id*. at 2325-26.

[245] The Court's scheduling of the case had the effect of pushing resolution past Election Day 2024. *See* Leah Litman, *Something's Rotten About the Justices Taking So Long on Trump's Immunity Case*, N.Y. TIMES, June 19, 2024, https://www.nytimes.com/2024/06/19/ opinion/supreme-court-trump-immunity.html. This is an example of "shadow docket" decisionmaking having important substantive effects. *See* Schmidt, Vladeck.

[246] *Id*. at 2332.

[247] 144 S. Ct. at 2327 (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)).

[248] *Id*. (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

[249] *Id*. at 2327-28 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 139–141 (1872); " Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 204 (2020); Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015)).

[250] *Id*. at 2328 (emphasis added).

[251] *Id*. at 2327 (quoting *Youngstown*, 343 U.S. at 655)).

President is presumptively immune from prosecution for acts in this category. The heart of the Court's analysis was that the "hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under a pall of potential prosecution raises unique risks to the effective functioning of government."[252] It explained that the danger of prosecuting a President for official conduct "is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive."[253] Although a President might face more damages suits, the threat of criminal punishment "is a far greater deterrent."[254] As a result, a President's apprehensions about criminal prosecution could sap the "'vigor[]' and 'energy' of the Executive."[255] To avoid that outcome, the Court held that there is "a presumptive immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility."[256] That was necessary "to enable the President to carry out his constitutional duties without undue caution."[257]

The Court also acknowledged a "countervailing" interest at stake—the "public interest in fair and effective law enforcement."[258] Taking that interest into account, the Court only recognized a "presumptive" immunity.[259] But the Court left open the possibility that absolute immunity might prove to be appropriate even for this category of presidential acts, reserving that question for a future case.[260]

The Court's analysis invites two obvious questions: How the government can rebut this presumptive immunity, and how a court is to distinguish official and unofficial acts. On the first question—rebutting the presumptive immunity—the Court wrote: "At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[261] This, on its face, is a demanding standard; it will be the rare criminal case against a former President that poses *no* dangers of intrusion on the executive branch. The standard is also the product of a rather egregious case of selective

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[252] *Id.* (internal quotation marks and citations omitted).

[253] *Id.* at 2330-31 (quoting *Fitzgerald*, 457 U.S. at 745).

[254] *Id.* at 2331.

[255] *Id.* (quoting The Federalist No. 70, at 471–472).

[256] *Id.*

[257] *Id.*

[258] *Id.* (quoting *Vance*, 591 U.S. at 799, 808).

[259] *Id.*

[260] *Id.* at 1332. Note that the "immunity" covering non-core "official" acts is different from that covering "core" presidential powers. A "core" act is immune in the sense that Congress is powerless to regulate it all. An "official" act is immune only in the sense that a President presumptively cannot be prosecuted for it; the act may nonetheless be subject to other forms of congressional regulation.

[261] *Id.* at 1331-32.

quotation. The quoted passage in *Fitzgerald* had said in fall: "[A] court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."[262] The Court's quotation elides half of the "balance." It seems to replace a balancing test with a hair-trigger test.[263]

The second question is how to distinguish official from non-official acts. The Court begins its discussion of non-core official acts by invoking Justice Jackson's middle category from *Youngstown*—the so-called "zone of twilight" where Congress and the President have concurrent authority.[264] But it becomes clear that the Court is talking about something broader. For instance, "speaking to and on behalf of the American people" can qualify as "official" conduct, according to the Court, even though it is not "connected to a particular constitutional or statutory provision."[265] It is not easy to fit the bully pulpit in the *Youngstown* framework. In the end, the Court gives the following broad test: "[T]he immunity we have recognized extends to the 'outer perimeter' of the President's official responsibilities, covering actions so long as they are 'not manifestly or palpably beyond [his] authority.'"[266] The Court also makes clear that, in distinguishing official and unofficial conduct, "courts may not inquire into the President's motives."[267] And a court may not "deem an action unofficial merely because it allegedly violates a generally applicable law."[268] Again, on its face, this test is very generous to former Presidents.

Finally, in the most confounding part of the Court's opinion, it said that no "evidence concerning the President's official acts" can even be introduced in a criminal proceeding.[269] To do so, the Court said, "threatens to eviscerate the immunity we have recognized," because it would "permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge."[270] And jury instructions would not be adequate to protect "the

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[262] 457 U.S. at 754. The source of this balancing test was *Nixon v. Administrator of General Services*, which described the relevant separation-of-powers test this way: "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U.S. 425, 443 (1977) (citation omitted).

[263] *See* Trevor W. Morrison, *A Rule for the Ages, or a Rule for Trump?*, LAWFARE (July 11, 2024), https://www.lawfaremedia.org/article/a-rule-for-the-ages--or-a-rule-for-trump.

[264] *Id.* at 2328.

[265] *Id.* at 2334.

[266] *Id.* at 2333 (quoting Blassingame v. Trump, 87 F.4th 1, 13 (D.C. Cir. 2023)).

[267] *Id.*

[268] *Id.* at 2334.

[269] *Id.* at 2340.

[270] *Id.* at 2340-41.

President's constitutional prerogatives."[271] Justice Barrett refused to join this part of the opinion, pointing out that forbidding "any mention" of an official act in, say a bribery case, would "hamstring the prosecution."[272] In response, the Court said that "of course the prosecutor may point to the public record to show the fact that the President performed the official act."[273] But a prosecutor may not "admit testimony or private records of the president or his advisors probing the official act itself."[274] It is not clear how this amorphous "public record" exception for public records will function.

B. A Preliminary Analysis

Assessing the *Trump* decision is difficult because much depends on how it is applied. But there are a number of things one can confidently observe off the bat.

To begin, the Court firmly aligned itself with the discretion model. The Court was highly sensitive to anything that could dampen the "vigor" or "energy" of the executive. And the opinion does not seem to take seriously that legal limitations may be a *valid* impingement on presidential "energy." Take this sentence: "A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office." Another way to put that same idea is: A President may be inclined to take one course of action, but may decide against it because of the legal consequences. The Court suggests that is a "distortion" of presidential judgment, but one might just as aptly call that an efficacious legal check. In other words, the Court neglects that the "public interest" may be *served* by a President that takes seriously the legal limits on his authority.

Moving on to the particular categories of executive action: The Court held that the President is absolutely immune for "core" acts. In other words, Congress cannot criminalize an act that is within the President's "conclusive and preclusive" authority. At that level of generality, the holding is unexceptionable because it is a tautology: The *definition* of an act within the President's "conclusive and preclusive" authority is that he has the constitutional power to do it notwithstanding a congressional directive to the contrary. For instance, if Congress passed a law making it a crime for the President to veto any bill, that law would plainly be unconstitutional and the President would be "immune" from prosecution for violating that law.[275]

The real action in this part of the opinion is not the truism that the President is "immune" from prosecution for "core" acts; it is the broad way in which the

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[271] *Id.* at 2340.

[272] Barrett.

[273] *Id.* at 2341 n.3.

[274] *Id.*

[275] *See* Trevor W. Morrison, *Moving Beyond Absolutes on Presidential Immunity*, LAWFARE (Mar. 18, 2024, 8:00 AM), https://www.lawfaremedia.org/article/moving-beyond-absolutes-on-presidential-immunity.

Court *understands* "core" acts. Although the Court purports to rely on Justice Jackson's concurrence for this category, Justice Jackson was far more circumspect about what can validly be put there. For Justice Jackson, this is where the President's power is "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[276] To classify a power as "core" means "disabling the Congress from acting upon the subject."[277] This, by the way, was the category into which Justice Jackson put the steel seizure, and he voted to invalidate it.[278] "Presidential claim to a power at once so conclusive and preclusive *must be scrutinized with caution*, for what is at stake is the equilibrium established by our constitutional system."[279]

That sense of "caution"—that sense of the "stake[s]"—is missing in the *Trump* opinion's treatment of the issue. For instance, the Court held "Trump is . . . absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials."[280] The reason, according to the Court, is that "the Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, including with respect to allegations of election crime."[281] Even more, the Court added that "the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress or reviewed by the courts."[282] The Court concluded that "the indictment's allegations regarding the Justice Department" therefore "plainly implicate Trump's 'conclusive and preclusive' authority."[283]

These are striking and far-reaching claims. Recall that, by definition, to classify the power "conclusive and preclusive" is to "disabl[e] Congress from acting upon the subject." The apparent upshot, then, is that Congress has *no* power over the President's "management of the Executive Branch" in these contexts.[284] Congress could not, for instance, prohibit the President from targeting political dissidents for criminal investigations.[285] Indeed, it is hard to see how this part of the opinion is consistent with *Morrison v. Olson*, which

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[276] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

[277] *Id.* at 637-38.

[278] *Id.* at 640.

[279] *Id.* at 638 (emphasis added).

[280] *Trump*, 144 S. Ct. at 2335.

[281] *Id.* at 2334.

[282] *Id.* at 2335.

[283] *Id.* at 2334.

[284] *Id.* at 2335 (quoting *Fitzgerald*, 457 U.S. at 750).

