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## The Unwritten Rules of Liberal Democracy

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## **The Unwritten Rules of Liberal Democracy**

Charles W. Collier

15 U. MASS. L. REV. 197

### **AUTHOR'S NOTE**

Professor of Law and Philosophy, University of Florida. Research and writing on this project were supported by summer grants from the University of Florida College of Law, for which I thank Dean Laura A. Rosenbury.

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**INTRODUCTION**

[The government] was armed with more power than any of the kings . . . had ever possessed. For it had become, in fact, an absolute sovereign, and in addition the heir of a revolution which had broken down all the barriers that laws, customs, and mores had previously opposed to the abuse and sometimes to the use of power.

Alexis de Tocqueville<sup>1</sup>

Liberal democracy is like a game in which many of the rules are unwritten. The importance of these unwritten rules becomes obvious as soon as they are discarded or disregarded. Whether the rules are discarded or disregarded, at some point it becomes unclear whether *the same game* is still even being played.

Since games are typically defined by their rules, the idea of “unwritten rules” introduces an element of uncertainty. But this is not the kind of uncertainty that makes the right decision harder to determine,<sup>2</sup> or the wrong decision easier to conceal, confuse, or explain away.<sup>3</sup> Nor is it the kind of uncertainty that general principles and broad norms bring to the relatively straightforward rules they underwrite and justify.<sup>4</sup> H.L.A. Hart wrote of the “open texture” of

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<sup>1</sup> 2 ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* 191 (François Furet & Françoise Mélonio eds., Alan S. Kahan trans., 2001).

<sup>2</sup> See, e.g., James Comey, Opinion, *A Critique That Strengthens the F.B.I.*, N.Y. TIMES, June 15, 2018, at A25 (“I was not certain I was right about those things at the time. That’s the nature of hard decisions; they don’t allow for certainty.”).

<sup>3</sup> See, e.g., Julie Hirschfeld Davis & Maggie Haberman, *Trump Embraces Shadowy Plots, Eroding Trust*, N.Y. TIMES, May 29, 2018, at A1.

Mr. Trump’s willingness to peddle suspicion as fact . . . is a vital ingredient in the president’s communications arsenal, a social media-fueled, brashly expressed narrative of dubious accusations and dark insinuations that allows him to promote his own version of reality . . . . “He’s the blame shifter in chief,” said Gwenda Blair, a Trump biographer . . . . “It goes to this idea that you can’t believe anything that you read or see. He has sold us a whole way of accepting a narrative that has so many layers of unaccountable, unsubstantiated content that you can’t possibly peel it all back.”

*Id.*

<sup>4</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–28 (1978). “[R]ules . . . set out legal consequences that follow automatically when the conditions

law.<sup>5</sup> There is much to be filled in (or out, as the case may be), many implications that need implementing, and many concrete details to be distilled from the spare language of a rule.

In a well-functioning liberal democracy, this “play in the joints” is normally lubricated by established institutional practices that draw on institutional memory, situational judgments that fall well within the realm of rationality, a shared sense of moral purpose, and not least by common sense and good faith. These all inform the “unwritten rules” of liberal democracy. Otherwise, where the written rules end, authoritarian tyranny may well begin.

This Article is set amidst the distinctly unsettled and unsettling state of governmental practices, legislative policy, and presidential politics of contemporary America. Immediacy, too, introduces its own uncertainty—as compared to the comfortable vantage point of the distant future. But, as I shall argue, there is no realistic alternative to beginning *in medias res*. To address these issues as they inherently demand, the usual precedents and protocols and precautions must be set aside—if they are not already “gone with the wind.”<sup>6</sup>

Since the 2016 Presidential Election, and even before, threats to liberal democracy have emerged, in plausible form, as never before in

provided are met . . . . A principle . . . states a reason that argues in one direction, but does not necessitate a particular decision.” *Id.* at 25–26.

<sup>5</sup> See H. L. A. HART, *THE CONCEPT OF LAW* 124–36 (2d ed. 1994).

Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases . . . .

. . . .

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance . . . between competing interests . . . .

*Id.* at 126, 135.

<sup>6</sup> Come writers and critics  
Who prophesize with your pen  
And keep your eyes wide  
The chance won’t come again  
And don’t speak too soon  
For the wheel’s still in spin . . .  
For the times they are a-changin’

BOB DYLAN, *The Times They Are A-Changin’*, on *THE TIMES THEY ARE A-CHANGIN’* (Warner Bros. Inc. 1964).

American history. This is largely a tale about the parlous state of “unwritten rules” in a thoroughly politicized polity. Part I traces out two of the most important stages in this development.

Liberal democracy depends not only on governmental institutions and officials but, indirectly, on the personal qualities those officials bring to their duties and responsibilities. Nowhere is this more important than at the top of the Executive Branch of government, where personality disorders of the President may take on constitutional significance. “Crazytown”—as it has been called—is thus the subject of Part II.<sup>7</sup>

Finally, Part III considers the roles of both “Input Controls” and “Output Controls” in protecting liberal democracy against the threat of authoritarian tyranny. For purposes of discussion, a proposed constitutional amendment is introduced and defended. This is an important intellectual exercise, for “without the constant effort to repair and construct liberal institutions of government . . . it is only a matter of time before one or another zealot will seize the chance to impose his private nightmare on the rest of us.”<sup>8</sup>

## I. A LEGACY OF ILLEGITIMACY

### A. Advice and Consent in the Shadow of the Law

On February 12, 2016, Supreme Court Justice Antonin Scalia took a trip to a remote resort ranch in Texas. The location—in the extreme Southwest corner of Texas, barely forty miles from the Mexican border—was hundreds of miles from any major highways, so the preferred way of getting there was by private plane from Houston to an airstrip on the vast, mountainous ranch.<sup>9</sup> On the day of his arrival, Justice Scalia observed some of the activities and was driven to some hunting sites. In the evening, he had dinner with friends and acquaintances at the main lodge, but he retired somewhat early, citing

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<sup>7</sup> See Philip Rucker & Robert Costa, *Bob Woodward’s New Book Reveals a ‘Nervous Breakdown’ of Trump’s Presidency*, WASH. POST (Sept. 4, 2018, 11:08 AM), [https://www.washingtonpost.com/politics/bob-woodwards-new-book-reveals-a-nervous-breakdown-of-trumps-presidency/2018/09/04/b27a389e-ac60-11e8-a8d7-0f63ab8b1370\\_story.html](https://www.washingtonpost.com/politics/bob-woodwards-new-book-reveals-a-nervous-breakdown-of-trumps-presidency/2018/09/04/b27a389e-ac60-11e8-a8d7-0f63ab8b1370_story.html) [https://perma.cc/VP5W-9P44] (“We’re in Crazytown.” (quoting White House Chief of Staff John F. Kelly)).

<sup>8</sup> BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 313 (1980).

<sup>9</sup> See Alan Blinder & Manny Fernandez, *Texas Ranch is Rugged Oasis for the Famous*, N.Y. TIMES, Feb. 14, 2016, at A23.

tiredness. Sometime during the night of February 12-13, Justice Scalia fell into a deep sleep—a sleep from which he was never to awaken.<sup>10</sup>

The next morning, when Justice Scalia did not come to breakfast or subsequent events, the ranch owner, John Poindexter, went to check on him. Justice Scalia was lying serenely in bed, seemingly undisturbed—but not alive. “[I]t took no medical training . . . to recognize that Justice Scalia was dead.”<sup>11</sup>

Chaos quickly ensued. There were no doctors or officials anywhere on the premises who could render any relevant assistance equal to the task at hand.<sup>12</sup> Thus, a sitting Supreme Court Justice was officially pronounced dead—over the telephone—by a county judge many miles away, on the assurances of those random laymen present at the scene that the Justice was, indeed, dead.<sup>13</sup>

The news quickly began to spread eastward toward Washington, D.C. There, chaos ensued all over again, though on a much grander scale. The political, legal, and institutional significance of Scalia’s death could hardly be overstated. He was the intellectual leader of the Court’s conservative wing, the epicenter of its considerable moral force, an ideological inspiration to like-minded conservatives such as Clarence Thomas, and a genial, gregarious friend to liberals like Elena Kagan and Ruth Bader Ginsburg.<sup>14</sup> He was the proverbial “heavyweight,” with a personality larger than life. Jeffrey Toobin wrote of him at the time of the *Citizens United* case:

More than anyone, Scalia was responsible for transforming the dynamics of oral arguments at the Supreme Court. When Scalia became a Justice, in 1986, the Court sessions were often somnolent affairs, but his rapid-fire questioning spurred his colleagues to try to keep pace, and, as Roberts said, in a tribute to Scalia on his twenty-fifth anniversary as a Justice, “the place hasn’t been the

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<sup>10</sup> See Alan Blinder & Manny Fernandez, *Owner of Texas Ranch Recalls Finding Justice’s Body*, N.Y. TIMES, Feb. 15, 2016, at A14.

<sup>11</sup> *Id.*

<sup>12</sup> See Eva Ruth Moravec et al., *The Death of Antonin Scalia: Chaos, Confusion, and Conflicting Reports*, WASH. POST (Feb. 14, 2016), [https://www.washingtonpost.com/politics/texas-tv-station-scalia-died-of-a-heart-attack/2016/02/14/938e2170-d332-11e5-9823-02b905009f99\\_story.html](https://www.washingtonpost.com/politics/texas-tv-station-scalia-died-of-a-heart-attack/2016/02/14/938e2170-d332-11e5-9823-02b905009f99_story.html) [<https://perma.cc/2TRM-BNJX>].

<sup>13</sup> *See id.*

<sup>14</sup> See Adam Liptak, *Justice Scalia, Who Led Court’s Conservative Renaissance, Dies at 79*, N.Y. TIMES, Feb. 14, 2016, at A1.

same since.” Alternately witty and fierce, Scalia invariably made clear where he stood.<sup>15</sup>

The ground began to shift—and not in a good way—beneath conservative centers of power like Washington think tanks and the offices of Republican Senators and Congressmen all across Capitol Hill. The portentous implications ran far beyond even the wildest dreams that liberal schemers could have concocted on their own. At the time, the Court was finely balanced between four solid, reliable conservatives and four solid, reliable liberals; the balancing point (and the fifth vote) was the fickle and unreliable Anthony Kennedy. Subtracting Justice Scalia’s vote from the conservative column and adding it to the liberal column portended a five-Justice liberal majority that could prevail indefinitely—*with or without* the help of Justice Kennedy. Replacing Justice Scalia with an Obama appointee would rival in magnitude the Court’s greatest ideological shift ever, when ultra-liberal Justice Thurgood Marshall was replaced by arch-conservative Justice Clarence Thomas—a parting gift of President George H.W. Bush.

Hence, the chaos in Washington following Justice Scalia’s death. A conservative political calamity was on the cusp of unfolding; a massive legal realignment was palpably in sight. But amidst all the sound and the fury, there quietly emerged one man who—by his swift, decisive, and prescient actions—gave the impression of having prepared far in advance (indeed, his whole life) for just this moment. That man was Senate Majority Leader Mitch McConnell.

Within hours of the news that Justice Scalia had died, Senator McConnell issued a Press Release in which he and his wife purportedly sent “our deepest condolences to the entire Scalia family.”

Today our country lost an unwavering champion of a timeless document that unites each of us as Americans. Justice Scalia’s fidelity to the Constitution was rivaled only by the love of his family: his wife Maureen, his nine children, and his many grandchildren. Through the sheer force of his intellect and his legendary wit, this giant of American jurisprudence almost singlehandedly revived an approach to constitutional interpretation that prioritized the text and original meaning of the Constitution.

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<sup>15</sup> Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, NEW YORKER, May 21, 2012, at 36.

Elaine and I send our deepest condolences to the entire Scalia family.<sup>16</sup>

But this was no ordinary letter of “condolences”; it ended with an ominous, dagger-like twist: “The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.”<sup>17</sup> (Just in case anyone missed the point, those last two sentences were set in bold-face type.) Thus, what purported to be a note of sympathy actually appears, on closer inspection, to be the vehicle for announcing a brazen political gambit: the Senate would not even consider a Supreme Court nominee during President Obama’s final year in office—regardless of who that nominee might be.

The stated purpose of this unprecedented refusal was to give the American people “*a voice in the selection of their next Supreme Court Justice.*”<sup>18</sup> But of course, the American people already had a “voice” in the selection of Justice Scalia’s successor: they elected President Barack Obama (twice) who, according to the Constitution, “*shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.*”<sup>19</sup>

The Constitution makes no attempt to distribute opportunities for making Supreme Court appointments “evenly” among Presidents, nor does it do anything to guard against an “uneven” distribution. (President Jimmy Carter, for example, never had the opportunity to appoint a single Justice during his four-year term of office.)<sup>20</sup> Instead, the matter is left entirely to chance and the vagaries and vicissitudes of death and resignation. One might say that it is “random” and in this sense similar to decision by a fair (i.e., random) lottery.

On this point there is substantial agreement with a maritime condition of extremity “for which all writers have prescribed the same rule:”<sup>21</sup>

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<sup>16</sup> Press Release, Mitch McConnell, Senate Majority Leader, Justice Antonin Scalia (Feb. 13, 2016), <https://www.republicanleader.senate.gov/newsroom/press-releases/justice-antonin-scalia> [<https://perma.cc/9KY9-QSAT>] (Statement on the Passing of Justice Antonin Scalia).

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

<sup>20</sup> *Judgeship Appointments by President*, U.S. COURTS, <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf> [<https://perma.cc/6RG7-QXYZ>].

<sup>21</sup> *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383).

When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to *God*, for selection of the victim.<sup>22</sup>

Likewise, it is as if the opportunities for Supreme Court appointments are determined by God. (At least, that is one way of reading what the Constitution contemplates.) God determines whether the Scalia seat will become vacant during the Obama Presidency or during the Trump Presidency.

This possibility Senator McConnell could not abide—this matter was far too important to be left to God. Thus, the good Senator thought to himself: “It is as if *I* were God. For I, too, can shift the Scalia vacancy from the Obama Presidency into the Trump Presidency.” “*And so it was*. God saw all he had made, and indeed it was very good.”<sup>23</sup>

Senator McConnell was aided in this grandest of larcenies by the fact that most of the “rules” governing Supreme Court appointments are unwritten. Again, the spare but imperative constitutional language states only that “[t]he President . . . *shall nominate*, and by and with the Advice and Consent of the Senate, *shall appoint* . . . Judges of the supreme Court.”<sup>24</sup> All the rest is unwritten: the courtesy visits, the Judiciary Committee hearings, statements and testimony by the nominee, expert testimony before the Committee, a Committee vote, referral to the full Senate, debate on the Senate floor, and finally a Senate vote.

Again, Senator McConnell undoubtedly thought to himself:

This case is far too consequential to risk all that. Chief Judge Merrick Garland [President Obama’s nominee] may very well prove to be an exceptionally qualified jurist of the highest caliber. There is too much—politically—at stake here to risk that. There must be no Committee hearings, no Committee vote, no Senate vote—nothing. Not even so much as a handshake for that poor hostage Garland.

*And so it was.*

As discussed below, I believe that President Obama, and perhaps Judge Garland himself, could plausibly have invoked the legal system to argue the contrary. There is a federal common law of Supreme

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<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Genesis* 1:31 (Jerusalem Bible) (emphasis added).

<sup>24</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

Court appointments, and no comparable nominee has ever been categorically denied the opportunity even to be considered.<sup>25</sup>

The historical rule that best accounts for the entire history of Supreme Court appointments is . . . the following: Although the Senate has the constitutional power to provide advice and consent on particular Supreme Court nominees (and hence to reject or resist individual nominees on the merits), the Senate may only deliberately transfer one President's Supreme Court appointment powers to an unknown successor . . . if there are contemporaneous questions about the *status* of the nominating President as the most recently elected President.<sup>26</sup>

Nevertheless, the Senate Judiciary Committee endorsed McConnell's approach with a statement signed by all the Republican members of the Committee.<sup>27</sup> The stakes could hardly have been higher, and it was crucially important to shape and frame perceptions quickly, even before they had time to form. (One hallmark of an illegitimate sales pitch is to deny the audience any opportunity to reflect on what it is being sold.)<sup>28</sup> *That meant*: shifting debate away

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<sup>25</sup> See, e.g., Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 73–76 (2016).

[T]here have been 103 prior cases in total in which—as in the case of Obama's nomination of Garland—an elected President nominated someone to fill an actual Supreme Court vacancy prior to the election of the President's successor. In all 103 cases, which go all the way back to the earliest days of the Republic, the sitting President has been able both to nominate *and appoint* a replacement Justice—by and with the advice and consent of the Senate.

. . . .

[T]here is no case in U.S. history where an elected President nominated a Supreme Court Justice *during an election year* (but prior to the election of his presidential successor) and failed to appoint a replacement Justice.

*Id.* at 73, 75 (second emphasis added).

<sup>26</sup> *Id.* at 60 (emphasis added).

<sup>27</sup> Letter from Senate Judiciary Comm., to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), <https://assets.documentcloud.org/documents/2719115/Senate-SCOTUS-Letter.pdf> [<https://perma.cc/F7EF-UDQX>].

<sup>28</sup> See, e.g., Charles W. Collier, *Intellectual Authority and Institutional Authority*, 42 J. LEGAL EDUC. 151, 166 (1992).

from the merits of any particular nominee and toward the issue of whether there should be an election-year appointment at all. So, shortly after Justice Scalia's untimely death, the Republicans on the Senate Judiciary Committee issued a McConnell-style broadside—addressed to McConnell himself:

We intend to exercise the constitutional power granted the Senate under Article II, Section 2 to ensure the American people are not deprived of the opportunity to engage in a full and robust debate over the type of jurist they wish to decide some of the most critical issues of our time . . . .

Accordingly, given the particular circumstances under which this vacancy arises, we wish to inform you of our intention to exercise our constitutional authority to withhold consent on any nominee to the Supreme Court submitted by this President to fill Justice Scalia's vacancy.<sup>29</sup>

This is a little like saying: “We intend to exercise our constitutional power and authority by not exercising them.”

