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The Virtuous Executive

Alan Rozenshtein

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Article

The Virtuous Executive

Alan Z. Rozenshtein[†]

As currently conceived, executive power law and scholarship detach the identity of the President from the powers and duties of the presidency. Whether an official was properly dismissed without cause, whether a pardon was validly issued, whether a foreign policy debacle rose to the level of an impeachable offense—the answers to all these questions are not supposed to depend on the President’s personal characteristics.

I argue that this veil of ignorance is incompatible with a correct understanding of Article II. To properly empower good Presidents and constrain bad ones, constitutional actors must take into account the President’s personal characteristics. Certain character traits—what I call the executive virtues—play an essential role in the proper functioning of Article II and the broader separation of powers. These virtues can and should be encouraged by courts, Congress, and other constitutional actors.

In this Article, I describe the executive virtues, show how they capture the original understanding of Article II, and argue for

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their contemporary importance in light of the presidency's ever-increasing power and discretion. I offer a preliminary list of the main executive virtues—loyalty, honesty, responsibility, justice, inclusiveness, and judgment—and describe how the constitutional requirement of executive virtue can be operationalized. For example, I show how questions of executive virtue were central in Trump v. Hawaii (the travel-ban case), offer a revisionist defense of the impeachment of Bill Clinton, and argue in favor of more control over presidential primaries by party elites. I conclude with the observation that, as recent history demonstrates, the lack of presidential virtue can constitute a full-blown constitutional crisis.

TABLE OF CONTENTS

Introduction	608
I. Dispositions and Virtues	615
A. Why Dispositions Matter	615
B. Making Inferences About Dispositions	617
II. The Executive Virtues	620
A. The Importance of Executive Virtue	620
1. Text, Structure, and Original Understanding	620
2. Modern Presidential Administration	625
B. A Taxonomy of Executive Virtues	626
1. Loyalty	634
2. Honesty	636
3. Responsibility	638
4. Justice	641
5. Inclusiveness	642
6. Judgment	643
C. Objections	644
1. Lack of Neutral Principles	644
2. Insufficient Guidance	648
3. Excessive Constitutional Stakes	650
III. Realizing the Executive Virtues	651
A. Responding to Virtue Violations	652
1. Judicial Oversight	652
2. Congress and the Impeachment Power	666
3. Intra-Executive Checks	673
B. Encouraging Virtuous Decision-Making	676
1. General Requirements of Virtuous Action	676
2. Prophylactic Bans on High-Risk Actions	677
3. Reason-Giving Requirements	681
4. When Oversight Undermines Virtue	682
C. Selecting for Virtue	685
1. Addressing Information Asymmetries	686
2. Virtue-Enhancing Electoral Processes	687
3. Electoral Institutional Choice	689
Conclusion	692

“[W]hat the presidency is at any particular moment depends in important measure upon who is President.” — Edward Corwin¹

“The presidency may be an instrument for representative democracy, benevolent autocracy, or malevolent Caesarism—depending on the interplay of constitutional interpretation, institutional competition, and personality and leadership qualities of the incumbent.” — Richard Pious²

INTRODUCTION

Judges and scholars debate issues of executive power at a “relentless” level of institutional abstraction.³ Even as there has been an “explosion” of litigation directly challenging presidential action,⁴ “institutional formalism” remains central to separation of powers jurisprudence, “blind[ing] courts to any more contingent, specific features of institutional behavior, or to the particular persons who happen to occupy the relevant offices,”⁵ even though “these features are central, as we know, to the way the institution actually functions.”⁶

In this paradigm, while the pleadings or the news cycle may focus on the actions of the president—the current occupant of the Oval Office, the actual person sitting at the Resolute Desk—the real action is properly framed in terms of the powers and duties of the Office of the President. Whether an executive branch official was properly dismissed without cause, whether a pardon was validly issued, whether a foreign policy debacle rose to the level of an impeachable offense—for all these questions, the answers should not depend on the personal characteristics of the current President, who is to be understood not as a person but “*generically*: as [a] faceless, nameless, institutional actor[] whose behavior is an institutional product.”⁷ While no one can deny the

1. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 29 (1940).

2. RICHARD M. PIOUS, *THE AMERICAN PRESIDENCY* 14 (1979).

3. Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 *CHAP. L. REV.* 133, 136 (2018).

4. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 *U. CHI. L. REV.* 1743, 1782 (2019).

5. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 *SUP. CT. REV.* 1, 2 (2014).

6. *Id.*

7. Terry M. Moe, *Presidents, Institutions, and Theory*, in *RESEARCHING THE PRESIDENCY* 337, 379 (George C. Edwards III et al. eds., 1993).

existence of “the president’s two bodies”—“the person of the president” on the one hand, the “institution of the presidency” on the other⁸—legal discourse pays vastly more attention to the institution than to the person.

This decontextualized approach to presidential power is undoubtedly dominant, at least in legal scholarship,⁹ but is it right? Can one properly reason about Article II behind a veil of ignorance as to who the President is at a particular time? With respect to executive power, can scholars develop a comprehensive theory, judges a satisfactory doctrine, and Congress an adequate oversight regime without taking into account the personal characteristics of the person that wields that power? Most importantly, can a purely institutional account of presidential power adequately empower properly motivated Presidents and sufficiently constrain improperly motivated ones?

I argue that the answer to all of these questions is no. Executive-power law and scholarship must take into account each

8. See Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119, 1121 (2020).

9. By contrast, there is a rich literature at the intersection of political science and psychology on presidential personality. See, e.g., JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER* (5th ed. 2020) (1972); STEVEN J. RUBENZER & THOMAS R. FASCHINGBAUER, *PERSONALITY, CHARACTER & LEADERSHIP IN THE WHITE HOUSE* (2004); STANLEY A. RENSHON, *THE PSYCHOLOGICAL ASSESSMENT OF PRESIDENTIAL CANDIDATES* (1998); DEAN KEITH SIMONTON, *WHY PRESIDENTS SUCCEED* (1987). The enduring popularity of the presidential biography evidences intense interest, at least among the public, in the personal characteristics of Presidents. The goal of this Article is to bring some of the insights from these literatures into legal scholarship.

To be sure, within the field of presidential studies the personalized approach to the study of Presidents has its critics, who have complained that “[b]y concentrating on personalities, on dramatic situations, and on controversial decisions and extraordinary events, students of the presidency have reduced the applicability of social science techniques,” Stephen J. Wayne, *An Introduction to Research on the Presidency*, in *STUDYING THE PRESIDENCY* 3, 6 (George C. Edwards III & Stephen J. Wayne eds., 1983), such as institutional and rational-choice accounts. See, e.g., Pildes, *supra* note 5 (describing an approach to judicial review that analyzes government institutions at a “high level of abstraction and generality”). But there is at least a debate between the individual and institutional approaches, and scholars continue to try to bridge the divide. See, e.g., Ignacio Arana Araya, *The Personalities of Presidents as Independent Variables*, 42 POL. PSYCH. 695, 696 (2021) (arguing that scholars should incorporate the findings of differential psychology in analyzing the personality traits of Presidents); Michael Lyons, *Presidential Character Revisited*, 18 POL. PSYCH. 791, 791 (1997) (advocating the use of the Myers-Briggs personality typology when analyzing presidential leadership style).

President's unique personal characteristics. In particular, certain character traits, what I call the *executive virtues*, play an essential role in the proper understanding and functioning of Article II. In particular, the proper exercise of these virtues limits the scope of presidential power and, far from being merely precatory, these virtues are subject to enforcement by Congress, the courts, and other constitutional actors.

This argument is relevant to several ongoing scholarly conversations. The first is recent scholarship that, in response to broad claims of executive power across multiple administrations, has focused on executive duties¹⁰—particularly the duty to “take Care that the Laws be faithfully executed,”¹¹ for which there remains no generally accepted interpretative theory.¹² Some have argued that this duty incorporates principles of fiduciary obligation.¹³ Others have argued for presidential duties of legal and factual deliberation,¹⁴ public-interest motivations,¹⁵ or deference to executive-branch experts.¹⁶ Still others have explored the

10. See Matthew Steilen, *Presidential Whim*, 46 OHIO N.U. L. REV. 489, 490–92 (2020) (describing literature that emphasizes the presidential duties of “responsibility, professionalism, skill, due care, good faith, faithfulness, and honesty”).

11. U.S. CONST. art. II, § 3.

12. See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1834, 1836–38 (2016) (describing the “long and varied course of interpretation” of this “simple but delphic” constitutional provision).

13. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019); see also Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1281–82 (2018) (using the requirement of faithful execution to argue that criminal obstruction of justice statutes can apply to the President).

14. Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1271 (2021) [hereinafter Roisman, *Presidential Law*]; Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 832 (2019) [hereinafter Roisman, *Presidential Factfinding*].

15. See, e.g., Shalev Gad Roisman, *Presidential Motive*, 108 IOWA L. REV. 1, 6 (2022) (arguing that “faithful execution” of the laws “require[s] the President to act motivated by the public interest, rather than her personal interest”).

16. See, e.g., Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. 35, 69 (2021) (“I argue for an understanding of the President's caretaking obligation as a responsibility to defer to and respect the reasonable judgments of other officials while maintaining the integrity of law-administration as a whole.”).

scope of prosecutorial discretion and policy underenforcement.¹⁷ Beyond the legally binding text of the Constitution, scholars have articulated the vital role of non-legal norms in operationalizing the Take Care Clause and the rest of Article II.¹⁸ On my account, these conceptions of the President's obligations all flow from a deeper constitutional commitment to proper presidential character.

My account is also relevant to the growing scholarly focus on the personal qualities of public officials,¹⁹ from career civil servants²⁰ to elected politicians.²¹ In particular, scholars concerned about democratic decline have noted (albeit in passing) the importance of the President's personal characteristics. For example, in his work on presidential demagogues in American history, Eric Posner uses character traits to distinguish the amoral, narcissistic demagogue from the virtuous, prudent

17. See Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1756 (2016) (using the judicial decisions over DAPA's constitutionality to illuminate the nature of discretion in the Faithful Execution Clause); Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 4–5 (2019) (arguing that the Take Care Clause constrains presidential discretion by analyzing the DAPA and travel ban decisions); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (arguing that executive officials have “discretion to decline enforcement in particular cases” but “lack discretion to categorically suspend enforcement”); Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1171–73 (2022) (arguing for “a somewhat humbler form of presidentialism in service of statute,” in between the extremes of “wholly [pursuing] the President's own policy aims” and “fully subjugat[ing] [executive policy interests] to the goal of agency conformity with statutory requirements”).

18. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 22–23 (2014). See generally Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2195 (2018).

19. Matthew Steilen characterizes recent literature on presidential power as centering around “a group of moral values, including responsibility, professionalism, skill, due care, good faith, faithfulness, and honesty.” Steilen, *supra* note 10, at 491.

20. Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1181 (arguing that public servants should be chosen for their competence, integrity, commitment, and propriety).

21. Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 115–16 (2018) (finding a constitutional role morality by unpacking “the American commitment to democracy” and “the requirements of good institutional citizenship in a robust separation of powers regime”).

“statesman.”²² Sanford Levinson and Mark Graber argue, with a particular focus on Donald Trump, that “[t]he Constitution presupposes at least some version of what we call ‘Publian presidents,’ Presidents with the character and capacity necessary to exercise the vast powers conferred by Article II.”²³ Jack Balkin identifies “the gradual loss of civic virtue and public-spiritedness in the country’s leaders” as a key component of “constitutional rot.”²⁴ But no one has mapped a systematic taxonomy of presidential character onto contemporary issues of executive power, which is the goal of this Article.

Finally, my argument can be seen as part of what Jodi Short has identified as a “moral turn in administrative and constitutional law.”²⁵ From both the left and right, scholars are increasingly focusing on the administrative state’s moral obligation to serve the public good.²⁶ By focusing on the dispositions of the President—who is, among other roles, the nation’s Administrator-in-Chief—this Article connects this research agenda with the broader literature on virtue ethics in law,²⁷ although my interest in the concepts of virtue and vice is less in making jurisprudential points about the nature of executive power and constitutional law than it is in developing a practical framework for analyzing the constitutional relevance of presidential character.²⁸

22. See ERIC A. POSNER, *THE DEMAGOGUE’S PLAYBOOK* 10 (2020).

23. Levinson & Graber, *supra* note 3, at 146.

24. Jack M. Balkin, *Rot and Renewal: The 2020 Election in the Cycles of Constitutional Time*, 13 NE. U. L. REV. 617, 638 (2021).

25. Jodi Short, *Legalizing the Politics of Care: The Search for the Moral Foundations of Administrative Law*, JOTWELL (Sept. 30, 2022), <https://adlaw.jotwell.com/legalizing-the-politics-of-care-the-search-for-the-moral-foundations-of-administrative-law> [<https://perma.cc/TC6B-8VP6>] (reviewing Emerson, *supra* note 16).

26. See, e.g., Emerson, *supra* note 16, at 38 (“Public care requires [government] officials to attend to the needs and values of those who have a stake in law’s administration.”); ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 1 (2022) (“[T]he master principle of our public law should be the classical principle that all officials have a duty, and corresponding authority, to promote the common good.”).

27. See generally Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) (describing an early application of virtue theory to legal theory); G. Alex Sinha, *Virtuous Law-Breaking*, 13 WASH. U. JURIS. REV. 199, 207–10 (2021) (collecting recent examples of virtue jurisprudence).

28. Cf. Andrew B. Ayers, *What if Legal Ethics Can’t Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1, 37 (2013) (“Virtue ethics involves a large

A fundamental benefit of this new approach is that it differs, conceptually and rhetorically, from the dominant agent-neutral approach. New vocabularies for familiar phenomena are especially useful when they foreground and make concrete previously obscure and diffuse intuitions. This Article came out of an attempt to articulate my sense that recent presidential leadership has been at odds with constitutional values in a broad sense, and my hope is that the framework I describe here will help readers who feel similar unease regarding the pathologies of the contemporary presidency.

In Part I, I give an account of virtue in terms of dispositions, explaining why dispositions are relevant in evaluating action and showing how reasoning in terms of virtues can help us make inferences about dispositions.

In Part II, I argue that the executive virtues capture the original understanding of Article II and reflect contemporary realities of ever-increasing presidential power and discretion. I offer a preliminary list of the main executive virtues—loyalty, honesty, responsibility, justice, inclusiveness, and judgment—and address objections to a virtue theory of Article II.

In Part III, I describe how the requirement of executive virtue can be operationalized in constitutional law and practice—in the courts, Congress, the executive branch itself, and the electoral process. I present several examples, including a novel reading of the Supreme Court's decision upholding the Trump administration's travel ban, a revisionist defense of the impeachment of Bill Clinton, and an argument in favor of more elite control over presidential primaries. I conclude with implications for theories of constitutional crisis, arguing that the four years of the Trump administration constituted a serious, and as-yet unresolved, constitutional crisis.

At the outset it is important to situate this Article within its contemporary political context. It would be pointless to deny that Donald Trump's presidency casts a long shadow over my account. Trump's extreme character defects and the damage they caused to the country and its constitutional system were widely

number of claims, on which virtue ethicists themselves often disagree. Rather than announcing the launch of a 'virtue-ethical' approach to a given subject, it seems more prudent to specify which claims or concepts from virtue ethics are of interest. So this article does not claim to offer a 'virtue-centered' or 'aretaic' approach to legal ethics. My interest is not in 'virtue ethics' but in the concept of virtue itself.").

discussed during his presidency and were the central theme of the House January 6 Committee.²⁹ This Article can be viewed in part as an attempt to give these observations firmer theoretical grounding. Moreover, Trump's status at the time of this Article's publication as the frontrunner in the Republican presidential primary³⁰ makes it all the more important to have a clear understanding of whether, on a characterological level, he can adequately discharge the duties of the presidency (my view, unsurprisingly, is that he cannot).

But, like any good account of constitutional meaning, a theory of executive virtue has no inevitable partisan or presentist bias (as my discussion of the Clinton impeachment will make clear),³¹ and I join other analysts of the Trump administration in the attempt to use examples from that administration to generate more general insights.³² Executive character vices exist in high-profile politicians of all political stripes. The rise and fall of New York's Democratic Governor Andrew Cuomo is a recent case in point.³³ There is no point on the political spectrum that is immune to the appeal of strongmen, demagogues, and would-be authoritarians. My hope is that a taxonomy of the executive virtues that animate Article II helps us to defend against their absence.

29. SELECT COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 8 (2022) (“[T]he central cause of January 6th was one man, former President Donald Trump”); *see also id.* at 113 (“President Trump believed then, and continues to believe now, that he is above the law, not bound by our Constitution and its explicit checks on Presidential authority.”).

30. *See Who's Ahead in the National Polls*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/polls/president-primary-r/2024/national/?ex_cid=abcpromo [<https://perma.cc/4Y3Z-7GEQ>] (showing Trump polling at 55.2% in the 2024 Republican Primary as of September 23, 2023).

31. *Cf.* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1411 (2018) (“[P]rincipled positivism contains no baked-in ideological or political bias.”).

32. *See, e.g.*, Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1343 n.18 (2019) (“Although all of these examples involve legal challenges to policy initiatives of the Trump administration, it is my hope that the analysis and proposals I offer here are durable enough to transcend this particular administration.”).

33. *See* Alan Z. Rozenshtein, *What Andrew Cuomo's Resignation Reveals About the State of American Democracy*, LAWFARE (Aug. 16, 2021), <https://www.lawfaremedia.org/article/what-andrew-cuomos-resignation-reveals-about-state-american-democracy> [<https://perma.cc/YFN6-4NYG>].

I. DISPOSITIONS AND VIRTUES

A *disposition* is an agent's cognitive and emotional response to a particular situation.³⁴ A *character trait* is a stable disposition, "guiding both our perception of and our response to the world around us."³⁵ A *virtue* (and its associated *vice*) is a normatively desirable (or undesirable) character trait: for example, honesty (or dishonesty), kindness (cruelty), diligence (laziness), and loyalty (faithlessness). In this Part, I explain why dispositions matter and how judgments about virtues and vices allow us to make inferences about an agent's disposition across time and situations.

A. WHY DISPOSITIONS MATTER

The dispositions of an agent bear on evaluations of the agent's actions in three ways: instrumentally, intrinsically, and expressively.³⁶

Dispositions matter *instrumentally* because the disposition behind a particular action can be a proxy for evaluating the action itself. Because agents generally act to satisfy their motivations, an important piece of evidence for evaluating whether a particular action is likely to lead to good outcomes is whether the motivation behind that outcome is itself good.³⁷

34. See Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1982 (2001).

35. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1438 (2000). This is an intentionally minimal definition of virtue, one that some virtue theorists might not agree with, requiring, for example, that for a character trait to be a virtue it must be accompanied by an intrinsic caring for the value in question. See, e.g., NICHOLAS BOMMARITO, *INNER VIRTUE* 7 (2018) ("A virtuous person is someone who cares about moral goods, and a virtuous state is one that manifests such concern."); Ayers, *supra* note 28, at 39 ("Virtues are deep commitments. Someone who has a virtue—a deep commitment to something of intrinsic value—tends to manifest that commitment over time by doing things that develop the ability to promote the intrinsic value effectively.").