[285] *Cf.* Michael S. Schmidt & Matthew Cullen, *Here Are Cases of Trump Rivals Who Were Subject to Investigation*, N.Y. TIMES (Sep. 21, 2024), https://www.nytimes.com/interactive/2024/09/21/us/trump-opponents-investigations.html ("[A]s president, Mr. Trump tried repeatedly to use the powers of the federal government to investigate or penalize those he considered foes.").

upheld an independent prosecutor, or *Humphrey's Executor*, which upheld independent agencies.[286] The Court's reasoning is not limited to criminal liability; indeed the word "immunity" is somewhat inapt. Actions within this "conclusive and preclusive" category are immune not just from criminal sanction but impervious to *any* kind of legal regulation, because by definition any regulation would be unconstitutional. For that reason, this part of the Court's opinion will have lasting significance for constitutional law.

The second *Trump* category—covering official but not core acts—will probably generate the most uncertainty and litigation on remand in the *Trump* prosecution and beyond. While immunity here is not absolute (at least not yet),[287] the formula the Court articulated is broad. An act counts as official as long as it is "not manifestly or palpably beyond the President's authority."[288] The fact that an act may have an improper motivation or may be in violation of a generally applicable law does not remove it from this category.[289] And once something is found to fall within that capacious category, immunity can only be rebutted if "the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[290]

Taken at face value, it will be a rare criminal case that involves conduct "manifestly and palpably beyond" a President's authority or presents *no* dangers of intrusion on the Executive Branch. The dissent was justified in say that this seems tantamount to absolute immunity in practice.[291] On the other hand, some legal tests that seem categorical in phrasing may prove more elastic in application. Justice Barrett's concurrence describes an understanding of the majority's test which renders it fairly "similar to the approach" urged by the Special Counsel; if that is how the test is applied, then the damage wrought by this opinion could be contained.[292] Indeed, strong arguments can be made that most of the actions for which Trump is being prosecuted should not be shielded

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[286] Justice Jackson in his *Youngstown* concurrence had cited *Humphrey's Executor* as an example of Congress "cut[ting] down" the "removal power." 343 U.S. at 638 n.4. He did note that the "exclusive power of removal in executive agencies . . . continued to be asserted and maintained" by the Roosevelt Administration afterwards. *Id.* (citations omitted). In *Trump*, the Court cited this part of Justice Jackson's opinion to suggest that Jackson *himself* thought the "power of removal in executive agencies" was an example of a "conclusive and preclusive" power. 144 S. Ct. at 2328. In Justice Jackson's telling, however, the removal power would seem to fall (at least in part) in the "zone of twilight."

[287] The Court made clear several times that immunity was "at least" presumptive, and it is hard to see why the Court would have included that caveat if there were not a few votes for absolute immunity even for non-core actions.

[288] *Id.* at 2333 (quoting Blassingame v. Trump, 87 F.4th 1, 13 (D.C. Cir. 2023)).

[289] *Id.* at 2333-34.

[290] *Id.* at 2331-32.

[291] *Id.* at 2360-61 (Sotomayor, J., dissenting).

[292] *Id.* at 2354 (Barrett, J., concurring in part).

by "immunity" under this opinion.[293] So just how broad this second category of immunity will prove in practice remains an open question.

One particular source of uncertainty is a tension in the majority opinion. On the one hand, the Court wrote that that "[i]f the President claims authority to act but in fact exercises mere 'individual will' and 'authority without law,' the courts may say so."[294] On the other hand, the Court wrote than "an action" is not "unofficial merely because it allegedly violates a generally applicable law."[295] The first sentence suggests that an unlawful act is *ultra vires* and may be set aside by court; the second sentence suggests that an act may be unlawful (because it violates a "generally applicable law") and yet still "official" and therefore immune from prosecution.

One solution to this apparent tension is to distinguish two ways that law can relate presidential authority. First, a law can be a source of presidential authority in the first place—say the pardon power specified in Article II, or a statute granting the President the power to raise tariffs on a class of imported goods. Second, a law can limit or penalize an action that concededly falls within the scope of an authority granted elsewhere—say, a bribery statute that penalizes certain exercises of the pardon power. I read the Court's opinion to hold that presumptive immunity is only relevant to questions of the second kind—that is, when the President acts in a manner that violates a "generally applicable law" that does not go to the prior question of a President's authority to act. When, however, the President's action exceeds the terms of some grant of authority, whether constitutional or statutory, then the action is *ultra vires* and cannot be regarded as "official" and "presumptively immune" under *Trump*.[296] I will return to this distinction in Part __ when I discuss possible legislative responses.

Finally, on a purely practical level, the majority's insistence that no "*evidence* concerning the President's official acts" can be introduced into criminal proceedings is befuddling. "The Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents can be held

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[293] *See* Richard Lazerus, *Never Mind the Immunity Ruling. Trump Can Be Prosecuted for Jan. 6*, WASH. POST, Aug. 15, 2024, https://www.washingtonpost.com/opinions/2024/08/15/ trump-prosecution-supreme-court-immunity/

[294] *Id.* at 2327 (quoting *Youngstown*, 343 U.S. at 655)).

[295] *Id.* at 2334.

[296] Readers may recognize that the Court took a similar approach to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908). Woodrow Wilson, writing around the same time as *Ex parte Young*, similarly observed: "The theory of our law is that an officer is an officer only so long as he acts within his powers; that when he transcends his authority he ceases to be an officer and is only a private individual, subject to be sued and punished for his offense." WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 19 (1908). For a similar reading of the *Trump* opinion, see Philip Bobbitt, *A Prudential Way Forward in* Trump v. United States, JUST SECURITY (July 26, 2024), https://www.justsecurity.org/98205/prudential-trump-v-united-states/.

liable."[297] It is hard to envision how a prosecution against a President for bribery would proceed. One could introduce evidence of the bribe itself—the *quid*—and, under the majority opinion, one could point to the "public record" to show that an official act took place—the *quo*.[298] But how would the prosecution show that the bribe influenced the official act—the *pro*?[299] The Constitution expressly contemplates that an ex-President can be prosecuted for bribery; by erecting roadblocks to such a prosecution, the opinion comes close, in Akhil Amar's words, to "declaring the Constitution itself unconstitutional."[300]

This invites a broader comment about method. It is hard to think of another opinion by the Supreme Court so divorced from the ordinary stuff of constitutional adjudication.[301] As a textual matter, the Constitution is actually quite specific in recognizing the amenability of a former President to criminal prosecution:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

That Clause clearly envisions that a former President can be prosecuted for conduct that would form the predicate of an impeachment.[302] The Court suggests that the "Clause does not indicate whether a former President may, consistent with the separation of powers, be prosecuted for his *official* conduct in particular."[303] But impeachment—which is limited to "Treason, Bribery, or other high Crimes and Misdemeanors"—paradigmatically involves official conduct. What makes something a "high" crime, rather than an ordinary one, is that it involves some breach of public trust by an official.[304] And the Clause plainly contemplates that impeachment and criminal prosecution will cover the *same* conduct. The dissent also presented substantial evidence from the

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[297] *Id.* at 2354 (Barrett, J., concurring in part).

[298] *Trump*, 144 S. Ct. at n.3.

[299] *Id.* at 2354-55; Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, THE ATLANTIC, July 2, 2024, https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877/.

[300] Amar, *supra* note __.

[301] Morrison, *supra* note __ ("Nothing in the constitutional text, the Court's precedents, or the federal government's historical practice dictated this rule. It is simply the result of the majority's policy determination . . . ."); Aziz Z. Huq, *Structural Logics of Presidential Disqualification: An Essay on* Trump v. Anderson, 138 HARV. L. REV. (forthcoming 2024) ("[*Trump*] eschews the Court's putative originalist and textualist commitments in favor of a raw consequentialism.").

[302] *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 40 (1974). Trump argued that criminal prosecution was only available *after* impeachment, but the Court unanimously rejected that argument.

[303] *Trump*, 144 S. Ct. at 2345.

[304] *Id.* at 37–38.

founding era and post-founding practice against the majority's view. The majority's essential response is call the historical evidence "fragmentary," and thus to rely instead on structural inference.[305]

The only "modality" of interpretation arguably in the Court's corner (so to speak) was precedent—in particular, *Nixon v. Fitzgerald*. But the *Nixon* opinion cannot bear that weight. As noted above, *Nixon* only held that a former President was "immune" from damages "in the absence in the absence of explicit affirmative action by Congress."[306] Strictly speaking, the only form of "immunity" recognized by *Nixon* was that the Court would not imply a cause of action for damages under the Constitution or a statute against the President.[307] That holding does not support the outcome in *Trump v. United States*. The premise of the Court's immunity holding in *Trump*—the only circumstance in which it would have any bite—is that there is a law of Congress in place that criminalizes an official act of the President. Whether Congress can criminalize a misuse of official power is a wholly different question from whether a court should imply a damages action for presidential wrongdoing.