At any rate, a letter from eleven Senate Republicans to their Majority Leader is of no constitutional significance. However, it could be considered a shot across the bow—an unofficial warning that the Senate might be planning to abdicate its constitutional duties and responsibilities that year. After all, the Constitution does *not* say: “The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court—*unless* the Senate elects not to participate in the appointments process that year.”<sup>30</sup> In fact, the Constitution recognizes no way that the Senate

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Milgram's experiments were . . . conducted in an atmosphere of great pressure, both temporal and psychological. The experiments were very smoothly run, highly engineered, “slick” productions. They took place over a thirty-minute time period, in a confined and narrow context that afforded no time for thought, no opportunity for exploration or reflection. It may be that Milgram's results are strictly limited to these conditions; under these conditions, and perhaps only under these conditions, subjects rely on institutional authority to the extent documented by Milgram.

*Id.* (footnote omitted).

<sup>29</sup> Letter from Senate Judiciary Comm., *supra* note 27.

<sup>30</sup> *Cf.* U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

could lawfully do this. “Not participating” is not a constitutionally recognized option under either the written or unwritten law.<sup>31</sup>

The *written* law of the Constitution poses two major problems for this approach. As Kar and Mazzone write:

First, the full Senate is not acting to provide advice at all in such circumstances. Rather, a number of Republicans on the Senate Judiciary Committee are preventing floor debates on the ultimate question whether *the Senate* advises and consents to the Garland nomination. Second, and more practically, advice that takes the form of “we will not act on any nominee [of President Barack Obama]” cannot provide [that] President with any actionable advice for how to nominate a candidate who might be appointed through the Constitution’s designated mechanisms.<sup>32</sup>

Mitch McConnell cannot and does not speak for “the Senate.” Senate Judiciary Committee Chairman Charles Grassley cannot and does not speak for “the Senate,” nor does his faithful cohort of Judiciary Committee Republicans.

More fundamentally, even if the full Senate *were* involved, there is no lawful way it could (in the Judiciary Committee Republicans’ words) “withhold consent on *any* nominee to the Supreme Court submitted by this President.”<sup>33</sup> Such a *general* option or power or authority *does not exist*—anywhere in the Constitution. It exists only in the wishful thinking of people like Mitch McConnell (and, perhaps, in a fabled, far-away place called Neverland). The duty to “advise and consent” arises only in the context of a *specific* nomination that has already been made by the President, as specified in Article II, not Article I.<sup>34</sup> The Senate’s duty is, in this sense, “auxiliary” to the expressly enumerated powers of the President—not the reverse.

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<sup>31</sup> It has been suggested that “[a] more likely construction is that the Senate’s refusal to consider constitutes a withholding of consent.” Email from Russell L. Weaver, Professor of Law, Univ. of Louisville, to Charles W. Collier, Professor of Law and Philosophy, Univ. of Fla. (Aug. 7, 2018, 5:54 PM) (on file with author). Aside from the not-inconsiderable fact that “the Senate” was never involved, this interpretation would be relevant only if the Constitution were a kind of logical and psychological guidebook as to *How People Think*. Instead, it is more like a *Handbook of Limited Governance* that underwrites no logical or psychological inferences—however valid they might be in the abstract—not clearly included in the *Handbook* itself.

<sup>32</sup> Kar & Mazzone, *supra* note 25, at 83–84.

<sup>33</sup> Letter from Senate Judiciary Comm., *supra* note 27 (emphasis added).

<sup>34</sup> See U.S. CONST. art. II, § 2, cl. 2.

The Constitution unambiguously assigns to the President the powers of nomination *and* appointment—the President “*shall* nominate” and “*shall* appoint.” With this second “shall,” the Senate is brought imperatively into the process: “by and with the Advice and Consent of the Senate.”<sup>35</sup> Once President Obama nominated Chief Judge Merrick Garland, it was up to the Senate to “advise” and “consent” *or not consent*.

[T]he President has constitutional powers at *both* the nomination *and* the appointment stages. Regardless of what it means to provide advice and consent, senatorial refusal to consider any nominee from a particular President *with the express purpose of transferring his appointment powers to a successor* may therefore implicate a deeper problem of separation of powers.<sup>36</sup>

Nevertheless, the Senate still did nothing.<sup>37</sup>

The *unwritten* law of the Constitution is equally conclusive and unsparing. A long-standing and unbroken line of practice creates a (rebuttable) presumption that the practice should be followed.<sup>38</sup>

There is . . . simply no historical precedent—recent or otherwise—for the deliberate transfer of presidential authority that Senate Republicans seek to effect with respect to the Supreme Court vacancy left by Justice Scalia. To the contrary, . . . a long-standing and unbroken line of historical practice emerges.<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Kar & Mazzone, *supra* note 25, at 91.

<sup>37</sup> If, by simply doing nothing, the Senate could effectively divest the President of his constitutional powers of appointment, unacceptable separation-of-powers concerns would be presented. *See, e.g., id.* at 92.

The outright senatorial refusal to consider any nominee from the current President in a deliberate attempt to divest him of his Supreme Court appointment powers (and transfer them to his successor) may go beyond the provision of “advice and consent,” as it has traditionally been construed in the context of Supreme Court appointments, to undermine one of the President’s constitutionally-designated powers.

*Id.* Thus, the reading in the text is preferred.

<sup>38</sup> Eight Justices have been nominated *during an election year*, and all eight of them, including Benjamin Cardozo and Louis Brandeis, were successfully confirmed. An additional five nominations were made in election years *after* the election of the nominating President’s successor; yet these nominees were confirmed as well, for a total of thirteen election-year appointments. *See id.* at 74–75.

<sup>39</sup> *Id.* at 72–73. However, Kar and Mazzone note that:

In relation to executive power, as Justice Frankfurter explained, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by [the Constitution].”<sup>40</sup> The Senate Republicans’ plan thus labors under the combined burden of *two* complementary presumptions: (1) the presumption that a long-standing and unbroken line of practice should be followed (formal consideration of any nominee submitted in good order by any President); and (2) the presumption that a *radical departure* from a long-standing and unbroken line of practice should *not* be followed (the purported withholding of consent to any nominee submitted by a particular President—for the express purpose of transferring that President’s constitutional powers of appointment to a

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[T]he Senate has only refused to consider a President’s Supreme Court nominations in the highly unusual circumstance where the nominating President’s status as the most recently elected President has been in doubt . . . . [T]he Republican plan is historically unprecedented and . . . in fact presents a major departure from more than two centuries of historical tradition.

*Id.* at 58, 61.

Our principal historical conclusions therefore hold true without exception. Put simply, the Senate has sometimes used its “advice and consent” powers to shape some Presidents’ Supreme Court choices—either by rejecting or resisting some particular nominees on their merits and with full Senate consideration. Absent contemporaneous doubts about the status of a nominating President as the most recently-elected President, however, the Senate has never before acted as if it had the further power to completely divest a sitting President of his Supreme Court appointment powers.

*Id.* at 82.

[Addressing] these objections . . . reveal[s] just how powerful the historical tradition is in the context of Supreme Court appointments, . . . expose[s] the grave pragmatic and constitutional risks of continuing forward with the Senate Republicans’ current plan, . . . and risks significant harm to the Court. The costs of mischief are all the greater where, as here, there is also a plausible argument that the plan violates the Constitution.

*Id.* at 73, 106.

<sup>40</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

successor). Furthermore, there are surrounding circumstances in this particular case that tend to support a presumption of consent.

The Senate had every opportunity—under its normal procedures—to consider Judge Garland’s nomination *and vote it down*. That would have been constitutionally (if not politically) unobjectionable and uncontroversial. Yet, Senator McConnell and his Republican colleagues pointedly did not do so—indeed, *they were afraid to do this*—because Judge Garland was rightfully perceived as one of the best and brightest candidates ever nominated to the Supreme Court.<sup>41</sup> Once the American public saw and heard Judge Garland on television—there would have been “hell to pay” for voting against him.

Under these circumstances, the Senate’s silence takes on added significance. Not all silences are equal, and in this case there may arguably have been sufficient surrounding circumstances to support a presumption of consent. Unofficially, it would have been hard to find any real criticism of Judge Garland himself from any Senator of either party.<sup>42</sup>

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<sup>41</sup> See, e.g., KAROL CORBIN WALKER, AM. BAR ASS’N, STATEMENT CONCERNING THE NOMINATION OF THE HONORABLE MERRICK B. GARLAND 8–9 (2016).

In undertaking its extensive nationwide investigation of the professional qualifications of Judge Garland, the Standing Committee wrote to and invited input relevant to our investigation from 3,085 persons, including all federal appellate and district judges, and magistrate judges, as well as many state judges, lawyers, and community and bar representatives who were likely to have personal knowledge of his professional qualifications.

*Id.* at 4.

The unanimous consensus of everyone we interviewed was that Judge Garland is superbly competent to serve on the United States Supreme Court. This significant point warrants repeating: all of the experienced, dedicated, and knowledgeable sitting judges, several former solicitor generals from both political parties, legal scholars from top law schools across the country, and lawyers who have worked with or against the nominee in private practice, government or within the judiciary describe the nominee as outstanding in all respects and cite specific evidence in support of that view.

*Id.* at 8–9.

<sup>42</sup> See *id.* at 5 (“Most remarkably, in interviews with hundreds of individuals in the legal profession and community who knew Judge Garland, whether for a few years or decades, not one person uttered a negative word about him.”).

Thus it was left to President Obama to read these uncertain tea leaves as best he could. Rather than assume that the Senate had unlawfully abandoned its constitutional role in appointments,<sup>43</sup> a more charitable interpretation of the Senatorial silence might be: “This is all the ‘Advice and Consent’ you are going to get.” In many circumstances silence may reasonably be understood as assent; e.g.:

Dearly beloved: We have come together in the presence of God to witness and bless the joining together of this man and this woman in Holy Matrimony . . . .

. . . .

. . . If any of you can show just cause why they may not lawfully be married, speak now; or else for ever hold your peace.<sup>44</sup>

Having dispensed with the unwritten law themselves, the Republican Senators could hardly complain if President Obama turned to the written law, which specifies no particular form for the Senate’s “Advice and Consent.” (Originally, this consultation was quite brief and informal, without committee hearings.)<sup>45</sup> Numerous commentators have confirmed that the “Advice and Consent” clause lends itself to various forms of implementation. The former Dean of the Senate, Robert Byrd, stated in a 2005 speech that: “There is no stipulation in the Constitution as to *how* the Senate is to express its advice or give its consent.”<sup>46</sup> Jonathan Adler has likewise observed: “The appointments clause . . . does not impose an affirmative duty to consider a nominee in any particular way . . . . [O]ne cannot consider Senate conduct in isolation. After all . . . the process necessarily involves engagement between the executive and legislative branch.”<sup>47</sup> Finally, as Kar and Mazzone put it: “A President’s power to appoint a Supreme Court Justice has both constitutional and extra-constitutional dimensions. The power clearly arises from the Constitution but it is exercised

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<sup>43</sup> A standard principle of judicial restraint is not to address or decide constitutional questions that do not have to be addressed or decided.

<sup>44</sup> THE BOOK OF COMMON PRAYER, THE CELEBRATION AND BLESSING OF A MARRIAGE 423–24 (2006).

<sup>45</sup> Russell L. Weaver, “*Advice and Consent*” in *Historical Perspective*, 64 DUKE L.J. 1717, 1731–32 (2015).

<sup>46</sup> 151 CONG. REC. 4351, 4365 (2005) (emphasis added).

<sup>47</sup> Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15, 19, 31 (2016).

through a process of engagement—‘advice and consent’—with the Senate.’<sup>48</sup>

Thus, in the unprecedented absence of any express grant *or* withholding of “consent” to his nominee, President Obama would have been well within his rights to declare the “Advice and Consent” requirement *presumptively* satisfied. (The party doing nothing constitutionally relevant cannot very well complain that its inaction should be interpreted in a particular way.) For purposes of *rebutting* the presumption of consent, the individual Senators could all have been given a specified period, during which they could go officially on the record as *opposing* the appointment (a new, unwritten rule, according to which the officially expressed opposition—by a majority of the individual Senators—would constitute *the Senate’s* withholding of consent to an appointment). If this procedure did not yield a withholding of consent, President Obama could then have proceeded to *appoint* Justice Garland and sign his commission. Sometimes, unprecedented problems require unprecedented solutions.<sup>49</sup>

The fact that this solution might not comport with the Senate’s own “Rules of Proceedings” is—under the circumstances—not a valid objection. As noted above, the Senate’s constitutional duty to “advise and consent *or not consent*” arises only in the context of *a specific*

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<sup>48</sup> Kar & Mazzone, *supra* note 25, at 58.

<sup>49</sup> Under the circumstances, President Obama clearly passed up some opportunities for creative thinking and some solutions, unlike that in the text, that do *not* make use of a “presumption of consent.”

(1) President Obama could have addressed a public letter to Senate Majority Leader Mitch McConnell informing him of his intention to poll the Senate on the question of “consent” to the Garland appointment—unless the normal procedures for considering a Supreme Court nominee were initiated within a reasonable time.

(2) If this notification produced no relevant results, the President could then have proceeded to poll all the Senators individually, on the question of “consent” to the Garland appointment. Nothing in the written law of the Constitution precludes this (or any other) means of obtaining the “Advice and Consent” of the Senate.

(3) The Senators’ responses would all be released publicly. If a majority of the Senators clearly favored the appointment of Judge Garland, the President could then proceed to *appoint* Justice Garland and sign his commission. (Otherwise, the nomination would be withdrawn, just as if the full Senate had voted against the nominee.)

(4) Assuming someone wanted to challenge any of the above approaches in court, who would have standing to do so?

*nomination that has already been made* by the President; in this sense, the Senatorial duty is “auxiliary” to the expressly enumerated powers of the President. The form of this “Advice and Consent” is not in any way limited in Article II—nor is it even mentioned in Article I. In purporting to withhold consent—in advance—to *any* nominee submitted by President Obama, Senator McConnell and the Republican members of the Senate Judiciary Committee violated their own “Rules of Proceedings,” specifically Senate Rule 31, which states in part: “When nominations shall be made by the President of the United States to the Senate . . . the *final* question on every nomination shall be, ‘Will *the Senate* advise and consent to this nomination?’”<sup>50</sup> Obviously, “the Senate” was never consulted by this renegade faction on the question of a purported *general* withholding of consent—in advance of any particular nomination. And the “final question” as to “this nomination”—the Garland nomination—was obviously never addressed and *eo ipso* never answered, one way or the other, by anyone—least of all by “the Senate.” Thus, after refusing to allow the Senate to carry out its constitutional duty, these “leaders” of the Senate cannot very well complain when the performance of their duty is facilitated, in alternative fashion, by the very branch of government (the Executive) directly and primarily empowered by the Constitution to *nominate* and *appoint* (“by and with the Advice and Consent of the Senate”). In this case, it seems, the Senate was “otherwise occupied,” in time-honored fashion, with the Great Game of partisan politics.

Ultimately, the Garland nomination simply languished in the Senate for 293 days—far longer than any other Supreme Court nomination in U.S. history—and then expired with the end of the 114th Congress.<sup>51</sup> Thus, the Senate’s silence functioned in this case—as intended—to divest President Obama of his constitutional power of appointment, raising unacceptable separation-of-powers concerns and contravening both the written and unwritten *law of the Constitution*:

[T]he Senate Republicans’ . . . plan is truly unprecedented . . .

. . . .

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<sup>50</sup> STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 43 (2013) (emphasis added).

<sup>51</sup> See Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC NEWS (July 20, 2016, 2:14 PM), <https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541> [<https://perma.cc/PLX9-JMKA>].

... By announcing in advance that they will not consider any nominee from the current President, Senate Republicans may have ... taken the one position that is most clearly contradicted by the entire history of Supreme Court appointment processes ... [H]istory strongly suggests that an outright refusal to do anything at all in order to deliberately transfer one President's appointment power to an unknown successor ... raises unprecedented constitutional questions relating to separation of powers ...<sup>52</sup>

“[S]ometimes,” writes Chief Justice Roberts, “the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent’ for Congress’s action.”<sup>53</sup> In Kar and Mazzone’s terms, there is indeed a severe constitutional problem with the Senate Republicans’ plan: they are “asserting, in effect, a new constitutional power, which has never before been exercised in U.S. history.”<sup>54</sup> If the historical tradition and respect for precedent—of which the Chief Justice speaks—are to be taken at all seriously, “then Senate Republicans lack[] this asserted power.”<sup>55</sup>

The product of an unprecedented, unconstitutional, and, in this sense, unlawful process is itself unlawful or—to use a term with perhaps greater currency: “illegitimate.” The nomination and appointment of Neil Gorsuch—to the seat denied to Merrick Garland—was thus the illegitimate product of an unprecedented, unconstitutional, and, *in that sense*, unlawful process. It follows that Justice Gorsuch’s tenure at the Supreme Court is, *in that sense*, of doubtful legitimacy, along with all of his opinions and all decisions in which he provides the deciding vote.<sup>56</sup> This “aura of illegitimacy,” this

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<sup>52</sup> Kar & Mazzone, *supra* note 25, at 72, 99; *cf. id.* at 100 (“By construing its ‘advice and consent’ powers to give it this new divestment power, Senate Republicans are therefore asserting, in effect, a new constitutional power, which has never before been exercised in U.S. history. If the historical tradition that we have uncovered has ripened into a constitutional rule, then Senate Republicans lacks [sic] this asserted power.”).

<sup>53</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010)).

<sup>54</sup> Kar & Mazzone, *supra* note 25, at 100.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Elizabeth Dias & Sydney Ember, *G.O.P. Tactics in 2016 Pay Off in Gorsuch, Who Proves Decisive Figure*, N.Y. TIMES, June 27, 2018, at A17 (“The consequences of President Trump’s nomination of Neil M. Gorsuch to the Supreme Court—and the Republican blockade of President Barack Obama’s nomination of Merrick B. Garland in 2016 for that seat—became powerfully clear on Tuesday after the court’s conservative majority handed down major

enduring taint on the Court’s reputation, is unlikely to recede anytime soon—at least not until Justice Gorsuch is gone and forgotten.