36. In developing this argument, I found Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333, 341–55 (2018), to be particularly helpful, though my framework ultimately differs substantially from his.

37. See, e.g., Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 199 (2008) ("[T]he presence of an actor's illegitimate motive (mental state) is likely to correlate with an absence of other objective reasons that are legitimate and sufficient under the circumstances to

This evidence is particularly helpful where evaluating the action on the merits is difficult. As Shalev Roisman argues, the importance of presidential motive is highest when presidential action is premised on “nonverifiable conditions” rather than where the “national interest is obvious.”³⁸ For example, if a President orders a military strike, the public, lacking expertise and access to the relevant classified information, will be helped in deciding whether the strike was in the national interest if it has reason to believe that the President acted diligently and prudently in ordering the strike (or, to the contrary, recklessly and impulsively).³⁹

An action’s background disposition can also matter *intrinsically*. As Richard Fallon notes:

The most familiar explanation of the relevance of governmental purpose in constitutional law builds on Justice Holmes’s aphorism: “even a dog distinguishes between being stumbled over and being kicked.” The point, I take it, is that we often cannot even characterize an act without understanding what motivated it. Within deeply entrenched ethical structures, what people (like dogs) are often owed is concern, care, or respect, and not necessarily a particular outcome. When constitutional doctrine is viewed against this background, there is nothing mysterious about the idea that the quality of governmental acts, and hence their constitutionality, should sometimes depend on their purposes.⁴⁰

On legal or moral grounds, then, actions taken out of certain dispositions may be prohibited outright.⁴¹ For example, the Constitution is sometimes read as prohibiting action based on improper government motives—for example, animus or other forms of non-neutrality—because such motives violate the legal and moral dimensions of the Equal Protection Clause.

justify his action.”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 509 (1996) (“Why do we wish to discover improper motive? Perhaps because we wish to discover adverse effects, but cannot do so directly; because we know that actions tainted with certain motives tend to have such consequences; because although a focus on motive will prove imprecise, we can think of no better way to gauge the effects of an action on the state of public discourse.”).

38. Roisman, *supra* note 15, at 7.

39. *See id.* at 25–28.

40. RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 93 (2001) (footnotes omitted) (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881)).

41. *See* Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, in POLITICAL LEGITIMACY 201, 203 (Jack Knight & Melissa Schwartzberg eds., 2019).

Finally, dispositions behind action matter *expressively*. This can be true in a narrow sense, in that the disposition behind an action has a direct psychological effect on the target of the action; knowing that the government has intentionally discriminated against you because of animus imposes a psychological cost beyond the action's concrete effects.

But dispositions are also expressive in a broader sense. Because law shapes, not just reflects, societal norms,⁴² publicly expressed motives for official action signal that those motives are appropriate. And if those motives are in fact bad, they can lead to the public spread of such motives, undermining the civic virtue that democratic government requires.

As an example of the three ways in which dispositions matter, consider a President who displays the virtue of loyalty⁴³: faithfulness to the nation's interests and to the Constitution. If we believe that a President is acting out of loyalty, we can be more confident that they are making good decisions, both as a matter of policy (instrumentally) and the constitutional requirement of faithful execution (intrinsically). Of course there is no guarantee that a well-meaning President will always make the right decisions, but, things being equal, Presidents who want to serve the nation will generally perform better than Presidents that only care about serving themselves.

Finally, a President that acts faithfully also signals (expressively) to the public that faithfulness is an important virtue, thereby strengthening the public's faithfulness. And to those that are injured or disadvantaged by government action, the President's faithfulness assures them that their disadvantage is "not personal," but for the common good.

B. MAKING INFERENCES ABOUT DISPOSITIONS

The previous Section explained why knowledge about an agent's disposition is relevant to evaluating the agent's actions. But this assumes that we know the agent's disposition. Where do we get this knowledge?

42. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998) ("Governmental actions can express—and therefore perhaps sustain—a reaffirmation or a rejection of [societal] norms.").

43. See *infra* Part II.B.1.

In situations where we lack evidence about an agent's disposition, we can use what we know generally about the agent's character. In effect, taking virtue and vice seriously is a way of incorporating character evidence—"a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness"⁴⁴—into constitutional law.

Of course, doing so raises a host of difficulties, as demonstrated by the complex rules regarding the use of character evidence at trial.⁴⁵ But these restrictions have never been predicated on character evidence being irrelevant—that is, having no probative value. Rather, rules against character evidence are driven by a concern that such evidence is disproportionately prejudicial so often as to justify additional restrictions, beyond the general principle that evidence should be excluded only when its prejudicial effects substantially outweigh its probative value.⁴⁶ Similarly, as I discuss throughout Part III, only in some

44. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 340–41 (1st ed. 1954), *quoted in* FED. R. EVID. 406 note from advisory committee on proposed rule.

45. Although the Federal Rules of Evidence purport to ban the admissibility of "[e]vidence of a person's character or character trait" for the purpose of "prov[ing] that on a particular occasion the person acted in accordance with the character or trait," the rules still allows defendants to introduce evidence of good character, and, more importantly, allows the introduction of evidence of "other crimes, wrongs, or acts" for "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(a)(1); *id.* at 404(a)(2); *id.* at 404(b)(2). As many commentators have noted, this latter carve-out reintroduces a substantial amount of de facto character evidence. *See, e.g.,* Peter Tillers, *What Is Wrong with Character Evidence?*, 49 *HASTINGS L.J.* 781, 788 (1998) (pointing out that evidence for "intent" and "opportunity" is admissible and can be "revelatory" of character). The end result is a doctrinal and conceptual "mess," or, as the Supreme Court has more colorfully characterized it, a "grotesque structure" of "misshapen stone[s]." Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 *MARQ. L. REV.* 709, 711 (2021); *Michelson v. United States*, 335 U.S. 469, 486 (1948).

46. FED. R. EVID. 403. As John Henry Wigmore, the most famous of the evidence treatise writers, observed, character evidence is excluded "not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." 1 *JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW* § 194, at 646 (3rd ed. 1940); *see also Michelson*, 335 U.S. at 475–76 ("[Character evidence] is not rejected

circumstances will it be appropriate to consider the executive virtues (and vices) of a President. But as I hope to demonstrate, there are enough cases in which the probative value of executive character outweighs its prejudicial effects that it is a conceptual tool worth developing.

Importantly, reasoning from character does not require treating character traits as unrealistically fixed or determinative. Indeed, in the second half of the twentieth century, trait theories of human personality came under sustained attack by “situationist” psychologists, who at their most extreme argued that human behavior is so contextual that it is meaningless to describe people as “inherently” brave or cowardly, kind, or cruel. The unrealistic extremes of both trait theory and situationism ultimately led to the dominant approach in contemporary behavior science, *interactionism*, which recognizes both the importance of context as well as stable character traits—for example, extroversion, agreeableness, and neuroticism.⁴⁷ One formulation of interactionism describes the synthesis of trait-based and situation-based theories as such: “certain kinds of persons will behave in certain kinds of ways in certain kinds of situations.”⁴⁸

Interactionism suggests that, while identifying durable character traits in Presidents is far from straightforward, it is not impossible. In particular, where the character trait is especially pronounced, is expressed in a context that typifies the presidency (e.g., the unique power and prestige of the office), and manifests itself in repeated instances over a President’s time in office (or in related contexts like prior public office or political campaigns), there are grounds to draw reasonable inferences based on character traits. Moreover, to the extent that the situationist critique has merit, it’s less an argument for treating presidential character as “marginal in the context of the tremendous historical forces lodged in the laws, traditions, and

because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.” (footnote omitted).

47. See RUBENZER & FASCHINGBAUER, *supra* note 9, at 7–14 (charting Presidents on the “Big Five” personality factors).

48. Daryl J. Bem, *Constructing a Theory of the Triple Typology: Some (Second) Thoughts on Nomothetic and Idiographic Approaches to Personality*, 51 J. PERSONALITY 566, 566 (1983).

commitments of institution[s]”⁴⁹ than it is for developing the right sorts of institutions, both inside and outside the executive branch, to shape presidential character and action in the right direction.⁵⁰

II. THE EXECUTIVE VIRTUES

Having established why dispositions matter generally, this Part focuses on a subset of dispositions, the *executive virtues* (and their corresponding *executive vices*), that are characteristic of, and vital to, the proper functioning of the executive.

A. THE IMPORTANCE OF EXECUTIVE VIRTUE

Motives and dispositions, and thus character and virtue, matter in our evaluation of all public officials. As Matthew Stephenson observes, “bureaucrats have faces, technocrats have souls, and the values and capabilities that these flesh-and-blood human beings bring to their jobs may matter more for the quality of our government than is often appreciated.”⁵¹ Neil Siegel has argued for the “internalization” of a “constitutional role morality” for politicians that includes such values as inclusiveness and moderation.⁵²

But the character approach is particularly applicable to evaluating presidential actions, primarily because of the broad, open-ended nature of executive power. In the rest of this Section, I outline how the character approach to Article II is supported by the text and original understanding of the Constitution on the one hand, and by the realities of modern presidential administration on the other.

1. Text, Structure, and Original Understanding

A character approach to Article II makes sense of its text and structure. Article II stresses virtue—specifically the virtue of “faithfulness”—twice: in the Take Care Clause⁵³ and the

49. THEODORE J. LOWI, *THE PERSONAL PRESIDENT* 136 (1985).

50. See *infra* Part III.B (laying out ways to encourage virtuous decision-making).

51. Stephenson, *supra* note 20, at 1180.

52. Siegel, *supra* note 21, at 159.

53. U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be *faithfully* executed . . .” (emphasis added)).

Presidential Oath or Affirmation Clause.⁵⁴ This double mention is conspicuous, given the otherwise largely undefined powers of the President in Article II. This suggests that the Framers understood the duties of the presidency to be resistant to codification—in contrast, for example, to the lengthy enumeration of Congress’s powers in Article I⁵⁵—and that they would have to be understood with reference to a more general predisposition to act “faithfully.”

The importance placed on the President’s personal qualities is also reflected in the elaborate presidential-selection procedures. The Constitution imposes more stringent qualifications for the President than it does on any other government official. For example, while members of the House of Representatives must be twenty-five years old⁵⁶ and Senators must be thirty years old,⁵⁷ the President must be thirty-five years old,⁵⁸ reflecting the greater expectations of maturity expected of the nation’s highest office. The President is also the only official who is required to be a natural-born citizen.⁵⁹ This requirement, though today anachronistic,⁶⁰ reflects the concern that the President not have divided national loyalties—loyalty being a virtue closely related to faithfulness.

The presidential-selection process also reflects a heightened concern with the President’s personal qualities, a concern that runs through contemporary sources, including the *Federalist Papers*.⁶¹ Contrary to popular belief, the electoral college was not primarily designed as a check against the popular will (but rather as an alternative to Congress selecting the President); its design was motivated in part to enable greater scrutiny of

54. *Id.* art. II, § 1, cl. 8. (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will *faithfully* execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’” (emphasis added)).

55. *Id.* art. I, § 8.

56. *Id.* art. I, § 2, cl. 2.

57. *Id.* art. I, § 3, cl. 3.

58. *Id.* art. II, § 1, cl. 5.

59. *Id.*

60. See, e.g., Robert Post, *What Is the Constitution’s Worst Provision?* 12 CONST. COMMENT. 191, 192 (1995) (answering the titular question with the Natural Born Citizen Clause).

61. See Levinson & Graber, *supra* note 3, at 146–51 (describing the *Federalist Papers*’ discussion of presidential character).

presidential candidates.⁶² This scrutiny would come chiefly from the electors, who Alexander Hamilton believed would possess the necessary “discernment” to choose the President.⁶³ Hamilton further tied the method of selection to the qualities of the President:

This process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and *virtue*.⁶⁴

Hamilton’s invocation of virtue in the executive is not an accidental characterization and reflects a larger point that has sometimes been overlooked in discussions of the Framers. Contemporary separation-of-powers scholarship is dominated by the realist, incentive-based, and game-theoretic strand that runs

62. Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 926 (2017) (arguing that the Framers created the electoral college in part so that Congress “could at least be expected to personally know the likely [presidential] candidates . . . and could render an informed judgment on their candidacy”).

63. THE FEDERALIST NO. 68, at 410 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *Remarks by George Mason at the Constitutional Convention* (June 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 31 (Max Farrand ed. 1911) [hereinafter FARRAND’S RECORDS] (“[I]t would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.”).

64. THE FEDERALIST NO. 68, *supra* note 63, at 414 (emphasis added); see also THE FEDERALIST NO. 10, *supra* note 63, at 82–83 (James Madison) (arguing that, in a large republic, “it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters”). Thomas Jefferson made a similar point about the importance of the selection of political leadership: “[T]here is a natural aristocracy among men. The grounds of this are virtue and talents. . . . The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society.” Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THOMAS JEFFERSON: WRITINGS 1304, 1305–06 (Merrill D. Peterson ed., 1984) [hereinafter Jefferson Letter].

through Hamilton's and James Madison's most well-known arguments in the *Federalist Papers*,⁶⁵ most notably Madison's argument for "[a]mbition . . . counteract[ing] ambition" between the branches⁶⁶ and Hamilton's argument for "vigor" and "unity" in the executive.⁶⁷

This "science of politics," as Hamilton described it,⁶⁸ is indeed important, but the Framers, Madison and Hamilton included, were also heavily influenced by civic republicanism: a set of ideas about legitimate political authority that, stretching back through the Renaissance to ancient Rome and Greece, emphasized the importance of civic virtue at all levels of society and government, including at the very top.⁶⁹ And in their everyday lives, what to us might seem like old-fashioned conceptions of "honor" dominated how the Founding generation thought about themselves and their relationships.⁷⁰

Perhaps the most important manifestation of this cultural and intellectual backdrop was George Washington, expected to become the first President under the Constitution and who himself cared immensely about protecting the "dignity" of the office.⁷¹ His personal characteristics, and the universal esteem in which he was held by the revolutionary elite, were critical in making the convention's participants comfortable with a single,

65. See Levinson & Graber, *supra* note 3, at 172–73 (noting that belief in "civic virtue" has largely been supplanted by a realist notion of politics that acknowledges people's self-interest and inability to set aside their own desires for the sake of the common good).

66. THE FEDERALIST NO. 51, *supra* note 63, at 322 (James Madison); see also David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 914 (2016) (describing *Federalist 51* as rejecting a "rel[iance] on the republican virtue of officeholders").

67. THE FEDERALIST NO. 70, *supra* note 63, at 423–24 (Alexander Hamilton).

68. THE FEDERALIST NO. 9, *supra* note 63, at 72 (Alexander Hamilton).

69. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 550–62 (1986) (exploring the tension between the Founders' beliefs in public virtue and self-interest).

70. See generally JOANNE B. FREEMAN, *AFFAIRS OF HONOR*, at xv–xvii (2001) ("It would be hard to overstate the importance of personal honor to an eighteenth-century gentleman, let alone to a besieged leader whose status was under attack. Honor was the core of a man's identity, his sense of self, his manhood. A man without honor was no man at all.").

71. See STEPHEN F. KNOTT, *THE LOST SOUL OF THE AMERICAN PRESIDENCY* 17–18 (2019) (observing that dignity "became the guiding force behind all of Washington's and Hamilton's efforts to develop respect for the office").

strong executive with a vaguely defined set of powers. South Carolina delegate Pierce Butler noted that the Constitution's grant of presidential power would not "have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their ideas of the Powers to be given to a President, by their opinions of his Virtue."⁷² Similarly, Thomas Paine, though not himself a participant at the convention, wrote later:

The Executive part of the Federal government was made for a man, and those who consented, against their judgment, to place Executive Power in the hands of a single individual, reposed more on the supposed moderation of the person they had in view, than on the wisdom of the measure itself.⁷³

None of this is to suggest that the Framers were naive about the realities of self-interest or the importance of institutional design, both in the writing of the Constitution and in the shake-down cruise of its first several decades. And in some ways, the original constitutional design was overly optimistic about the ability of the nation's leaders to put aside their political ambitions. Tension between John Adams and Thomas Jefferson during the Adams administration, as well as the uncertainty following the 1800 election, when Aaron Burr initially refused to concede to Jefferson, led to the Twelfth Amendment, which elevated institutional design over trust in (a)political virtue.⁷⁴ But the tension between a politics of virtue and of self-interest is an ongoing tension, in which neither alone can fully explain the Founders' worldview.⁷⁵

72. Letter from Pierce Butler to Weedon Butler (May 5, 1788), in *FARRAND'S RECORDS*, *supra* note 63, at 302.

73. Thomas Paine, *Thomas Paine to the Citizens of the United States, Letter II*, *NAT'L INTELLIGENCER*, Nov. 22, 1802, in 3 *THE WRITINGS OF THOMAS PAINE* 385, 388 (Moncure Daniel Conway ed., 1895).

74. See Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 *WM. & MARY L. REV.* 1501, 1535–54 (2014) (summarizing evolving views on the role of the presidency from the election of 1800 to the passage of the Twelfth Amendment).

75. I take no position on originalism's merits as an interpretative theory. My point is only to demonstrate that, to whatever extent one finds originalism convincing, my virtue theory of Article II is compatible with it.

2. Modern Presidential Administration

The President is the dominant actor in the administrative state and thus the overall government.⁷⁶ This is partly because the original institutional features of the presidency—the unity of the office and its accompanying “energy” and “dispatch”⁷⁷—have steadily allowed it to gain power at Congress’s expense.⁷⁸ Party politics have also undermined the traditional separation of powers between Congress and the President, leading instead to a “separation of parties” under which Presidents have particularly free hands when Congress is controlled by members of their own party.⁷⁹ For their part, both Congress and the courts have contributed to the increasing grant of discretion to the executive branch through broad delegations and permissive procedural requirements.⁸⁰

There are many names for this phenomenon—the “imperial Presidency,”⁸¹ “constitutional dictatorship,”⁸² the “executive unbound”⁸³—but the end result is the same: for better or (quite possibly) for worse, our constitutional system gives enormous

76. See BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 12 (2020) (“[T]he presidency has been the central engine of the federal government from the outset[] and has grown massively in size and influence over the centuries.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (“We live today in an era of presidential administration.”).