At bottom, the opinion is an example of free-form structuralism overriding strong evidence from text and history. "Structural" argument is, of course, one of the basic building blocks of constitutional law, and it can be a valuable part of the interpretive toolkit. But this opinion is not the structuralism of Charles Black. Structural argument here devolves into a functional assessment of how "vigorous" and "energetic" we want the President to be. This is a particular undisciplined kind of structuralism, that has justly been criticized.[308] To quote Justice White's *Fitzgerald* dissent: "This is policy, not law, and in my view, very poor policy."[309] In the next Part, I turn to limiting the damage.

III. AFTER *TRUMP*: PUTTING THE PRESIDENT UNDER LAW

"The President . . . is ours, and we exercise the right to destroy him."[310]

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[305] The Court made a similar move in *Fitzgerald*, where it said that "inquiries into history and policy . . . tend to converge" when it comes to presidential immunity. Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982).

[306] *Id.* at 748–49 n.27.

[307] *Id.*; *see id.* ("We decide only this constitutional issue, which is necessary to disposition of the case before us.").

[308] *Cf.* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 43 (2014) (describing and critiquing decisions "based on the Court's high-level, functional assessment of what separation of powers requires").

[309] *See id.* at 770 (White, J., dissenting). I am not even sure that the opinion is bad or "poor policy" in a purely consequentialist sense. Perhaps the majority was right that partisan prosecution of former presidents is a greater threat to American democracy than loosening the legal fetters on presidential power. That is a difficult balance to strike, and the Supreme Court did not have the legal warrant to strike it (at least with a tool as blunt as "immunity").

[310] JOHN STEINBECK, AMERICA AND AMERICANS 46 (1966).

The dissent *Trump v. United States* charged that "[i]n every use of official power, the President is now a king above the law."[311] The majority emphatically denied that charge. Who was right? Is the "highest" officer of government in fact "bound to obey" the law, as the Court affirmed nearly a century and a half ago?[312]

A. The Principle of Remedial Choice

To answer that question requires some sort of metric against which the Court's performance can be judged. A tempting starting point would be that Presidents should be judicially accountable each time they exceed their authority or violate the law. In practice, though, *no* official, let alone the President, is judicially accountable for every legal violation. *Marbury*'s ringing avowal that every violation of a right "must have a remedy" has always been an imperfectly realized aspiration.[313] My lodestar in the Article, then, is not remedial perfection but the more modest structural imperative, basic to constitutionalism, that government generally be kept within the bounds of law.[314] While there is some flexibility in how this norm can be satisfied, it is "more unyielding" than the *Marbury* dictum.[315] It would not be tolerable to have "regime of public administration that was systematically unanswerable to the restraints of law, as identified from a relatively detached and independent judicial perspective."[316] And, as a corollary, it would be intolerable for the President, the most powerful official of all, to be systematically unanswerable to the restraints of law in court.

But a regime or an official can be made answerable to judicial judgment in a variety of ways. As Henry Hart recognized in his famous dialogue, even when *some* judicial remedy is a constitutional imperative, there is often a range of choice as to *which* remedy should be made available. The "choice in the selection of remedies . . . can rarely be of constitutional dimension."[317] The Supreme Court gestured toward this idea in *Nixon v. Fitzgerald*. When the

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[311] Trump v. United States, 144 S.Ct. 2312, 2371 (2024) (Sotomayor, J., dissenting).

[312] United States v. Lee, 106 U.S. 196, 220 (1882).

[313] Consider sovereign immunity, official immunity, standing, and the political question doctrine. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1487 (1987) ("[C]ourts since the mid-nineteenth century have opened up a wide remedial gap by creating expansive official immunities without correspondingly relaxing government immunity."); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007) ("[T]he *Marbury* dictum simply does not describe reality.").

[314] *See* Fallon & Meltzer, *supra* note __, at 1779 (contrasting the "*Marbury* dictum" with "[a]nother principle, whose focus is more structural, [that] demands a system of constitutional remedies adequate to keep government generally within the bounds of law").

[315] *Id.* at 1779.

[316] *Id.*

[317] Hart, *supra* note __, at 1366.

dissenters claimed that the Court had put the President above the law, the majority responded that it is "simply error to characterize an official as 'above the law' because a *particular remedy* is not available against him."[318] The implication of the Court's response, though, was that if *all* remedies were denied, the dissenters might have a point. To sum up: The structural imperative that the state generally be kept within legal bounds is unyielding, but it leaves some flexibility in the choice of remedies.

In the case of the President, there are in theory several judicial mechanisms that could serve the purpose of keeping his activities generally within legal bounds: The first is the civil suit for damages; the second is criminal prosecution; the third is the civil suit for coercive or declaratory relief.[319] and fourth are political checks like impeachment and elections. As Part I describes, before *Trump*, damages suits were effectively barred but it was widely assumed that a former President could be prosecuted (though it had never been tried). And coercive relief against the President (generally through the fiction of a suit against subordinate officers) was routine. From *Panama Refining* and *Youngstown*, to *Trump v. Hawaii* and *Biden v. Nebraska* in the recent times,[320] suits for injunctions (or for vacatur, the injunction's administrative law cousin) have been the most important mechanism for checking presidential power.

B. The Effect of Trump

How does the overall landscape of judicial review of presidential action look after *Trump*? Damages suits are of course still dead—if anything they are more dead than before. The majority relied heavily on *Fitzgerald*, and made no reference to the limitation built into *Fitzgerald*: that its analysis was only applicable to *implied* causes of action.[321] Further, while *Fitzgerald* itself was a bitterly fought 5-4 decision,[322] none of the *Trump* dissenters questioned whether *Fitzgerald* was rightly decided.

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[318] Nixon v. Fitzgerald, 457 U.S. 731, 758 n.41 (1982) (emphasis added).

[319] There are also non-judicial mechanisms that could also serve this purpose. Elections and impeachment, for example, are possible avenues for punishing presidential lawbreaking. As I defend below, though, some judicial mechanisms are important as a supplement to these political checks. *See infra* Part __. Elections are too multifaceted to be a reliable legal check, and would mostly inoperative for second term Presidents (who do not have to stand for reelection). And impeachment has been so consumed by partisanship as to be practically toothless. Mitt Romney was the first senator in U.S. history to vote to impeach a President of his own party. It is true that impeachment may be a more realistic check in periods of divided government. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2345 (2006). But the high threshold required for conviction in the Senate makes a successful impeachment and removal extremely unlikely without bipartisan buy-in.

[320] 600 U.S. 477 (2023).

[321] Morrison, *supra* note __ (noting this aspect of *Fitzgerald*).

[322] For an inside look, see GRAETZ & GREENHOUSE, *supra* note __, at 319–21.

Then there is criminal liability, the proper subject of the *Trump* decision. The last Part faulted the decision on the level of craft, but some of those deficiencies may lessen the opinion's capacity for mischief. Perhaps the scope of "official" conduct will be narrower in application than meets the eye, and perhaps the "presumption" of immunity will be readily rebuttable. We will learn more as the remand plays out. The best-case scenario, however, would still mean that a great deal of presidential wrongdoing is immunized from prosecution.

Even if we assume, for a moment, that coercive relief against presidential action will remain unaffected, the grant of immunity for *both* damages *and* criminal liability is troubling. There are certain forms of presidential wrongdoing that are not amenable to prospective relief, either because it cannot be anticipated or because it is not discovered until after it happens.[323] Nixon was alleged have instructed his Attorney General to install secret, unlawful wiretaps, for example. And Trump is alleged to have incited a riot to interrupt the certification of the presidential election and to have mishandled classified documents. "Coercive" relief is simply not realistic in these contexts. It would be one thing if damages were ruled out by immunity but prosecution was available as a backstop (as was the case before *Trump*), or vice versa. But to grant immunity in both contexts opens a serious hole in presidential accountability.[324]

What about suits for coercive relief? In the modern era, these suits have been the backbone of public law. At the same time, as we've seen, the judiciary's power to order such relief against the President directly rests on shaky ground. The threat of the *Trump* opinion is not just what it holds for criminal cases, but what it augurs for civil cases seeking coercive or declaratory relief.

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[323] As Justice Harlan noted in his *Bivens* concurrence: "For people in Bivens' shoes"—that is, victims of unconstitutional searches and seizures at the hands of federal agents—"it is damages or nothing." Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

[324] One palliative is that damages actions and criminal prosecutions might still proceed against executive branch subordinates. The Court has held that the President's immunity from damages does not extend even to close aides in the White House. *See* Harlow v. Fitzgerald, 457 U.S. 800, 808–09 (1982) (stating that "a Cabinet official directly accountable to the President" and "Presidential aides" are not entitled to absolute immunity). And in the criminal context, the Court in *Trump* did not suggest that the President's immunity would extend to subordinates. If the President ordered Seal Team 6 to assassinate a political rival, for instance, they could be prosecuted. *See* Manual for Courts Martial Rule 916(d) (2024) ("It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."). But again, it is not clear that presidential wrongdoing can always be pinned on lower-level officials, especially in light of qualified immunity. *See infra* Part __. And the President could pardon lower-level officials for federal crimes. So these palliatives are at best incomplete from a practical point of view, and when they work would leave the most responsible official—the President—off the hook.