Finally, in 2018, with the retirement and replacement of Justice Kennedy, the tactics surrounding Justice Scalia’s successor have come full circle. The Court conservatives now appear to have attained—with *two* appointments—exactly what the Court liberals would, and should, have attained with the appointment of Merrick Garland alone: a five-vote majority—without Justice Kennedy—that could prevail indefinitely.<sup>57</sup>

## B. Relitigating the Rules of a Presidential Election

Suppose your local Police Chief calls a press conference and announces:

I’m here to update you on an important investigation. First, I’m going to include more detail about our process than I ordinarily would, because I think the people of this town deserve those details in a case of intense public interest.

Although we did not find clear evidence that the subjects of our inquiry intended to violate laws governing the handling of classified information, there is evidence that they were *extremely careless* in their handling of very sensitive, highly classified information.

In our system, the prosecutors make the decisions about whether charges are appropriate based on evidence we help collect. Although we don’t normally make public our recommendations to the prosecutors, in this case, given the importance of the matter, I think *unusual transparency is in order*.

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decisions to uphold Mr. Trump’s travel ban and in favor of abortion rights opponents.”).

<sup>57</sup> In a kind of coda, garlanded with apparently unappreciated irony, Professor Akhil Reed Amar has championed Judge Brett Kavanaugh’s nomination for the Kennedy seat:

[W]ith the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh . . . .

. . . .

Except for Judge Garland, no one has sent more of his law clerks to clerk for the justices of the Supreme Court than Judge Kavanaugh has.

Akhil Reed Amar, Opinion, *A Liberal’s Case for Brett Kavanaugh*, N.Y. TIMES, July 10, 2018.

Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that *no reasonable prosecutor would bring such a case*.

As a result, although the District Attorney's office makes final decisions on matters like this, we are expressing to the District Attorney our view that no charges are appropriate in this case.

That is essentially what James Comey, Director of the Federal Bureau of Investigation ("FBI"), said and did at a press conference he called on July 5, 2016, a few months before the upcoming presidential election.<sup>58</sup> Of course, the "subjects of the inquiry" were former Secretary of State Hillary Clinton and her colleagues at the Department of State.

Here is some background information. The Department of Justice and the FBI began an investigation in July 2015 into former Secretary Clinton's use of a private email server.<sup>59</sup> By the spring of 2016, FBI Director Comey and his investigators had determined that the evidence did not support a criminal prosecution.<sup>60</sup> Although a number of persons participated in drafting the July 5, 2016 press conference statement, Comey himself added the following gloss, just a few days in advance; the tone is supremely confident, almost defiant, as if he is letting the American people in on a secret that his superiors at the Justice Department might not approve of:

This will be an unusual statement in at least a couple ways. First, I am going to include more detail about our process than I ordinarily would, because I think the American people deserve those details in a case of intense public interest. Second, I have not coordinated or reviewed this statement in any way with the Department of Justice or any other part of the government. *They do not know what I am about to say.*<sup>61</sup>

In fact, his superiors were not pleased. In a subsequent investigation of the investigation, conducted by the Justice

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<sup>58</sup> Press Release, James B. Comey, F.B.I. Dir., Statement on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016), <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system> [<https://perma.cc/5YQH-C4BN>].

<sup>59</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 1 (2018) [hereinafter O.I.G. REPORT].

<sup>60</sup> *Id.* at iii.

<sup>61</sup> Press Release, James B. Comey, *supra* note 58 (emphasis added).

Department's Office of the Inspector General ("O.I.G. Report"), Comey is faulted mainly for two things, the first of which is essentially *hubris*:

Comey's decision to make this statement was the result of his belief that *only he* had the ability to credibly and authoritatively convey the rationale for the decision to not seek charges against Clinton, and that he needed to hold the press conference to protect the FBI and the Department from the extraordinary harm that he believed would have resulted had he failed to do so.<sup>62</sup>

Second, Comey is faulted for violating both the written and unwritten rules of the Department of Justice: "Comey's unilateral announcement was inconsistent with Department policy and violated long-standing Department practice and protocol by, among other things, criticizing Clinton's uncharged conduct. Comey [also] usurped the authority of the Attorney General . . . ."<sup>63</sup>

The FBI investigation into Secretary Clinton's use of a private email server took a number of peculiar twists and turns, but a few general observations may be ventured. First, the so-called "email scandal" was largely a made-up, political controversy.<sup>64</sup> There is a simple and blindingly obvious explanation for Secretary Clinton's unusual email practices: the personal information-technology available to federal government employees (especially in a bureaucracy as vast as the State Department) is chronically inferior to that available in the private sector.<sup>65</sup> This is not an excuse for Secretary Clinton's unsatisfactory solution (the use of a private email server that was not continuously monitored),<sup>66</sup> but it is an explanation. Reportedly, both Director Comey and even President Trump have sometimes failed to

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<sup>62</sup> O.I.G. REPORT, *supra* note 59, at vi (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> *Cf.* LANNY J. DAVIS, THE UNMAKING OF THE PRESIDENT 2016, 7 (2018) (discussing Secretary Clinton's experience with media and Republicans' feeding frenzies during Whitewater).

<sup>65</sup> I can personally attest to this as a former Summer Law Intern at the Department of Justice and a Law Clerk to a Federal Appeals Court Judge. For an extended period of time, the Department of Justice was pursuing an antitrust case against Microsoft Corp. It apparently did not behoove the Justice Department to make use of Microsoft programs, products, or software in its offices while pursuing this litigation. This could partly explain the limited and outdated choices of information technology available in federal agencies over an extended period of time.

<sup>66</sup> See Press Release, James B. Comey, *supra* note 58.

use their cumbersome but secure government-issued devices for conducting official business.<sup>67</sup> So much for consistency.

The FBI bears approximately the same relationship to the Department of Justice as the Police Chief, in my example above, does to the District Attorney's office. It would be just as odd for the Police Chief to announce (at his public press conference) that "no reasonable prosecutor would bring such a case," as it was for Director Comey to do so in similar circumstances. Neither are prosecutors, reasonable or otherwise, so it is odd for them even to be pronouncing on what a prosecutor would or would not do. It is as if a defense attorney (in a case tried before a judge) were to announce in open court that "No reasonable judge would hold against my client." It would be even odder for these statements about "reasonable prosecutors" to be made without coordinating with or even informing the prosecutors themselves, which Director Comey did not do. According to the O.I.G. Report: "Comey acknowledged that he made a conscious decision not to tell Department leadership about his plans to make a separate statement because he was concerned that they would instruct him not to do it."<sup>68</sup> The Report "found that it was extraordinary and insubordinate for Comey to do so, and . . . found none of his reasons to be a persuasive basis for deviating from well-established Department policies . . . ."<sup>69</sup>

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<sup>67</sup> See, e.g., Eliana Johnson et al., *'Too Inconvenient': Trump Goes Rogue on Phone Security*, POLITICO (May 21, 2018, 7:00 PM), <https://www.politico.com/story/2018/05/21/trump-phone-security-risk-hackers-601903> [<https://perma.cc/FG6H-57FA>]. The article reported that:

President Donald Trump uses a White House cellphone that isn't equipped with sophisticated security features designed to shield his communications, according to two senior administration officials—a departure from the practice of his predecessors that potentially exposes him to hacking or surveillance . . . . Trump campaigned in part on his denunciations of Hillary Clinton's use of a private email server as secretary of state—a system that made classified information vulnerable to hacking by hostile actors.

*Id.*; see also O.I.G. REPORT, *supra* note 59, at xii ("[W]e learned during the course of our review that Comey, Strzok, and Page used their personal email accounts to conduct FBI business.").

<sup>68</sup> O.I.G. REPORT, *supra* note 59, at v. I.e., if the answer is likely to be "No," don't ask. As a small child, I found this defense surprisingly underappreciated.

<sup>69</sup> *Id.*

Saying that Secretary Clinton was “extremely careless”<sup>70</sup> with her email practices, but not charging her with anything, would be like the Police Chief’s pulling someone over for driving “extremely recklessly” but not ticketing him. Since Secretary Clinton was a leading presidential candidate, Director Comey might also, in all fairness (and in the interest of “transparency”), have announced that Donald Trump was likewise under investigation for “extremely suspicious” evidence of illegal election collusion with the Russian government—but that he had not (yet) been charged with anything either. Needless to say, those would have been far more serious allegations; yet they were never brought up by the FBI (or the Justice Department, or the President) in any public forum, at any time before the election. So much for fairness (and “transparency”).<sup>71</sup>

In a strange way, the July 5, 2016 press conference—unfortunate as it was—set off a series of far-reaching reverberations that were to have far worse and more profound effects later. The initial reactions

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<sup>70</sup> Press Release, James B. Comey, *supra* note 58.

<sup>71</sup> See, e.g., Matt Apuzzo et al., *In Trying To Avoid Politics, Comey Shaped an Election*, N.Y. TIMES, Apr. 23, 2017, at A1.

[W]ith polls showing Mrs. Clinton holding a comfortable lead, Mr. Comey ended up plunging the F.B.I. into the molten center of a bitter election. Fearing the backlash that would come if it were revealed after the election that the F.B.I. had been investigating the next president and had kept it a secret, Mr. Comey sent a letter informing Congress that the case was reopened.

What he did not say was that the F.B.I. was also investigating the campaign of Donald J. Trump. Just weeks before, Mr. Comey had declined to answer a question from Congress about whether there was such an investigation.

....

... Mr. Comey’s approach to the two investigations... [differed] starkly.... In the case of Mrs. Clinton, he rewrote the script, partly based on the F.B.I.’s expectation that she would win and fearing the bureau would be accused of helping her. In the case of Mr. Trump, he conducted the investigation by the book, with the F.B.I.’s traditional secrecy....

Mr. Comey made those decisions with the supreme self-confidence of a former prosecutor who, in a distinguished career, has cultivated a reputation for what supporters see as fierce independence, and detractors view as media-savvy arrogance.

*Id.*

were bad enough. Legal commentators and the Trump campaign seized on the language of “extremely careless,” which came perilously close to the statutory, criminal element of “gross negligence.” Mr. Trump made the most of this, and chants of “Lock her up!” pervaded the remainder of his election campaign. The deeper significance of Director Comey’s press conference was not evident until much later, when in light of subsequent events it began to represent—in James Comey’s mind above all—a *mistake* that had to be *corrected* at all costs.

Faced with a complicated series of events, it is always hard to single out just those that were truly *necessary* to the outcome.<sup>72</sup> Theoretically, the list could be infinite.<sup>73</sup> Perhaps a butterfly in

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<sup>72</sup> See, e.g., H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 40–44 (2d ed. 1985) (arguing that, at times, we attempt to trace causes and effects through voluntary action and abnormal occurrences to no avail).

<sup>73</sup> On the “Butterfly Effect,” see, for example, Edward N. Lorenz, *Deterministic Nonperiodic Flow*, 20 J. ATMOSPHERIC SCI. 130, 140–41 (1963); Edward N. Lorenz, *The Predictability of Hydrodynamic Flow*, 25 TRANSACTIONS N.Y. ACAD. SCI. 409 (1963). In *The Predictability of Hydrodynamic Flow*, Lorenz describes his research:

During the course of this investigation we encountered a rather striking phenomenon. At various times we found it desirable to repeat portions of previous computations. For this purpose we took the values which the machine had printed at one particular time step, and entered these values into the machine as new initial conditions. Sometimes the machine did not repeat its previous performance. Fairly soon, small differences between the solutions would appear, and these would grow until eventually there was no resemblance between the two solutions.

The cause of the initial discrepancies was soon evident. The numbers had been carried in the machine to six significant figures, but only three figures had been printed in the output. The new initial values had thus been rounded off to three figures, and we were unwittingly superposing a small disturbance upon the earlier conditions. In comparing the two solutions, we were observing the growth of a small disturbance . . . .

. . . .

This result had obvious implications for the atmosphere, in view of the inevitable inaccuracies of observed initial conditions. It suggested that two indistinguishable states could eventually evolve into entirely different states, and that a long-range prediction would fail completely in at least one instance.

. . . .

northern Alaska might have noticed an especially bright and appealing flower and flapped its wings a little harder to investigate, setting off a barely perceptible air current which, when combined in just the right way with other, seemingly random currents of air, could contribute to an eventual strengthening of the air flow across the entire North American continent, across the North Atlantic Ocean, and into the Middle East. This theoretically-increased air flow could have a decisive effect on tremendous air currents that generally follow a path south of the Himalayas, but would now be pushed into the northern route, setting off major atmospheric changes worldwide.<sup>74</sup> These atmospheric conditions could have impacted Arizona in June of 2016, where devastating tornados might have crisscrossed the state, such that Attorney General Lynch's airplane—which was heading for Phoenix at the time—might have been diverted, and a fateful meeting with former President Bill Clinton might never have taken place.

The butterfly in northern Alaska, however, looked the other way, never saw the appealing flower, and the theoretical exercise in meteorological conditions did not play out as it might have. The weather in Arizona was calm and clear, and former President Clinton found his plane on the same tarmac as Attorney General Lynch's. President Clinton saw no reason not to board the Attorney General's plane unexpectedly, for a friendly chat (even as his wife was under investigation by the FBI and the Justice Department). For James Comey, this incident "tipped the scales" in his decision to hold the press conference on his own, without bringing the compromised Attorney General into the fold.<sup>75</sup>

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. . . One meteorologist remarked that if the theory were correct, one flap of a sea gull's wings would be enough to alter the course of the weather forever. The controversy has not yet been settled, but the most recent evidence seems to favor the sea gulls.

*Id.* at 423–24, 431; see also Ray Bradbury, *A Sound of Thunder*, COLLIER'S, June 28, 1952, at 20, 60. (Could the result of a U.S. presidential election turn on what happened to a little butterfly sixty million years ago?).

<sup>74</sup> See, e.g., Judah L. Cohen et al., *Arctic Warming, Increasing Snow Cover and Widespread Boreal Winter Cooling*, 7 ENVTL. RES. LETTERS 1, 5, 6 (2012); Judah Cohen & Justin Jones, *Tropospheric Precursors and Stratospheric Warmings*, 24 J. CLIMATE 6562, 6562–63, 6570 (2011); Judah Cohen et al., *Winter 2009–2010: A Case Study of an Extreme Arctic Oscillation Event*, 37 GEOPHYSICAL RES. LETTERS 1, 1 (2010); Judah Cohen et al., *Decadal Fluctuations in Planetary Wave Forcing Modulate Global Warming in Late Boreal Winter*, 22 J. CLIMATE 4418, 4425 (2009).

<sup>75</sup> See O.I.G. REPORT, *supra* note 59, at v, 242–43.

Another series of “necessary causes” began with the investigation of electronic devices used by Secretary Clinton and her senior staff aides. In the Clinton investigation—unlike the Trump-Russia investigation—Director Comey and his investigators were not looking primarily for a “smoking gun.”<sup>76</sup> They provisionally accepted Secretary Clinton as the hard-working, patriotic, head of an unwieldy, far-flung agency who truly believed she could not do her job with the information technology provided by the government. (All of her predecessors—in the “computer age” at least—came to the same conclusion.) The fact that her solution fell short of the governing standards presumptively reflected the *mens rea* not of a treasonous spy but of a harried and impatient administrator.<sup>77</sup> Thus, the investigators were looking primarily for a “pattern of practice.” “They stated that they discovered persistent practices of State Department employees, including both political and career employees, discussing classified information on both unclassified government email accounts and personal email accounts, and that this culture predated Clinton’s tenure as Secretary of State.”<sup>78</sup> Even a representative sample of Secretary Clinton’s practices could provide sufficient evidence of her failure to follow “best practices.”

Practical limits were also placed on the scope of the investigation from the very beginning:

[A]t the outset of the investigation, former Deputy Director [Mark F.] Giuliano generally advised the team that the purpose of the investigation was not to follow every potential lead of classified information . . . Giuliano told the team, “[T]his is not going to become some octopus . . . The focus of the investigation [is] the appearance of classified information on [Clinton’s] personal emails and that server during the time she was Secretary of State.” . . . [T]he FBI’s “purpose and mission” was not to pursue “spilled [classified] information to the ends of the earth.”<sup>79</sup>

Likewise, “in the beginning of the investigation, the Midyear team wanted to obtain every device that touched the server, but . . . over

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<sup>76</sup> *See id.* at 324, 368.

<sup>77</sup> *See id.* at 165–66.

<sup>78</sup> *Id.* at 95.

<sup>79</sup> *Id.* at 93 (alterations to internal quotations in original); *see also id.* at 95 (“I think the idea was that, that this investigation had to be somewhat focused, otherwise it could spin off into a million different directions. And this investigation could take different forms for years and years and years to come. So, you know, the, the focus of the investigation was, was really the private email system.”).

time the team realized that this would not be ‘fruitful.’ . . . OTD personnel told the team that ‘it was not likely that there would be anything on the devices’ themselves.”<sup>80</sup>

Perhaps most significantly, the team of investigators:

*Did not seek to obtain every device, including those of Clinton’s senior aides, or the contents of every email account through which a classified email may have traversed . . . . [T]he reasons for not doing so were based on limitations . . . imposed on the investigation’s scope, the desire to complete the investigation well before the election, and the belief that the foregone evidence was likely of limited value.*<sup>81</sup>

Thus, for example:

The Midyear team obtained 2703(d) orders for noncontent information in Mills’s Gmail account and Abedin’s Yahoo! account and a search warrant for Sullivan’s personal Gmail account. However, the Midyear team did not obtain search warrants to examine the content of emails in Mills’s or Abedin’s private email accounts *and did not seek to obtain any of the senior aides’ personal devices.*<sup>82</sup>

Specifically, “the investigators did not seek access to the private devices used by Sullivan, Mills, or Abedin during Clinton’s tenure at State.”<sup>83</sup>

Since the FBI did not systematically round up all electronic devices that could possibly have been used by Secretary Clinton’s staff to send and receive messages from her, it left itself open and vulnerable to the pure workings of chance. Again, perhaps another butterfly in northern Alaska might have noticed an especially bright and appealing flower and flapped its wings a little harder to investigate, setting off a barely perceptible air current which, when combined in just the right way with other, seemingly random currents of air, could contribute to an eventual strengthening of the air flow across the entire North American continent, such that it could have

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<sup>80</sup> *Id.* at 94.