77. THE FEDERALIST NO. 70, *supra* note 63, at 424 (Alexander Hamilton).

78. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006) (“Few aspects of the founding generation’s political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers.”).

79. See *id.* at 2315 (“[T]he degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”).

80. See generally ADRIAN VERMEULE, *LAW’S ABNEGATION* 1–22 (2016) (explaining that Congress has sacrificed some of its own political power in favor of significant abnegations to the executive).

81. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at viii (1973).

82. CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP*, at vii (1948); see also Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1795–99 (2010) (tracing the emergence and conceptualization of the phrase “constitutional dictatorship”).

83. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 5 (2010).

discretion—decisions that Justice Jackson characterized as “delicate, complex, and involv[ing] large elements of prophecy”⁸⁴—to one person, in a way that is uncharacteristic of the legislature and judiciary. This is the most important reason why the personal qualities of the President are so critical, not just as a matter of politics or policy, but of constitutional structure. In other words, the President’s motivations matter both *instrumentally* and *intrinsically*.⁸⁵

Another reason why presidential virtue is so important is that the President plays a uniquely *expressive* role in the national discourse. When a multi-member body like a legislature acts, it can be difficult to identify a collective intent, since different members may have voted to support a bill for different reasons, and, at least in the American system of relatively weak parties, no party official can truly be said to speak for anyone else.⁸⁶

But the President is different. Because the President is a single individual in whom the executive power is vested, their motivations are more naturally perceived—if only at the level of the public—than the motivations behind the executive action at issue.⁸⁷ And because of the unique, outsized role that the President plays in national discourse, their publicly understood motives are more expressively important than are the publicly understood motives of individual legislatures.⁸⁸

B. A TAXONOMY OF EXECUTIVE VIRTUES

Before I offer a proposed list of executive virtues, it is important to clarify several points.

84. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

85. *See supra* Part I.A (discussing the ways in which the dispositions of an agent bear on evaluations of the agent’s actions).

86. *See* Gerald C. Mac Callum, Jr., *Legislative Intent*, 75 *YALE L.J.* 754, 755–56 (1966) (“The most obvious difficulty with the notion of legislative intent concerns the relationship between the intent of a collegiate legislature and the intentions of the several legislators.”).

87. *See* Shaw, *supra* note 32, at 1380–83 (evaluating the use of presidential intent in judicial review of executive action).

88. *See* Roisman, *supra* note 15, at 3–5 (discussing the ubiquity of discourse on presidential motivation in impeachment hearings and executive scholarship more broadly).

First, where does this list of virtues come from? The answer is that what makes a virtue relevant to a particular activity is that it is “an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are *internal to practices* and the lack of which effectively prevents us from achieving any such goods.”⁸⁹ There is no simple rule for determining what a practice’s goals are; the answer is some combination of tradition, what is normatively accepted by practitioners (in this case, Presidents and the larger set of political and legal actors that engage with them), and internal consistency. While such an account cannot entirely escape circularity, it can nevertheless serve as a ground for normative description, as demonstrated by the general consensus around what counts as legitimate modes of constitutional interpretation.⁹⁰

But because the virtues are moral concepts, their use raises the issue of whether a virtue theory of Article II is an example of what David Pozen and Adam Samaha have called “fundamentalist arguments,” which “draw directly on deep philosophical premises or comprehensive normative commitments, whether involving a system of religious belief, political morality, or social theory.”⁹¹ Perhaps the most famous example of such an argument was Ronald Dworkin’s “moral reading” of the

89. ALASDAIR MACINTYRE, *AFTER VIRTUE* 191 (3rd ed. 2007) (emphasis added).

90. The most famous of these lists is that provided by Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 7–8, 93–94 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991). Others have offered their own, broadly compatible, taxonomies. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987) (identifying arguments from text, intent of the Framers, constitutional theory, precedent, and values); see also David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 737–38 (2021) (summarizing the broad similarities between Bobbitt and subsequent theorists’ modalities).

91. Pozen & Samaha, *supra* note 90, at 750.

Constitution,⁹² which continues to influence the left⁹³ and right.⁹⁴ As Pozen and Samaha note, courts continue to incorporate moral arguments, albeit in disguise.⁹⁵ Pozen and Samaha identify fundamentalist arguments as an “anti-modality” of constitutional interpretation,⁹⁶ and for good reason: moral readings have proven controversial for constitutional scholars and courts alike, in large part because they do not respect the diversity of legitimate moral views in society and underestimate the indissolubility of moral debate.⁹⁷

But a theory that respects different conceptions of the good life need not itself be void of moral considerations. “[P]olitical liberalism is a theory at once minimal (in that it allows wide scope for free choice and diversity) and moral (in that it appeals to individual motivations other than self-interest)—specifically, the motivations that all of us have to live harmoniously with and respect others’ views of the good life.⁹⁸ Just as these motivations require a variety of moral commitments and virtues on the public’s part,⁹⁹ so too does the characteristic political form of such a society—in our case, the Constitution—require of officeholders a set of moral characteristics. In this way, my theory of Article II, while a “moral reading” in one sense, hopefully avoids the problems of fundamentalism that attend Dworkinian theories.

92. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996) (“The moral reading proposes that we all . . . interpret and apply . . . abstract clauses on the understanding that they invoke moral principles about political decency and justice.”).

93. See, e.g., JAMES E. FLEMING, *CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS* 109–10 (2022) (applying Dworkin’s denouncement of sheer “moral disapproval” (e.g., prejudice) as a legitimate means of justification for lawmaking).

94. See, e.g., VERMEULE, *supra* note 26, at 6 (acknowledging the general value of Dworkin’s moral reading but departing from its “conventionally left-liberal and individualist bent”).

95. See Pozen & Samaha, *supra* note 90, at 752 (“[F]undamentalist arguments may gain entry into constitutional law, partially and perhaps surreptitiously, if they are reformulated in modality-compatible terms.” (footnote omitted)).

96. *Id.* at 750.

97. See, e.g., Richard A. Posner, *Conceptions of Legal “Theory”: A Response to Ronald Dworkin*, 29 *ARIZ. ST. L.J.* 377, 382–83 (1997) (critiquing the scope and persuasiveness of moral argumentation).

98. WILLIAM A. GALSTON, *LIBERAL PURPOSES* 118 (1991).

99. *Id.* at 215–16 (stating that “well-ordered souls” are the “foundation of sustainable republican government”).

Second, although a rough consensus as to what constitutes executive virtues is likely achievable (and is all that is necessary), full consensus probably is not. This is partly because the complex constellation of executive virtue can be decomposed into its constituent parts. Just as the full color spectrum can be generated by combining different sets “primary” colors, so can one describe different sets of “primary” executive virtues that cover the full range of desirable presidential conduct. For example, public-policy scholar James Pfiffner has suggested that the relevant presidential virtues are trustworthiness, integrity, reliability, loyalty, responsibility, self-restraint, compassion, consistency, and prudence—a list that gets at the same basics values as does my taxonomy through different building blocks.¹⁰⁰

The more important source of disagreement is substantive. What one considers to be an executive virtue will depend on one’s interpretation of the Constitution’s text and structure, normative priors, and judgment as to the practical effect of specific virtues on the effective functioning of the executive branch. Even if we could achieve consensus as to the executive virtues, that consensus might itself change over time. For example, norms around presidential communications—and the associated character traits of being able to emotionally and rhetorically connect with the public—have changed dramatically over American history, from a preference for relative aloofness to an expectation of constant, often intimate, communication.¹⁰¹ What would have seemed a demagogic vice to George Washington and his generation is viewed today as an important virtue in our contemporary expectations of the President as “Communicator in Chief.”¹⁰²

100. JAMES P. PFIFFNER, *THE CHARACTER FACTOR* 12–16 (2004).

101. For an in-depth exploration of how effective rhetorical practices have shifted throughout time, see generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987). Relatedly, Presidents have become more extraverted over time. See RUBENZER & FASCHINGBAUER, *supra* note 9, at 31–33 (documenting an increase in traits such as need for power and need for affiliation, both of which are correlated with extraversion).

102. See generally STEPHEN E. FRANTZICH, *PRESIDENTS AND THE MEDIA: THE COMMUNICATOR IN CHIEF* 1–25 (2019) (discussing nuances of the relationship between the President and media); John Allen Hendricks & Robert E. Denton, Jr., *Political Campaigns and Communicating with the Electorate in the Twenty-First Century*, in *COMMUNICATOR-IN-CHIEF: HOW BARACK OBAMA USED NEW MEDIA TECHNOLOGY TO WIN THE WHITE HOUSE* 1, 1–18 (John Allen Hendricks & Robert E. Denton, Jr. eds., 2010) (tracing how the public’s

Third, virtues are not all-or-nothing: no one is completely honest or deceitful, infinitely kind or cruel. Each virtue is a spectrum, and there will naturally be disputes about where on the spectrum a particular President lies and what point on the spectrum is “good enough” for the President to fulfill their constitutional obligations relative to that virtue.

Similarly, the executive virtues are imperfectly correlated: the President can exhibit loyalty but lack judgment, or can be candid but shirk responsibility—in short, “most presidents have multidimensional characters.”¹⁰³ As Dennis Thompson, one of the leading figures in political ethics, has noted, “ethical character is fragmented. The classic ideal of the unity of virtue is neither psychologically plausible nor ethically necessary. Presidents, like the rest of us, can have some virtues without having all the others.”¹⁰⁴

But even if, as the ancient Greeks believed, the perfectly virtuous person is as “rare as the phoenix,”¹⁰⁵ that does not mean that aiming for or demanding executive virtue is pointless; it is enough for the President to be “virtuous enough” and to look for doctrines and institutions that can increase virtue on the margin.

Fourth, the executive virtues must be understood as distinct from the “ordinary” or “private” virtues that we would celebrate in each other, in two respects. First, some character traits that are neutral, or even condemnable, in everyday situations might be helpful for Presidents.¹⁰⁶ For example, “dark triad”¹⁰⁷ traits,

expectations for presidential communication have shifted with developments in social media and other new technologies).

103. PFIFFNER, *supra* note 100, at xi.

104. Dennis F. Thompson, *Constitutional Character: Virtues and Vices in Presidential Leadership*, 40 *PRESIDENTIAL STUD. Q.* 23, 24 (2010).

105. Jacob Smith & Georgi Gardiner, *Opacity of Character: Virtue Ethics and the Legal Admissibility of Character Evidence*, 31 *PHIL. ISSUES* 334, 340 (2021).

106. This is captured in the idea of a “role morality”: “the moral obligations and permissions associated with social roles—for example, the lawyer’s moral duties of confidentiality and zeal, as well as the lawyer’s moral permission to promote client interests even at the expense of worthier ones.” David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 *GEO. J. LEGAL ETHICS* 337, 338 n.2 (2017).

107. See generally Delroy L. Paulhus & Kevin M. Williams, *The Dark Triad of Personality: Narcissism, Machiavellianism, and Psychopathy*, 36 *J. RSCH. PERSONALITY* 556, 556 (2002) (identifying Machiavellianism, narcissism, and

like narcissism and even some degree of psychopathy, can help with the charismatic leadership and “fearless dominance” that are hallmarks of modern presidential success.¹⁰⁸ Second, even where the same virtue applies to both private and public life, an individual need not exhibit it in the same way in both contexts. A President can be honest in his public affairs but be a liar in his private life, and vice versa. Indeed, public virtue may require acting in ways that would be considered unvirtuous in ordinary life. This is the problem of “dirty hands”: taking actions that, while on the whole correct, require acting in ways that nevertheless constitute moral wrongs.¹⁰⁹

At the same time, it would be a mistake to view the executive virtues as only “public” and disconnected from private conduct. Perhaps the best example of the effect of private vice on public conduct is the issue of presidential adultery, which has frequently compromised the President’s public duties. The Clinton impeachment is the most famous example.¹¹⁰ Other, arguably more serious, examples include John F. Kennedy’s repeated infidelities, which posed serious national security threats, as well as Richard Nixon’s affair with a Chinese spy, which allowed FBI director J. Edgar Hoover to effectively blackmail him.¹¹¹ Private vices can also implicate character traits that can be relevant

psychopathy as the top aversive traits that have been given the most empirical attention).

108. See, e.g., Ronald J. Deluga, *Relationship Among American Presidential Charismatic Leadership, Narcissism, and Rated Performance*, 8 LEADERSHIP Q. 49, 59–60 (1997) (finding empirical support for the hypothesis that “presidential narcissistic behavior is positively associated with charismatic leadership and rated performance”); Scott O. Lilienfeld et al., *Fearless Dominance and the U.S. Presidency: Implications of Psychopathic Personality Traits for Successful and Unsuccessful Political Leadership*, 103 J. PERSONALITY & SOC. PSYCH. 489, 498 (2012) (“We found that a measure of the boldness associated with certain features of psychopathy . . . predicted overall presidential performance in two large independent surveys of U.S. historians.”). “Innocent” Presidents—those, like Grant and Harding, who scored low on measures like achievement, drive, and assertiveness—have generally been regarded as unsuccessful. See RUBENZER & FASCHINGBAUER, *supra* note 9, at 67–68.

109. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFS. 160, 161 (1973).

110. See generally Joanne B. Ciulla, *Dangerous Liaisons: Adultery and the Ethics of Presidential Leadership*, in POLITICS, ETHICS AND CHANGE 74, 89–91 (George R. Goethals & Douglas Bradburn eds., 2016) (recounting how Clinton’s denial of his affair with Monica Lewinsky led to both a loss of public support and an impeachment hearing).

111. *Id.* at 86–88.

to executive virtue, like impulse control or judgment.¹¹² To the extent that private vice can undermine the President's standing with the public—or even worsen the public's own character—it is relevant to executive virtue.

Fifth, one might worry that a theory of presidential virtue cannot simultaneously be faithful to historical practice and contemporary moral standards. Constitutional theorizing is a form of Rawlsian “reflective equilibrium,”¹¹³ a search for coherence among our well-considered legal views. Any plausible attempt at coherence must take special care to preserve “fixed points”: “judgment[s] that, albeit revisable, strike[] us on reflection as very hard to shake.”¹¹⁴ Thus, in a constitutional culture like ours, in which tradition plays such an important role, any plausible theory of constitutional virtue must incorporate the virtuousness of early exemplars—George Washington in particular, but also the broader Founding generation, whose cultural outlook was the bedrock of the Constitution's conception of executive virtue.¹¹⁵

But should the values of an elite stratum of eighteenth-century white men, especially given the commitment of many of them to racial and other forms of unjust subordination, hold any appeal for us today? I believe they can, as long as we separate the virtues—values, like loyalty, honesty, and judgment, that remain critical to contemporary democratic governance—from the Founders' deeply imperfect attempts to realize them.¹¹⁶

112. PFIFFNER, *supra* note 100, at 90 (“[T]he failure of some presidents and presidential candidates to forego [extramarital sex] legitimately calls into question their judgment, self-restraint, and commitment to the duties of public office.”).

113. See generally Norman Daniels, *Reflective Equilibrium*, STAN. ENCYC. OF PHIL. (Oct. 14, 2016), <https://plato.stanford.edu/entries/reflective-equilibrium> [<https://perma.cc/8MAJ-KYHA>].

114. Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in THE CHALLENGE OF ORIGINALISM 246, 261 (Grant Huscroft & Bradley W. Miller eds., 2011).

115. See *supra* Part II.A.1 (exploring how the Founders' understanding of executive virtue can be synthesized from sources such as the Constitution and the *Federalist Papers*).

116. Unlike later politicians, especially in the antebellum South, who tried to morally justify slavery, the Founders either opposed slavery or, in the case of slaveholders like Washington, Jefferson, and Madison, understood that slavery was evil and that their lifelong ownership of slaves, and the Constitution's

Sixth, it is important to not conflate executive virtues with those characteristics that guarantee political success. Although our most successful Presidents combined virtue with great political acumen—Washington and Lincoln being the preeminent examples—other Presidents, like Lyndon Johnson and Richard Nixon, had important successes despite (indeed perhaps because of) their lack of important executive virtues.¹¹⁷ And others, like Gerald Ford or Jimmy Carter, are generally viewed as unsuccessful Presidents despite having high personal moral character.¹¹⁸ Historical context and simple contingency undoubtedly play as big of a role as character does in whether a President is successful in the eyes of history.¹¹⁹

But the gap between executive virtue and executive success is not an argument against the normative desirability of the executive virtues, for several reasons. First, much of what makes a President successful depends on historical factors outside their control, and so the executive virtues, even if a necessary condition for presidential success, are not a sufficient one.¹²⁰ Second, as noted above, the executive virtues are not the same as the personal virtues; thus, a seemingly virtuous President may

protections for slavery, was unjustifiable hypocrisy. *See generally* SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING* 25–57 (2018) (recounting the history of early antislavery efforts). One need not go so far as to argue that the Constitution was a covertly anti-slavery document to argue that the values underlying the Constitution are at least consistent with, if not most expressive of, more egalitarian values than those that were prevalent at the Founding.

117. *See* PFIFFNER, *supra* note 100, at 151–54 (describing Johnson as obnoxious, domineering, and crude, yet acknowledging his positive impact on civil rights legislation); RUBENZER & FASCHINGBAUER, *supra* note 9, at 105–16 (discussing Nixon's low scores on personality traits such as extraversion, openness, character, and agreeability, but stating that he “showed considerable strengths as president”).

118. *See, e.g.*, *Presidential Historians Survey 2021*, C-SPAN, <https://www.c-span.org/presidentsurvey2021/?page=overall> [<https://perma.cc/4DX9-VAPM>] (ranking Carter 26th and Ford 28th in a survey by historians).

119. *See, e.g.*, RUBENZER & FASCHINGBAUER, *supra* note 9, at 4 (“A president's character has no relation to how good a president's historians judge him to be [even though a] number of personality traits and qualities do predict presidential success.”).

120. *See, e.g.*, Brandon C. Prins & Steven A. Shull, *Enduring Rivals: Presidential Success and Support in the House of Representatives*, 33 CONG. & PRESIDENCY 21, 34 (2006) (finding that economic deterioration is associated with increased presidential success).

struggle because they lack the relevant *public* virtue for the job.¹²¹

Third, and most importantly, the executive virtues are necessary for the proper functioning of our constitutional system, not necessarily for political success. Looking just at modern American political history, Presidents who present seeming counterexamples to the desirability of executive virtue also did immense damage to our constitutional system. Johnson, although responsible for landmark civil-rights and social-welfare legislation, did more than anyone to embroil the country in the Vietnam War.¹²² Nixon, despite his many legislative and foreign-policy successes, intentionally prolonged the Vietnam War for his own political benefit and discredited the presidency through the Watergate scandal.¹²³ Rather than undermining the importance of executive virtue, examples of such flawed Presidents show how virtue and vice can coexist in a single person, and the dangers that executive vice can pose to American democracy.