Mississippi v. Johnson has never been overruled. In some presidential powers cases—like *Youngstown* itself—it has been raised by the government and implicitly repudiated by the Court. But it was never formally disavowed, and in *Franklin* a majority of the Court expressed sympathy with its claim about the judicial power. Moreover, citations to *Mississippi v. Johnson* still luxuriate in lower court briefing and decisions. According to a simple Westlaw search, since the inauguration of Donald Trump in 2016 the case has been cited in 356 trial court filings, 135 appellate court filings, and 68 lower court opinions. Meanwhile, the case has not been cited by the Supreme Court for its holding since *Franklin*, over thirty years ago.[325] *Mississippi* has been lurking, stubbornly and ominously, not far below the surface of Supreme Court doctrine.

And *Trump* could breathe new life into it. The reasoning in *Trump* resembles in several respects the reasoning in *Mississippi*. Both opinions exemplify the "discretion" model.[326] The structural contention of *Mississippi* was that "the President *is* the executive department" and that the judiciary cannot restrain the actions of a coequal "department" directly.[327] The *Trump* majority similarly noted that the President "'the only person who alone composes a branch of government,'"[328] and that "immunity is required to safeguard the independence and effective functioning of the Executive Branch."[329] Justice Scalia, in his opinion defending of *Mississippi*, wrote that immunity was entailed by *Fitzgerald* as well: "Many of the reasons we gave in *Nixon v. Fitzgerald* for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions."[330] To Scalia, "immunity from such relief is 'a functionally mandated incident of the President's unique office.'" Permitting coercive relief against the President would "distract him from his constitutional responsibility" and "produce needless head-on confrontations between district judges and the Chief Executive."[331]

To be clear, *Trump v. United States* does not necessarily imply that *Mississippi* should be resuscitated, even if one accepts its core reasoning. *Trump* was concerned that the threat of criminal liability would chill presidential decisionmaking. But coercive relief does not present the same danger of overdeterrence as criminal prosecution. Imagine President Biden deliberating whether to adopt some form of student-loan forgiveness in circumstances of legal uncertainty. His appetite for legal risk would certainly be greater if the consequence of being wrong about the scope of his power was simply that his

[325] It was cited in a statutory interpretation case in 1995 for the proposition that the Court has occasionally referred to the judiciary as a "department." Hubbard v. United States, 514 U.S. 695, 699 (1995).

[326] *See supra* notes __ and accompanying text.

[327] Mississippi v. Johnson, 71 U.S. 475, 500 (1867).

[328] *Trump*, 2329 (quoting Trump v. Mazars USA, LLP, 591 U.S. 848, 868 (2020)).

[329] *Id.* at 2331.

[330] Franklin v. Massachusetts, 505 U.S. 788, 827 (1992) (opinion of Scalia, J.).

[331] *Id.* at 828.

program would be halted, and not that he would be prosecuted and put in prison.[332] For that reason, the core reasoning of *Trump* should not control in the context of coercive relief, and it should not be so extended.

That said, in the Court's last encounter with *Mississippi v. Johnson*, a majority of Justices expressed sympathy with presidential immunity from injunctive relief.[333] And there is at least some danger that the current Court would be persuaded by Justice Scalia's extension of *Nixon v. Fitzgerald*—and the discretion model—to the coercive context.[334] And if that were to happen, the immunity trifecta—damages, injunctions, crimes—would be complete. The trifecta would, on its face, be a blow to the unyielding structural imperative of keeping the President within legal bounds, as understood and enforced by an independent judiciary. And it would be a profound symbolic blow to the ideal of government under law if there was no legal mechanism at all—criminal or civil—by which the President himself could be checked.[335]

C. The Practical Stakes

Still, it would be fair to ask: For all the symbolic importance of presidential immunity from coercive relief, how much is at stake in practical terms?[336] The reason to ask this question is that even Justice Scalia agreed that presidential actions are *reviewable* indirectly, through suits directed at subordinates. "Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive."[337] Indeed, two cases decided within a week of *Trump* suggest that this mechanism remains alive and well: *Loper Bright Enterprises v. Raimondo* and *Ohio v. EPA*. In *Loper Bright*, the Supreme Court overturned *Chevron* deference to administrative agencies. The opinion was a paean to the legality model of judicial review of executive action. Indeed, the majority in *Loper Bright* (including the same five justices who joined the *Trump* opinion in full) wanted judicial checks on the executive branch to be *more* robust. In *Ohio v. EPA*,

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[332] Another way to put this point is that coercive relief is directed to the institution of the presidency rather than the body of the incumbent. *See* Renan, *supra* note __. And sanctions that would be visited on the President (or former President) in his personal capacity—like damages awards or criminal sanctions—may have a more powerful *ex ante* chilling effect.

[333] Franklin v. Massachusetts, 505 U.S. 788 (1992).

[334] *Id.* (Scalia, J.).

[335] Siegel, *supra* note __, at 1700 ("Presidential immunity from suit creates a counterdemocratic, monarchical symbol of unrestrained personal power.").

[336] *Cf.* Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996) ("[H]ow much beyond mere symbolism—a factor I do not underestimate in constitutional law—is at stake?").

[337] *Franklin*, 505 U.S. at 828.

decided the next day, the Court effectively invalidated an important Biden Administration policy as inconsistent with the APA.[338]

These cases should not leave us heartened about the prospects for presidential accountability, however. They are part of a broader pattern of caselaw that is both *pro*-president but *anti*-regulatory.[339] The Court has, by and large, been deferential to decisions of the President himself but not the lower denizens of the administrative state. For all the Court's skepticism of agencies, it has consistently boosted presidential power, often (as Gillian Metzger has argued) in a way that undermines internal checks on presidential unilateralism.[340] So robust review of presidential action does not necessarily follow from the Court's skeptical stance toward agency action.

And the fact that judicial review of presidential actions can *ordinarily* be obtained—in Justice Scalia's word—is a far cry from *always*. Indeed, Justice Scalia made the claim in a case where he would have held the presidential action unreviewable. There are a large number of statutes that confer power upon the President directly, and there are inherent constitutional powers that have been claimed by the executive branch over time. It is doubtful that there will be lower-level subordinates available to be sued in all of these circumstances, especially if the executive designs internal procedures in manner determined to evade judicial review. It is judicial review of these important categories which now stands on shakier ground after *Trump*. Consider the following scenarios:

- With an election approaching, a first-term President fires the Chair of the Federal Reserve System, because the President believes that high-interest rates are hurting his reelection chances by suppressing the economy and raising borrowing costs. Suppose that the firing violates statutory tenure protections, which are valid under current Supreme Court precedent.[341] The Chair sues the President in Federal Court for a declaratory judgment holding the firing unlawful and ineffective, and for an injunction requiring reinstatement. Would the President be "immune" from such a suit?[342]

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[338] I say "effectively invalidated" because the technical posture was an application to stay the policy while litigation was pending.

[339] *See* Metzger, *supra* note __, at 2 (noting that anti-administrativists "oppose administration and bureaucracy, but not greater presidential power").

[340] *See id*. at 95.

[341] Humphrey's Executor v. United States, 295 U.S. 602 (1935). Even the recent dissent in *CFPB v. Community Financial Services Association of America* suggested that the "Federal Reserve Board should be regarded as a special arrangement sanctioned by history." 601 U.S. 416, 467 n.16 (2024) (Alito, J., dissenting). The dissent was talking about appropriations, but a similar point could be made about tenure protection.

[342] Note that this scenario involves two different senses of "immunity." First, it may be that the President is "absolutely immune" from interference with his removal power because, in the language of *Trump*, it is a "core" power that cannot be regulated by Congress. Second, it may be that the President is "immune" in the *Mississippi v. Johnson* sense—that is, immune from an injunctive or declaratory remedy. If the President is

- The current Republican nominee for Vice President, Senator JD Vance, has proposed that if elected again Trump should "[f]ire every single midlevel bureaucrat, every civil servant in the administrative state, replace them with our people."[343] When "when the courts stop [him]," he added, Trump should invoke Andrew Jackson and say, "the chief justice has made his ruling. Now let him enforce it."[344] Would a President be "immune" from injunctive relief in these circumstances, such that he would not even have to violate a court order to carry out this plan?

- Toward the end of his administration, President Trump announced a policy of excluding "from the apportionment base" noncitizens without "a lawful immigration status."[345] The President ordered the Secretary of Commerce to include information in his census report permitting him to carry out the policy. The purpose of this policy was "to diminish the 'political influence' and 'congressional representation' of States 'home to' unauthorized immigrants."[346] California, for instance, would have lost two or three congressional seats. The policy was challenged in court, on the ground that it violates the census statute"[347] and the Constitutional directive to count the "whole number of persons in each State."[348] After a district court agreed, the Supreme Court dismissed the case for lack of standing.[349] But what if a future President takes the action threatened in the announced policy? That is, what if the President, in his "statement showing the whole number of Persons in each State," excludes undocumented noncitizens, and adjusts House seats accordingly? Under *Franklin*, the Solicitor General could argue that any actions taken by the Secretary of Commerce were not "final" and therefore not reviewable. And the SG could argue, under *Franklin* and *Mississippi*, that no one has standing to challenge the President's actions under the census statute, because a federal court has no power to enter any relief. If that argument prevails, a massive rearrangement

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immune in that sense, then we would be stuck with the firing even if it was unlawful. In this section I discuss immunity in the second sense.