<sup>81</sup> *Id.* at ii (emphasis added).

<sup>82</sup> *Id.* at 90 (emphasis added); *see also id.* at 93 (“Generally the witnesses told us that they could not remember anyone within the team arguing that more should have been done to obtain the senior aides’ devices.”).

<sup>83</sup> *Id.* at 93; *see also id.* at 94 (“[T]he Midyear team asked Abedin whether she backed up her clintonemail.com emails and she responded that her email was ‘cloud-based’ and she did not ‘know how to back up her archives.’ . . . [B]ased on this testimony, the team assessed that finding helpful evidence on Abedin’s devices was unlikely.”). *Id.*

rained every day that week in North Carolina, where after high school, a pretty young cheerleader might have been waiting forlornly in the rain for a bus, when the captain of the football team pulled up in his sports car and offered her a ride home, after which he asked her out on a date that weekend, which she gladly accepted, as she already had a bit of a crush on him. She might very well have resolved—then and there—never again to communicate with “that creep Anthony Weiner,” deleted all messages on her computer and phone to and from him, and changed her email address and phone number, so that she never heard from him again.

As it was, however, the butterfly in northern Alaska looked the other way and never saw the appealing flower. The weather was bright and sunny all that week in North Carolina, so the pretty young cheerleader walked home from school instead of waiting for the bus, and never saw the captain of the football team. That weekend—without any dates—she had nothing better to do than send and receive increasingly explicit computer messages to and from Anthony Weiner, who was eventually arrested by the criminal authorities, and whose laptop computer was impounded and turned over to the FBI in late September, 2016.

And lo and behold, on that very laptop were *hundreds of thousands* of emails to and from Secretary Clinton and one of her senior aides, Huma Abedin, Secretary Clinton’s Deputy Chief of Staff, who happened to be Anthony Weiner’s estranged wife, from whom he happened to have “inherited” his laptop computer.<sup>84</sup>

This should have been no surprise to anyone at the FBI. Since the electronic devices of Secretary Clinton’s staff had not all been systematically collected and reviewed, it should be no surprise to have one turn up later. But this put Director Comey in a particular, self-inflicted bind. Now he had, not one, but two of his own mistakes to correct.

First was the mistake of assuring the American public that the Clinton email investigation was definitively “over and done with,” that all relevant evidence had been reviewed and found wanting, and that no indictments could possibly come down. That was not necessarily true, as Anthony Weiner inadvertently proved. The fact that it could so easily be disproved reflected Director Comey’s second mistake. (How hard could it have been to round up *all* electronic devices of Secretary Clinton’s staff, including those jointly used by family members?)

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<sup>84</sup> *Id.* at 306–07.

A standard, one-sentence “Declination of Prosecution” notice from the Justice Department would have had none of the broader implications that Director Comey’s press conference introduced, which would haunt him later. The discovery of additional emails, or even an additional device, in the Clinton investigation should not have surprised or alarmed anyone, since there had been no effort to round up *all* of those emails and devices anyway, even those of Clinton’s senior aides. Indeed, as one prosecutor stated, “the only reason the FBI later obtained the Weiner laptop was because ‘it had ended up in our laps.’”<sup>85</sup> However, Anthony Weiner’s laptop computer then sat unexamined for nearly a month in a queue for processing evidence at the FBI.<sup>86</sup> No one thought it necessary to notify Director Comey. Whether the laptop was processed before or after the election was of no particular concern.<sup>87</sup>

But, for Director Comey, once he found out about the additional, hundreds of thousands of emails on October 27, 2016, this immediately became a matter of tremendous, self-imposed concern. He viewed the American public as going to the polls under false pretenses—false pretenses that he himself had wrongly set in place, with his assurances at the press conference. Those assurances of extraordinary “transparency” and of a definitively closed Clinton email investigation were no longer necessarily true (even though, given the unsystematic collection of the Clinton emails, the additional emails were not considered significant even by Director Comey’s own investigators).

Director Comey’s own, distinctly personal bind, his perceived need to set the record—*his record*—absolutely straight, at all costs (and in

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<sup>85</sup> *Id.* at 95.

<sup>86</sup> *See id.* at vii–viii (The emails were discovered on the laptop on September 26, 2016, but “no evidence that anyone associated with the Midyear investigation, including the entire leadership team at FBI Headquarters, took any action on the Weiner laptop issue until the week of October 24.”); *see also* William Saletan, *Unread October: The FBI Ignored Anthony Weiner’s Laptop. That May Have Cost Hillary Clinton the Election.*, SLATE (June 14, 2018, 11:24 PM), <https://slate.com/news-and-politics/2018/06/fbi-ignored-anthony-weiners-laptop-and-it-may-have-cost-hillary-clinton-the-election.html> [<https://perma.cc/7EVA-AVME>].

<sup>87</sup> *See* Saletan, *supra* note 86; *see also* O.I.G. REPORT, *supra* note 59, at 330 (“The FBI’s neglect had potentially far-reaching consequences. Comey told the OIG that, had he known about the laptop in the beginning of October and thought the email review could have been completed before the election, it may have affected his decision to notify Congress.”).

so doing to correct his own, self-inflicted mistakes), took precedence—for him—over both the written and unwritten rules of a presidential election.<sup>88</sup> These self-imposed concerns seemed increasingly to have taken on the dimensions—if not the form—of a great, white whale for the beleaguered, preoccupied Captain Comey:

The White Whale swam before him as the monomaniac incarnation of all those malicious agencies which some deep men feel eating in them, till they are left living on with half a heart and half a lung. That intangible malignity which has been from the beginning; to whose dominion even the modern Christians ascribe one-half of the worlds; which the ancient Ophites of the east revered in their statue devil;—Ahab did not fall down and worship it like them; but deliriously transferring its idea to the abhorred white whale, he pitted himself, all mutilated, against it. All that most maddens and torments; all that stirs up the lees of things; all truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil, to crazy Ahab, were visibly personified, and made practically assailable in *Moby-Dick*. He piled upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it.

... But, as in his narrow-flowing monomania, not one jot of Ahab's broad madness had been left behind; so in that broad madness, not one jot of his great natural intellect had perished. That before living agent, now became the living instrument. If such a furious trope may stand, his special lunacy stormed his general sanity, and carried it, and turned all its concentrated cannon upon its own mad mark; so that far from having lost his strength, Ahab, to that one end, did now possess a thousandfold more potency than

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<sup>88</sup> See O.I.G. REPORT, *supra* note 59, at 372–73. Director Comey's preoccupation with setting the record straight ran counter to the standards of his profession:

[T]he problem originated with Comey's elevation of "maximal transparency" as a value overriding, for this case only, the principles of "stay silent" and "take no action" that the FBI has consistently applied to other cases. The Department [of Justice] and the FBI do not practice "maximal transparency" in criminal investigations. It is not a value reflected in the regulations, policies, or customs guiding FBI actions in pending criminal investigations. To the contrary, the guidance to agents and prosecutors is precisely the opposite—no transparency except in rare and exceptional circumstances due to the potential harm to both the investigation and to the reputation of anyone under investigation.

*Id.* at 373.

ever he had sanely brought to bear upon any one reasonable object.<sup>89</sup>

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<sup>89</sup> HERMAN MELVILLE, *MOBY-DICK* 163–65 (Raymond M. Weaver ed., Albert & Charles Boni, Inc. 1925) (1851).

But be all this as it may, certain it is, that with the mad secret of his unabated rage bolted up and keyed in him, Ahab had purposely sailed upon the present voyage with the one only and all-engrossing object of hunting the White Whale . . . . He was intent on an audacious, immitigable, and supernatural revenge.

Here, then, was this grey-headed, ungodly old man, chasing with curses a Job's whale round the world, at the head of a crew, too, chiefly made up of mongrel renegades, and castaways, and cannibals . . . . Such a crew, so officered, seemed specially picked and packed by some infernal fatality to help him to his monomaniac revenge.

. . . .

. . . For with the charts of all four oceans before him, Ahab was threading a maze of currents and eddies, with a view to the more certain accomplishment of that monomaniac thought of his soul.

*Id.* at 166, 177.

Ah, God! what trances of torments does that man endure who is consumed with one unachieved revengeful desire. He sleeps with clenched hands; and wakes with his own bloody nails in his palms.

Often when forced from his hammock by exhausting and intolerably vivid dreams of the night, which, resuming his own intense thoughts through the day, carried them on amid a clashing of phrensies, and whirled them round and round in his blazing brain, till the very throbbing of his life-spot became insufferable anguish; and when, as was sometimes the case, these spiritual throes in him heaved his being up from its base, and a chasm seemed opening in him, from which forked flames and lightnings shot up, and accursed fiends beckoned him to leap down among them; when this hell in himself yawned beneath him, a wild cry would be heard through the ship; and with glaring eyes Ahab would burst from his state room, as though escaping from a bed that was on fire. Yet these, perhaps, instead of being the unpressible symptoms of some latent weakness, or fright at his own resolve, were but the plainest tokens of its intensity.

*Id.* at 180.

“Oh! thou clear spirit of clear fire, whom on these seas I as Persian once did worship, till in the sacramental act so burned by thee, that to this hour I bear the scar; I now know thee, thou clear spirit, and I now know that *thy right worship is defiance* . . . . Oh, thou clear

On October 28, 2016—over strenuous objections at all levels of the Department of Justice—Director Comey notified the majority and minority chairmen of all the relevant congressional committees as follows:

In previous congressional testimony, I referred to the fact that the Federal Bureau of Investigation (FBI) had completed its investigation of former Secretary Clinton’s personal email server. Due to recent developments, I am writing to supplement my previous testimony.

In connection with an unrelated case, the FBI has learned of the existence of emails that appear to be pertinent to the investigation. I am writing to inform you that the investigative team briefed me on this yesterday, and I agreed that the FBI should take appropriate investigative steps designed to allow investigators to review these emails to determine whether they contain classified information, as well as to assess their importance to our investigation.

Although the FBI cannot yet assess whether or not this material may be significant, and I cannot predict how long it will take us to complete this additional work, I believe it is important to update your Committees about our efforts in light of my previous testimony.<sup>90</sup>

That was eleven days before the election (at the height of early voting).

Director Comey’s notification immediately threw the election into complete chaos. An instantly re-energized Mr. Trump gleefully

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spirit, of thy fire thou madest me, and like a true child of fire, I breathe it back to thee.”

*[Sudden, repeated flashes of lightning . . .]*

“ . . . There is some unsuffusing thing beyond thee, thou clear spirit, to whom all thy eternity is but time, all thy creativeness mechanical. Through thee, thy flaming self, my scorched eyes do dimly see it. Oh, thou foundling fire, thou hermit immemorial, thou too hast thy incommunicable riddle, thy unparticipated grief. Here again with haughty agony, I read my sire. Leap! leap up, and lick the sky! I leap with thee; I burn with thee; would fain be welded with thee; *defyingly I worship thee!*”

*Id.* at 447–48 (first and third emphases added).

<sup>90</sup> Letter from James B. Comey, Dir., Fed. Bureau of Investigation, to Cong. Comm. Chairmen (Oct. 28, 2016) (on file with author) [hereinafter Oct. 28 Letter].

pounced on the new information as “bigger than Watergate,”<sup>91</sup> and warned against electing a candidate who was clearly about to be indicted.<sup>92</sup> Double-digit percentage changes in voter sentiment were soon detected in both state and national polling.<sup>93</sup>

As for Clinton, she viewed the Comey letter to Congress as effectively ending her candidacy. It was, as she said later in a conference call to donors, simply too much to “overcome.”<sup>94</sup> In her memoir, she recalls that when she and her aides heard where the new emails came from:

Huma looked stricken. Anthony had already caused so much heartache. And now this.

“This man is going to be the death of me,” she said, bursting into tears.

....

... At the time, the FBI had no idea if the emails were new or duplicates of ones already reviewed, or if they were personal or work related, let alone whether they might be considered classified retroactively or not. They didn’t know anything at all. And Comey didn’t wait to learn more. He fired off his letter to Congress two days before the FBI received a warrant to look at those emails.

Why make a public statement like this, which was bound to be politically devastating, when the FBI itself couldn’t say whether the new material was important in any way? At the very end of his July 5 press conference, Comey had declared sanctimoniously,

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<sup>91</sup> Michelle Ye Hee Lee, *Trump’s Bizarre Claim That the Clinton Email Controversy Is ‘Bigger Than Watergate,’* WASH. POST (Oct. 30, 2016, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/10/30/trumps-bizarre-claim-that-the-clinton-email-controversy-is-bigger-than-watergate/> [<https://perma.cc/S6LN-KNAQ>].

<sup>92</sup> See Chuck Todd et al., *Trump Warned of Endless Clinton Investigations. Instead, the Focus Is on Him,* NBC NEWS (June 15, 2017, 8:30 AM), <https://www.nbcnews.com/politics/first-read/trump-warned-endless-investigations-clinton-instead-focus-him-n772736> [<https://perma.cc/N9YE-APP5>].

<sup>93</sup> Cf. Nate Cohn, *Did Comey Cost Clinton the Election? Why We’ll Never Know,* N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/upshot/did-comey-cost-clinton-the-election-why-well-never-know.html> [<https://perma.cc/GUF5-6LQL>] (arguing evidence from the polls in October 2016 remains inconclusive as to the Comey effect on Clinton’s decline in support).

<sup>94</sup> Clinton Blames FBI’s Comey for Her Presidential Election Defeat, VOA NEWS (Nov. 12, 2016, 7:23 PM), <https://www.voanews.com/usa/us-politics/clinton-blames-fbis-comey-her-presidential-election-defeat> [<https://perma.cc/9AX4-T4YF>].

“Only facts matter,” but here the FBI didn’t know the facts and didn’t let that stop it from throwing the presidential election into chaos.<sup>95</sup>

Clinton was right. On the Sunday afternoon two days before Election Day (after early voting had mostly ended), Director Comey sent a second notification to all the same congressional committee chairs and co-chairs, essentially saying “never mind.”

I write to supplement my October 28, 2016 letter that notified you the FBI would be taking additional investigative steps with respect to former Secretary of State Clinton’s use of a personal email server. Since my letter, the FBI investigative team has been working around the clock to process and review a large volume of emails from a device obtained in connection with an unrelated criminal investigation. During that process, we reviewed all of the communications that were to or from Hillary Clinton while she was Secretary of State.

Based on our review, we have not changed our conclusions that we expressed in July with respect to Secretary Clinton.<sup>96</sup>

All the apparently “pertinent” emails on Weiner’s laptop were copies or backed-up versions of emails from Abedin’s accounts, which were already well known to investigators.<sup>97</sup> There was nothing new or relevant. But, “[b]y then it was too late,” writes Secretary Clinton. “If anything, that second letter may have energized Trump supporters even more and made them more likely to turn out and vote against me. It also guaranteed that undecided voters saw two more days of headlines about emails and investigations.”<sup>98</sup>

With his statements and actions, Director Comey violated many of the written and unwritten rules of a presidential election. The determination of the Justice Department’s Office of the Inspector General (“O.I.G.”), that Director Comey’s press conference statement “was inconsistent with Department policy and violated long-standing Department practice and protocol,” has already been discussed—as well as his usurpation of the Attorney General’s authority, which the O.I.G. found “extraordinary and insubordinate” and a “deviati[on] from well-established Department policies.”<sup>99</sup>

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<sup>95</sup> HILLARY RODHAM CLINTON, *WHAT HAPPENED* 314–15 (2017).

<sup>96</sup> Letter from James B. Comey, Dir., Fed. Bureau of Investigation, to Cong. Comm. Chairmen (Nov. 6, 2016) (on file with author).

<sup>97</sup> See Oct. 28 Letter, *supra* note 90.

<sup>98</sup> CLINTON, *supra* note 95, at 405.

<sup>99</sup> O.I.G. REPORT, *supra* note 59, at v, vi.

The Department of Justice (of which the FBI is a part) and its prosecutors and investigators observe a “quiet period” (of at least sixty days) prior to an election, during which sensitive information is not publicly released.<sup>100</sup> This unwritten rule is presumptively to be observed unless there is a very good reason to the contrary. The voting public needs time to process and “digest” news, to put it into perspective before an election. Emotionally charged, last-minute revelations may not fulfill their dire potential when reassessed in the cold morning light of counter-arguments and further developments. “Quiet” does not mean “cover-up” though, as Deputy Attorney General Rod Rosenstein has explained. “When federal agents and prosecutors quietly open a criminal investigation, we are not concealing anything; we are simply following the longstanding policy that we refrain from publicizing non-public information. In that context, silence is not concealment.”<sup>101</sup>

The timing of FBI Director Comey’s October 28th “surprise” was dictated by the actions of a child molester, by his own Bureau’s negligence (in sitting on the new evidence for a month), and by his own personal promises of extraordinary “transparency.” None of these was a good reason for departing from the “quiet period” policy, especially considering that no one even knew the nature of the “new” evidence. As the O.I.G. Report somewhat delicately put it:

[W]e found . . . that the Midyear team:

. . . .

Did not seek to obtain every device, including those of Clinton’s senior aides, or the contents of every email account through which a classified email may have traversed . . . . We further found that [this was], in part, *in tension with* Comey’s response in October 2016 to the discovery of Clinton emails on the laptop of Anthony Weiner . . . .<sup>102</sup>

Yet Comey might have reasoned to himself: “If I wait two more days for a search warrant, that would be only *nine* days before the election. And if I wait two more days to assess the hundreds of thousands of

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<sup>100</sup> See Josh Meyer, *Anticipation Builds Around Mueller as 60-Day Election Window Nears*, POLITICO (Aug. 30, 2018, 6:54 PM), <https://www.politico.com/story/2018/08/30/mueller-midterms-russia-probe-election-window-805491> [<https://perma.cc/5YW2-VGHX>].