With these caveats, here is an attempt to list some of the most important virtues of the executive, as their role is contemplated in our modern democratic constitutional system.¹²⁴

1. Loyalty

Perhaps the most important virtue in a President is the virtue of loyalty, by which the President subordinates their interests to those of the nation, the public, and the Constitution. The Framers “shared a general obsession with corruption,”¹²⁵ and recent scholarship has persuasively argued that the requirement of faithful execution would have been originally understood as

121. See PFIFFNER, *supra* note 100, at 10 (“[Presidents] can be good people and ineffective political leaders or very effective political leaders while having personal moral deficiencies.”).

122. RUBENZER & FASCHINGBAUER, *supra* note 9, at 103.

123. PFIFFNER, *supra* note 100, at 120–24.

124. In developing this list, I have drawn substantial inspiration from Thompson, *supra* note 104, although I deviate from Thompson’s list in several important respects.

125. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347 (2009).

carrying fiduciary obligations,¹²⁶ an obligation that necessitates the fiduciary's loyalty.¹²⁷

Loyalty lies at the heart of the President's Article II responsibilities. The President swears an oath to "faithfully execute the Office of [the] President" and to "preserve, protect and defend the Constitution."¹²⁸ The President must "take Care that the Laws be faithfully executed,"¹²⁹ a provision that was understood at the Framing to require "true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office."¹³⁰ This constitutional requirement is closely related to a basic requirement of political morality in a representative state: that leaders act to further the common good.

Duties of loyalty are also reflected in other constitutional provisions relating to the executive. For example, as noted above, the requirement of natural-born citizenship seeks to screen out individuals with potentially divided national loyalties.¹³¹ And loyalty is also at the core of the restrictions placed upon the President by the Foreign Emoluments Clause—which prohibits the President, absent congressional consent, from receiving "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"¹³²—to prevent "external influence."¹³³ Finally, loyalty is reflected in the two offenses explicitly called out as grounds for impeachment—treason and bribery—both of which are manifestations of disloyalty.¹³⁴

126. See Kent, Leib & Shugerman, *supra* note 13, at 2118 ("[T]he faithful execution duty was often imposed to prevent officeholders from misappropriating profits that the discretion inherent in their offices might afford them.").

127. Cf. RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. L. INST. 2007) (requiring a trustee to set aside personal interests and administer a trust in a way that advances the interests of beneficiaries).

128. U.S. CONST. art. II, § 1, cl. 8.

129. *Id.* art. II, § 3.

130. Kent, Leib & Shugerman, *supra* note 13, at 2118.

131. For a brief discussion of the Naturalization Clause, see *supra* notes 59–60 and the accompanying text.

132. U.S. CONST. art. I, § 9, cl. 8.

133. James Madison, *Notes on the Constitutional Convention*, in FARRAND'S RECORDS, *supra* note 63, at 384, 389.

134. U.S. CONST. art. II, § 4.

2. Honesty

The honest President values candor and feels obligated to tell the truth and to provide appropriate transparency into their decisions. Lying (and secrecy in general) incurs two main costs on democratic government: interfering with the public's ability to hold Presidents accountable and undermining public trust and confidence in the government.¹³⁵

The need for honesty in the executive is implicit in the Constitution's text. For example, the President must "from time to time give to the Congress Information of the State of the Union"—information that, presumably, is accurate.¹³⁶ The Senate's advice-and-consent power over appointments and treaties also relies on the President providing truthful information.¹³⁷ The presidential oath implies honesty in its taking.¹³⁸ And of course, the general requirement of faithful execution implies the ability of principals—here Congress and, more generally, the public—to control their agent, which further requires honesty. Indeed, honesty was understood at Founding as a key component of fidelity.¹³⁹

Two forms of presidential dishonesty are particular noteworthy: self-deception and bullshit. A self-deceiving President convinces themselves that something false is true because they want to believe it. One notable example of presidential self-deception is Bill Clinton's casuistic claim (assuming he sincerely believed it) that he "did not have sexual relations" with Monica Lewinsky because he did not *perform* oral sex on her.¹⁴⁰ Another is George W. Bush's delusions and wishful thinking about Iraq,

135. See generally PFIFFNER, *supra* note 100, at 39–63 (surveying several contemporary presidential lies, their historical context, and subsequent impact).

136. U.S. CONST. art. II, § 3.

137. See *id.* art. II, § 2, cl. 2.

138. See *id.* art. II, § 1, cl. 8 (requiring the President to "solemnly swear" that they will "faithfully execute" their role).

139. Kent, Leib & Shugerman, *supra* note 13, at 2132–33 (comparing definitions of "faithfully" from Founders-era sources and noting that honesty was a recurring element).

140. See Peter Tiersma, *Did Clinton Lie?: Defining "Sexual Relations,"* 79 CHI.-KENT L. REV. 927, 949–51 (2004) (explaining how Clinton may have understood the phrase "sexual relations").

most notably his misplaced confidence that Saddam Hussein possessed weapons of mass destruction.¹⁴¹

In some ways, presidential bullshit is the mirror image of presidential delusion: while the deluded President wants desperately to believe that a particular false statement is true (and the lying President wants people to think that they are telling the truth), the bullshitting President doesn't care about the truth at all.¹⁴² Presidential bullshit overwhelms public discourse with a flood of truths, half-truths, lies, and patent absurdities and so undermines the audience's very faith in its ability to discover the truth.¹⁴³ The most famous practitioner of presidential bullshit is undoubtedly Donald Trump, whose constant stream of self-evident falsehoods and "political gaslighting"¹⁴⁴ created a "post-truth" politics of "alternative facts."¹⁴⁵ The destabilizing effects

141. See Gerard N. Magliocca, *George W. Bush in Political Time: The Janus Presidency*, 34 LAW & SOC. INQUIRY 473, 474 (2009) (suggesting that Bush's mismanagement of the Iraq War contributed to his low approval ratings).

142. See HARRY G. FRANKFURT, ON BULLSHIT 33–34 (2005) (noting that the bullshitter demonstrates "indifference to how things really are" and their "statement is grounded neither in a belief that it is true nor, as a lie must be, in a belief that it is not true").

143. See Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 569 (2020) (arguing that democracy depends on a common belief in truth, rendering bullshitters, and their indifference to the truth of their statements, even more dangerous than liars).

144. Political gaslighting can be defined as "trafficking in dubious or outright false information about matters of public significance by a politician or political apparatus when the speaker knows or should reasonably know that the information is likely to be incorrect, and the audience has a reasonable basis for doubting the speaker's claims." G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1092 (2020). For a nuanced exploration of this phenomenon and a description of the Trump administration's overt efforts to spread information that was demonstrably false, see *id.* at 1088–104.

145. See Matthew Yglesias, *The Bullshitter-in-Chief*, VOX (May 30, 2017), <https://www.vox.com/policy-and-politics/2017/5/30/15631710/trump-bullshit> [<https://perma.cc/P2QT-HLZE>] (discussing the political strategy behind Trump's disregard for the truth); Quinta Jurecic, *On Bullshit and the Oath of Office: The "LOL Nothing Matters" Presidency*, LAWFARE (Nov. 23, 2022), <https://www.lawfaremedia.org/article/bullshit-and-oath-office-lol-nothing-matters-presidency> [<https://perma.cc/2DM3-S9DY>] (questioning Trump's ability to faithfully execute the responsibilities of President given his perceived lack of acknowledgment or respect for the law).

of new communications technology only heightened the epistemically corroding effects of Trump's attack on truth.¹⁴⁶

3. Responsibility

Although worries about power-hungry would-be tyrants are common in American law and scholarship, some degree of "power motivation" is necessary for presidential success.¹⁴⁷ The question is how to take what is at best an amoral desire for power and make it serve constitutional ends. The virtue of responsibility is a key way of taming that power.

The virtue of responsibility is best exemplified by the sign that Harry Truman famously had on his desk in the Oval Office: "The Buck Stops Here." It was a theme that he frequently revisited during his presidency, and for a final time in his farewell address: "The President—whoever he is—has to decide. He can't pass the buck to anybody. No one else can do the deciding for him. That's his job."¹⁴⁸ By comparison, shirking is well-illustrated by Donald Trump's infamous comment, in response to his administration's early missteps in responding to the COVID-19 pandemic, "I don't take responsibility at all."¹⁴⁹

One component of responsibility is diligence. The responsible President recognizes the importance of deliberation that aims for truth and good decision-making. Accurate factfinding is important to many presidential actions,¹⁵⁰ and "the most familiar and pervasive justification for delegation of substantial

146. See Tokaji, *supra* note 143, at 570–71 (explaining that unlike conventional forms of communication such as print media, social media allows for unfiltered dissemination of information, the factual accuracy of which can be difficult to obtain).

147. See RUBENZER & FASCHINGBAUER, *supra* note 9, at 31 (noting that "power motivation" is associated with better executive performance).

148. President Harry S. Truman, *The President's Farewell Address to the American People* (Jan. 15, 1953), <https://www.trumanlibrary.gov/library/public-papers/378/presidents-farewell-address-american-people> [<https://perma.cc/L4BM-M9YH>].

149. Gerard Seijts & Kimberley Young Milani, *The Myriad Ways in Which COVID-19 Revealed Character*, 50 *ORG. DYNAMICS* 1, 3 (2021); see also Avi Selk, "The Buck Stops with Everybody": How Trump Twists Cliches to Do His Bidding, *WASH. POST* (Jan. 11, 2019), https://www.washingtonpost.com/lifestyle/president-trump-is-where-metaphors-go-to-die/2019/01/11/f1ff1644-1522-11e9-90a8-136fa44b80ba_story.html [<https://perma.cc/XS4C-LW7W>].

150. See Roisman, *Presidential Factfinding*, *supra* note 14; Roisman, *Presidential Law*, *supra* note 14; see also Kent, Leib & Shugerman, *supra* note 13, at 2190–91.

policymaking authority to bureaucratic agents”—including to their boss, the President—“is that they have superior expertise.”¹⁵¹ Importantly, diligence has a moral component; good epistemological agents have certain moral virtues, like the ability to resist magical or wishful thinking.¹⁵²

Another, perhaps even more important, component of responsibility is a President’s taking ownership, both in terms of public politics and in their moral self-conception of their role, for their decisions and those of their subordinates. A responsible President ensures that they don’t remain ignorant of major decisions either out of a desire to protect themselves from controversy or simply out of laziness. An infamous example of a President who lacked responsibility was Ronald Reagan, who took an extremely hands-off approach to governing. This management style created a culture in which subordinates felt free to make major decisions—notably the selling of arms to Iran to fund Nicaraguan rebels—without consulting the President, whom they (reasonably) viewed as wanting to preserve plausible deniability.¹⁵³

A deeply internalized sense of responsibility is also key for the proper exercise of the prerogative power: the ability, perhaps even responsibility, for the President to act outside the law during emergency situations. The Lockean conception of the prerogative—by which “the Laws themselves should in some Cases give way to the Executive Power”¹⁵⁴—was broadly recognized at the Founding, though there was an important debate as to what the prerogative required. For Hamilton, the prerogative was constitutionally unproblematic and simply a part of the President’s inherent Article II powers.¹⁵⁵

151. Stephenson, *supra* note 20, at 1182.

152. See ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES* 73–80 (2007) (describing the virtues of love of knowledge, charity, courage, humility, and conscientiousness).

153. PFIFFNER, *supra* note 100, at 124–30 (recounting the history of the Iran-Contra affair).

154. JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT* 265, 375 (Peter Laslett ed., Cambridge University Press 1988).

155. Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 48 AM. J. POL. SCI. 429, 437–38 (2004) (“Even though [Hamilton] never used the term prerogative in its Lockean sense to describe the powers of the president in the *Federalist*, his general discussion

But for Jefferson, such a conception of the prerogative was too dangerous. “Thus, where the Hamiltonian executive would invoke powers implicit in the Constitution to justify an extra-legal exercise of prerogative, the Jeffersonian executive would forthrightly admit a violation of the laws and seek *post hoc* approval from the public.”¹⁵⁶ This would avoid “distorting the meaning of the Constitution to justify necessary exercises of presidential prerogative,”¹⁵⁷ a version of Justice Jackson’s famous argument that it would be better for the courts to watch passively as the executive violates the law than for them to sanction the executive’s action and therefore create a “loaded weapon” for future executives.¹⁵⁸

The Jeffersonian conception of prerogative relies on the President’s sense of responsibility because it requires the President to take responsibility for extra-legal acts, and thus submit themselves to judgment by the legislature and the public.¹⁵⁹ The most famous example of this approach to the prerogative is Lincoln’s extra-constitutional actions during the Civil War—for example, deploying and calling up troops at the beginning of the war and unilaterally suspending habeas corpus during it—which Lincoln defended on the grounds of general necessity rather than specific Article II powers. Following Jefferson’s prerogative procedures, Lincoln requested retroactive congressional

of constitutional principles provides indirect but unambiguous evidence that the responsibility of coping with contingencies almost always rests with the executive.”).

156. *Id.* at 430.

157. *Id.* at 434.

158. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); see also John Q. Barrett, *A Commander’s Power, a Civilian’s Reason: Justice Jackson’s Korematsu Dissent*, 68 *LAW & CONTEMP. PROBS.* 57, 78 (2005) (noting that Justice Jackson viewed the *Korematsu* decision as “most useful to justify wartime invasions of civil liberty” (quoting Robert H. Jackson, *Wartime Security and Liberty Under Law*, Address at Buffalo Law School (May 9, 1951))).

159. See Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 *BUFF. L. REV.* 557, 659–60 (2018); Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 *S. CAL. L. REV.* 45, 82 (2014) (“Disclosure can thus be understood to represent a recognition that even justified harm requires some kind of confession before the lawbreaker can earn meaningful absolution.”).

ratification,¹⁶⁰ not to mention popular ratification in the election of 1864, which Lincoln insisted should be held.¹⁶¹

4. Justice

Justice today is generally thought of as a societal virtue—indeed, the “first virtue of social institutions”¹⁶²—in which people receive what is appropriately due to them. But justice has also long been recognized as an individual virtue, with a just person desiring and acting such that other people get their due.¹⁶³

A just President thus cares that individuals are treated properly and have their rights respected, but also that those who deserve sanction are properly punished. Justice requires special care for

the more vulnerable citizens, those who are seen as different or marginal and those who do not yet have all the rights of citizenship. The political pressure to respect their rights is usually weaker and sometimes even negative, and the influence of the disposition or its absence is therefore more pronounced.¹⁶⁴

A particularly stark example of the difficulties that these different aspects of justice present is Barack Obama’s self-consciously tragic conception of his role as commander in chief,¹⁶⁵ particularly with respect to targeted killings, which he insisted on personally and individually reviewing and approving, in part because, as a “student of writings on war by Augustine and Thomas Aquinas, he believe[d] that he should take moral

160. See Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency*, 67 REV. POL. 77, 93 (2005).

161. *Id.* at 109 (“[I]n standing for reelection Lincoln also submitted to the people’s judgment about whether he had abused prerogative in the previous four years.”).

162. JOHN RAWLS, A THEORY OF JUSTICE 3 (Harvard Univ. Press rev. ed. 1999).

163. See, e.g., ARISTOTLE, NICOMACHEAN ETHICS 18 (Martin Ostwald trans., 1962) (recognizing justice in the principle, “[t]o each according to his deserts”).

164. Thompson, *supra* note 104, at 25.

165. See Quinta Jurecic, “*The Loneliest Job*”: Donald Trump, Barack Obama, and the Moral Requirements of the Presidency, LAWFARE (July 28, 2016), <https://www.lawfaremedia.org/article/loneliest-job-donald-trump-barack-obama-and-moral-requirements-presidency> [<https://perma.cc/2KS4-U7GX>]; Quinta Jurecic, *Obama’s Moral Muse*, LAWFARE (Oct. 6, 2015), <https://www.lawfaremedia.org/article/obamas-moral-muse> [<https://perma.cc/L5NH-MTCL>].

responsibility for such actions.”¹⁶⁶ This behavior reflected both Obama’s sense of responsibility as commander in chief (see above) and also his understanding that targeted killing imposed the greatest deprivation of right imaginable—the right to life—and thus required the highest level of care. To be clear, the argument is not that Obama’s personal involvement justified what is, at minimum, an extraordinarily controversial program.¹⁶⁷ Rather, *if* such a program is morally and legally justifiable, the President’s personal involvement plays an important role in that justification.

5. Inclusiveness

The President plays three distinct roles: (1) head of party; (2) head of government; and (3) head of state. In all three roles, the virtue of inclusiveness—of trying to act on behalf of the public and for the public good—is important. As head of party, the President must ensure that, while the party represents a distinct set of ideological and policy positions, it does not veer off into partisan extremism. As head of government, the President must ensure that the government acts for the benefit of all. As head of state, the President, more than any other person, represents the nation, both abroad and also to itself, as a political and social unity. As William Galston notes, “liberal leaders must have the capacity to forge a sense of common purpose against the centrifugal tendencies of an individualistic and fragmented society.”¹⁶⁸

Of all the executive virtues, inclusiveness may be the one most tied to public rhetoric. Consider, for example, George W. Bush’s public statements, made several times in the wake of the September 11, 2001 attacks, amid an increase in anti-Muslim hate crimes, emphasizing that neither Islam nor American Muslims were to blame for 9/11 or were the enemy in America’s

166. Jo Becker & Scott Shane, *Secret “Kill List” Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [<https://perma.cc/3QTZ-LZHD>].

167. See generally Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145 (2010) (discussing whether targeted killings are morally justified under peacetime or wartime paradigms).

168. GALSTON, *supra* note 98, at 226.

military and counterterrorism responses.¹⁶⁹ Or when Barack Obama (then a state senator from Illinois) famously declared at the 2004 Democratic national convention that “there is not a liberal America and a conservative America—there is the United States of America.”¹⁷⁰ The *West Wing* screenwriter Aaron Sorkin nicely expressed this virtue when the fictional President Bartlett, speaking during a presidential debate, curtly remarked, “I’m the president of the United States, not the president of the people who agree with me. And by the way, if the Left has a problem with that, they should vote for somebody else.”¹⁷¹

6. Judgment

From Aristotle onwards, theorists of human virtue have recognized the need for another virtue, a kind of meta-virtue, that would help with the problem of actualizing the virtues in real-world practice. This meta-virtue—which Aristotle called *phronesis* and which is often translated as “judgment,” “prudence,” or “practical wisdom”¹⁷²—has several components that are particularly important for a virtuous President.