[343] James Pogue, *Inside the New Right, Where Peter Thiel Is Placing His Biggest Bets*, VANITY FAIR, May 2022, https://www.vanityfair.com/news/2022/04/inside-the-new-right-where-peter-thiel-is-placing-his-biggest-bets.

[344] *Id.*

[345] Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (July 23, 2020).

[346] Trump v. New York, 141 S. Ct. 530, 538 (2020) (Breyer, J., dissenting) (quoting 85 Fed. Reg. at 44680).

[347] 13 U.S.C. §141(b)

[348] U.S. Const. amdt. 14, § 2.

[349] Trump v. New York, 141 S. Ct. 530, 535 (2020).

of the political power could be effected unilaterally by the President without judicial review.[350]

- A new President is elected after campaigning on a promise to ban all members of a particular religious or ethnic group from entering the country. He implements that policy by proclamation under 8 U.S.C. § 1182(f).[351] Suppose the courts hold that the actions of officials below the President are either non-final or shielded by the so-called doctrine of "consular nonreviewability," which says that "federal courts cannot review" a "consular officer's denial of a visa."[352] Could a court still review the *President*'s decision to adopt the general policy?[353]

- A President invokes a 1798 law known as the Alien Enemy Act and threatens to deport summarily noncitizens residing in the United States. The Act authorizes the President make a "public proclamation" that there has been an "invasion or predatory incursion . . . against the United States," and then to "apprehend[]" and "remove[]" noncitizens "as alien enemies."[354] If the President were to proclaim that migration

[350] This was the reasoning of Justice Scalia's opinion in *Franklin*. The plurality did not entirely agree; it thought the President was likely to follow a declaratory judgment issued to the Secretary, in light of the SG's concession at argument that the President would do so. But I am not confident that the Court would come to the same conclusion in my hypothetical: First, the SG may not make a similar concession. Second, the Court embraced rationale of Justice Scalia's dissent in *Haaland v. Brackeen*, 599 U.S. 255, 1639 (2023) ("But '[r]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.'" (quoting Franklin v. Massachusetts, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in judgment)).

[351] "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). This was the authority President Trump invoked in the travel ban case.

[352] Department of State v. Muñoz (2024).

[353] In the travel ban litigation, the lower courts got around consular nonreviewability by noting that the doctrine does not prohibit judicial review of a broad *policy*, but only particular consular decisions. *See* Hawaii v. Trump, 878 F.3d 662, 679 (9th Cir. 2017), rev'd, 585 U.S. 667 (2018) ("[T]his case is not about individual visa denials, but instead concerns 'the President's promulgation of sweeping immigration policy.'"). The Supreme Court did not reach the question of consular nonreviewability; it "assume[d] without deciding that [the] plaintiffs' statutory claims [were] reviewable" because it denied relief on the merits. 585 U.S. 667, 682–83 (2018). Shifting the focus from consular decisions to the President's policy, of course, activates the *Mississippi* question. (Disclosure: I was part of the team that represented Hawaii and the other plaintiffs in *Trump v. Hawaii*.)

[354] 50 U.S.C. § 21 (originally enacted as Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577).

presently amounts to an "invasion," and sought to deport noncitizens residing within the country,[355] would a court have the power to review the scope of the President's authority under this statute?

- A newly inaugurated President with business interests around the world receives large amounts of money from foreign governments channeled through his businesses. Congress, which is controlled by members of his own party, refuses to do anything about it. Does a court have the power to prohibit the President from continuing to receive this money under the Emoluments Clause?[356]

- The National Emergencies Act authorizes the President unilaterally to declare a "national emergency," which then activates well over 100 emergency powers that the President can invoke.[357] The President declares a national emergency due to unemployment or energy shortages, and then suspends some of the requirements of the Clean Air Act in several states.[358] Would a court have any power to review the legality of these suspensions?

- The Antiquities Act authorizes the President, "in the President's discretion," to create "national monuments" on federal land, and to "reserve parcels of land as a part of the national monuments."[359] Can the courts police the boundaries of that statutory authorization? If the President claims the authority to shrink or revoke a monument created by a predecessor, is *that* act judicially reviewable?

- A President unilaterally imposes across-the-board tariffs on all imports into the United States as part of a protectionist trade policy. If that authority were challenged, could a court hear the case?[360]

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[355] Zolan Kanno-Youngs, *Trump's Ideas for the Border Slim on Detail*, N.Y. TIMES, Oct. 16, 2024, at A1 ("[Trump] proposes invoking the Alien Enemies Act of 1798 to expel suspected members of drug cartels and criminal gangs without due process.").

[356] When a case resembling this actually arose during the Trump administration, the Justice Department argued that "Plaintiffs seek an unconstitutional remedy: an injunction against the President in his official capacity." Mem. of Law in Support of Def.'s Mot. To Dismiss at 48, CREW v. Trump, No. 1:17-cv-00458, (S.D.N.Y. June 9, 2017), ECF No. 35.

[357] 50 U.S.C. § 1621(a); *see* Brennan Ctr. for Justice, A Guide to Emergency Powers and Their Use, https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use (cataloging emergency authorities of the President).

[358] *See* 42 U.S.C. § 7410(f).

[359] 54 U.S.C. § 320301(a), (b).

[360] A trade official from the Trump Administration who would likely be part of a new administration, for instance, has asserted "clear authority" to unilaterally impose across-the-board tariffs on all imports into the United States. Charlie Savage, Jonathan Swan, & Maggie Haberman, *A New Tax on Imports and a Split from China: Trump's 2025*

These are not fanciful hypotheticals, and one could multiply them. They show that the stakes of immunity are anything but symbolic: The President has numerous constitutional authorities that he could try to put to unlawful use, and he has numerous statutory authorities whose bounds he could overstep.[361]

Perhaps, in all these scenarios, the courts could bend over backwards to find subordinate officials as proper defendants. But it is not at all clear that the strategy would always succeed. First of all, the APA only authorizes judicial review of "final agency" action, and a court could find in these scenarios that the relevant "final" action is the President's. This is in fact just what the Court held in *Franklin*. And without a cause of action under the APA, plaintiffs may be foreclosed from seeking judicial relief against subordinates.[362] Second, if the President is "immune" from any possible remedy, one could imagine a court finding "traceability" or "redressability" problems as a matter of Article III standing. Third, perhaps subordinate officials could be cut out of the President's decisionmaking or enforcement process in a manner that would defeat standing. Recall the government's contention in district court in the *Youngstown* case: The "President could immediately appoint somebody else to operate the steel mills, or he could undertake that himself."[363] In response to that very possibility, the en banc D.C. Circuit in the *Nixon Tapes* case observed: "The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own."[364] If all these potential barriers could be successfully navigated—perhaps because the Court is, in the end, rightly committed to the principle that presidential action should be reviewable—at a certain point one must ask what the purpose of retaining this vestigial immunity is.[365]

Trade Agenda, N.Y. TIMES, Dec. 26, 2023, https://www.nytimes.com/2023/12/26/us/politics/trump-2025-trade-china.html (citing the International Emergency Economic Powers Act and Section 338 of the Tariff Act of 1930).

[361] On the standard for reviewing statutory powers, see Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U.L. REV. 63 (2020); Kevin M. Stack, *The Reviewability of the President's Statutory Power*, 62 VAND. L. REV. 1169 (2009); Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982).

[362] To put this more precisely, the Court might deny that the plaintiffs have a "non-statutory" cause of action to sue presidential subordinates if they are not encompassed by the APA's cause of action. *See* Dalton v. Specter; Alexandra Nickerson, Note, *Ultra-APA Ultra Vires Review: Implied Equitable Actions for Statutory Violations by Federal Officials*, 121 COLUM. L. REV. 2521 (2021); Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807 (2016);

[363] *Steel Seizure Materials*, *supra* note __, at 372.

[364] Nixon v. Sirica, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc) (per curiam).

[365] One way to conceive the problem is that suits against subordinate officers are a "fiction" that allows the President to be sued, while nominally preserving the President's immunity. But as Lon Fuller once observed, "[a] fiction becomes wholly safe only when it is used with a complete consciousness of its falsity." FULLER, *supra* note __. *Franklin* suggests that the Court may not yet have reached that higher

A final point: Symbolism cannot be severed from practicality so easily in the domain of constitutional law. As I discuss below, the very possibility of constitutional law rests on a puzzle—why would politically powerful actors abide by limits on their authority in the first place? As Daryl Levinson asks, why would a "U.S. president, backed by a popular majority and commanding the same military force that makes the country a global superpower, . . . ever bow to constitutional rules and rights" that stand in his way?[366] One answer is that presidents are shaped by a broader sociopolitical culture that demands respect for judicial judgments. On this "constructivist" view, constitutional law "affects the behavior of officials and citizens by shaping—not just constraining—their interests and values."[367] In this way, "political actors can come to possess an intrinsic interest in constitutional compliance."[368] The Supreme Court plays a role in constructing such a culture, and hence the symbolic dimensions of its decisions can become important to the practical efficacy of the constitutional project. To hold the President personally "immune" from judicial oversight across the board may undermine a culture of respect for constitutional limitations in the oval office that is, in the final analysis, the real source of constraint.[369]

D. Fixing the Holes

This Part proposes two fixes to put presidential accountability on firmer footing. First, the Court should make clear that the President is subject to injunctive or declaratory relief issued by a federal court. Second, Congress—which is already considering one legislative response—should ensure that some sure avenue of accountability exists for completed acts of presidential lawlessness.