<sup>101</sup> Memorandum from Rod J. Rosenstein, Deputy Att’y Gen., Dep’t of Justice, to the Att’y Gen. 2 (May 9, 2017) (on file with author).

<sup>102</sup> O.I.G. REPORT, *supra* note 59, at ii (emphasis added).

emails, that would be only *seven* days before the election.” So he rolled the dice with what little he knew—only to “unroll” them later, *two* days before the election.

But as everyone knows, dice cannot really be unrolled any more than the genie can be put back into her bottle. Irreparable damage to the legitimacy of the election had, quite predictably, already been done.

The Department of Justice, like other federal agencies, is subject to applicable provisions of the Hatch Act.<sup>103</sup> The very first provision states: “(a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not—

(1) *use his official authority or influence for the purpose of interfering with or affecting the result of an election.*”<sup>104</sup>

One commentator writes that: “the Hatch Act . . . proscribes acting with improper ‘purpose’ to influence an election and in engaging in certain discrete partisan activities like receiving political contributions. It has little direct application here, where *there is no evidence indicating that Comey acted with any improper purpose.*”<sup>105</sup> Let’s examine that proposition.

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<sup>103</sup> An Act to Prevent Pernicious Political Activities (Hatch Act), 5 U.S.C. §§ 7321–7326 (2020).

<sup>104</sup> § 7323(a)(1) (emphasis added).

<sup>105</sup> Jane Chong, *Pre-Election Disclosures: How Does, and Should, DOJ Analyze Edge Cases?*, LAWFARE (Nov. 8, 2016, 9:10 AM) (emphasis added), <https://www.lawfareblog.com/pre-election-disclosures-how-does-and-should-doj-analyze-edge-cases> [<https://perma.cc/U469-YQE3>]; see also David Cole, *What James Comey Did*, N.Y. REV. BOOKS, Dec. 8, 2016. Cole argues:

Whatever else one might say about the just-concluded 2016 presidential election, one thing is certain: FBI Director James Comey played an outsized and exceptionally inappropriate part.

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... [H]is October 28 announcement dramatically shifted the trajectory of the campaign, deflected attention from Donald Trump’s own considerable troubles, and *inevitably influenced the choices of many early voters.*

....

... Comey’s October 28 announcement certainly affected the results of the 2016 election, but there is no evidence that he took

There is no direct evidence that Director Comey intended to *change the result* of the 2016 presidential election. In this context that would mean: intervening in the election, intending for the result to differ (i.e., for a different candidate to win) from what it would have been without the intervention. If that had been Director Comey's "purpose," he would indeed have been acting with an "improper purpose." But the Hatch Act requires only that he not act "for the purpose of *interfering with or affecting* the result of an election."<sup>106</sup> So the question is not whether Director Comey intended to *change the result* of the 2016 election, but only whether he intended to "affect" the result of the election. One can affect the result of an election without changing the result, e.g., by voting.

Director Comey certainly knew that his intervention(s) in the election would *affect* its result. "[A]s any remotely sentient observer could have predicted," writes Jeffrey Toobin, "his interjection created a sensation that was damaging to Clinton's chances."<sup>107</sup> Yet, that still speaks only indirectly to Director Comey's purpose or intent. The question might provisionally be put as: Did Director Comey intervene in the 2016 election *because* he knew his intervention would affect the result; or did he do so *in spite of* the fact that his intervention would affect the result? According to standard legal doctrine, "A person is presumed to intend the natural and probable consequences of his voluntary acts."<sup>108</sup> But a presumption may be rebutted.

In the ancient legend, Icarus used a pair of improvised wings and flew farther and higher than any man had ever done before. This was exhilarating; this blinded him. Ultimately, despite all warnings, Icarus flew too close to the sun; the wax securing his wings melted; and he fell spiraling down into the sea and drowned.

Likewise, at a parlous and decisive moment in our history, much depended on a man already predisposed to soaring flights of independence bordering on authoritarianism—for which he had been

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his action for that purpose, and absent such a motive, the Hatch Act is not implicated.

*Id.* (emphasis added). "[I]nvariably," I take it, carries the further connotations of "predictably" and "foreseeably" in this context, which bring into play the presumption of intent.

<sup>106</sup> § 7323(a)(1) (emphasis added).

<sup>107</sup> Jeffrey Toobin, *Clinton Investigation Mania, Part 2*, NEW YORKER, (Nov. 6, 2016), <https://www.newyorker.com/magazine/2016/11/14/clinton-investigation-mania-part-two> [<http://perma.cc/KE3S-52QA>].

<sup>108</sup> *Presumed Intent*, BLACK'S LAW DICTIONARY (5th ed. 1979).

richly rewarded all his life, with positions of increasing authority and discretion. This was exhilarating; this blinded him. So, faced with a delicate situation that demanded finely-balanced certainties rather than imponderable probabilities, he instead rolled the dice one time too many and came crashing down into the perfect chaos his miscalculation created for us all. The O.I.G. Report concludes that “[as] with his July 5 announcement, [in making this decision to notify Congress] Comey engaged in ad hoc decisionmaking based on his personal views even if it meant rejecting longstanding Department policy or practice . . . . [T]he burden was on him to justify an extraordinary departure from these established norms, policies, and precedent.”<sup>109</sup>

Burden-shifting is what presumptions are all about: the burden of proof and the burden of producing evidence.<sup>110</sup> Director Comey was ultimately laboring under the burdens of *two* presumptions: (1) the presumption that he intended to “affect” if not change the result of the 2016 election (which would have been “the natural and probable consequence of his voluntary acts”<sup>111</sup>)—in notifying Congress as he did; and (2) the presumption that the established norms, policies, and precedent of the Department of Justice should be followed. Rebutting these two presumptions would not be easy even under the best of circumstances.

In his memoir, Director Comey gives his most considered defense. He begins in a confessional tone: “I have many [flaws] . . . . I can be stubborn, prideful, overconfident, and driven by ego. I’ve struggled with those my whole life.”<sup>112</sup> This is like the question in the job interview when the interviewer asks what your “greatest weakness” is. You are supposed to say something like: “Well, sometimes I probably work too hard at my job.” So, Director Comey’s “flaws,” reported *sua sponte*, may be assumed to be underestimated. In fact, 200 pages later, he is still “struggling” with his ego and his pride: “I have long worried about my ego . . . . [T]here is danger that all that pride can make me blind . . . .” (like Icarus).<sup>113</sup>

Director Comey’s main defense is as follows:

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<sup>109</sup> O.I.G. REPORT, *supra* note 59, at 371, 372.

<sup>110</sup> See Charles W. Collier, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423, 423 n.1 (1986).

<sup>111</sup> *Presumed Intent*, *supra* note 108.

<sup>112</sup> JAMES COMEY, *A HIGHER LOYALTY*, at x (2018).

<sup>113</sup> *Id.* at 206.

I had assumed from media polling that Hillary Clinton was going to win. I have asked myself many times since if I was influenced by that assumption. I don't know. Certainly not consciously, but I would be a fool to say it couldn't have had an impact on me. It is entirely possible that, because I was making decisions in an environment where Hillary Clinton was sure to be the next president, *my concern about making her an illegitimate president* by concealing the restarted investigation bore greater weight than it would have if the election appeared closer or if Donald Trump were ahead in all polls. But I don't know.<sup>114</sup>

If you point a loaded gun at my heart and pull the trigger, you are presumed to want me dead, even if I survive. Charges of “assault with a deadly weapon, attempted murder, etc.” will still lie, even if you claim: “I was just attempting a citizen’s arrest. I thought he was jaywalking, and I didn’t want him to get away.” (And if I die within a year and a day, the charges are raised to *murder* at the common law.)

Director Comey figuratively pointed a loaded gun at the heart of the Clinton campaign and pulled the trigger. He knew this would “affect” the result of the election. Again, “as any remotely sentient observer could have predicted, his interjection created a sensation that was damaging to Clinton’s chances.”<sup>115</sup> Director Comey also knew his interjection might possibly even *change* the result of the election, such that Mr. Trump would win. That was a chance he was willing to take. But that was not a chance he was lawfully authorized to take.

Nowhere in the job description of FBI Director does it say that he is “personally authorized and empowered to assure the ‘legitimacy’ (as he sees it) of our elected Presidents—even if that means influencing the results of elections and departing from the established norms, policies, and precedent of the Department of Justice.” Nevertheless, this was Director Comey’s justification to himself, as he intentionally “affected” the result of the election and also knowingly took the chance that he might possibly even *change* the result altogether. His actions and statements thus fall well within the provision of the Hatch Act prohibiting a federal employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.”<sup>116</sup> Director Comey’s considered “defense” does nothing to rebut either of the two presumptions he was subject to.

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<sup>114</sup> *Id.* at 204 (emphasis added).

<sup>115</sup> Toobin, *Clinton Investigation Mania, Part 2*, *supra* note 107.

<sup>116</sup> 5 U.S.C. § 7323(a)(1) (2020).

In a lengthy article entitled *The Comey Letter Probably Cost Clinton the Election*, acclaimed pollster and statistician Nate Silver concludes:

Hillary Clinton would probably be president if FBI Director James Comey had not sent a letter to Congress on Oct. 28. The letter . . . upended the news cycle and soon halved Clinton's lead in the polls, imperiling her position in the Electoral College.

The letter isn't the only reason that Clinton lost. It does not excuse every decision the Clinton campaign made . . . .

But . . . [t]he impact of Comey's letter is comparatively easy to quantify, by contrast . . . . *At a minimum*, its impact might have been only a percentage point or so. Still, because Clinton lost Michigan, Pennsylvania and Wisconsin by less than 1 point, the letter was probably enough to change the outcome of the Electoral College.

. . . .

So while one can debate the magnitude of the effect, there's a reasonably clear consensus of the evidence that the Comey letter mattered—probably by enough to swing the election. This ought not be one of the more controversial facts about the 2016 campaign; the data is pretty straightforward.<sup>117</sup>

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<sup>117</sup> Nate Silver, *The Comey Letter Probably Cost Clinton the Election*, FIVETHIRTYEIGHT (May 3, 2017) (emphasis added) (footnote omitted), <https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election/> [<https://perma.cc/57ED-GZA5>]; see also Kevin Drum, *Let's Talk About Bubbles and James Comey*, MOTHER JONES (Apr. 22, 2017), <https://www.motherjones.com/kevin-drum/2017/04/lets-talk-about-bubbles-and-james-comey/> [<https://perma.cc/64SQ-RUDW>].

[T]he Comey effect was real, it was big, and it probably cost Clinton the election.

. . . .

. . . Comey's letter is unique for a few reasons. First, it was an intervention by an institution that Americans have largely perceived as nonpartisan. (Indeed, the FBI actively works to foster that image.) Second, the intervention was almost perfectly timed to impact Clinton at the worst time—dominating the final week of campaigning as an unusually large number of undecided voters made up their minds. Finally, it aligned perfectly with the narrative pushed by Trump—and bolstered by the media's obsessive coverage of how Clinton handled her State Department email, and the slow-drip release of hacked emails—that Clinton was somehow fundamentally corrupt.

. . . .

“Perhaps the truest explanation of why things happened as they did is the most ordinary,” writes James Fallows in another context: “that human beings could not foresee the way that chance and circumstance could magnify the consequences of their acts.”<sup>118</sup>

Ironically, the “aura of illegitimacy” that so concerned Director Comey did, in fact, materialize; it simply enveloped a different candidate. And it happened, not *despite* Director Comey’s best efforts, but precisely *because* of them.

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The effect of Comey’s late intervention into the election is also clear in the national polls. As neuroscientist Sam Wang showed, Clinton’s margin over Trump falls dramatically in national polls directly after the Comey letter and never recovers. At the time, statistician Nate Silver noted that the Comey letter coincided with “a swing of about 3 points against her”—a massive swing in a tight election. These public polls are supported by internal polling from both campaigns suggesting that Comey was a massive blow to Clinton at a pivotal moment in the election.

....

It’s true that there are other possible explanations for a late shift in vote intentions, but thus far there is no alternative explanation of merit. (The cyberhacks were surely important, but their effects would have been felt more steadily throughout the campaign.)

Instead, the evidence is clear, and consistent, regarding the Comey effect. The timing of the shift both at the state and national levels lines up very neatly with the publication of the letter, as does the predominance of the story in the media coverage from the final week of the campaign. With an unusually large number of undecided voters late in the campaign, the letter hugely increased the salience of what was the defining critique of Clinton during the campaign at its most critical moment.

....

... Comey broke a decades-long norm of not intervening in presidential elections. The fact that his interference alone almost certainly swayed an election is indicative of a broader and disturbing breakdown of political norms.

Sean McElwee et al., *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan. 11, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign> [<https://perma.cc/5AZ5-6UU9>].

<sup>118</sup> James Fallows, *M-16: A Bureaucratic Horror Story*, ATLANTIC MONTHLY, June 1981, at 56, 65.

## II. THE AUTHORITARIAN PERSONALITY

[T]hey told me I was everything. 'Tis a lie.

King Lear<sup>119</sup>

### A. Present at the Destruction

Out of the rubble and ashes of World War II emerged a new world order, and a new appreciation of the role played by psychological factors in the social and political process. Former U.S. Secretary of State Dean Acheson entitled his postwar memoir *Present at the Creation*, as a metaphor for the task of reconstruction at war's end, which was "just a bit less formidable than that described in the first chapter of Genesis. That was to create a world out of chaos; ours, to create half a world, a free half, out of the same material without blowing the whole to pieces in the process."<sup>120</sup> But how had so much been reduced to rubble and ashes in the first place?

Many years earlier, in Munich, an unknown man of no consequence arose at five o'clock in the morning. He had "gotten into the habit of throwing pieces of bread or hard crusts to the little mice which spent their time in the small room, and then to watch these droll little animals romp and scuffle for these few delicacies."<sup>121</sup> For him, watching the mice fight over bread crumbs was more than a sadistic amusement. It was the Darwinian "struggle for existence," playing out on a small scale.

For the young Hitler, this formative experience helped to rationalize and justify his overweening desire for power: it was *natural*, rooted in the eternal laws of nature, and specifically in the need for self-preservation—the primary motive of human behavior. Even at this early stage, some of the defining features of the authoritarian "world-view" may be discerned:

[T]he authoritarian person lives in a world which may be conceived . . . as a sort of jungle in which man's hand is necessarily against every other man's, in which the whole world is conceived of as dangerous, threatening, or at least challenging, and in which human beings are conceived of as primarily selfish or evil or stupid. To carry the analogy further, this jungle is peopled with animals who either eat or are eaten, who are either to be feared or

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<sup>119</sup> WILLIAM SHAKESPEARE, KING LEAR act 4, sc. 6.

<sup>120</sup> DEAN ACHESON, PRESENT AT THE CREATION, at xvii (1970).

<sup>121</sup> ADOLF HITLER, MEIN KAMPF 295 (Reynal & Hitchcock trans., Houghton Mifflin Co. 1939) (1925).

despised. One's safety lies in one's own strength and this strength consists primarily in the power to dominate.<sup>122</sup>

In Erich Fromm's analysis, this "struggle for existence" was moderated and channeled into a stable social order by the "natural" bonds and roles of medieval society—family, trade, guild, religion, community.<sup>123</sup> At the same time, "psychological factors play [an] active [role] in the social process[.]"<sup>124</sup> The traditional "identity with nature, clan, religion, gives the individual security. He belongs to . . . a structuralized whole in which he has an unquestionable place."<sup>125</sup> (In this traditional social ordering, a mere real estate developer—lacking any experience in government, politics, academia, or the military—could hardly aspire to become President.) But all this changed with the transition from the "golden age" of *Gemeinschaft* (community) to the not-so-golden age of *Gesellschaft* (society).<sup>126</sup>

The medieval social system was destroyed and with it the stability and relative security it had offered the individual. Now with the beginning of capitalism all classes of society started to move. There ceased to be a fixed place in the economic order which could be considered a natural, an unquestionable one. *The individual was left alone; everything depended on his own effort, not on the security of his traditional status.*<sup>127</sup>

In the new economic order:

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<sup>122</sup> A. H. Maslow, *The Authoritarian Character Structure*, 18 J. SOC. PSYCHOL. 401, 402–03 (1943). "If one is not strong enough the only alternative is to find a strong protector. If this protector is strong enough and can be relied upon, then peace of a certain sort is possible to the individual." *Id.* at 403. A recent commentator has reached similar conclusions about the world-view of President Donald Trump: "Magnanimity, fair dealing, example setting, win-win solutions, a city set upon a hill: All this, in the president's mind, is a sucker's game, obscuring the dog-eat-dog realities of life. Among other distinctions, Mr. Trump may be our first Hobbesian president." Bret Stephens, Opinion, *The Thomas Hobbes Presidency: Conservatives Were Outraged by Obama's Apologies. What About Trump's Slander?*, WALL ST. J. (Feb. 7, 2017, 6:14 PM), <https://www.wsj.com/articles/the-thomas-hobbes-presidency-1486426412> [<https://perma.cc/2KRQ-F6VM>].

<sup>123</sup> See ERICH H. FROMM, *ESCAPE FROM FREEDOM* 5–6 (First Owl Book ed. 1994) (1941).

<sup>124</sup> *Id.* at 5.

<sup>125</sup> *Id.* at 34.

<sup>126</sup> See generally FERDINAND TÖNNIES, *GEMEINSCHAFT UND GESELLSCHAFT* (1887).

<sup>127</sup> FROMM, *supra* note 123, at 59.

[T]he unpredictable laws of the market decided whether [one's] products could be sold at all and at what profit . . . .