The first is the ability to act virtuously in the absence of bright-line rules. The issues facing a President are both too important and too varied to be fully encompassed by clear *ex ante* rules. A President who refuses to recognize the need to exercise judgment will make poor decisions and be tempted to deflect responsibility onto legalistic and bureaucratic structures, thereby undermining their sense of responsibility. More generally, a President who lacks “integrative complexity”—the ability to “synthesize opposing viewpoints” and “maintain a high acceptance of uncertainty”—will fall into “black-or-white’ thinking” and “all-or-nothing judgments.”¹⁷³

169. See *Backgrounder: The President’s Quotes on Islam*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH, <https://georgewbush-whitehouse.archives.gov/infocus/ramadan/islam.html> [<https://perma.cc/TU29-LMFG>].

170. *Barack Obama’s Remarks to the Democratic National Convention*, N.Y. TIMES (July 27, 2004), <https://www.nytimes.com/2004/07/27/politics/campaign/barack-obamas-remarks-to-the-democratic-national.html> [<https://perma.cc/2EGT-6ZVU>].

171. THOMAS FAHY, *CONSIDERING AARON SORKIN* 170 (2005).

172. ARISTOTLE, *supra* note 163, at 152, 153 n.19.

173. Felix J. Thoemmes & Lucian Gideon Conway III, *Integrative Complexity of 41 U.S. Presidents*, 28 POL. PSYCH. 193, 195 (2007).

A second important element of presidential judgment is the ability to balance competing virtues. The executive virtues are not a unity, at least not in any straightforward way. To act with loyalty to the Constitution may sometimes require lying; treating certain people unjustly and violating their rights; or violating one's loyalty to friends, allies, or subordinates. But sometimes this is just a matter of making marginal tradeoffs, in which case good judgment requires that no value be fetishized and pursued with such single-minded devotion that it crowds out competing considerations.

In other, more extreme, cases, judgment requires "dirty hands"¹⁷⁴ and thus another virtue, that of "toughness."¹⁷⁵ Short of dirty hands is the increasingly common need for a President to sometimes play "constitutional anti-hardball": temporarily violating constitutional norms in order to credibly "bring both sides to the negotiating table or as a means to push through a depoliticizing reform."¹⁷⁶

C. OBJECTIONS

Here I want to address three big-picture objections to the virtue-based approach to Article II: that it (1) is hopelessly subjective and subject to special pleading by partisans; (2) provides insufficient guidance for executive action; and (3) is dangerously destabilizing to the constitutional order. These are substantial objections, but I believe that the virtue account has responses to all of them, at least to the point of demonstrating why a theory of Article II that ignores executive virtue would be even worse.

1. Lack of Neutral Principles

One worry about the virtue approach is that it cannot provide what the postwar legal scholar Herbert Wechsler called "neutral principles" for responsible constitutional analysis.¹⁷⁷ As Stephen Vladeck has observed, "[t]he harder question is . . . not whether . . . judicial skepticism of government conduct is *ever*

174. See Walzer, *supra* note 109 and accompanying text.

175. See William Galston, *Toughness as a Political Virtue*, 17 SOC. THEORY & PRAC. 175, 184 (1991).

176. David E. Pozen, *Hardball and/as Anti-Hardball*, N.Y.U. J. LEGIS. & PUB. POL'Y 949, 955 (2019).

177. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959).

appropriate, but rather whether those with different political views can nevertheless agree on objective criteria to govern the cases in which skepticism is warranted, and those in which it isn't."¹⁷⁸

One version of the neutral-principles approach requires the constitutional analyst to disregard the President's personal qualities when evaluating the legality of presidential action. But as Sanford Levinson and Mark Graber argue, this is an overly narrow understanding of what makes a principle neutral.¹⁷⁹ Just as neutral principles did not support Wechsler's infamous critique of *Brown v. Board of Education* on the grounds that it failed to respect the association rights of southern whites,¹⁸⁰ nor do they require "blithely abstract[ing] from the occupant of the White House."¹⁸¹ The neutral principle of Article II is simple: "anti-Publican" Presidents—those who are "manifestly unfit to exercise the longstanding powers of the presidency"—should enjoy less executive power than their more "Publican" counterparts.¹⁸² The point of developing a rich account of presidential character is to provide a way for good-faith constitutional analysts to debate the finer point of executive power with a shared vocabulary and set of normative commitments (e.g., loyalty, honesty) in the executive.

One might nevertheless worry that, although a virtue theory of Article II could be neutral in theory, it cannot be neutral in practice. After all, what is to prevent virtue discourse from degenerating into special pleading, with partisans of different administrations reflexively claiming that their President is always virtuous—or, especially in an age of negative polarization, that Presidents of the opposing party are always vicious? Indeed, the dominant narrative during the 2016 presidential election on both sides was that the other party's nominee was uniquely unvirtuous.¹⁸³

178. Stephen I. Vladeck, *The Aggressive Virtues*, 93 N.Y.U. L. REV. ONLINE 66, 67 (2018).

179. Levinson & Graber, *supra* note 3, at 138.

180. Wechsler, *supra* note 177, at 33–34; *Brown v. Bd. of Educ.*, 347 US. 483 (1954).

181. Levinson & Graber, *supra* note 3, at 138.

182. *Id.*

183. See Thomas E. Patterson, *News Coverage of the 2016 General Election: How the Press Failed the Voters*, HARV. KENNEDY SCH. SHORENSTEIN CTR. ON

People who care about virtue when their party is out of power may also not care about virtue when their political fortunes improve, and vice versa. A notable recent public example is William Bennett, who served as Secretary of Education under Ronald Reagan and wrote the bestselling *Book of Virtues* in the early 1990s¹⁸⁴ (along with a high-profile attack on Bill Clinton's character¹⁸⁵), only to support Donald Trump's 2016 presidential bid despite recognizing Trump's many character defects.¹⁸⁶ On the other side of the political spectrum, many prominent feminists supported Bill Clinton despite the many credible allegations of sexual misconduct against him.¹⁸⁷

But the difficulties in reaching consensus about presidential character traits, while substantial, should not be exaggerated. It is true that individual analysts can come to idiosyncratic conclusions,¹⁸⁸ and even consensus judgments of professional evaluators will inevitably spur controversy, especially when the evaluations are of contemporary political figures.¹⁸⁹ But this does not

MEDIA, POL. & PUB. POL'Y (Dec. 7, 2016), <https://shorensteincenter.org/news-coverage-2016-general-election> [<https://perma.cc/V6EN-ZGVH>] (“[B]oth Hillary Clinton and Donald Trump received coverage that was overwhelmingly negative in tone and extremely light on policy.”).

184. WILLIAM J. BENNETT, *THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES* (1993).

185. WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* 38 (1998) (“A president whose character manifests itself in patterns of reckless personal conduct, deceit, abuse of power, and contempt for the rule of law cannot be a good president.”).

186. See, e.g., Jonah Goldberg, *In a Slow-Motion Invasion of the Body Snatchers, Media Figures Embrace Trump One by One*, NAT'L REV. (Mar. 12, 2016), <https://www.nationalreview.com/g-file/donald-trump-media-supporters-principles-conservatism> [<https://perma.cc/A8M5-7K2T>].

187. See Elizabeth Rapaport, *Sex and Politics at the Close of the Twentieth Century: A Feminist Looks Back at the Clinton Impeachment and the Thomas Confirmation Hearings*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 23–24 (Leonard V. Kaplan & Beverly I. Moran eds., 2001) (noting that Susan Estrich, Gloria Steinem, and Patricia Ireland all provided at least a qualified defense of President Clinton).

188. For example, James Barber, who pioneered the study of presidential personality, see *supra* note 9, was criticized for his idiosyncratic typology, though his work remains deeply influential. See Lyons, *supra* note 9, at 791, 793.

189. See, e.g., Jeannie Suk Gersen, *Will Trump Be the Death of the Goldwater Rule?*, NEW YORKER (Aug. 23, 2017), <https://www.newyorker.com/news/news-desk/will-trump-be-the-death-of-the-goldwater-rule> [<https://perma.cc/3L3U-XXEM>].

mean that the consensus is incorrect,¹⁹⁰ or that individual analysts can't use rigorous methodologies¹⁹¹ and established measurement instruments.¹⁹² Ultimately, the question is not whether we can perfectly measure presidential character, let alone predict future behavior, but whether this information provides a useful input to our decision-making.

In addition, the character approach is no more vulnerable to special pleading than are other normatively charged concepts like equality or justice. The goal of constitutional theory in general is to avoid the "anti-modality" of constitutional partisanship without being blind to the on-the-ground realities—in the case of executive power, of presidential character.¹⁹³

In this enterprise, legal scholars play an important role: speaking publicly on matters of the day, they often band together to write letters and issue statements that purport to speak for the field at large, or at least a substantial portion of it.¹⁹⁴ More importantly, albeit more indirectly, through their teaching they shape the substantive views of the next generation of lawyers.¹⁹⁵ In both of these capacities, legal scholars have a responsibility to stand up for the executive virtues and call out instances of their violation, irrespective of the politics of the executive in question.

The evenhanded application of these standards may require extra care, given the left-leaning tilt of legal academia and the potentially distorting effects of partisanship and ideological

190. Recent analyses of presidential character have paid special attention to methodological considerations so as to increase the rigor of the analysis. *See, e.g.*, RUBENZER & FASCHINGBAUER, *supra* note 9, at 4–7.

191. *See, e.g.*, Jonathan Renshon, *Stability and Change in Belief Systems: The Operational Code of George W. Bush*, 52 J. CONFLICT RESOL. 820, 832–33 (2008) (using operational code to analyze presidential speech); Margaret G. Hermann, *Assessing Leadership Style*, in THE PSYCHOLOGICAL ASSESSMENT OF POLITICAL LEADERS 178, 208–11 (Jerrold M. Post ed., 2003) (describing the method of constructing a presidential profile).

192. *See, e.g.*, Lyons, *supra* note 9, at 793.

193. *See* Pozen & Samaha, *supra* note 90, at 753–56.

194. For a criticism of this practice in the context of the Clinton impeachment, see Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999).

195. *See* Siegel, *supra* note 21, at 117 (“[L]aw professors might consider operating within a relatively long time horizon and developing ways to instruct their students—in their capacities as future politicians, not just future judges—that a role morality applies to their conduct.”).

uniformity.¹⁹⁶ During the Trump presidency, legal scholars (myself included) were outspoken, and I believe properly so, in their criticisms of Trump's unvirtuous behavior.¹⁹⁷ But Trump's critics, coming largely as they did (again, myself included) from the center and left of the ideological and political spectrum, benefited rather than suffered, professionally and psychologically (in the sense of having to criticize their own team), for their criticisms. For the vast majority of law professors, the real test of their commitment to rule-of-law norms will be when those norms are threatened from the left, not the right.¹⁹⁸

2. Insufficient Guidance

A practical worry about the character approach to executive power is that it cannot generate sufficiently clear guidance to the President or to other government actors that provide oversight. Because virtuous action is a complex interplay of internal motivation and situational context, and often requires the balancing of competing virtues, there is no straightforward way to liquidate a virtue theory into a set of simple decision rules.¹⁹⁹

There are several responses to this objection. The first is that a virtue-based approach does not seek to displace agent-neutral rules where such rules have proven workable—that is, where the administrability benefits of rules are not outweighed by the greater sensitivity of standards.²⁰⁰ Whether because of the clarity or the constitutional or statutory text, or because of unbroken historical practice, the legal status of the vast majority of presidential action—certainly of the normal day-to-day activities of the Presidency—is settled and can be operationalized

196. See Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1, 3 (2018) (finding that 15% of law professors are conservative, and only 32% of law professors are moderately liberal or moderately conservative).

197. Indeed, an entire blog, with leading law professors as contributors, was devoted to covering Trump and his administration's many legal and ethical failings. See TAKE CARE, <https://takecareblog.com> [<https://perma.cc/ANQ8-M3TH>].

198. See *supra* notes 31–33 and accompanying text (“Executive character vices exist in high-profile politicians of all political stripes.”).

199. See, e.g., David Solomon, *Internal Objections to Virtue Ethics*, 13 MIDWEST STUD. PHIL. 428, 432 (1988) (developing the objection that virtue ethics “lack[] the capacity to yield suitably determinate action guides”).

200. Cf. Coenen, *supra* note 36, at 374–75 (discussing the “rules/standards” tradeoff). See the discussion below of prophylactic rules against unvirtuous action, *infra* Part III.B.2.

through clear rules. In these situations, the motivations, and thus character traits, of the President are irrelevant. Put more generally, a virtue theory seeks to supplement, rather than replace, the existing rules of executive power, at least where those rules have proven unproblematic.

A second response is to emphasize that virtue concepts can provide more guidance than is commonly assumed. Virtues like loyalty or honesty have two important features that make them good at guiding action: they are everyday concepts that we are all familiar with, and they are “thick” concepts in the sense that they combine evaluation—honesty is good, dishonesty is bad—with descriptions, often quite detailed, of what actions and dispositions are required by the virtue.²⁰¹ It is easy to identify examples of honesty, or of honest exemplars, and this goes a long way to providing actionable guidance.²⁰²

Third, although it is true that in hard cases, a virtue-based approach will often lack precise answers, this does not necessarily make it worse than competing approaches. Legal analysis of difficult Article II problems is already suffused with standards, and there is little reason to think that executive power can be “rulified” under any conceptual framework. Consider, for example, the difficulties that the Office of Legal Counsel (OLC) faced in developing a framework for analyzing the Obama administration’s various deferred action immigration policies: “[t]he open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is ‘faithful’ to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules.”²⁰³ And the principles that OLC was able to derive were all inevitably tied to presidential judgments that required the virtues of loyalty, responsibility, and so on.²⁰⁴ Judgments about Article II power

201. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 129 (1985) (noting that “thick” concepts “express a union of fact and value”).

202. See ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 58–59 (1999) (arguing that a common understanding of the qualities of an honest person involves specific details to direct ethical action).

203. See, e.g., *Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the U.S.*, 38 Op. O.L.C. 39, 45 (2014) [hereinafter OLC DACA Memo].

204. Another example from OLC is its opinion holding that “the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with

already implicitly touch on considerations of executive virtues; it's just a matter of whether or not that analysis is explicit or not.

More generally, the precision of existing constitutional concepts should not be overstated. As Mitch Berman has argued, the rules of constitutional law—norms that are “sufficiently determinate to adequately serve the system’s core conduct-guidance function”—stem from more abstract principles, which “do not purport to determine action but rather have . . . a dimension of weight” and that “may ‘bear on’ the proper legal characterization or treatment of a dispute without purporting to deliver decisive resolution.”²⁰⁵ Just as these principles—fidelity to text, commitment to stare decisis, respect for popular sovereignty and individual rights, to name a few²⁰⁶—are foundational in constitutional law writ large, so are the executive virtues foundational to the constitutional law of executive power.

3. Excessive Constitutional Stakes

A final worry about the virtue-based approach is that it raises the constitutional stakes too high. Democracy is society’s most important “infinite game”: one whose purpose is not winning but “continuing the play.”²⁰⁷ Getting to play the next round requires securing consent from this round’s losers. If the losing coalition does not feel that the electoral outcome was legitimate, it may decide to reject the system outright, leading to instability and, in extreme cases, collapse. A virtue theory of Article II might contribute to this instability by giving opponents of an administration a language with which to not simply oppose an administration’s actions, but to argue that, because of the personal qualities of the President, the entire administration is illegitimate.

This is a serious concern and, based as it is in the unpredictable nature of politics, it cannot be conclusively addressed. But the danger of overemphasizing executive virtue must be compared to the alternative: *under*-reaction to a constitutional threat. Normalization is a way in which even those who oppose

him, the President has the authority to decline to execute the statute.” Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994).

205. Berman, *supra* note 31, at 1330.

206. *Id.* at 1386–90.

207. JAMES P. CARSE, FINITE AND INFINITE GAMES 3 (1986).

authoritarianism can unknowingly enable it. For example, in Trump's case, extreme popular resistance was not required because his attempts to undermine the results of the 2020 election were unsuccessful. But had the election come down to one or two states, and had Trump managed to pressure state officials in those two states to overrule the will of the voters, mass mobilization against the regime would have been necessary to preserve American democracy. And thus, a language for articulating why the regime was not simply acting unconstitutionally but was thoroughly illegitimate would have been important to have.

III. REALIZING THE EXECUTIVE VIRTUES

So far I have argued that certain character traits are necessary for the proper functioning of the presidency. In this Part, I explore how different actors throughout our constitutional system—the courts, Congress, other members of the executive branch, political parties, and the public itself—can help realize the promise of executive virtue in three ways: by responding to virtue violations, encouraging virtuous decision-making, and increasing the chances that a virtuous President will be elected in the first place.

As I discuss in the next Section, I foresee a limited role for courts, at least when it comes to policing executive virtue violations. This raises the question as to what sort of obligations the executive virtues impose on the President—specifically, are they “just norms” or are they fully-fledged legal requirements?²⁰⁸ For example, Neil Siegel, in advocating for a “constitutional role morality” for elected officials, suggests that such a morality “can be thought of as occupying normative territory at the border between law and politics as conventionally conceived—that is, between a realm of ‘hard’ restraints on the exercise of discretion by elected officials, and a realm of unlimited discretion by such officials.”²⁰⁹ On this view, “[o]fficial conduct that disregards role restraints is *anticonstitutional*, even if it is not *unconstitutional*, meaning that such conduct is contrary to the spirit or purposes of the Constitution.”²¹⁰

208. The distinction between norms and law looms large in recent discussions of executive power. See, e.g., Renan, *supra* note 18; Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703 (2021).

209. Siegel, *supra* note 21, at 116.

210. *Id.*

Siegel is certainly correct that *some* questions regarding presidential character are a matter of unenforceable, nonlegal norms. But there is a category of justiciable issues—admittedly small, but nevertheless important—in which presidential character should play an explicit role. And even for non-justiciable issues, it is incorrect to say that considerations of character are always matter of norms and not constitutional law. Rather, they fall under what Lawrence Sager famously characterized as “underenforced [legal] norms”: situations in which courts, for various institutional reasons, fail to fully enforce constitutional requirements that are nevertheless “valid to their conceptual limit.”²¹¹

As Berman notes, “given the singular role that the Constitution plays in our political culture, collective interest in constitutional meaning is not limited to predictions about the outcome of litigation,” and so “we might find our political culture enriched by being able to contemplate constitutional operative propositions alone, divorced from the constitutional decision rules which are designed solely to govern litigation.”²¹² As I demonstrate in the following Sections, especially where the courts will not act, Congress, the executive branch, and the public itself have an important role to play in furthering executive virtue as a matter of binding law.