1. Strengthening Coercive Relief

The case for taking this step is straightforward. Indeed, echoing Charles Black's defense of *Brown*, the "scheme of reasoning" on which this proposition rests is "awkwardly simple."[370] First, no federal official—including the President—is above the law. Second, to be under the law means—at a

consciousness, and *Trump* is not reassuring on that score. The result—to quote Jonathan Siegel—is "a system highly vulnerable to error." Siegel, *supra* note __, at 1649.

[366] LEVINSON, *supra* note __, at 45.

[367] *Id.* at 53.

[368] *Id.*

[369] Bradley & Morrison, *supra* note __ ("An executive obligation to comply with judicial decisions *is itself part of the practice-based constitutional law of the United States*").

[370] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960).

minimum—to be subject to some kind of judicial remedy when unlawful behavior that gives rise to an otherwise justiciable case. "No subtlety at all."[371]

It would be superfluous to pile up citations for the first point (even the *Trump* majority agreed with it, at least as a rhetorical matter). To quote *United States v. Lee* again: "No man in this country is so high that he is above the law," and "the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[372] To categorically except the "highest" and most powerful officer from the operation of that principle would be to disembowel it.[373] This has deep roots in constitutional history. "[T]he common-law fiction that '[t]he king . . . is not only incapable of *doing* wrong, but even of *thinking* wrong,' was rejected at the birth of the Republic."[374] Thomas Paine put it most memorably: "in America, the law is king."[375] The public reaction to the Truman Administration's arguments in the *Steel Seizure* shows that this is not just a legalism. When the government's lawyer denied any judicial imposed limit, the response was outrage because—in the words of a White House aide—the lawyer had touched the "nerve of constitutionalism."

The second proposition—that to be under law requires at least one form of judicial remedy—may be more controversial. In theory, a President beyond the reach of judicial remedies might still be accountable to his oath and his own conscience. And there are some internal structures within the executive branch that could constrain the President.[376] Our constitutional history, however, has tended to reflect the Hobbesian aphorism—"he that is bound to himselfe onely, is not bound."[377] Judicial review of government action in some form has become

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[371] *Id.*

[372] United States v. Lee, 106 U.S. 196, 220 (1882).

[373] *See* Siegel, *supra* note __, at 1672.

[374] Clinton v. Jones, 520 U.S. 681, 697 n.24 (1997) (quoting 1 W. Blackstone, Commentaries *246).

[375] THOMAS PAINE, COMMON SENSE 36 (Harv. Univ. Press 2010) (capitalization altered). "For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." *Id.*

[376] *See* GOLDSMITH, *supra* note __; Katyal, *supra* note __; Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (book review). For an argument that the law (as opposed to politics and reputational concerns) does little to constrain the executive in practice, see ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2011). *But see* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (book review) ("Posner and Vermeule do not actually present much evidence at all, let alone convincing evidence, for their descriptive claim that modern presidential power is largely unconstrained by law."); Bradley & Morrison, *supra* note __, at 1151 ("Law, politics, and policy are best viewed not as mutually exclusive but as overlapping, interactive domains."). Posner and Vermeule do not deny that *some* judicially enforceable limits on presidential power exist, however, *see id.* at 30–31, and my focus in this Article is whether courts have the power to review presidential action that transgresses the law and gives rise to a justiciable case.

[377] THOMAS HOBBES, LEVIATHAN 204 (Oxford Univ. Press 1909) (1651).

an indispensable element—"psychologically if not logically"[378]—of limited government under law. Indeed, as an institutional matter, an independent judiciary available to review executive action has been taken as a critical ingredient of the rule of law more generally.[379] And even *internal* checks within the executive branch would be weakened in the absence of judicial review. The practical authority of the Solicitor General's office or the Office of Legal Counsel to constrain the executive branch often depends on their ability to "backstop [their] judgments in judicial doctrine."[380]

The upshot of these propositions is that the President should be amenable to *some* form of judicial oversight. After *Trump*, civil suits for damages and criminal prosecutions have been blunted as tools of accountability. That leaves suits for coercive relief. The Court should therefore make explicit that the President can be a named defendant in such a suit if necessary, and can be specified in any resulting remedy.[381]

This proposal would not be a radical change in practice. A subpoena, after all, is a judicial order backed by contempt, just like an injunction, and the Court has made clear that Presidents are subject to subpoenas going all the way back to John Marshall in the *Burr* case. As the Court has said, "it is also settled that the President is subject to judicial process in appropriate circumstances."[382] And presidential policies *have* been reviewable in substance for the entirety of

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[378] LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983) ("[A] conception of public administration free from judicial oversight would have damaged the fundamental political axiom of limited government."); Fallon & Meltzer, *supra* note __, at 1789.

[379] *See* Merrill, *supra* note __, at 690. Indeed, Albert Venn Dicey—generally taken as first formulator and defender of the "rule of law" in its modern sense—wrote that the concept means "not only that no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is . . . amenable to the jurisdiction of the ordinary tribunals." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 181 (3d ed. 1889). The rule of law includes "the idea of legal equality"—specifically, that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." *Id.* For a challenge to the standard historiography of the concept, which puts Dicey at its modern origin, see Jeremy K. Kessler, *The Origins of the Rule of Law*, L. & CONTEMP. PROBS. (forthcoming 2025).

[380] Pillard, *supra* note __, at 685. Pillard continues: "These offices' ability to act as meaningful constitutional checks on executive prerogative in the many areas in which the Court has not drawn limits is considerably more precarious." *Id.*; *see also* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

[381] The Court or Congress could also overturn *Franklin v. Massachusetts*, which is quite dubious as a matter of statutory interpretation. *See* Kovacs, *supra* note __. That would ensure that aggrieved plaintiffs have a cause of action to "set aside" presidential actions.

[382] Clinton v. Jones, 520 U.S. 681, 703 (1997) (citing United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) and United States v. Nixon, 418 U. S. 683 (1974)).

the modern era—despite the government's efforts to resist that trend in *Youngstown* and other cases. The Court again: "we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law."[383] To be sure, this has generally happened through the fiction of a suit against a subordinate. But, to quote a favored phrase of Chief Justice Roberts, "[t]he Constitution deals with substance, not shadows."[384]

The problem is that the pertinent language in *Mississippi v. Johnson* has never been expressly repudiated. And if the *Trump* decision revives that part of *Mississippi*, then several categories of presidential action may be rendered unreviewable in *any* form. There are two straightforward ways for the Court to deal with *Mississippi* without formally overruling it. First, the Court could simply ratify the predominant understanding of commentators, which is that *Mississippi* is a political question case, and not a case about the judicial power over the President more broadly.[385] Indeed, the Court has already said as much.[386] Second, the Court could make clear that *Mississippi* was confined to *discretionary* acts of the President, and that the President has no discretion to violate the law. This would explain why *Mississippi* also dismissed the case as to a lower-level official. This approach, incidentally, is close to what the Court recently said in *Loper Bright*: When a statute "delegates discretionary authority to an agency," a court's role is "'fix[ing] the boundaries of [the] delegated authority.'"[387] A court's role is not revisiting a choice entrusted to an agency's discretion. *Mississippi* could be taken as simply the analog of that principle in the context of the President.

Justice Scalia's view was that "[i]t is incompatible with [the President's] constitutional position that he be compelled personally to defend his executive actions before a court."[388] This view seems divorced from reality. No one doubts that Truman was compelled "to defend his executive actions before a court" in the *Youngstown* case. Justice Scalia's argument must rest, then, on the special *additional* offense that would result by naming Truman personally in a case where it was necessary. That would seem to depend on a quasi-mystical sense of the dignity or inviolability of the President. I would have thought that this sense was retired long ago in a constitutional republic that purports to subject all officials to law.[389]

To be clear, courts should not routinely name Presidents in their injunctive orders when it is not necessary. As the D.C. Circuit has noted, "[i]n most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against

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[383] *Id.*

[384] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1867).

[385] *See supra* notes __ and accompanying text.

[386] Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 496 (1971).

[387] *Loper Bright* (quoting Monaghan, *supra* note __, at 27).

[388] Franklin v. Massachusetts, 505 U.S. 788, 827 (1992).

[389] Renan, *supra* note __, at 1165.

subordinate officials."[390] And litigants should not needlessly provoke such an interbranch confrontation. But where it *is* necessary to name a President in order for judicial review to succeed, the "nerve of constitutionalism" should not be severed to protect the President from dignitary offense.