. . . Each individual must go ahead and try his luck. He had to swim or to sink. Others were not allied with him in a common enterprise, they became competitors, and often he was confronted with the choice of destroying them or being destroyed.<sup>128</sup>

Yet this new economic individuation also offered *freedom from* the static, unchanging bonds, roles, and limits of traditional society. Now an undistinguished real estate developer—a very, very wealthy real estate developer—could indeed aspire to become President. The sky was the limit, but it is lonely at the top. “They were more free, but they were also more alone.”<sup>129</sup> Security and community were traded for the fruits of ambition and the chance for fame. And the masses?

The masses who did not share the wealth and power of the ruling group had lost the security of their former status and had become a shapeless mass, to be flattered or to be threatened—but always to be manipulated and exploited by those in power. A new despotism arose side by side with the new individualism.<sup>130</sup>

In this setting the appeal of authoritarianism makes perfect sense. The dominating leader promises a way to overcome the unbearable feeling of powerlessness: by “becom[ing] a part of a bigger and more powerful whole outside of oneself, to submerge and participate in it . . . . By becoming part of a power which is felt as unshakably strong, eternal, and glamorous, one participates in its strength and glory.”<sup>131</sup> This same dynamic (or dialectic) applies to the leader as well: “the ‘*authoritarian character*[.]’ . . . admires authority and tends to submit to it, but at the same time he wants to be an authority himself and have others submit to him.”<sup>132</sup> As Abraham Maslow puts it, in psychological terms:

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<sup>128</sup> *Id.* at 60–61; *see also id.* at 99 (“The breakdown of the medieval system of feudal society had one main significance for all classes of society: the individual was left alone and isolated. He was free. This freedom had a twofold result. Man was deprived of the security he had enjoyed, of the unquestionable feeling of belonging, and he was torn loose from the world which had satisfied his quest for security both economically and spiritually. He felt alone and anxious. But he was also free to act and to think independently, to become his own master and do with his life as he could—not as he was told to do.”).

<sup>129</sup> *Id.* at 47.

<sup>130</sup> *Id.* at 46.

<sup>131</sup> *Id.* at 154.

<sup>132</sup> *Id.* at 162.

Every authoritarian character is both sadistic and masochistic. Which tendency will appear depends largely (but not entirely) on the situation. If he is in dominance status, he will tend to be cruel; if he is in subordinate status, he will tend to be masochistic. But because of these tendencies in himself, he will understand, and deep down within himself will agree with the cruelty of the superior person, even if he himself is the object of the cruelty.<sup>133</sup>

This analysis has clear implications for the clear and present dangers of our time.

“America’s child president,” writes a conservative commentator (George Will in the *Washington Post*):

[H]as a weak man’s banal fascination with strong men whose disdain for him is evidently unimaginable to him. And, yes, he only perfunctorily pretends to have priorities beyond personal aggrandizement. But just as astronomers inferred, from anomalies in the orbits of the planet Uranus, the existence of Neptune before actually seeing it, [Special Counsel] Mueller might infer, and then find, still-hidden sources of the behavior of this sad, embarrassing wreck of a man.<sup>134</sup>

Or, from the liberal side (Bruce Shapiro in *The Nation*):

The political brutality of the Trump era is rooted in the Rehnquist right’s decades-long campaign to undo the modern American social contract—New Deal business regulations, civil rights, environmental protections, and sexual equality—and to restore executive power to the days before civil-liberties-minded judges and a post-Watergate Congress reined it in.<sup>135</sup>

Or, finally, from what might be termed the British expatriate perspective (Andrew Sullivan in *New York Magazine*):

This is not treason as such. It is not an attack on America, but on a version of America, the liberal democratic one . . . . It is an attack on those institutions that Trump believes hurt America—like NATO and NAFTA and the E.U. It is a championing of an illiberal America, and a partnering with autocrats in a replay of old-school Great Power zero-sum politics, in which the strong pummel and

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<sup>133</sup> Maslow, *supra* note 122, at 408 (“He will understand the bootlicker and the slave even if he himself is not the bootlicker or the slave.”).

<sup>134</sup> George F. Will, Opinion, *This Sad, Embarrassing Wreck of a Man*, WASH. POST (July 17, 2018, 2:57 PM), [https://www.washingtonpost.com/opinions/this-sad-embarrassing-wreck-of-a-man/2018/07/17/d06de8ea-89e8-11e8-a345-a1bf7847b375\\_story.html](https://www.washingtonpost.com/opinions/this-sad-embarrassing-wreck-of-a-man/2018/07/17/d06de8ea-89e8-11e8-a345-a1bf7847b375_story.html) [<https://perma.cc/BQT3-F54P>].

<sup>135</sup> Bruce Shapiro, *Keeping Kavanaugh Off the Supreme Court*, NATION (July 18, 2018), <https://www.thenation.com/article/keeping-kavanaugh-off-supremecourt/> [<https://perma.cc/98UB-S5BJ>].

exploit the weak. Trump is simultaneously vandalizing the West, while slowly building a strongman alliance that rejects every single Western value. And Russia—authoritarian, ethnically homogeneous, internally brutal, internationally rogue—is at its center.<sup>136</sup>

In 1965, Erich Fromm wrote that “[t]he United States has shown itself resistant against all totalitarian attempts to gain influence.”<sup>137</sup> Would he write the same thing today?<sup>138</sup>

## B. The Narcissist-in-Chief

As adults, we have forgotten most of our childhood, not only its contents but its flavor; as men of the world, we hardly know of the existence of the inner world . . . . Our capacity to think, except in the service of what we are dangerously deluded in supposing is our self-interest and in conformity with common sense, is pitifully limited: our capacity even to see, hear, touch, taste and smell is so shrouded in veils of mystification that an intensive discipline of unlearning is necessary for *anyone* . . . .<sup>139</sup>

Under the U.S. Constitution, no one can become President who has not “attained to the Age of thirty five Years.”<sup>140</sup> Does this ensure that American Presidents will be mature enough—mentally, intellectually, morally, emotionally—for the job? This question began receiving the attention it deserved at about the same time as Donald Trump started ascending the presidential opinion polls.

“Honestly, I don’t think people change that much,” says Mr. Trump himself.<sup>141</sup> “When I look at myself *in the first grade* and I look

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<sup>136</sup> Andrew Sullivan, *Why Trump Has Such a Soft Spot for Russia*, N.Y. MAG.: THE INTELLIGENCER (July 20, 2018), <http://nymag.com/intelligencer/2018/07/andrew-sullivan-why-trump-has-such-a-soft-spot-for-russia.html> [<https://perma.cc/Z96Q-LUZN>].

<sup>137</sup> FROMM, *supra* note 123, at xv.

<sup>138</sup> See generally, e.g., MADELEINE ALBRIGHT, FASCISM: A WARNING 4 (2018) (“Why . . . is democracy now ‘under assault and in retreat?’ Why are many people in positions of power seeking to undermine public confidence in elections, the courts, the media, and—on the fundamental question of earth’s future—science? . . . And why, this far into the twenty-first century, are we once again talking about Fascism?”).

<sup>139</sup> R. D. LAING, THE POLITICS OF EXPERIENCE 10–11 (1967).

<sup>140</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>141</sup> Maureen Dowd, Opinion, *Introducing Donald Trump, Diplomat*, N.Y. TIMES, Aug. 16, 2015, at SR9.

at myself now, I'm basically the same."<sup>142</sup> Distinguished anthropologist James Harvey Robinson states for the record:

[A]ccumulating evidence seems to indicate that when bodily maturity is once reached, the increase of knowledge and intelligence slackens or even almost ceases in many cases. By 13 or 14 the child has acquired an overwhelming part of the knowledge, impressions, cautions and general estimates of his fellow creatures and the world in which he lives, which he continues to harbour with slight modifications during his lifetime . . . .

. . . We have had time before 13 to take over the standardized sentiments of our elders, to learn all that they know, to accept their views of religion, politics, manners, general proprieties and respectabilities.<sup>143</sup>

This developmental paradigm has recently received highly instructive, first-hand confirmation from General James N. Mattis, who served as President Trump's Secretary of Defense:

It seemed Mattis and others were at the end of their rope with the president. How are you possibly questioning these things that are obvious and so fundamental? It was as if Mattis were saying, God, stop it!

. . . .

The president left. Among the principals there was exasperation with these questions. Why are we having to do this constantly? When is he going to learn? They couldn't believe they were having these conversations and had to justify their reasoning. Mattis was particularly exasperated and alarmed, telling close associates that the president acted like—and had the understanding of—“a fifth or sixth grader.”<sup>144</sup>

That would put Mr. Trump at the intellectual level of a ten to twelve-year-old—a bit at the low end of Robinson's developmental model,

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<sup>142</sup> MICHAEL D'ANTONIO, NEVER ENOUGH 40 (2015) (emphasis added). Translated into age-brackets, Trump is essentially saying: “*I'm basically the same now as I was at age six.*”

<sup>143</sup> James Harvey Robinson, *Civilization*, in 5 *Encyclopædia Britannica* 735, 739 (14th ed. 1929). Professor Robinson based these conclusions partly on millions of intelligence tests administered by the military.

<sup>144</sup> BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE 306, 307–08 (2018); cf. Jack Healy et al., ‘*Our Country Is Being Run by Children*’: *Shutdown's End Brings Relief and Frustration*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/shutdown-federal-workers-reaction.html> [<https://perma.cc/49J4-VAT7>].

but otherwise generally consistent with it. Thus, when Senator Rand Paul points to “a sophomoric quality that is entertaining about Mr. Trump,” and asks: “My goodness, that happened in junior high. Are we not way above that?”<sup>145</sup>—the answer must be, “No, we are not.” How could we be?

According to a standard manual of mental disorders, a clinically significant *personality disorder* can generally be traced back to adolescence or at least early adulthood. It forms “an enduring pattern of thinking, feeling, and behaving that is relatively stable over time”<sup>146</sup>—which fits in well with Trump’s claims that “I’m a solid, stable person” and that, anyway, “people [don’t] change that much.”<sup>147</sup> The extreme manifestation of this phenomenon would be Peter Pan, the boy who never grew up at all:

The difference between him and the other boys . . . was that they knew it was make-believe, while to him make-believe and true were exactly the same thing. This sometimes troubled them, as when they had to make-believe that they had had their dinners.

. . . .

. . . Peter would not budge. He was tingling with life and also top-heavy with conceit. “Am I not a wonder, oh, I am a wonder!” he whispered . . . .

. . . .

Peter was not quite like other boys; but he was afraid at last. A tremor ran through him, like a shudder passing over the sea; but on the sea one shudder follows another till there are hundreds of them, and Peter felt just the one. Next moment he was standing erect on the rock again, with that smile on his face and a drum beating within him. It was saying, “To die will be an awfully big adventure.”<sup>148</sup>

Peter Pan appears to be suffering from a number of serious mental disorders. Even so, “overweening ambition and confidence may lead

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<sup>145</sup> Frank Bruni, Opinion, *An Overdose of Donald Trump at the G.O.P. Debate*, N.Y. TIMES (Sept. 16, 2015), <https://www.nytimes.com/2015/09/17/opinion/an-overdose-of-donald-trump-republican-gop-debate.html> [<https://perma.cc/87GM-NEH4>].

<sup>146</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 647 (5th ed. 2013) [hereinafter DSM-5].

<sup>147</sup> Dowd, *supra* note 141.

<sup>148</sup> J. M. BARRIE, PETER PAN 61, 77, 84 (Jack Zipes ed., Penguin Books 2004) (1911).

to high achievement,”<sup>149</sup> as the diagnostic guidelines concede and as the example of Donald Trump confirms. (Such people tend to have biographies written about them with titles like *Never Enough*; according to George Will, they also tend to “nurs[e] . . . innumerable delusions.”)<sup>150</sup> Several standard psychology textbooks feature Trump as an example, one of which states:

Mr. Trump’s image is exemplary of the culture of narcissism: he refers to himself in the third person as “The Donald” and is primarily well known as the developer whose name must appear on each edifice and on his array of highly publicized marriages, divorces, and prenuptial agreements. He is the sole purveyor of winning and losing.<sup>151</sup>

Within the mental health disciplines, *narcissism* is understood as a normal and healthy stage of childhood development and psychological growth. “In healthy development,” writes one analyst, “the child’s normal initial sense of grandiosity (‘when I cry, milk is produced’) is gradually modified and transformed into energy, ambition, and self-esteem.”<sup>152</sup> By contrast, however, arrested development of these attributes may lead to *narcissistic personality disorder*.<sup>153</sup> An adult with this disorder:

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<sup>149</sup> DSM-5, *supra* note 146, at 671 (discussing “associated features supporting diagnosis” of narcissistic personality disorder).

<sup>150</sup> George F. Will, Opinion, *Donald Trump is a Counterfeit Republican*, WASH. POST (Aug. 12, 2015), [https://www.washingtonpost.com/opinions/a-counterfeit-republican/2015/08/12/c28c2968-4052-11e5-bfe3-ff1d8549bfd2\\_story.html](https://www.washingtonpost.com/opinions/a-counterfeit-republican/2015/08/12/c28c2968-4052-11e5-bfe3-ff1d8549bfd2_story.html) [<https://perma.cc/K33T-KZEM>] (“In every town large enough to have two traffic lights there is a bar at the back of which sits the local Donald Trump, nursing his fifth beer and innumerable delusions.”); see D’ANTONIO, *supra* note 142.

<sup>151</sup> Jerrold Lee Shapiro & Susan Bernadett-Shapiro, *Narcissism: Greek Tragedy, Psychological Syndrome, Cultural Norm*, in 1 MENTAL DISORDERS OF THE NEW MILLENNIUM 25, 38 (Thomas G. Plante ed., 2006).

<sup>152</sup> *Id.* at 31. “[A]ll theorists who address this syndrome agree that narcissism is a healthy and appropriate stage of childhood development.” *Id.* at 30.

<sup>153</sup> See Joan Acocella, *Selfie: How Big a Problem Is Narcissism?*, NEW YORKER, May 12, 2014 (book review).

In the DSM, narcissism is one of the so-called “personality disorders,” a category different from neuroses . . . . Neuroses are afflictions of the “worried well.” At a certain point in these people’s lives, things become hard for them. They wake up in the middle of the night; they’re swamped with dread; they don’t know why. A personality disorder, by contrast, doesn’t seem to start or to

1. Has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements).

....

4. Requires excessive admiration.

....

9. Shows arrogant, haughty behaviors or attitudes.

....

Vulnerability in self-esteem makes individuals with narcissistic personality disorder very sensitive to “injury” from criticism or defeat . . . . They may react with disdain, rage, or defiant counterattack.<sup>154</sup>

go away. The person’s family will often report that he’s always been like that. Furthermore, he thinks that he is perfectly all right.

*Id.*

<sup>154</sup> DSM-5, *supra* note 146, at 669–71. Additionally, “[i]ndividuals with this disorder . . . may be preoccupied with how well they are doing and how favorably they are regarded by others.” *Id.* at 670. See George T. Conway III, *Unfit for Office: Donald Trump’s Narcissism Makes It Impossible for Him to Carry Out the Duties of the Presidency in the Way the Constitution Requires*, ATLANTIC (Oct. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/george-conway-trump-unfit-office/599128/> [<https://perma.cc/8ZT8-8S3H>]; see also Mark Leibovich, *Donald Trump is Not Going Anywhere*, N.Y. TIMES MAG., Oct. 4, 2015, at 28 32–33. “I observed to Trump that I had never encountered a candidate who talked so much to me about the latest polls. He knew precisely why that was. ‘That’s because they’re not leading,’ he said.” *Id.* at 52. The article continues:

Trump makes no attempt to cloak his love of fame and, admirably, will not traffic in that tiresome politicians’ notion that his campaign is “not about me, it’s about you.” The ease with which Trump exhibits, and inhabits, his self-regard is not only central to his “brand” but also highlights a kind of honesty about him . . . .

....

. . . I, too, have grown exceedingly weary of this world—the familiar faces, recycled tropes and politics as usual—and here was none other than Donald J. Trump, the billionaire blowhard whom I had resisted as a cartoonish demagogue, defiling it with resonance . . . .

....

(“I hope they attack me,” says Trump, “because everybody who attacks me is doomed.”<sup>155</sup>)

When his beloved Wendy falls into a frightful faint, Peter Pan springs boldly into action. Instead of moving her (which “would not be sufficiently respectful”) he decrees that a whole new house should be built right around her—on the spot.<sup>156</sup> None of the other boys objects; indeed, “[t]hey were all delighted” with such a grand idea, and soon “they were as busy as tailors the night before a wedding.”<sup>157</sup> Afterwards, Peter Pan inspects the finished house and notes only that it lacks a chimney and a knocker on the door, both of which are quickly supplied.<sup>158</sup>

Likewise, none of Donald Trump’s stated policy prescriptions seems at all beyond the appreciation of an average teenager. Indeed, they verge on the blindingly obvious.<sup>159</sup> Illegal immigrants? “Build a wall. A Great Wall. A very long and costly wall. And make those dirty *banditos* pay for it! (Somehow.)”<sup>160</sup>

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. . . Was Trump the logical byproduct of a cancerous system in which American democracy has mutated into a gold rush of cheap celebrity, wealth creation and narcissistic branding madness? Or has he merely wielded the tools of this transformation—his money, celebrity and dominance of the media—against the forces that have engendered this disgust in the system to begin with?

*Id.* 32–33.

<sup>155</sup> Monica Langley, *Donald Trump’s One-Man Roadshow: GOP Hopeful Soars Amid Rivals’ Hostility; ‘Everybody Who Attacks Me Is Doomed,’* WALL ST. J., Sept. 14, 2015, at A1.

<sup>156</sup> BARRIE, *supra* note 148, at 60.

<sup>157</sup> *Id.*; *cf. id.* at 88 (“Peter thought it his due, and he would answer condescendingly, ‘It is good. Peter Pan has spoken.’”).

<sup>158</sup> *Id.* at 63.

<sup>159</sup> *Cf.* WILHELM REICH, *THE MASS PSYCHOLOGY OF FASCISM* 83 (Vincent R. Carfagno trans., 3d ed. 1970) (“Hitler repeatedly stressed that one could not get at the masses with arguments, proofs, and knowledge, but only with feelings and beliefs. In the language of National Socialism . . . the nebulous and the mystical are . . . conspicuous . . .”).