A. RESPONDING TO VIRTUE VIOLATIONS

1. Judicial Oversight

a. The Presumption of Regularity

Given the importance of the executive virtues, it would be natural to look to the courts to respond to virtue violations. Yet there are good reasons for courts to be cautious when considering questions of executive virtue. As an example, consider the

211. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978). I have modified Sager’s original formulation—“underenforced norms”—because Sager uses “norms” in a different way than the contemporary “law versus norms” distinction. For Sager, legal requirements are a kind of norm; thus, when he describes certain constitutional requirements as “underenforced norms,” he is not implying that they are any less legally binding for being nonjusticiable. *Id.*

212. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 2, 15–16 (2004).

hypothetical, raised by Benjamin Wittes and Quinta Jurecic, of what to do with a President who is psychologically incapable of “solemnly” swearing to a “commitment that involves the centrality of anyone or anything other than himself.”²¹³ On a straightforward textual reading of Article II, a President who did not satisfy the constitutionally prescribed age or nationality requirements would hold office unlawfully; presumably, then, a President whose character deficiencies were so great as to prevent them from satisfying the Oath Clause would also hold office unlawfully.

If the notion that the judiciary would even entertain such an argument seems absurd, that’s because it almost certainly is. But it’s important to unpack what lies behind that strong intuition. As Wittes and Jurecic note,

[I]t is quite improper for the judiciary to look behind a person’s formal compliance with Article II, Section I, Clause 8—any more than the courts have mechanisms to verify that the content of a State of the Union address really meets the requirements of Article II, Section 3. It’s the very definition of a political question.²¹⁴

This is undoubtedly true—an across-the-board judicial rejection of presidential authority would not only throw the country into crisis but also lead to a constitutional standoff, one in which the judiciary, which has “no influence over either the sword or the purse” and “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments,” would likely lose.²¹⁵

Doctrinally, this underenforcement of executive virtue is reflected in the presumption of regularity, under which courts assume, absent clear evidence to the contrary, that executive branch officials “have properly discharged their official duties,”²¹⁶ both in terms of the procedures they have followed and

213. Benjamin Wittes & Quinta Jurecic, *What Happens When We Don’t Believe the President’s Oath*, LAWFARE (Mar. 3, 2017), <https://www.lawfaremedia.org/article/what-happens-when-we-dont-believe-presidents-oath> [<https://perma.cc/H9LA-D87Q>].

214. *Id.*

215. THE FEDERALIST NO. 78, *supra* note 63, at 465 (Alexander Hamilton).

216. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 15 (1926); see generally Aram A. Gavoor & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 FLA. L. REV. 729 (2022) (arguing for a uniform and historically grounded presumption of regularity).

the motivations that have led to their action.²¹⁷ This presumption is one of many ubiquitous “constitutional decision rules”: “doctrines that direct courts how to decide whether a constitutional operative provision”—that is, “the judiciary’s understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision”—“is satisfied.”²¹⁸

But although the presumption of regularity means that courts will generally not directly address questions of executive virtue, this is not because presidential virtue is unimportant; on the contrary, it is presidential virtue’s very centrality that illuminates the presumption of regularity and helps give it force.

First, as a practical matter, the presumption helps avoid drowning the courts in time-consuming litigation about the President’s dispositions and motivations.²¹⁹ Virtue inquiries are resource-intensive for two reasons. The range of evidence that is potentially relevant to virtue evaluations is broad, including not only official acts but also unofficial statements and biographical details. Motives and dispositions are always in principle relevant to evaluations of executive action.²²⁰ It may seem odd, perverse even, for deference doctrine to be justified by “a fear of too much justice,”²²¹ but questions of judicial capacity play a major, if often underappreciated, role in judicial decision-making.²²²

Second, the presumption helps preserve executive discretion by limiting when and how courts can interfere with executive decision-making. This is in part justified on separation of powers

217. See Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2432–33 (2018) (“Whether and to what extent the Court is willing to presume procedural or motivational regularity in a given context depends on the Court’s assessment of the relevant decision-making scheme across several dimensions . . .”).

218. Berman, *supra* note 212, at 9.

219. See, e.g., Bernick, *supra* note 17, at 62–63 (discussing the decision costs of judicial investigation into Presidents’ public statements).

220. See *supra* Part I.A.

221. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (criticizing the majority’s rejection of a death row inmate’s statistical evidence of racially disproportionate capital sentences on the grounds that such evidence “throws into serious question the principles that underlie our entire criminal justice system,” *id.* at 315 (majority opinion)).

222. See generally ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019) (proposing a model of judicial capacity to explain the volume of litigation before the Court, the Court’s rulings in major Constitutional issues, and the Court’s deference to other government actors).

grounds²²³ and on the recognition that the “optimal” level of abuse of power is nonzero,²²⁴ but it can also be justified as supporting the virtue of responsibility. Oversight can encourage virtuous behavior, but it can also create moral hazard if the overseen actor feels that the ultimate decision will be made by another. This applies to judicial oversight of legislatures²²⁵ and lower courts,²²⁶ and might similarly apply to judicial oversight of the executive branch. “The buck stops here” lacks its psychological punch when it’s followed by “on its way to the courts.”

Third, judicial forbearance from questioning the President’s character helps protect the courts’ legitimacy within our broader democratic system. In this regard, the presumption of regularity serves many of the same institutional functions as the political question doctrine, at least in its “prudential” version.²²⁷ For example, judicial invalidations of executive action on the ground of insufficient character are a particularly stinging form of judicial oversight. It is one thing to disagree with the President’s legal

223. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–90 (1999) (recognizing that “the decision to prosecute is particularly ill-suited to judicial review” because the executive branch’s values and plans “are not readily susceptible to the kind of analysis the courts are competent to undertake” (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))).

224. See Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 676 (2015) (“In the administrative state, abuse of power is not something to be minimized, but rather optimized. An administrative regime will tolerate a predictable level of abuse of power as part of an optimal package solution—as the inevitable byproduct of attaining other ends that are desirable overall.”).

225. See Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1561 (2002) (“[I]f judicial review is a constitutional insurance policy against erroneous legislative determinations, it may dilute rather than strengthen legislators’ incentives to take precautions against erroneous enactment of unconstitutional statutes.”).

226. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963) (“I could imagine nothing more subversive of a judge’s sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.”).

227. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 183–97 (1962) (discussing the Supreme Court’s use of the political question doctrine to avoid declaring its ultimate constitutional judgment); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253 (2002) (“[T]he prudential political question doctrine is . . . a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches.”).

judgment or factual conclusions; it is another to accuse, even implicitly, a government official, especially the President, of being unvirtuous. Thus, criticisms on the basis of a lack of virtue run the risk of “expressing lack of the respect due coordinate branches”²²⁸—a lack of respect for the President, for sure, but also for the President’s supporters in Congress.

Virtue judgments put the courts in conflict not only with the political branches but with the public as well, exacerbating the countermajoritarian tendencies of judicial review. Presidential elections ask voters to decide a variety of important issues regarding presidential character, from which character traits are and are not desirable to what the optimal mix is to whether a particular candidate’s virtues outweigh their vices. When courts strike down executive action on virtue grounds, they are implicitly rebuking the voters’ character judgments.

Finally, the presumption of regularity buttresses a particular conception of judicial professional standards by helping courts avoid being perceived as engaging in “anti-modalities” of legal reasoning: in particular, “fundamentalist” arguments based on comprehensive moral theories, partisan arguments based on political approval or disapproval of the current President, and emotional arguments based on the anger and disgust that moral violations provoke.²²⁹ In other words, the presumption keeps courts from opening themselves up to charges of special pleading, which, as noted above, are an ever-present, if surmountable, danger.²³⁰

Given these justifications for the presumption of regularity, it is unsurprising that criticisms of presidential character are very rarely the explicit basis for a judicial decision. But this does not mean that their role is insignificant. As Pozen and Samaha note, the very reason that a form of judicial reasoning is characterized as an “anti-modality” is because it is so tempting for courts to engage in.²³¹ And not just courts—it is a characteristic

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

229. See Pozen & Samaha, *supra* note 90, at 750–60 (describing typical features of fundamentalist, partisan, and emotional anti-modalities).

230. See *supra* Part II.C.1.

231. See Pozen & Samaha, *supra* note 90, at 740 (“Anti-modalities draw on sources of decisional guidance that are normatively or psychologically plausible but that are forbidden nonetheless . . . [T]heir popularity and familiarity may put pressure on any commitment to ensure that legal decision-making remains a distinctive enterprise.”).

feature of the anti-modalities that they are precisely those “considerations that people tend to prioritize in making normative and prescriptive judgments are banished to the realm of the political.”²³²

But judges (like celebrities) are just like us. They read the news and have opinions about the nation’s leaders. It would be surprising if judges were able to resist “the temptation to smuggle in one or more anti-modalities”²³³ and entirely exclude their perceptions of the President’s character traits from their “situation sense”: the “specialized form of cognitive perception . . . that reliably focuses their attention on the features of a case pertinent to its valid resolution.”²³⁴

Unfortunately and frustratingly, in many cases we can only speculate as to how these opinions shape judicial decision-making.²³⁵ One might hypothesize that the unanimous Supreme Court decision against Richard Nixon’s claims of executive privilege during Watergate were influenced by the Justices’ personal feelings regarding Nixon.²³⁶ More recently, Richard Pildes has argued that the Supreme Court’s pushback against the Bush administration’s expansive claims of executive power in the Guantánamo Bay cases was partly due to the “the overall tenor of the administration’s conception of presidential powers as a whole: to *this* particular presidency, rather than to the presidency as a

232. *Id.* at 732.

233. *Id.*

234. Dan M. Kahan et al., “Ideology” or “Situation Sense”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 355 (2016) (citing KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 59–61, 121–57, 206–08 (1960)).

235. There is a growing empirical literature about judicial partisanship. *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016); Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505 (2012). But it is unclear how one could measure whether, even in the case of a nakedly partisan judge, whether that judge’s rulings were motivated by a negative virtue assessment of the President rather than some other factor.

236. *See* United States v. Nixon, 418 U.S. 683 (1974); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 290 (1979) (“Brennan knew that he could count on Douglas and Marshall. Douglas was eager to come to grips with his long-time antagonist. He regarded Richard Nixon as morally, intellectually and in every other way unfit to be President. Marshall was no less hostile. They might well be joined by Stewart. His skepticism about a President run amok had grown steadily.”).

formal institution.”²³⁷ And many commentators—both in praise²³⁸ and criticism²³⁹—have noted the unusual pushback that the Trump administration received from the federal courts, at least initially. But in all these cases, one has to aggressively read between the lines to glean the impact of these considerations, making a systematic analysis and normative evaluation of their role in the doctrine difficult.

b. Overcoming the Presumption: Trump v. Hawaii

A notable exception, however, and one that shows how courts can explicitly and legitimately take questions of presidential character into account, is the litigation around the Trump administration’s travel bans that predominantly targeted Muslim-majority countries.²⁴⁰ Although the Supreme Court ultimately upheld the bans, it did so not because it viewed Trump’s motivations as irrelevant, but rather because of the heightened judicial deference it felt it owed to the executive on matters of national security.²⁴¹ Despite the strong dissents that the Chief Justice’s opinion provoked, a close reading of the cases shows a surprising amount of common ground among the Justices on the

237. See Pildes, *supra* note 5, at 18.

238. For a sample of commentators praising judicial pushback against the Trump administration, see Nancy Gertner, *The “Lower” Federal Courts: Judging in a Time of Trump*, 93 IND. L. REV. 83 (2018); Dawn Johnsen, *Judicial Deference to President Trump*, TAKE CARE (May 8, 2017), <https://takecareblog.com/blog/judicial-deference-to-president-trump> [<https://perma.cc/YC6A-2Z9A>]; Benjamin Wittes & Quinta Jurecic, *The Revolt of the Judges: What Happens When the Judiciary Doesn’t Trust the President’s Oath*, LAWFARE (Mar. 16, 2017), <https://www.lawfaremedia.org/article/revolt-judges-what-happens-when-judiciary-doesnt-trust-presidents-oath> [<https://perma.cc/SA5U-U8JG>]; Leah Litman, Helen Klein Murillo & Steve Vladeck, *The Rule of Law and the Resistance Police*, TAKE CARE (June 1, 2017), <https://takecareblog.com/blog/the-rule-of-law-and-the-resistance-police> [<https://perma.cc/J2WU-SFFY>].

239. For examples of commentators reacting unfavorably to this judicial pushback, see Josh Blackman, *The Legal Resistance*, 9 FAULKNER L. REV. 45 (2017); Ilya Shapiro, *Courts Shouldn’t Join the #Resistance*, CATO INST.: CATO AT LIBERTY (May 29, 2017), <https://www.cato.org/blog/courts-shouldnt-join-resistance> [<https://perma.cc/CY5T-Z3SS>].

240. See Shaw, *supra* note 32, at 1392–93 (noting that the travel bans “provide the clearest illustration” of the issues surrounding executive intent).

241. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2422 (2018) (“[T]he Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving ‘sensitive and weighty interests of national security and foreign affairs.’” (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–34 (2010))).

relevance, at least in principle, of presidential character to evaluations of presidential action.

Shortly after assuming office in January 2017, and following almost no interagency deliberation, the Trump administration issued Executive Order 13769 (the first travel ban), which blocked entry of people from seven Muslim-majority countries.²⁴² This executive order was replaced in March 2017 (the second travel ban), which removed Iraq from the list of banned countries and made some additional changes but continued to ban travel from the remaining six countries.²⁴³

In September 2017, Trump, through Presidential Proclamation 9645 (the third travel ban), made several substantial changes to the travel restrictions.²⁴⁴ These included changing the list of countries affected and including several that were not Muslim-majority: North Korea and Venezuela.²⁴⁵ In addition, the rationale for the travel restrictions changed to emphasize that countries on the travel ban did not share sufficient information with the United States to enable the proper vetting of their nationals.²⁴⁶ Indeed, Chad, one of the Muslim-majority nations added to the third travel ban, was removed from the ban after it improved its information sharing and collection.²⁴⁷ Viewed in isolation, the third travel ban was plausibly a defensible and non-discriminatory application of the President's broad discretionary authority to restrict foreign entry into the United States for national security purposes.²⁴⁸

But the central question in *Trump v. Hawaii*, in which the Supreme Court upheld the third travel ban, was whether it *could*

242. *Id.* at 2403.

243. *See* Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

244. *Trump v. Hawaii*, 138 S. Ct. at 2404.

245. *Id.* at 2405.

246. *Id.* (describing the Acting Secretary of Homeland Security's finding that several countries "remained deficient in terms of their risk profile and willingness to provide requested information.").

247. The Supreme Court cited this as evidence that the third travel ban was not intended to discriminate against Muslims. *See Trump v. Hawaii*, 138 S. Ct. at 2422.

248. *See* Stewart Baker, *The Hidden Cost of Undoing the Travel Ban*, LAWFARE (Feb. 4, 2021), <https://www.lawfaremedia.org/article/hidden-cost-undoing-travel-ban> [<https://perma.cc/EAJ3-ZH2Z>] ("Under pressure from the courts and the press, the leadership of the Department of Homeland Security had reshaped Trump's order into a calibrated security tool that depended not at all on the majority religion of the countries it affected.").

be viewed in isolation, or whether the President's prior actions—the first two bans and Trump's repeated statements attacking Muslims—should have rendered the third travel ban invalid.²⁴⁹ The virtue-based approach helps articulate precisely in what ways Trump's motivations were relevant to the constitutionality of the third travel ban and why the Court erred in disregarding them. First, Trump's motivations were relevant—on both instrumental and intrinsic grounds—to answering the question of whether the travel ban was an appropriate use of the enormous discretion that the law gives to the President to make immigration decisions that implicate national security and the public interest. Second, Trump's *publicly expressed* motivations were relevant to the expressive harms that the travel ban created, even if its substantive provisions were otherwise defensible.

The majority refused to inquire into Trump's motivations because it held that the proper standard of review to apply was rational basis review.²⁵⁰ Although the Court could “look behind” the “facial neutrality” of the travel ban, it would “uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”²⁵¹ But, critically, the majority's reason for adopting rational basis review was not that such a deferential standard was appropriate for all executive actions. Rather, the majority applied rational basis review because, in its view, issues implicating national security concerns required a “highly constrained” role for courts.²⁵²

Indeed, rational basis review—particularly the willingness of courts to impute legitimate justifications for government action—is a poor fit for judicial review of executive action precisely because presidential dispositions underlie presidential actions. The fact of a single executive means that the “collective judgment rationale” for rational basis review of legislation—by which the sheer number of actors involved in passing legislation, along with the many procedural hurdles of (frequently supermajoritarian) bicameralism and presentment, suggests the high

249. See *Trump v. Hawaii*, 138 S. Ct. at 2418 (“[T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”).

250. *Id.* at 2420.

251. *Id.*

252. *Id.*

probability of a rational basis for government action²⁵³—does not apply to executive action. As David Driesen observes, since “[t]he President is a single person, . . . his decisions may reflect his own predilections.”²⁵⁴

Applying rational basis review also foreclosed considering the expressive effects of the President’s many anti-Muslim statements, noting that “the issue before us is not whether to denounce [Trump’s] statements” and that “we must consider not only the statements of a particular President, but also the authority of the Presidency itself.”²⁵⁵ But again, the Court’s reluctance to consider the public expressions of motive should be viewed as stemming from its application of a strong deference doctrine to national security issues, not an across-the-board refusal to consider motives.

Evidence for this nuanced position comes from a remarkable passage in which the majority all but concedes the harms of Trump’s rhetoric. After spending three paragraphs listing the many anti-Muslim statements Trump made, including tweets to “anti-Muslim propaganda videos,”²⁵⁶ the majority drew a sharp contrast to a proud (albeit imperfect) presidential tradition of publicly expressing religious tolerance:

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that “happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.” President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that “America would fight with her whole strength for your right to have here your own church,” declaring that “[t]his concept is indeed a part

253. See David M. Driesen, *Judicial Review of Executive Orders’ Rationality*, 98 B.U. L. REV. 1013, 1028–29 (2018) (“This ensures that people from various regions of the country with differing outlooks support the legislation. Plausible rationales will likely exist for all legislation adopted by such a large group of diverse representatives.”).

254. *Id.* at 1047; see also Manheim & Watts, *supra* note 4, at 1812 (“By contrast, when the president issues a presidential order . . . he often can do so without adhering to any cumbersome procedural formalities, even though he is essentially filling Congress’s shoes and carrying out a lawmaking-like role . . .”).