2. A Legislative Response to Trump

Coercive relief is not a rule-of-law panacea; it is no remedy for presidential lawbreaking that is in the past. For that reason, some legislative response makes sense to ensure that some form of accountability exists in that circumstance, notwithstanding the combined punch of *Nixon* and *Trump*.

Thirty-six Democratic Senators have endorsed a proposed bill authored by Senator Schumer designed to undo *Trump v. United States*. The bill would provide that a former President "shall not be entitled to any form of immunity (whether absolute, presumptive, or otherwise) from criminal prosecution." It would instruct that no federal court can "consider" whether an act was "official" or within a President's "conclusive or preclusive" power in the context of a criminal prosecution. It would require that a prosecution be brought in district court in D.C., and it would strip the Supreme Court of appellate jurisdiction—leaving the D.C. Circuit with the final word. And it would only allow a civil action challenging the law within a very short timeframe.

While it is heartening to see legislative energy directed toward fixing the *Trump* decision, this proposal strikes me misguided on several levels. First, it would set a troubling precedent to purport strip federal courts of jurisdiction to consider a constitutional defense in a criminal prosecution that could end with the accused in prison. It does not take an active mind to imagine how that precedent could be misused. Second, the bill itself relies on the concept of "immunity," which (as noted above) is a conceptual morass. The Court used "immunity" in *Trump* to describe the *Youngstown* category of exclusive presidential powers. Taken literally, then, the proposed bill would seem to allow a president to be prosecuted for, say, pardoning someone whom Congress does not wish pardoned. And finally, on a more mundane level, there are more targeted solutions that would have a much more realistic prospect of becoming law.

I sketch two possibilities here. The first would build on an opening left by *Fitzgerald*. Specifically, *Fitzgerald* itself did not close the door on *Congress's* option to subject the President to liability. The case thus cohered with the basic principle that the choice of remedy remains in Congress's hands, as long as the overall system of remedies meets a basic structural baseline.[391] Congress, then, taking up *Fitzgerald*'s invitation, could enact a cause of action allowing the

[390] *See* Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996). Indeed, I have written elsewhere that lower courts should in general exercise more remedial restraint. *See* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts* (2022).

[391] *See* Morrison, *supra* note __, at 1587.

President to be sued for damages in some circumstances. This would challenge the Supreme Court either to distinguish *Fitzgerald*, or to revisit *Fitzgerald*. And if successful, it would enable some retrospective review of the President's actions for lawfulness.[392]

The second possibility would be to exploit a tension in the *Trump* opinion discussed above.[393] On the one hand, the *Trump* majority said that when a President "claims authority" but in fact lacks it, "the courts may say so."[394] On the other hand, the Court wrote that an action is not "unofficial merely because it allegedly violates a generally applicable law."[395] I suggested resolving this tension by distinguishing specific laws that limit a President's authority and "generally applicable" laws the penalize acts otherwise falling within the President's authority.[396] On this reading, an act would be unofficial—and therefore subject to prosecution—if it violates a law of the first kind, because it would be *ultra vires*. Congress could exploit this facet of the *Trump* opinion by passing a statute making clear that when a President violates a criminal law the President is acting without authority. Such a statute would not be "generally applicable" because it would be a circumscription of the President's authority in particular.[397] Congress could even specify particular criminal statutes that, in its view, take away a President's authority to act. In this way, the President's acts would be stripped of their official character and any immunity defense should fail for that reason.

E. The Problem of Contempt

The most obvious objection to injunctive relief directly against the President is that a court might be powerless as a practical matter to coerce compliance through contempt sanctions.[398] After all, the courts have neither the sword nor the purse, as the saying goes, and it is hard to see what resources of force or violence the courts could muster to vie with the most powerful officer of the government. As Matthew Stephenson has phrased the question, "[w]hy would people with money and guns ever submit to people armed only with gavels?"[399] Indeed, even the U.S. Marshal's Service—which is tasked with

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[392] Another option would be to waive the sovereign immunity of the United States in cases of presidential wrongdoing.

[393] *Supra* notes __ and accompanying text.

[394] *Trump*, 144 S. Ct. at 2327 (quoting *Youngstown*, 343 U.S. at 655)).

[395] *Id.* at 2334.

[396] *See supra* Part __.

[397] Of course, it would only be constitutional to the extent it regulated actions within Congress's power to regulate, either because Congress has exclusive or concurrent authority under Justice Jackson's framework.

[398] *Cf.* Mississippi v. Johnson, 74 U.S. (4 Wall.) 475, 500–01 (1867) ("If the President refuse obedience, it is needless to observe that the court is without power to enforce its process.").

[399] Matthew C. Stephenson, *"When the Devil Turns…": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003).

enforcing contempt orders—is part of the Department of Justice,[400] and by rule all Supreme Court process "issues in the name of the President of the United States."[401] Would enforcing orders against the President be a practical (if not a logical) impossibility?

It would not. First of all, this concern has not been an obstacle in the past. The very same argument would have meant that the Court should refuse the subpoena in *United States v. Nixon* or *Trump v. Vance*. Both of those cases involved compulsory judicial orders against sitting Presidents.

Second, it would be a mistake to regard the President as unique in this regard. Orders against the President would just be one instance of what Daryl Levinson calls the positive puzzle of constitutional commitment.[402] If a President and his administration were committed to defying the courts, it likely would not matter that the party named in the judgment was technically a department head rather than the President himself.[403] To object on the basis of practical enforcement difficulties, then, rests on a questionable assumption about why judgments are obeyed in the first place. In an exhaustive empirical study of contempt sanctions against federal officials, one of Nicholas Parrillo's striking findings was how infrequent contempt sanctions are in public law cases. While courts have at times been willing to find that federal agencies or officials are in contempt, "the judiciary as an institution—particularly the higher courts—has exhibited a virtually complete unwillingness to allow sanctions, at times intervening dramatically to block imprisonment or budget-straining fines at the eleventh hour."[404]

One vivid illustration of this pattern—with particular resonance for this Article—is *Land v. Dollar*.[405] The D.C. district court and D.C. Circuit ordered Charles Sawyer, Truman's Secretary of Commerce, to transfer stock in a company back to its former owners.[406] In response, Secretary Sawyer "carr[ied] out a remarkably aggressive two-pronged strategy to keep control of the company."[407] That led the D.C. Circuit to initiate contempt proceedings against Secretary Sawyer and several other officials.[408] In response, Sawyer and the other officials argued to the D.C. Circuit that they were "immune from

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[400] Parrillo, *supra* note __, at 693.

[401] Sup. Ct. R. 45.1. On the other hand, the U.S. marshals are bound by statute to execute all judicial orders, and at least the rank and file enjoy tenure protection. 28 U.S.C. § 566(c); *see* Parrillo, *supra* note __, at 693 & n.27.

[402] Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011).

[403] Siegel, *supra* note __, at 1688.

[404] Parrillo, *supra* note __, at 697.

[405] Land v. Dollar, 341 U.S. 737 (1951) (per curiam).

[406] The government had possession of the stock as a result of a Depression era bailout. Parrillo, *supra* note __, at 748.

[407] *Id.* at 750.

[408] *Id.* at 751.

punishment for contempt," because "the courts cannot 'coerce' executive officials."[409]

The D.C. Circuit took this as an existential challenge to constitutionalism. "The matter reaches to bedrock," the court wrote.[410] The government's powers are limited by a written constitution, and the judiciary was established to ensure that there would "be a tribunal with power to determine whether specific acts of the legislature or of the executive are within the powers conferred by the people in the written document."[411] Secretary Sawyer argued that, even if a court found his actions to be unlawful, "he is immune from compulsion by the courts in respect to that action."[412] The D.C. Circuit disagreed vehemently:

> To claim that the executive has [the power to defy a judgment] is to claim the total independence of the executive from judicial determinations in justiciable cases and controversies. To characterize such judicial determinations as illegal coercion of the executive is to deny one of the fundamental concepts of our government.[413]

The court concluded with a warning: Obey our order within five days, or surrender yourselves into custody for civil contempt.[414]

The Department of Justice scrambled to request a stay from the Supreme Court, repeating the broad arguments of official immunity it had made to the D.C. Circuit. It was unclear whether Sawyer would comply with the D.C. Circuit's order.[415] With two days left on the clock, Chief Justice Vinson—acting solo "in chambers"—granted Sawyer and the other officials a stay "pending consideration of the forthcoming petitions for certiorari."[416] The Court as a whole was then asked to dissolve the stay. In a brief *per curiam*, the Court denied the request and granted certiorari in the underlying dispute.[417] A constitutional showdown had been averted, at least temporarily.[418]

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[409] Land v. Dollar, 190 F.2d 623, 638 (1951) (per curiam).

[410] *Id.* at 638.

[411] *Id.* at 639.

[412] *Id.*

[413] *Id.* Sawyer had also argued that he was acting under a direct order from President Truman. But the court held that "the directives of superior executive officials cannot nullify the court decree." *Id.* at 640.

[414] *Id.* at 648.