<sup>160</sup> See *Immigration Reform That Will Make America Great Again*, TRUMP: MAKE AM. GREAT AGAIN!, <https://meitar.github.io/radical-leftists-for-trump/www.donaldjtrump.com/positions/immigration-reform> [<https://perma.cc/TW6R-K9PA>]. The website proclaims:

1. *A nation without borders is not a nation.* There must be a wall across the southern border.

. . . .

Mr. Trump offers—as one commentator puts it—“a simpler and more appealing narrative than the realities of the current global economy.”<sup>161</sup> It is probably no accident that his campaign slogan (“Make America Great Again!”) is not something like “America—Whistling Past the Graveyard?” or even “America, Just Do It.” (Mr. Trump, ever the enterprising businessman, has actually *trademarked* “Make America Great Again!” and warned other candidates against using the phrase for “promoting public awareness of political issues” or “fundraising in the field of politics.”<sup>162</sup> So, be careful what you say about America. Be very careful.)

Of course, a teenage politician’s target audience would be his fellow teenagers. And none of their commonly stated “reasons” for supporting Mr. Trump seems beyond the intellectual range of a teenager either. (“When he gets in there,” said one, “he’ll figure it out.”<sup>163</sup> Somehow.)

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For many years, Mexico’s leaders have been taking advantage of the United States by using illegal immigration to export the crime and poverty in their own country (as well as in other Latin American countries).

....

... They are responsible for this problem, and they must help pay to clean it up.

....

Mexico must pay for the wall.... We will not be taken advantage of anymore.

*Id.*

<sup>161</sup> Brendan Nyhan, *Donald Trump, the Green Lantern Candidate*, UPSHOT (New York Times) (Aug. 25, 2015), <https://www.nytimes.com/2015/08/26/upshot/donald-trump-the-green-lantern-candidate.html?searchResultPosition=1> [<https://perma.cc/84EP-CJQJ>].

<sup>162</sup> See MAKE AMERICA GREAT AGAIN, Registration No. 4,773,272. In connection with the filing of the trademark, Mr. Trump’s attorney explained that, “[t]he issue is not whether it is being used verbally by others in public. The problem is that it is repeatedly being used by others as a slogan or catchphrase. That is what the trademark filing protects against.” David Martosko, *Trump Trademarked Slogan ‘Make America Great Again,’* DAILYMAIL.COM (May 12, 2015, 12:04 PM), <https://www.dailymail.co.uk/news/article-3077773/Trump-trademarked-slogan-Make-America-Great-just-DAYS-2012-election-says-Ted-Cruz-agreed-not-use-Scott-Walker-booms-TWICE-speech.html> [<https://perma.cc/R2RF-LG6A>] (last updated May 13, 2015, 12:28 AM).

<sup>163</sup> Alan Blinder, *Trump Fails to Fill Alabama Stadium, but Fans’ Zeal Is Hardly Diminished*, N.Y. TIMES, Aug. 22, 2015, at A11. Although Mr. Trump has

“I play to people’s fantasies,” Mr. Trump once wrote in explaining his alleged business acumen. “I call it truthful hyperbole.”<sup>164</sup> This approach seems to resonate particularly well with youthful audiences:

Mr. Trump offered a speech of less than a minute on the state party’s stage. But that was beside the point, as star-struck supporters greeted him like a stadium rocker during a sprawling tailgate party before kickoff.

....

... [Y]oung people... predominated outside Jack Trice Stadium, where the Iowa State Cyclones hosted the Iowa Hawkeyes.

....

Though he said nothing about the issues of the day, the audience seemed satisfied. “It was pretty cool; we got to see him,” said Braiden Loreno, a sophomore. “I’m definitely voting for him.”<sup>165</sup>

It is probably inadvisable to take Mr. Trump’s stated “policy views” too terribly seriously. Indeed one commentator has written an article entitled *The Serious Problem with Treating Donald Trump Seriously*.<sup>166</sup>

That we’re even talking about his “positions” means that we’ve already progressed to the dangerous Stage Two of the Trump phenomenon, as if his stated views are the standard by which Trump ought to be judged. . . . But looking for some kind of ideological thread in Trump’s various positions is a fool’s errand (and another victory for Trump). The appeal of Trump’s alleged

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drawn criticism for unveiling few detailed policy proposals, many of his supporters said they were unbothered. “When he gets in there, he’ll figure it out,” said Amanda Mancini, who said she had traveled from California to see Mr. Trump. “So we do have to trust him, but he has something that we can trust in. We can look at the Trump brand . . .” *Id.*

<sup>164</sup> DONALD J. TRUMP WITH TONY SCHWARTZ, *TRUMP: THE ART OF THE DEAL* 40 (1987).

<sup>165</sup> Trip Gabriel, *Trump Gets Rock Star Greeting in Iowa (Oh, and Three Rivals Also Show Up)*, N.Y. TIMES, Sept. 13, 2015, at A22.

<sup>166</sup> Michael Kinsley, *The Serious Problem with Treating Donald Trump Seriously*, VANITY FAIR (Oct. 12, 2015), <http://www.vanityfair.com/news/2015/10/the-serious-problem-with-treating-donald-trump-seriously> [<https://perma.cc/69HL-TVXX>].

views on every issue is their extremeness. That, and their seeming simplicity.<sup>167</sup>

The football tailgater is Mr. Trump's true *métier* and the standard by which he should be judged.<sup>168</sup> "Though he said nothing about the issues of the day, the audience seemed satisfied."<sup>169</sup> (What more do you need to know?)

In a highly unusual development, a "a senior official in the Trump Administration" has publicly raised concerns to a national audience in an anonymous *New York Times* Op-Ed, questioning *inter alia* President Trump's intellectual and emotional maturity and his fitness for office.

[W]e believe our first duty is to this country, and the president continues to act in a manner that is detrimental to the health of our republic.

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<sup>167</sup> *Id.* ("Trump stands for the proposition that you don't need to know much to run the government. You just need to use your common sense . . .").

<sup>168</sup> *Cf.* HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 305 (1966). ("Hitler . . . during his lifetime exercised a fascination to which allegedly no one was immune . . ."). Arendt described the effect Hitler had on his listeners:

The "magic spell" that Hitler cast over his listeners . . . rested indeed "on the fanatical belief of this man in himself," on his pseudo-authoritative judgments about everything under the sun, and on the fact that his opinions . . . could always be fitted into an all-encompassing ideology.

. . . Society is always prone to accept a person offhand for what he pretends to be, so that a crackpot posing as a genius always has a certain chance to be believed. In modern society, with its characteristic lack of discerning judgment, this tendency is strengthened, so that someone who not only holds opinions but also presents them in a tone of unshakable conviction will not so easily forfeit his prestige, no matter how many times he has been demonstrably wrong. Hitler, who knew the modern chaos of opinions from first-hand experience, discovered that the helpless seesawing between various opinions and "the conviction . . . that everything is balderdash" could best be avoided by adhering to *one* of the many current opinions with "unbending consistency." The hair-raising arbitrariness of such fanaticism holds great fascination for society because for the duration of the social gathering it is freed from the chaos of opinions that it constantly generates.

*Id.* at 305 n.1.

<sup>169</sup> Gabriel, *supra* note 165.

That is why many Trump appointees have vowed to do what we can to preserve our democratic institutions while thwarting Mr. Trump's more misguided impulses until he is out of office.

The root of the problem is the president's amorality. Anyone who works with him knows he is not moored to any discernible first principles that guide his decision making . . . .

. . . .

In addition to his mass-marketing of the notion that the press is the "enemy of the people," President Trump's impulses are generally anti-trade and anti-democratic.

. . . .

It may be cold comfort in this chaotic era, but Americans should know that *there are adults in the room*. We fully recognize what is happening. And we are trying to do what's right even when Donald Trump won't.

. . . .

Given the instability many witnessed, there were early whispers within the cabinet of invoking the 25th Amendment, which would start a complex process for removing the president. But no one wanted to precipitate a constitutional crisis. So we will do what we can to steer the administration in the right direction until—one way or another—it's over.<sup>170</sup>

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<sup>170</sup> Opinion, *The Quiet Resistance Inside the Trump Administration*, N.Y. TIMES, Sept. 6, 2018, at A23 (emphasis added); see also Dwight Garner, *A Road Map of 'Crazytown'*, N.Y. TIMES, Sept. 6, 2018, at C1 (book review) ("The reality was that the United States in 2017 was tethered to the words and actions of an emotionally overwrought, mercurial and unpredictable leader. Members of his staff had joined to purposefully block some of what they believed were the president's most dangerous impulses. It was a nervous breakdown of the executive power of the most powerful country in the world." (quoting BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE*, at xxii (2018)). I have not even discussed President Trump's mounting "legal" troubles (in the narrow sense). The following will have to suffice:

Eventually, the whole Robert Mueller investigation will reach its conclusion and the story will be restored to clear view. But even now we know what Trump seems unable to comprehend—that he is a key reason why the investigation keeps going. This is not because he is reviled by the establishment for his politics, but because of what the investigation and his response have already revealed about this character: his disregard of legal limits when it is in his personal and political interest to ignore them, and his persistent failure to render an honest accounting of his actions . . . .

. . . .

The President's response? "'*The New York Times* is failing,' Trump said in the East Room. 'If I weren't here, I believe *The New York Times* probably wouldn't even exist.'"<sup>171</sup>

### III. COUNSEL FOR THE SITUATION

#### A. Defending Liberal Democracy

In a liberal democracy, the most significant bulwarks against authoritarian tyranny may be classified as follows: Input Controls, Process Controls, and Output Controls.<sup>172</sup>

Input Controls determine, directly or indirectly, who shall have a seat at the table—a vote in the polity. It is possible to imagine extraordinary scenarios in which the principle of universal political participation might justifiably be suspended. Perhaps the following will sound faintly familiar:

Imagine a totalitarian clique taking advantage of an economic crisis to exploit popular discontent. The propaganda machine spreads the word: If only Adolf or Benito or Vladimir were in command, they would have the wisdom to make the sun rise once more in the heavens. This messianic message gains a powerful political following, both on the streets and in the ballot box. What then?<sup>173</sup>

Of course, as Ackerman acknowledges, “crudities like barring totalitarian groups from parliament must be recognized as the acts of

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Trump's chronic scorn for the law and legal institutions, together with his trademark dishonesty, are not the only ways in which the president has presented the prosecutors with a damaging picture of himself and his motives. Those attributes appear in the specifics of his conduct as both president and, before then, as candidate, and it is reflected in the conduct of many of those whom he has chosen to assist him in his affairs.

Bob Bauer, *Trump's Contempt for the Law Will Be His Downfall*, ATLANTIC (Aug. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/08/trumps-contempt-for-the-law-will-be-his-downfall/568564/> [https://perma.cc/LP9V-A9AM].

<sup>171</sup> Andrew Restuccia et al., 'It's Open Season on the President': Op-Ed Unleashes West Wing Meltdown, POLITICO (Sept. 5, 2018, 4:36 PM), <https://www.politico.com/story/2018/09/05/trump-official-comes-out-against-the-president-in-anonymous-times-op-ed-808714> [https://perma.cc/5EA7-9EA9] (last updated Sept. 5, 2018, 10:30 PM).

<sup>172</sup> ACKERMAN, *supra* note 8, at 302–13.

<sup>173</sup> *Id.* at 304.

desperation they are.”<sup>174</sup> (On the other hand, as has also been well observed, the United States Constitution is not a “suicide pact.”)<sup>175</sup> Among the more indirect approaches: “[I]t is possible to imagine structural measures that will affect the long-term liberality of the social forces that push their way into the governmental arena. The question here is *political education* in its broadest sense.”<sup>176</sup>

Process Controls address features of institutional design—the way formal institutions structure participation in the affairs of state. In the American setting, the notion of Process Controls is largely a nod to the legacy of *The Federalist No. 10* (Madison) and its familiar analyses of federalism, separation of powers, and checks and balances as constitutional safeguards against the tyranny of “faction.” In the present circumstances, however, Ackerman’s description of Process Controls sounds hopelessly naive:

The goal is to remove law-making authority from the hands of a single statesman or easily organized clique. No official’s word becomes law when it is spoken; each power holder is constitutionally obliged to persuade others whose tenure does not depend on their passive acquiescence. This idea is taken to its extreme in the American system, where President, Supreme Court, and the two Houses of Congress are deprived of the power of unilateral command in the hope of forcing each to engage the others in a convincing effort at conversation.<sup>177</sup>

These Process Controls are supposed to “make it *costly* for statesmen to indulge authoritarian pretensions.”<sup>178</sup> (But what if the statesmen are billionaires?)

Output Controls attempt to place some political and legal outcomes permanently beyond the reach of government, as with the “absolute” prohibitions of a Bill of Rights. Counter-majoritarian judicial review and the jurisprudence of fundamental rights are thereby tasked with protecting certain outcomes against “the tyranny of the majority.”<sup>179</sup>

The following discussion draws on versions of both Input Controls and Output Controls.

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<sup>174</sup> *Id.* at 305.

<sup>175</sup> *See Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

<sup>176</sup> ACKERMAN, *supra* note 8, at 305 (emphasis added).

<sup>177</sup> *Id.* at 306.

<sup>178</sup> *Id.* at 303 (emphasis added).

<sup>179</sup> *See, e.g., JOHN STUART MILL, ON LIBERTY* (1859), *reprinted in J. S. MILL ON LIBERTY IN FOCUS* 21, 23–30 (John Gray & G.W. Smith eds., 1991).

## **B. A Proposed Constitutional Amendment**

For purposes of discussion, it may be useful to set out a proposed constitutional amendment designed to address some of the above issues. The intention of the amendment is to cultivate a more thoughtful, informed, judicious, and “politically educated” electorate.

### *Section 1.*

Education is a fundamental right of all people in the United States. This right may neither be denied without Due Process of law nor abridged in any manner inconsistent with the Equal Protection of the laws. No State may deny or abridge access to education, at any level, based on inability to pay.

### *Section 2.*

No person born or naturalized in the United States shall be eligible to vote, without first having earned a high school diploma or the equivalent (as granted by a duly accredited school district). This provision applies only to persons who shall not have attained to the age of fifty years by the time this article is ratified; upon ratification, this provision shall go into effect after three years have passed.

No person born or naturalized in the United States after ratification of this article, or within fifteen years prior to its ratification, shall be eligible to vote, without first having earned a college degree (as granted by a duly accredited institution of higher education). Enrollment in good standing at such an institution satisfies this requirement.

### *Section 3.*

Congress shall have power to enforce this article by appropriate legislation.

In many ways, this proposed amendment may be viewed as a radical measure. I view it as a proportionate response to a governmental crisis of epic proportions.

In what follows, the historical and legal bases of this proposed amendment are set out in summary fashion. Then some of the broader implications of education and voting as safeguards of liberal democracy are explored.

### C. The Long Arc of Footnote Four

The U.S. Constitution makes explicit and implicit references to the virtues and value of education. In Article I, the Congress is empowered to “promote the Progress of Science and useful Arts” by protecting authors and inventors with copyright and patent laws.<sup>180</sup>

The First Amendment protects “the freedom of speech, [and] of the press” against any “abridg[ment]” by Congress or the States.<sup>181</sup> This language has been judicially interpreted to include an implied right of “freedom of association”<sup>182</sup> as well as an implied “right to receive information.”<sup>183</sup> Together, these express and implied provisions underwrite a grand intellectual and educational project known as “the marketplace of ideas,” which was given its seminal expression in a 1919 dissenting opinion of Justice Oliver Wendell Holmes:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>184</sup>

What would it mean for education to be a “fundamental,” constitutional right? “Typically,” writes John Hart Ely, “what we mean by labeling something a constitutional right is that the state cannot deny it to everyone and that when it denies it to some but not others it had better have a very good reason for doing so.”<sup>185</sup> Here, some background may be useful.

In *Skinner v. Oklahoma*, an Oklahoma law labeled as “habitual criminals” those who committed two or more felonies involving

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<sup>180</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>181</sup> U.S. CONST. amend. I; *see also* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (The First Amendment is enforceable against the States by virtue of its “incorporation” in the Fourteenth Amendment.).

<sup>182</sup> *See NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958).

<sup>183</sup> *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>184</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>185</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 234 n.30 (1980).

“moral turpitude.”<sup>186</sup> Habitual criminals were subject to being “rendered sexually sterile.”<sup>187</sup>

Skinner’s first felony was chicken stealing, obviously a crime of high “moral turpitude.” But the Oklahoma law made some conspicuous exceptions: “[O]ffenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.”<sup>188</sup> Thus, one could *embezzle* as much as one liked, and receive the same sentence as for comparable *larceny*—without ever being subject to sterilization.

This the Supreme Court could not abide:

[T]he nature of the two crimes is intrinsically the same and they are punishable in the same manner. Furthermore, the line between them follows . . . highly technical [distinctions] . . . .

. . . .

. . . [T]he instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the [previous] cases requires.<sup>189</sup>

The Court here refers to the rule, authoritatively expounded by James Bradley Thayer, that judicial review should generally defer to legislative choices (the so-called “presumption of constitutionality”). The legislature is the lawmaker in the first instance, and only if someone happens to challenge a law will it ever be judicially reviewed. (Both courts and legislatures know this.) In striking down legislation on grounds of unconstitutionality, the courts are in effect “intruding” on the work of a coordinate branch of government—the branch primarily entrusted with legislation.<sup>190</sup> Thus, to overturn an

<sup>186</sup> Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

<sup>187</sup> *Id.* at 536–37.

<sup>188</sup> *Id.* at 537.

<sup>189</sup> *Id.* at 539–41.

<sup>190</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–37 (1893) for a discussion of this issue:

Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body . . . . In so far as legislative choice,

allegedly mistaken law, the mistake must be so obvious that “those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>191</sup>

If the Oklahoma law involved only the legislative categorization of crimes, no substantial constitutional question would be presented. (“States may do a good deal of classifying that it is difficult to believe rational.”)<sup>192</sup> In *Skinner* though, as the Court emphasized:

We are dealing . . . with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear . . .

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ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.

. . . Now, it is the legislature to whom this power is given,—this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court . . .

It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law . . . . As the opportunity of the judges to check and correct unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

<sup>191</sup> *Id.* at 144. Thayer further notes:

This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.

*Id.*

<sup>192</sup> *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

[Oklahoma] has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.<sup>193</sup>

A few years earlier, in *United States v. Carolene Products Co.*, Justice Stone had unveiled a new theory of heightened judicial review, several aspects of which seem to coalesce here:

There may be narrower scope for operation of the *presumption of constitutionality* when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth [Amendment] . . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exacting judicial scrutiny* under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities. [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a *correspondingly more searching judicial inquiry*.<sup>194</sup>

As an initial matter, the “right to marry and have offspring” is arguably at the level of those explicitly protected liberties in the Bill of Rights.<sup>195</sup> (Stone himself, writing a concurring opinion in *Skinner*, argues that the Oklahoma statute violates *due process*.)<sup>196</sup> Second, in creating a disfavored underclass of “blue-collar felons,” Oklahoma has made “as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”<sup>197</sup> Nowadays, the right to

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<sup>193</sup> *Skinner*, 316 U.S. at 541.

<sup>194</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added) (citations omitted); see also ELY, *supra* note 185, at 105 (discussing judicial review as it relates to the First Amendment).

<sup>195</sup> *Skinner*, 316 U.S. at 541.

<sup>196</sup> See *Skinner*, 316 U.S. at 544–45 (Stone, C.J., concurring) (“There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned . . . . A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process.”).

<sup>197</sup> *Id.* at 541 (majority opinion).

procreation would be considered a “fundamental right” and benefit from heightened judicial review on either of the above rationales.

A constitutional amendment explicitly deeming education a fundamental right would, by definition, benefit from heightened review under Stone’s first paragraph. (Legislation inconsistent with such a right would then “appear[] on its face to be within a specific prohibition of the Constitution.”)<sup>198</sup> But any restriction on the *right to vote* raises fundamental questions of its own, some of which are touched on in Stone’s second paragraph (the conceptual framework of “representation-reinforcing review”).<sup>199</sup>

One of the things we mean by labeling something a right is that it shall not be denied, or granted in only watered-down form, to some subset of persons unless there is a good reason for doing so.

. . . .

. . . [I]t is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one.<sup>200</sup>

#### D. A New Electorate

Justice Stone cites two voting rights cases (twice) in *Carolene Products* footnote. *Nixon v. Herndon* involved a suit by a Black man who was denied the right to vote pursuant to a Texas statute providing that “in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas.”<sup>201</sup> Justice Holmes, writing for the Court, dismissed defendants’ main argument—that the suit was “political”—as “little more than a play upon words . . . . That private damage may be caused by . . . political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years . . . .”<sup>202</sup> (Holmes then proceeds to cite a case from 1703, reported partly in Latin.)<sup>203</sup>

<sup>198</sup> *Carolene Products Co.*, 304 U.S. at 152 n.4.

<sup>199</sup> See ELY, *supra* note 185, at 87–88, 116–17.

<sup>200</sup> *Id.* at 118 n.\*, 120.

<sup>201</sup> *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (quoting Acts 38th Leg. 2d Called Sess. (1923) c 32, § 1 (Vernon’s Ann. Civ. St. 1925, art. 3107)).

<sup>202</sup> *Id.*

<sup>203</sup> *Ashby v. White* (1703) 92 Eng. Rep. 126; 2 Ld. Raym. 938. In that case Chief Justice Holt stated:

The invalidity of the Texas statute was not open to doubt, “because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment],” writes Holmes; “[s]tates may do a good deal of classifying that it is difficult to believe rational, but there are limits . . . .”<sup>204</sup> Little more than a decade later, those *limits* would have a new name (and a new theory): Stone’s “heightened judicial review.”

The *Herndon* decision created “an emergency” in Texas—and the chilling prospect that a Black man might vote in a Democratic Party primary election.<sup>205</sup> In response, the legislature of Texas hastily enacted a new statute providing, *inter alia*: “[E]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own

It is not to be doubted, but that the commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exerciseable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of England vested in them . . . .

*Id.* at 134; 2 Ld. Raym. at 950.

A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes . . . .

*Id.* at 135–36; 2 Ld. Raym. at 953.

If then when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it.

*Id.* at 136; 2 Ld. Raym. at 954.

Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents; but on the reason of the law, and *ubi eadem ratio, ubi idem jus*. This privilege of voting does not differ from any other franchise whatsoever.

*Id.* at 138; 2 Ld. Raym. at 957.

<sup>204</sup> *Herndon*, 273 U.S. at 541.

<sup>205</sup> *Nixon v. Condon*, 286 U.S. 73, 82 (1932).

way determine who shall be qualified to vote or otherwise participate in such political party . . . .”<sup>206</sup> Pursuant to this new statute, the State Executive Committee of the Democratic Party promptly adopted a resolution limiting participation in primaries to “all white democrats . . . and none other . . . .”<sup>207</sup>

Writing for the Court in *Nixon v. Condon*, Justice Cardozo observed that the clear intention of the new legislation was to separate “state action” (restrained by the Fourteenth Amendment) from the decision to exclude Blacks. “[P]rivate persons unconnected with [the S]tate”—for example, the plenary membership of the Texas Democratic Party, assembled in convention—might have prescribed the qualifications of its members.<sup>208</sup>

Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.

. . . Power so entrenched is statutory, not inherent. If the [S]tate had not conferred it, there would be hardly color of right to give a basis for its exercise.<sup>209</sup>

Once again, “the great restraints of the Constitution set limits to” the power of the State;<sup>210</sup> and the right to vote had to be wrested forcibly from the malign grip of Texas by a stubbornly persevering plaintiff, wielding the Fourteenth Amendment as a powerful sword.

Today, the “American experiment” in enlightened self-governance must be written off—for now at least—largely as a failure.<sup>211</sup>

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<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> *Id.* at 83. “[In State conventions] platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally is true more particularly in Texas, where the statute is explicit in committing to the [S]tate convention the formulation of the party faith.” *Id.* at 85.

<sup>209</sup> *Id.* at 84–85. The Court in *Condon* acknowledged that a recent state court decision had found that the statute in question constituted an express “‘grant of power’ to the State Executive Committee . . . to determine who shall participate in [primary elections]” because “the Legislature grant[ed] th[is] power in language too plain to admit of controversy . . . .” *Id.* at 87 n.1 (quoting *Love v. Buckner*, 49 S.W.2d 425, 426 (Tex. 1932)).

<sup>210</sup> *Id.* at 89.

<sup>211</sup> *See* David Remnick, *The Unwinding of Donald Trump*, NEW YORKER (July 17, 2018), <https://www.newyorker.com/news/daily-comment/the-unwinding-of-donald-trump> [<https://perma.cc/KFP6-DW7R>]. Rather than enlightenment:

Domestic ideologies of an unmistakably autocratic and authoritarian tenor, imperialist nationalism as foreign “policy,”<sup>212</sup> willful disregard of scientific evidence, blinding ignorance enshrined in the administrative agencies, and routine lying on the part of the President<sup>213</sup>—

The vague sense of torpor and gloom that so many Americans have shouldered these past two years derives precisely from the [Presidency].

....

... [It has] raised dark suspicions and aroused the sickening feeling that we are living in the pages of the most lurid espionage novel ever written. Robert Mueller and his investigators may never get to the end of the mysteries that they are exploring. They may never get to the end of the myriad corruptions, furtive connections, and double-dealings.

*Id.*

<sup>212</sup> See, e.g., Thomas L. Friedman, Opinion, *Trump is China's Chump*, N.Y. TIMES (June 28, 2017), <https://www.nytimes.com/2017/06/28/opinion/trump-china-asia-pacific-trade-tpp.html> [<https://perma.cc/FAJ8-EV9Y>].

<sup>213</sup> David Leonhardt & Stuart A. Thompson, Opinion, *President Trump's Lies*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html> [<https://perma.cc/7QQ7-2QM8>]; Jack Shafer, *Week 62: Trump's Losing a Tabloid War to His Own Lawyer*, POLITICO (July 27, 2018), <https://www.politico.com/magazine/story/2018/07/27/trump-lawyers-cohen-giuliani-avenatti-davis-219075> [<https://perma.cc/VU4Z-8ZTH>].

Not since Donald Trump salted the New York tabloids in the 1980s and '90s with his signature formula of leaks, lies and lunacy has our daily news diet tasted so vividly of scandal . . . [Rudy] Giuliani's client [President Trump] is one of the best-documented liars on the planet. Why should anybody believe anything a liar's lawyer says in his defense?

*Id.*

In his first year as President, Trump made 2,140 false claims, according to the [*Washington*] *Post*. In just the last six months, he has nearly doubled that total to 4,229. In June and July, he averaged sixteen false claims a day.

....

... At this point, the falsehoods are as much a part of his political identity as his floppy orange hair and the “Make America Great Again” slogan. The untruths . . . are Trump's political “secret sauce.”

Susan B. Glasser, *It's True: Trump Is Lying More, and He's Doing It on Purpose*, NEW YORKER (Aug. 3, 2018), <https://www.newyorker.com/news/>

these are all now firmly ensconced at the highest levels of government.<sup>214</sup>

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letter-from-trumps-washington/trumps-escalating-war-on-the-truth-is-on-purpose [https://perma.cc/2WE5-AXGN].

[H]is favorite moniker by far is “Witch Hunt”—embellished, in recent weeks, to “Rigged Witch Hunt”—which Trump has used a whopping 84 times this year alone in reference to Mueller’s investigation.

... Multiple studies have shown that when something is repeated often enough, people start to think of it as true, whether it actually is—a concept known as illusory truth. “When a statement is repeated, it starts to feel more familiar,” said Keith Payne, a psychology and neuroscience professor at the University of North Carolina at Chapel Hill. “That feeling of familiarity is easily interpreted as the feeling of truth.” Payne is the co-author of a study that found that even when people know a claim is false, just a few repetitions can make them more likely to think it’s true.

Olivia Paschal, *Trump’s Tweets and the Creation of ‘Illusory Truth,’* ATLANTIC (Aug. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693/> [https://perma.cc/6MAP-JEZF].

<sup>214</sup> Andrew G. McCabe, former Acting Director and Deputy Director of the FBI, writes:

People do not appreciate how far we have fallen from normal standards of presidential accountability. Today we have a president who is willing not only to comment prejudicially on criminal prosecutions but to comment on ones that potentially affect him. He does both of these things almost daily. He is not just sounding a dog whistle. He is lobbying for a result. The president has stepped over bright ethical and moral lines wherever he has encountered them. Every day brings a new low, with the president exposing himself as a deliberate liar who will say whatever he pleases to get whatever he wants.

Andrew G. McCabe, *Every Day is a New Low in Trump’s White House,* ATLANTIC (Feb. 14, 2019), <https://www.theatlantic.com/politics/archive/2019/02/andrew-mccabe-fbi-book-excerpt-the-threat/582748/> [https://perma.cc/Y4QR-A7WL]. See also Dwight Garner, *In ‘The Threat,’ Andrew McCabe Issues the Latest Warning Call About Trump’s America,* N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/books/review-threat-fbi-trump-andrew-mccabe.html> [https://perma.cc/65J2-PM7D] (book review) (“What more could a person do to erode the credibility of the presidency?” (quoting ANDREW G. MCCABE, *THE THREAT: HOW THE FBI PROTECTS AMERICA IN THE AGE OF TERROR AND TRUMP* 217 (2019))).

Despite all this, the right to vote continues to be described as a cherished or “precious” right. If this were so, voting would be pursued with all the excitement and vigor of finding diamonds strewn along the streets or searching for solid gold Easter Eggs hidden in every meadow. But it is not. Americans have “voted with their feet” (or, rather, not), producing a pitiful turnout rate of 55.4% in the most recent presidential election, based on voting-age population.<sup>215</sup>

The Census Bureau estimated that there were 245.5 million Americans ages 18 and older in November 2016, about 157.6 million of whom reported being registered to vote. (While political scientists typically define turnout as votes cast divided by the number of *eligible* voters, in practice turnout calculations usually are based on the estimated voting-age population, or VAP.) . . . [I]n 2016 . . . the actual number of votes tallied [was] nearly 136.8 million.<sup>216</sup>

This sorry statistic should be kept firmly in mind in the context of any proposal to restrict voting rights. Under our current system, the main “restriction” is imposed by potential voters themselves.

Voting is not a precious right, but it could be. Restricting the electorate on the basis of educational qualifications is a proposition fraught with all the usual possibilities of unintended consequences. But the consequences of inaction are evident for all to see. They amount, as Roger Cohen suggests, to a “seeping, constant attempt—one sacred value at a time—to disorient Americans to the point they accept the unacceptable, cede to the grotesque, acquiesce to total arbitrariness as a governing principle.”<sup>217</sup>

<sup>215</sup> Dwight R. Lee, *Voting with Ballots Versus Voting with Your Feet*, LIBR. ECON. & LIBERTY (Feb. 5, 2018), <https://www.econlib.org/library/Columns/y2018/Leevoting.html> [<https://perma.cc/Z9NR-7R4H>]; see also Gregory Wallace, *Voter Turnout at 20-Year Low in 2016*, CNN (Nov. 30, 2016, 10:48 AM) <https://www.cnn.com/2016/11/11/politics/popular-vote-turnout-2016/index.html> [<https://perma.cc/95L5-7ZGN>].

<sup>216</sup> Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 21, 2018), <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/> [<https://perma.cc/5JXL-Y4D5>].

<sup>217</sup> Roger Cohen, *Trump 2020 Is No Joke. Nor Are the Head-Spinning Distractions*, N.Y. TIMES, June 24, 2017, at A18; cf. George Packer, *Get Out and Vote*, NEW YORKER, Aug. 6 & 13, 2018, at 13:

The midterm elections in November are the last remaining obstacle to President Trump’s consolidation of power. None of the other forces that might have checked the rise of a corrupt homegrown oligarchy can stop or even slow it. The institutional clout that

The Supreme Court does not dispute that “education . . . bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution.”<sup>218</sup> Thus, a constitutional amendment imposing an educational requirement for voting does not simply stand in opposition to voting rights—as an irrelevant obstacle—the way a poll tax<sup>219</sup> or a property requirement<sup>220</sup> would. Arguably, education *enhances* the right to vote. Voting may be enhanced *indirectly* by education through greater and more insightful participation in freedom of speech (especially in the political “marketplace of ideas”); and *directly*, by counteracting modern society’s “characteristic lack of discerning judgment,” of which Hannah Arendt wrote.<sup>221</sup> As the Supreme Court stated in *San Antonio Independent School District v. Rodriguez*:

[Appellees contend] that education . . . is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The ‘marketplace of ideas’ is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has

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ended the Presidency of Richard Nixon no longer exists. The honest press, for all its success in exposing daily scandals, won’t persuade the unpersuadable or shame the shameless, while the dishonest press is Trump’s personal amplifier. The federal courts, including the Supreme Court, are rapidly becoming instruments of partisan advocacy, as reliably conservative as elected legislatures. It’s impossible to imagine the Roberts Court voting unanimously against the President, as the Burger Court, including five Republican appointees, did in forcing Nixon to turn over his tapes. (Brett Kavanaugh, Trump’s nominee to succeed Anthony Kennedy, has even suggested that the decision was wrong.) Congress has readily submitted to the President’s will, as if legislation and oversight were burdens to be relinquished. And, when the independent counsel finally releases his report, it will have only the potency that the guardians of the law and the Constitution give it.

<sup>218</sup> Summarizing arguments, *see supra* Part III.C, that the Court does “not dispute.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>219</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>220</sup> *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 631–32 (1969).

<sup>221</sup> ARENDT, *supra* note 168, at 305 n.1.

not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

*We need not dispute any of these propositions.* The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote.<sup>222</sup>

Here the High Court pauses. "Yet," observes Justice Powell, writing for the Court, "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."<sup>223</sup> That those are "desirable goals . . . is not to be doubted"—but pursuing them would implicate *public policy* concerns foreign to the Court's strictly judicial mandate.<sup>224</sup> "[T]hey are not values to be implemented by judicial intrusion into otherwise legitimate state activities"—hence the need for constitutional amendment.<sup>225</sup>

The right to vote, and voting itself, are still ultimately something of a puzzle. Inside the voting booth—faced with an imponderable array of candidates for, say, Commissioner of Agriculture—the system seems primitive indeed. It is hard to see this as a rational way of imparting information. It is hard to see this banal, bureaucratic setting as the "primal scene" of democracy. On a strict cost-benefit analysis, voting in a national election (even in our convoluted Electoral College system) could be viewed as irrational.<sup>226</sup> No national election in the United States has ever been decided by a single vote, nor would one ever be. Instead, one must look beyond such considerations for a voting "rationale."

Perhaps the best analogy is to consider voting "symbolic"—not unlike school spirit, *esprit de corps*, and patriotism itself. In other

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<sup>222</sup> *Rodriguez*, 411 U.S. at 35–36 (emphasis added).

<sup>223</sup> *Id.* at 36 (emphasis added).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 145–146, 149 (1957).

words, the purpose of voting is to encourage others to vote. It is an act of “symbolic solidarity.” “Individually”—the thinking goes—“we do not matter; our vote does not matter. But together we can make a difference.” The strongest and most informative routes to this outlook and its associated insights run directly through the educational system. Thus, the proposed article of amendment, while formally introducing more restrictive voter qualifications, may actually lead to greater participation in voting by a more thoughtful, informed, judicious, and politically educated electorate.

At some point, the fears of young people will overwhelm the fears of the old. Some time after that, the young will amass enough power to act. It will be too late to avoid some catastrophes, but perhaps not others. Humankind is nothing if not optimistic . . . .<sup>227</sup>

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<sup>227</sup> Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change. A Tragedy in Two Acts*, N.Y. TIMES MAG., Aug. 5, 2018, at 66.