255. *Trump v. Hawaii*, 138 S. Ct. at 2418.

256. *Id.* at 2417.

of America.” And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that “[t]he face of terror is not the true faith of Islam,” and that America is “a great country because we share the same values of respect and dignity and human worth.” Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.²⁵⁷

Had the majority meant to entirely foreclose considerations of the expressive effects of presidential character, it would not have issued such a clear rebuke of the President’s rhetoric. On this point—the harm that the President’s words caused—all the members of the Court, in the majority and dissent alike, seem to agree.²⁵⁸

How might a similar case have come out outside the national security context, and thus outside this zone of additional deference to the executive? Although the majority exhibited some uneasiness with using “extrinsic statements—many of which were made before the President took the oath of office”—as evidence of presidential motive,²⁵⁹ it did not foreclose the use of such statements, and for good reason. As Katherine Shaw has argued, “judicial reliance on presidential speech may be appropriate where such speech supplies relevant evidence of intent or purpose.”²⁶⁰ The question, then, is when such evidence is “relevant.” Here, the core psychological insight of a character-based approach to presidential action—that Presidents, like all people, have stable, discernible character traits, and that past actions are thus probative evidence of future motives—suggests that

257. *Id.* at 2417–18 (citations omitted).

258. *See, e.g., id.* at 2418 (“Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements.”); *cf. id.* at 2433 (Sotomayor, J., dissenting) (“[Subsequently emphasizing national security concerns] does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created.”).

259. *Id.* at 2418 (majority opinion).

260. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 137 (2017); *see also* Shaw, *supra* note 32, at 1394–95 (“[I]t was quite significant that the Court [in *Trump v. Hawaii*] did not entirely close the door to the legal relevance of presidential statements and presidential intent . . .”).

statements made before becoming President should not be discounted as evidence of character.²⁶¹

As an institution, the presidency can no doubt change the character of the person holding the office if only because, as Barack Obama observed, “[t]here’s nothing that can completely prepare you for the job of being president of the United States.”²⁶² At the same time, Michelle Obama’s observation, after four years in the White House, is also true: sometimes, “[b]eing president doesn’t change who you are, it reveals who you are.”²⁶³ National public office—the Presidency above all—does not pluck people from obscurity. Rather, it selects for those who have spent decades in public life (if not public service) and who come into the office with pre-existing personality traits and worldviews.

And, with respect to the expressive importance of presidential motive, campaign statements can be *more*, rather than less, important than statements made in office. This is because the election of a candidate acts as an implicit validation of their campaign statements and promises. As Michael Coenen notes:

To the extent those communications connect up with a law that the winning candidate helps to put into place, the expressive harms generated by the law are amplified by the fact that the communications came before rather than after constituents’ votes were cast In this scenario, the bad motives are plausibly attributable not just to the candidate who made the motive-revealing communications, but also to the constituency that, having heard those communications, chose to elect the candidate in spite of (or, worse yet, because of) what the candidate said. From the perspective of the individuals who bear the brunt of the bad message, the expressive “sting” becomes all the more severe.²⁶⁴

Of course, not all pre-presidency statements are equally probative of the motive behind official presidential action. In lower-

261. See Coenen, *supra* note 36, at 357 (“[Election] candidates reveal to the world a set of *values, opinions, and worldviews* that may subsequently shape public perceptions of subsequent official actions.”).

262. Scott Bixby et al., *President Obama, on Hillary Clinton: Unlike Donald Trump, ‘She Actually Knows What She’s Talking About,’* GUARDIAN (Oct. 20, 2016), <https://www.theguardian.com/us-news/live/2016/oct/20/donald-trump-hillary-clinton-debate-us-election-news-live?filterKeyEvents=false&page=with:block-58092b73e4b005f21833b935> [<https://perma.cc/EPT9-ME8P>].

263. Liz Halloran, *Michelle Obama: ‘Being President . . . Reveals Who You Are,’* NPR (Sept. 5, 2012), <https://www.npr.org/sections/itsallpolitics/2012/09/04/160581747/michelle-obama-being-president-reveals-who-you-are> [<https://perma.cc/H4YX-9HA3>].

264. Coenen, *supra* note 36, at 358–59.

court litigation over the travel ban, Judge Alex Kozinski used this point to argue that reliance on campaign statements as evidence of motive was “folly”:

Candidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor shlub’s only intention is to get elected . . . And why stop with the campaign? Personal histories, public and private, can become a scavenger hunt for statements that a clever lawyer can characterize as proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day . . . And it will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?²⁶⁵

But one can take Kozinski’s point while still recognizing that, in certain exceptional circumstances, the President’s statements leave little question about their motive—both in terms of what the President’s motive for future action actually is, and what the public perceives it to be. The travel ban was one of those cases. As Justice Sotomayor noted in dissent, Trump’s statements about Muslims were not isolated or made in low-profile settings.²⁶⁶ Throughout the 2016 campaign, Donald Trump repeatedly expressed hostility to Muslims, at one point calling, in an official campaign statement (which remained on the Trump campaign website for several months into his presidency), for a “total and complete shutdown on Muslims entering the United States.”²⁶⁷ As the travel ban evolved, Trump made no secret of his anti-Muslim motivation, grousing about the “watered down, politically correct version” of the ban that his administration was pursuing.²⁶⁸ These were not “poorly selected yearbook quotes.” Not all campaign statements are probative of future presidential motive, but “a wholesale exclusionary approach to campaign

265. *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting) (citations omitted).

266. *Trump v. Hawaii*, 138 S. Ct. 2392, 2435–38 (2018) (Sotomayor, J., dissenting) (discussing multiple statements made by Trump in settings such as television interviews and Republican debates).

267. *Id.* at 2435 (citations omitted).

268. *Id.* at 2437 (citations omitted).

communications would prove a clumsy means of confronting that reality.”²⁶⁹

Another benefit of the virtue approach is that it can withstand one of the most serious objections to considering a President’s campaign as probative of later motive: the problem of “taint.” As Micah Schwartzman asks,

If officials take some action that is impermissible solely because of the wrongfulness of their intentions, can they remedy the impermissibility of their action by repeating it on the basis of legitimate intentions? Or is their future conduct tainted by what they have previously done? And if so, how can they remove the taint?²⁷⁰

Judge Kozinski emphasized the issue of taint in arguing that considering campaign comments would lead to the

absurd result . . . that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate. If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all (“just kidding!”) and try again?²⁷¹

But if the concern is with the expressive effects of the past statements, the President can publicly disavow those statements and work to promote a different set of values in public. Indeed, as Justice Sotomayor noted in her dissent, a notable feature of the travel bans was Trump’s unwillingness to ever publicly reject its anti-Muslim basis:

[D]espite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump’s failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint.²⁷²

As to the President’s actual motive, a virtue approach does not deny the possibility of internal psychological change. The fact that character is relatively stable does not mean that it is permanent; it simply means that the burden of proof is on the side seeking to show that it has changed. With the travel bans,

269. Coenen, *supra* note 36, at 360.

270. Schwartzman, *supra* note 41, at 220.

271. *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting).

272. *Trump v. Hawaii*, 138 S. Ct. at 2439 (2018) (Sotomayor, J., dissenting).

a consistent, public repudiation of Trump's prior anti-Muslim animus, along with rigorous, deliberative intra-executive branch policy process could well have provided a basis for concluding that, whatever candidate Trump's views of Muslims, his actions as President were not impermissibly tainted by anti-Muslim bias.²⁷³

Trump v. Hawaii shows that, at least in principle, the presumption of regularity has its limits, and that when the President conspicuously fails to exhibit the executive virtues, the courts need not be blind to that fact. Still, *Trump v. Hawaii* cannot be interpreted as a full-throated endorsement of courts taking virtue into account when evaluating presidential action. After all, the President's vices were conspicuously on display, and he nevertheless won. Even if the reason for that victory was the additional deference, above and beyond the presumption of regularity, that Presidents enjoy in national security cases, the category of such cases is large and thus would be seriously limited when courts take into account questions of presidential virtue.

2. Congress and the Impeachment Power

In many ways, Congress's capacity to respond to virtue violations by the President is the mirror image of the courts'. This can be seen by examining each of the rationales for the presumption of regularity, which apply with far less force, if at all, when Congress responds to executive action.

First, unlike the courts, which are required to hear challenges to executive actions from any party with standing, Congress can choose which executive actions it wants to oversee or otherwise engage with, thus limiting the extent to which considerations of executive virtue would overwhelm legislative capacity.

Second, although congressional inquiry into presidential character can raise separation-of-powers concerns to the extent that it interferes with the President's duties, this concern is counterbalanced by the fact that it is in precisely those domains in which presidential character is most important—areas of

273. Schwartzman, *supra* note 41, at 223 ("In developing new policies, [officials] can engage sincerely in public deliberation about permissible purposes and offer evidence to show that the policies in question serve those purposes. And they can administer those policies over time in a manner consistent with their stated purposes.").

broad executive discretion—that current congressional control is at its weakest.²⁷⁴ In other words, congressional inquiries into executive virtue have the greatest bite in those areas in which the Presidency is at its most imperial and where greater interbranch checks are most needed.

Third, and most importantly, congressional enforcement of executive virtue does not raise countermajoritarian concerns, since it represents a fight between the political branches, and Congress's democratic pedigree is at least as good as the President's.

Of course, Congress's inherently political nature carries its own substantial dangers. On the one hand, if congressional parties won't stand up to their own President, presidential abuses will go unchecked. On the other hand, members of the opposing party could weaponize the issue of presidential character to opportunistically attack everything that the President does. Ultimately, the same democratic checks that justify congressional action must also be relied on to check congressional abuses, as when voters punished Republicans in the 1998 midterms for the perceived excesses of Bill Clinton's impeachment.²⁷⁵

But whatever the benefits and drawbacks of congressional enforcement of presidential virtue, there is no disputing that it plays an important role in congressional-executive relations. Identifying all the sites of virtue enforcement would be impossible, given the many different independent actors in Congress and the wide variety of means, both informal and formal, of responding to unvirtuous executive action—from public criticisms of the President to congressional investigations to resistance to the President's legislative agenda. In this Subsection, I focus on the highest-profile actions that Congress can take against the President—impeachment and removal—showing how considerations of executive virtue play central roles.

The central and still unsettled question of impeachment is what constitutes a “high crime and misdemeanor.”²⁷⁶ Answers lie on a continuum between two poles. Impeachment

274. For a discussion of the evolution of checks and balances between the executive and legislative branches, see *supra* notes 76–84 and the accompanying text.

275. See Alan I. Abramowitz, *It's Monica, Stupid: The Impeachment Controversy and the 1998 Midterm Election*, 26 LEGIS. STUD. Q. 211, 211 (2001).

276. U.S. CONST. art. II, § 4.

maximalists argue that impeachment is a wholly political act and thus, as then-House Minority Leader Gerald Ford argued, “an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office.”²⁷⁷ Impeachment minimalists, on the other hand, argue that only a recognized crime that rises to the level of treason or bribery can serve as the basis for impeachment.²⁷⁸ The scholarly consensus is somewhere in the middle: on the one hand, impeachment should not be used for purely partisan disagreements, or even general presidential “maladministration”; on the other hand, criminal conduct is not required for impeachment, as long as the President’s actions constitute a sufficient serious abuse of power or breach of public trust.²⁷⁹

Presidential character is relevant to impeachment in three ways, each of which is exemplified by the three modern presidential impeachments. First, character can help clarify the motive behind a particular act (the first Trump impeachment). Second, considerations of character can help clarify whether removal and disqualification are warranted (the second Trump impeachment). Third, impeachment can be justified where the President’s actions demonstrate a lack of character in a way that has negative expressive effects (the Clinton impeachment).²⁸⁰

277. 116 Cong. Rec. 11861, 11913 (1970).

278. Alan Dershowitz, for example, argued in the context of the first Trump impeachment that impeachment required “criminal-type behavior akin to treason and bribery.” Alan M. Dershowitz, Letter to the Editor, *Why I’m Defending Trump*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/opinion/letters/alan-dershowitz-trump.html> [<https://perma.cc/UZ5V-P7BX>]. For a less extreme, and more pragmatic, version of this position, see CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK*, NEW EDITION 32 (2018).

279. See, e.g., CASS R. SUNSTEIN, *IMPEACHMENT* 51–53 (2017) (discussing how the drafting of the Constitution informs possible interpretations of grounds for impeachment).

280. Whether a particular President *should* be impeached (or removed) is a separate question. As Jamal Greene has pointed out, one should not confuse the “category of impeachable offenses” with the category of “things over which a president should be impeached.” Quinta Jurecic & Alan Z. Rozenstein, *The Authoritarian Arguments for Trump’s Acquittal*, LAWFARE (Jan. 31, 2020), <https://www.lawfaremedia.org/article/authoritarian-arguments-trumps-acquittal> [<https://perma.cc/H6BC-BP5H>].

a. *Clarifying Mixed Motives*

Impeachment for abuse of power raises the question of presidential character directly, because the question of whether a President acted “corruptly” is a question into presidential motivation. A good example of this is Donald Trump’s first impeachment, at the core of which was the question of how to understand his phone call with Ukrainian President Volodymyr Zelensky, in which Trump pressured Zelensky to investigate then-presidential candidate Joe Biden and his son Hunter.²⁸¹

One of the highest-profile defenses of Trump’s conduct came from Alan Dershowitz, who argued in the Senate that “[i]f a president does something which he believes will help him get elected, in the public interest, that cannot be the kind of quid pro quo that results in impeachment.”²⁸² Dershowitz later clarified his remarks, admitting that a crime committed to aid the President’s reelection would be impeachable, but that a non-criminal action, even if it was undertaken with mixed motives—a combination of public-spirited and self-serving motivations—was not impeachable.²⁸³ Dershowitz’s argument was that political considerations are frequently at issue in presidential decision-making, including with high-profile foreign policy and national security decisions.²⁸⁴ Thus, if Trump’s call with Zelensky was impeachable merely because Trump was motivated in part by political considerations, then, Dershowitz argued, Abraham Lincoln’s decision to send Union troops off the battlefield to vote in the election of 1864 was equally impeachable.²⁸⁵

The problem with Dershowitz’s *reductio* is that it treats the category of actions taken from mixed motives as one

281. See Tamara Keith, *Trump, Ukraine and The Path to the Impeachment Inquiry: A Timeline*, NPR (Oct. 12, 2019), <https://www.npr.org/2019/10/12/768935251/trump-ukraine-and-the-path-to-the-impeachment-inquiry-a-timeline> [<https://perma.cc/B4VE-GLRY>].

282. Allan Smith, *Dershowitz: Trump Pursuing Quid Pro Quo to Help Reelection Is Not Impeachable*, NBC NEWS (Jan. 29, 2020), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/dershowitz-trump-pursuing-quid-pro-quo-get-re-elected-not-n1125816> [<https://perma.cc/ZE4E-ES8G>].

283. Alan Dershowitz, Opinion, *I Never Said President Could Do Anything to Get Reelected*, HILL (Jan. 30, 2020), <https://thehill.com/opinion/judiciary/480720-dershowitz-i-never-said-president-could-do-anything-to-get-reelected> [<https://perma.cc/UR64-MJUZ>].

284. *Id.*

285. *Id.*

undifferentiated mass, as if there's no difference between the actions of a Lincoln and the actions of a Trump.²⁸⁶ But of course there is, and a key difference is which motivation predominates²⁸⁷: Lincoln's paramount concern was the preservation of the Union, an expression of his general character trait of public loyalty—the ability to distinguish between the nation's interests and his own, and to put the former ahead of the latter.²⁸⁸ We can be confident about this because we can put Lincoln's actions in the broader context of his personal characteristics. By contrast, Trump's history makes clear his tendency to put his own interests above those of the nation, a particularly egregious motivation in the context of weighty foreign-policy decisions.²⁸⁹

Jonathan Turley, who also argued against impeachment, made a related argument about the standard for determining whether Trump's motivations during the Zelensky call were "corrupt":

There is no question that an investigation of the Bidens would help President Trump politically. However, if President Trump honestly believed that there was a corrupt arrangement with Hunter Biden that was not fully investigated by the Obama Administration, the request for an investigation is not corrupt, notwithstanding its inappropriateness.²⁹⁰

The response to this argument is that such a President would demonstrate a different character flaw: the inability to

286. See Jurecic & Rozenshtein, *supra* note 280 ("There is no credible case that the president acted on mixed motives when he sought to strongarm the Ukrainian government into announcing an investigation into the Bidens . . .").

287. For a discussion of whether the Constitution requires the public-regarding motive to predominate, or whether it is enough that it merely be an important part of the bundle of motivations, see Roisman, *supra* note 15, at 53–55.

288. See *supra* Part II.B.1 (discussing the importance of the virtue of loyalty and the subordination of self-interest to the national and public interest).

289. See Roisman, *supra* note 15, at 57 ("The worse the impermissible motive, the more stringent the mixed motive standard we might prefer."); see also Anita Kumar, *How Trump Fused His Business Empire to the Presidency*, POLITICO (Jan. 20, 2020) <https://www.politico.com/news/2020/01/20/trump-businesses-empire-tied-presidency-100496> [<https://perma.cc/Y6C5-Z2AC>] (describing Trump's intentional intermingling of his business and political interests).

290. *The Impeachment Inquiry into President Donald J. Trump: The Constitutional Basis for Presidential Impeachment: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 34 (2019) (written statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School) (archived at <https://perma.cc/6JL8-K3HZ>).

stand up to self-serving cognitive biases and wishful thinking.²⁹¹ There was—and still is—no reason to believe that there was anything approaching the level of a “corrupt” arrangement that would justify pressuring a foreign country to investigate one’s leading political opponent.²⁹² Even if Trump could argue that he was acting out of a sincere motive to help the country, his motive would nevertheless be tainted by the character flaw of allowing wishful thinking to cloud his judgment.

b. What Actions Reveal About Character

Just as our knowledge of a President’s character can shed light on the President’s motives in a particular case, the President’s actions and motives in a particular case can teach us broader lessons about their character and their continued fitness (or lack thereof) for office. This is particularly important for impeachment. Although the question of impeachment is backwards-looking—did a particular event or action rise to the level of an impeachable offense—the remedy, removal from office, is forward-looking: was the offense serious enough to demonstrate that the President should not be permitted to serve out their term in office?

Donald Trump’s second impeachment is a good example of this situation, and the confusions that can occur when it is ignored. In the wake of the January 6 Capitol riot, the House impeached Trump for “incitement of insurrection.”²⁹³ Unlike in Trump’s first impeachment trial, senate Republicans largely avoided defending Trump’s conduct on the merits.²⁹⁴ Rather,

291. See *supra* Part II.B.2 (discussing the relationship between self-deception and motivated self-interest in the presidency).