[415] Parrillo, *supra* note __, at 752–53. Interestingly, after it won the stay, the government "quickly moderated the sweeping claims of immunity" at the merits stage. *Id.* at 756.

[416] Sawyer v. Dollar, 1951 WL 44185, at *1 (U.S. May 22, 1951) (Vinson, C.J., opinion in chambers).

[417] Land v. Dollar, 341 U.S. 737, 738 (1951) (per curiam).

[418] *Cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. Pa. L. Rev. 991, 995–96 (2008) (describing presidential-judicial showdowns).

Justice Jackson wrote separately. He unsuccessfully urged the Court to delay its summer recess and hear oral argument immediately.[419] Denying the stay "without hearing" was not, in his view, "prudent judicial action."[420] And he was clearly troubled by the spectacle of a high official of the executive branch disobeying a court order. "It is the Court that is now on trial," he wrote. When the "shoe of contempt was on the other foot," the Court had supported the government's efforts to enforce court decrees.[421] He thought the Court should likewise enforce decrees against the government:

> The spectacle of this Court stalling the enforcement efforts of lower courts while there is outstanding a judgment that some of the Nation's high officials are guilty of contempt of court is not wholesome. The evil influence of such an example will be increased by delay. This Court should exercise utmost care lest it appear to be indifferent to a claim of official disobedience.[422]

In the end, the Court never had to rule definitively on the propriety of contempt or DOJ's immunity arguments. After the Court stayed the contempt sanction and put the case off until the following Term, the parties settled.[423]

Eagle-eyed readers may have noted that *Land v. Dollar* was decided in 1951 (June 4, to be precise). *Youngstown* was decided a year later, almost to the day: June 2, 1952. The *Land v. Dollar* fracas must have been on the Court's mind when it decided *Steel Seizure* so soon afterwards. Both cases involved Secretary of Commerce Charles Sawyer, claiming to be acting on behalf of President Truman, asserting a broad immunity for official acts. In *Land v. Dollar*, the Court refused to hold an expedited hearing; in *Youngstown*, it did. And in *Land v. Dollar*, the Court let Sawyer and several other officials off the hook (at least until the following Term); in *Youngstown*, the Court invalidated Sawyer's action, repudiating broad claims of immunity in the process.

The deeper lesson that Parrillo draws from *Land v. Dollar* is that, while the judiciary has been hesitant to impose contempt *sanctions*, that hesitancy has not undermined executive compliance with court judgments. Contempt is effective not because the official is put in a jail cell or made to pay a fine. "The efficacy of judicial review of agency action rests primarily on a strong norm, shared in the overlapping communities that agency officials inhabit, that officials comply with court orders."[424] Contempt has a "shaming effect" that reinforces that

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[419] 341 U.S. at 750 (statement of Jackson, J.). But the Court responded that "hearing argument in a matter of weeks" was not "compatible with the orderly administration of justice." *Id.* at 740 (per curiam).

[420] *Id.* at 749.

[421] *Id.* (citing United States v. United Mine Workers, 330 U.S. 258).

[422] *Id.* at 749-50.

[423] Parrillo, *supra* note __, at 756.

[424] *Id.* at 697.

norm. And this facet of contempt would be just as efficacious against a President as a cabinet secretary.[425]

In the end, the glue of constitutional democracy under law is not the U.S. Marshals Service but something more intangible—the power of a court judgment to induce compliance because of a culture of respect for law. *Youngstown*, once again, is typical. The Court did not need to use contempt sanctions to coerce compliance from Truman and Sawyer. They voluntarily complied with the Court's order. Justice Douglas tells a revealing story in his autobiography.[426] After the Court handed down *Youngstown*, Justice Hugo Black invited President Truman to dinner at his "exquisite Alexandria home" with the other Justices.[427] Justice Douglas recalls:

> Truman was gracious though a bit testy at the beginning of the evening. But after the bourbon and canapés were passed, he turned to Hugo and said: "Hugo, I don't much care for your law but, by golly, this bourbon is good."

What caused Truman to submit to the Court's judgment was not the U.S. Marshal knocking on his door, but the shared commitment of self-government under a Constitution emblemized by that glass of bourbon. The Court's impotence in a battle of physical force with the President is beside the point.[428]

CONCLUSION: THE COURT ON TRIAL

One disorienting aspect of the *Trump* opinion is its splintered public reception. Defenders of the opinion have pointed out that "official acts" could be narrowly construed, that immunity is mostly rebuttable, that the danger of partisan prosecution is real, and that the practical effect of the opinion is

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[425] A contempt finding could also facilitate political remedies. If a President defied a court order, for instance, that could form the predicate of an impeachment.

[426] WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS (1974).

[427] *Id.* at 450.

[428] It may be that the President is "immune" from certain contempt *sanctions*. For instance, perhaps by analogy to the President's temporary immunity from indictment, a President should be temporarily immune to *imprisonment* by a court while in office. Carter, *supra* note __, at 1353–54; *see* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1653 (Boston, Hilliard, Gary & Co. 1833) ("The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability . . . ."). Given the extraordinary rarity of actual sanctions against *any* executive official, I do not regard this as a significant limitation. When it comes to reviewing executive action, a contempt sanction is only as strong—or as fragile—as the broader legal and political culture. *Cf.* Carter, *supra* note __, at 1393. Indeed, Parrillo notes ominously at the end of his article that, "[i]f partisanship regarding judicial contempt approached that regarding congressional contempt, it could diminish contempt's shame and ultimately the efficacy of judicial review of the federal government." Parrillo, *supra* note __, at 794; *cf.* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2013).

uncertain.[429] All true. From another vantage point though, the opinion goes to the very heart of constitutionalism—whether and how the state can be put under law.[430] Judicial opinions have an expressive and symbolic dimension as well as a doctrinal one.[431] And few propositions in American law—in American political culture—have the symbolic resonance of the proposition with which the Article began: that no one, the President included, is above the law. In *United States v. Nixon*, the Court was acting in the service of that symbol, and the decision is celebrated (even venerated) for that reason.[432] The unanimous Court gave the impression of the law deposing a kingly President. To say that the President is immune from criminal prosecution for official acts gives the opposite impression. It feels like a "slur on the Republic's faith."[433]

Both sides—defenders and detractors—have a point: From a doctrinal point of view, the opinion and its organizing distinctions are plastic enough that its practical significance could be limited. On the other hand, as Justice Holmes said, "[w]e live by symbols,"[434] and the opinion's harm on that score is real. Indeed, in the final analysis constitutionalism depends on a culture of respect for judicial judgments, and profligate grants of "immunity" to the President threaten to erode that shared norm.

This Article's ambition has been to zoom out—to place the *Trump* opinion in the larger context of presidential immunities. Judicial mechanisms for holding the President to account are disappearing. Damages are off the table; criminal penalties have been at least weakened. And the *Trump* opinion is a troubling portent for the last stronghold of presidential accountability—suits

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[429] *See, e.g.*, We the People, *Presidential Immunity from the Founding to Today*, Nat'l Const. Ctr., at 5:05 (July 11, 2024), https://constitutioncenter.org/news-debate/podcasts/presidential-immunity-from-the-founding-to-today (interviewing Michael McConnell, who observes that "for most official acts, the president only has provisional immunity," and that the "decision really is not as momentous as . . . most people think it was").

[430] *See, e.g.*, Sean Wilentz, *The 'Dred Scott' of Our Time*, N.Y. REV. BOOKS (Aug. 15, 2024) ("In effect [the decision] invests the presidency with quasi-monarchial powers, repudiating the foundational principle of the rule of law.").

[431] *See* Max Lerner, *The Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937).

[432] *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 184 (Knopf 2001) (calling *Nixon* "the most celebrated case to have come before the Court since I became a Justice"); Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 1 (Sep. 5, 2018), https://www.c-span.org/video/?449705-1/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-1 (calling *Nixon* "one of the four greatest moments in Supreme Court history," along with *Marbury*, *Youngstown*, and *Brown*).

[433] The phrase is Melville's. HERMAN MELVILLE, *The House-Top*, *in* BATTLE-PIECES AND ASPECTS OF THE WAR 86, 87 (1866). It did not help that the Court (unlike in *Nixon*) broke down exactly along partisan lines, and that the opinion was handed down at a time when ethical controversies had already broken the "spell of the ermine" for many observers. Lerner, *supra* note __, at 1311 n.58.

[434] OLIVER WENDELL HOLMES, *John Marshall*, *in* COLLECTED LEGAL PAPERS 266, 270 (1920).

for coercive or declaratory relief. It suggests that immunity may erode the most important mechanism for checking presidential power in modern public law. Beyond a legislative response to *Trump* itself, an easy and available way to restore some faith would be to confirm what has been implicit in the last century of constitutional practice: The President can be sued for—and compelled by a court to desist from—unlawful behavior. A President absolutely hellbent on blowing past constitutional and statutory boundaries may, in the final analysis, be too strong to resist. Perhaps, as Justice Jackson prophesied, the aspiration to put the President under law is destined to pass away.[435] But the Court should not (continue to) hasten its passing.

[435] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).