292. See Keith, *supra* note 281 (noting that there is “no evidence” for the claim that Vice President Biden pressured Ukraine to remove a prosecutor to protect his son, Hunter).

293. Brian Naylor, *Article of Impeachment Cites Trump’s ‘Incitement’ of Capitol Insurrection*, NPR (Feb. 9, 2021), <https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/11/955631105/impeachment-resolution-cites-trumps-incitement-of-capitol-insurrection> [<https://perma.cc/2QDM-ZHSC>].

294. Domenico Montanaro, *Senate Acquits Trump in Impeachment Trial — Again*, NPR (Feb. 13, 2021), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again> [<https://perma.cc/C9UJ-AD6D>] (“The constitutional argument allowed many Republican senators to sidestep the merits of the case against Trump.”).

they argued that Trump was no longer President when the trial took place.²⁹⁵ Commentators have pointed out the structural and historical problems with this argument,²⁹⁶ one of which goes directly to the question of presidential personality: sometimes an impeachable offense is so grave that it demonstrates not only the President's lack of fitness to continue holding office, but also that it would be too dangerous to allow them to hold any office in the future. Thus, after removal, the Senate can also vote to bar the (now-former) President from holding office.²⁹⁷

c. Character's Expressive Effects

Bill Clinton's impeachment was unpopular with legal scholars at the time. While few defended Clinton's actions—his affair with White House intern Monica Lewinsky, and his subsequent lying under oath and attempt to get others to do the same—many viewed them as merely a “squalid triviality” that did not justify impeachment.²⁹⁸ This remains an influential position today.²⁹⁹

But the Clinton impeachment can be justified on grounds that have nothing to do with criminality or even abuse of the formal powers of office. Instead, Clinton could have properly been impeached to express key norms around public and private behavior.³⁰⁰ Political elites' behaviors have expressive moral effects: because they are so high profile, they signal to the population what is and is not morally permissible. For better or (as is often the case) for worse, the President functions as a moral role model.

295. *See id.* (“The heart of Trump’s legal team’s argument was supposed to be that the Senate did not have jurisdiction to take up the trial of a former federal official.”).

296. For a comprehensive analysis, see Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13 (2001).

297. U.S. CONST. art. I, § 3, cl. 7.

298. Frank O. Bowman, III, *Falling Out of Love with America: The Clinton Impeachment and the Madisonian Constitution*, 60 MD. L. REV. 5, 14 (2001) (describing the unique circumstances surrounding the Clinton impeachment).

299. *See, e.g.*, LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT*, at xvi (2018) (describing the effort to remove Clinton from office as “contemptible”).

300. *See* RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 133–79 (1999) (evaluating the moral dimensions of Clinton’s impeachment through the lens of both public and private morality).

Clinton's behavior undermined this role in at least two ways. First, his choice of a young, powerless intern as his sexual partner illustrates a comfort with the most extreme sorts of sexual power imbalances. Second, his willingness to lie under oath and to encourage others to do the same demonstrates a variety of self-serving personality traits. This conduct, even if it did not immediately threaten the nation, corrupted the public's virtues. Whether or not this justified impeachment is a more complicated issue and would have to take into account the impeachment's costs. But contrary to the position of many of the scholars at the time, there was a *prima facie* case for impeaching Clinton for his actions.

3. Intra-Executive Checks

Constraints on the executive branch, and the President in particular, cannot only come from the other branches; checks must also come from an "internal separation of powers" within the executive branch itself³⁰¹—or, as it is sometimes disparagingly called by its critics, the "deep state."³⁰²

Both in their advice to the President as well as the bureaucratic and institutional structure they build around executive decision-making, the President's allies and subordinates should stress the importance of acting with the appropriate motivations. This requires both bureaucratic advocacy and, in certain cases, disobedience and resignation,³⁰³ a particularly salient issue during the Trump administration.³⁰⁴

301. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (explaining how bureaucracy within the executive branch promotes intra-executive checks and balances).

302. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653–54 (2018) (describing the emergence of the term "deep state" as "an all-purpose scapegoat . . . demonizing and delegitimizing critics of the [Trump] administration").

303. For an emerging literature on bureaucracy as an internal check on the President's power, see *id.* at 1655 ("[T]he American bureaucracy serves an important, salutary, and quite possibly necessary role in safeguarding our constitutional commitments and enriching our public policies."); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627 (2019).

304. See, e.g., Erica Newland, Opinion, *I Worked in the Justice Department. I Hope Its Lawyers Won't Give Trump an Alibi*, WASH. POST (Jan. 10, 2019),

Unfortunately, there is no simple rule governing when resignation is appropriate. On the one hand, a lack of executive virtue can be a reason for an executive branch official to resign and avoid enabling the President's behavior, even if they agree with the President's policies. On the other hand, a lack of executive virtue can constitute a reason to *stay* in the executive branch, especially if one disagrees with the President's actions and believes that they could help check the President's vices from the inside. Either way, considerations of executive vice and what, if anything, can be done about it are central.

The character-based approach also helps clarify when it is appropriate for high-level executive branch officials to take the most extreme legal action available against an unvirtuous President: invocation of the Twenty-Fifth Amendment, which provides that, if the Vice President and a majority of the cabinet determine and inform Congress that the President is "unable to discharge the powers and duties of his office," the Vice President becomes acting President.³⁰⁵ Even if the President objects, the President continues to be indefinitely stripped of their powers as long as two-thirds of both houses of Congress vote to uphold the determination of President inability.³⁰⁶

Section 4 was included among the Twenty-Fifth Amendment's provisions on presidential incapacity to address the situation where the President is unable or *unwilling* to voluntarily transfer power to the Vice President (as provided under Section 3, which has been invoked in the bulk of uses of the Twenty-Fifth Amendment).³⁰⁷ The classic Section 4 scenario is a medical emergency that incapacitates the President, but both the historical context of the Twenty-Fifth Amendment as well as its broad language makes clear that it can properly be invoked over the President's objections.³⁰⁸ Woodrow Wilson's stroke in his second term

https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html [<https://perma.cc/LY3K-94MQ>] (discussing the author's resignation from the Office of Legal Counsel after "decid[ing] that the responsibilities entailed in [her] oath were incompatible with the expectations of [her] job").

305. See U.S. CONST. amend. XXV, § 4.

306. *Id.*

307. See U.S. CONST. amend. XXV, § 3.

308. *Cf.* JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 121 (3rd ed. 2014) (describing the legislative debate

left him seriously physically disabled, although mentally “relatively clear.”³⁰⁹ Had Wilson’s Vice President or cabinet wanted to declare Wilson incapable of carrying out his duties, they may have done so over Wilson’s objection.³¹⁰

As John Feerick, the primary drafter of the amendment, observes, the congressional debate over the amendment suggests that mere “unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an ‘inability’ within the meaning of the Amendment.”³¹¹ In particular, Section 4 is best understood as excluding those situations in which impeachment is an available remedy—namely, when the inevitable delays involved in impeachment do not endanger the nation. In this respect, Section 4 is properly viewed as an adjunct to impeachment: “[i]f the alternative is to allow an imminent and irreparable catastrophe, Section 4 might be worth using even if just to allow enough time for the impeachment machine to warm itself up.”³¹²

Section 4 of the Twenty-Fifth Amendment thus represents the extreme case of the relevance of presidential character. Even the worst failings of presidential character generally will not rise to the level of justifying a Section 4 invocation, because impeachment will serve as an adequate remedy. But given the President’s immense power, both domestically and in particular in foreign affairs, one can imagine situations—for example, a combination of extreme delusion and impulsiveness in close proximity to the nuclear button—in which the Vice President and a majority of the cabinet properly conclude, and Congress affirms, that the President’s character defects, whether latent or new, present such an imminent threat to the country that a Section 4 invocation is appropriate.

over how Congress could exercise Section 4 even if the President pre-emptively fires all Cabinet members).

309. ARTHUR S. LINK, *WOODROW WILSON* 121 (1979).

310. Of course, the lack of the Twenty-Fifth Amendment at the time meant that there was no mechanism to remove Wilson from power.

311. John D. Feerick, *A Response to Akhil Reed Amar’s Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 *HOUS. L. REV.* 41, 55 (2010).

312. Brian C. Kalt, *The Many Misconceptions About Section 4 of the Twenty-Fifth Amendment*, 47 *OHIO N.U. L. REV.* 345, 356 (2021).

B. ENCOURAGING VIRTUOUS DECISION-MAKING

For obvious reasons, it would be better for the executive to act virtuously in the first place rather than to have to deal with fallout from unvirtuous action. In this Section, I consider three ways to encourage virtuous decision-making: (1) general requirements of executive virtue; (2) specific prohibitions on actions that are likely to be performed unvirtuously; and (3) procedural requirements that can encourage virtuous action. Within these categories I consider the different role that courts, Congress, and the executive themselves can play. I conclude with a caution against too much ex-ante regulation of the executive, lest such regulation undermine the very virtues it seeks to encourage.

1. General Requirements of Virtuous Action

The argument that Article II contemplates that the President will possess and act out of the executive virtues carries with it a corresponding limitation on the President's authority: presidential power should not extend to unvirtuous action. As noted above, whether a presidential action is virtuous is not an either/or, since an action need not be exclusively based on a virtuous disposition to be virtuous and since different virtues can come into conflict. Thus, the determination of whether an action is, all things considered, virtuous enough to satisfy the general requirement of executive virtue will be a complex one. And for the reasons described above,³¹³ the courts have only a limited role in reviewing individual executive actions against this requirement.

But that does not mean that this limitation is merely precautionary on the President, or that there is no point in the courts, Congress, or the President and their subordinates articulating these limitations. First, articulations of executive virtue serve an important expressive function, helping raise public awareness of what to expect from its President.³¹⁴ Second, as Jodi Short has observed as part of her analysis of the "public interest" standards that are ubiquitous in American law, requirements to act in the

313. See *supra* Part III.A.1.

314. See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 887 n.123 (1999) ("[C]onstitutional rights that are announced but that carry no sanction when violated might influence behavior by educating the public or shaping social norms.").

public interest “organize[] the roles, identities, and cognition of public administrators” and serve to “remind[] them of their public-facing duties and foster[] habits of public responsiveness”—in other words, acting as “a kind of proto-‘nudge’ toward integrity, constraint, and regularity in public administration.”³¹⁵

In other words, a better understanding of the executive virtues can help the relevant norms be internalized by Presidents themselves. It might even marginally cause a President to limit their attempts to increase executive power, given the possibility that future Presidents will lack the requisite virtues. An example is Obama’s attempt at the end of his first term to proceduralize the drone strike policy, lest he lose the 2012 election to Mitt Romney.³¹⁶

In this regard, the role of executive branch lawyers will be critical. Many issues implicating executive character will never be addressed by the courts, because of justiciability doctrines like standing and the political question doctrine. In such cases, the most authoritative sources of constitutional interpretation will be executive branch legal entities like OLC, which frequently advises the President on the scope of the Take Care Clause,³¹⁷ and White House counsel, who similarly provide legal advice on the scope of presidential power. Across a wide range of issues, from prosecutorial discretion to the pardon power to the Emoluments Clause, these entities should take seriously the requirement that the President act in accordance with the executive virtues and advise the president accordingly.³¹⁸

2. Prophylactic Bans on High-Risk Actions

Along the lines of prophylactic rules—“risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows

315. See Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759, 777–78 (2023).

316. See Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES (Nov. 24, 2012), <https://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html> [<https://perma.cc/JES6-QJBR>].

317. See, e.g., OLC DACA Memo, *supra* note 203 (noting that the President’s discretion under the Take Care Clause does not lend itself to formulas or bright-line rules).

318. See Roisman, *supra* note 15, at 35–36 (suggesting a circumstance under which White House Counsel or OLC would advise the President).

constitutionally sanctioned or required rules”³¹⁹—some types of action are so likely to be carried out unvirtuously that a blanket rule prohibiting them is warranted, irrespective of the President’s actual disposition in taking that action. In particular, the appropriateness of a categorical prohibition depends on whether (1) the action is the sort that is generally (in the sense of a prior probability) committed unvirtuously; (2) evaluating the President’s actual dispositions will be uniquely difficult; and (3) giving the President even the option to act will have a negative effect on executive virtue.

A rich area for prophylactic bans is financial conflicts of interest. The Constitution, through the two Emoluments Clauses,³²⁰ recognizes the danger of presidential venality. Although Congress has excluded the President and Vice President from the financial conflict-of-interest rules that generally apply to the executive branch,³²¹ Presidents have, as a matter of voluntary norms, generally applied those rules to their own conduct, often by putting their assets in a blind trust on taking office.³²² But Donald Trump’s “extraordinary mingling of presidential duties with his personal business interests,”³²³ which included encouraging allies and even foreign governments to patronize his many hotels and resorts, has demonstrated the insufficiency of the current system and the need for explicit restrictions on presidential financial and business activity.³²⁴

319. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999).

320. U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* art. II, § 1, cl. 7 (prohibiting the President from receiving “any other Emolument” besides a salary “from the United States, or any of them”).

321. See 18 U.S.C. § 208(a) (2012); see also *id.* § 202(c) (excluding the President and Vice President).

322. See Renan, *supra* note 18, at 2218 (“Following precedent established by President Eisenhower, the practice of creating a blind trust appears to have become routine . . .”).

323. BAUER & GOLDSMITH, *supra* note 76, at 50.

324. For one set of proposed reforms, see *id.* at 64–71 (discussing such reforms as banning presidential participation in a business interest or banning presidential blind trusts). See also Kumar, *supra* note 289 (“In three years in the White House, Donald Trump has accomplished something no president before him has done: fusing his private business interests with America’s highest public office.”).

A more controversial, because it stakes out novel constitutional terrain, but equally important prophylactic limitation on unvirtuous executive power is a prohibition on presidential self-pardon. Article II's assignment to the President of the power to "grant Reprieves and Pardons for Offences against the United States"³²⁵ is generally thought to vest almost completely unreviewable discretion in the President, at least when it comes to the choice of whom to pardon.³²⁶ This is because the substantive question at the heart of an evaluation of a presidential pardon—whether the pardon was granted "with considerations of mercy and the public welfare"³²⁷—is so difficult to answer, and so courts will not question the validity of a pardon (even if, as Daniel Hemel and Eric Posner argue, "Congress can impeach a president for improper use of the pardon power"³²⁸).

But there is one area in which an important substantive limitation on the pardon power can be cleanly derived, and that is a presidential self-pardon. When OLC considered this question during the Watergate scandal in the final weeks of Nixon's presidency, it argued against the constitutionality of self-pardons, though its analysis was limited to the observation that, "under the fundamental rule that no one may be a judge in his own case, it would seem that the question" of whether the President can self-pardon "should be answered in the negative."³²⁹ And while founding-era statements argue against self-pardons,³³⁰ a number of legal scholars maintain that the President either has the power to self-pardon or that it is at least a close question.³³¹

325. U.S. CONST. art. II, § 2, cl. 1.

326. See Hemel & Posner, *supra* note 13, at 1321 (characterizing the President's pardon power as "plenary").

327. Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 93 (2019).

328. Hemel & Posner, *supra* note 13, at 1321.

329. Presidential or Legis. Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974); see also Hemel & Posner, *supra* note 13, at 1325 (arguing that there is "substantial doubt as to whether the president has the power to *self-pardon*" given the constitutional "norm against self-dealing that is baked into the American system of government").

330. See BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS 52 (2012) (quoting James Wilson's statement at the Constitutional Convention in response to Edmund Randolph's concern about self-pardons that if the President committed a crime "he can be impeached and prosecuted").

331. See, e.g., Michael Conklin, *Please Allow Myself to Pardon . . . Myself: The Constitutionality of a Presidential Self-Pardon*, 97 U. DET. MERCY L. REV.

The executive virtues add to the case against the constitutionality of self-pardons. They interfere with at least two of the virtues—loyalty (putting the nation’s interests above one’s own) and responsibility (facing up to punishment for one’s actions)³³²—in two ways. First, they create potentially overwhelming temptations for the President to act unvirtuously. Second, given how high-profile a self-pardon would be, the expressive costs of such an action would be immense by undermining the public’s commitment to loyalty and responsibility.

A rule against self-pardons could be effectuated in a number of ways. Within the executive branch, OLC could reaffirm at

291, 293 nn.7–8 (2020) (collecting citations for and against presidential self-pardons); Michael W. McConnell, *Trump’s Not Wrong About Pardoning Himself*, WASH. POST (June 8, 2018), https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html [https://perma.cc/F7T9-3S4S] (supporting the proposition that a President may pardon themselves); Ilya Shapiro, *The President Can Self-Pardon, but It Would Be an Impeachable Offense*, CATO INST. (Dec. 15, 2020), <https://www.cato.org/commentary/president-can-self-pardon-it-would-be-impeachable-offense#> [https://perma.cc/LM8A-4EYH] (“Even if the president has the power to pardon himself, he shouldn’t exercise it. And if he does—at least where he pardons himself to stop an investigation or prosecution that threatens him personally or politically—then he should be impeached.”); see also Michael J. Conklin, *Can a President Pardon Himself? Law School Faculty Consensus*, NE. U. L. REV.: EXTRA LEGAL (Dec. 20, 2019), <http://nulawreview.org/extralegalrecent/2019/12/19/can-a-president-pardon-himself-law-school-faculty-consensus> [https://perma.cc/ZFU2-7UX7] (finding that while a president can probably not constitutionally pardon himself, it is still a close legal question).

332. The relationship between self-pardons and the prerogative power is complex. See *supra* Part II.B.3 (discussing generally the prerogative power). One argument finds self-pardons not only compatible with, but indeed required by, the prerogative, since only the ability to self-pardon would incentivize a President to act extra-legally when necessary. See Michael Kelley, Note, *The Constitutionality of the Self-Pardon and Its Compatibility with Lockean Prerogative*, 64 N.Y.L. SCH. L. REV. 185, 199 (2019) (describing the potential necessity for self-pardons). On this view, impeachment (for a first-term President) or “historical legacy” (for a second-term President) is sufficient to satisfy the requirement of judgment “by the whole,” which further excludes future prosecution because “prosecution is a unilateral action of the executive branch.” *Id.* at 202. In my view, this argument for self-pardons gets it precisely backward: neither impeachment, nor, especially in the case of a second-term President, the judgment of history is a sufficient counterweight to executive use of prerogative; only the shadow of prosecution (which, given the high political stakes and the distraction it would cause to the new President’s agenda, would undoubtedly only occur if the overwhelming national mood was in favor) would be sufficient to satisfy the Lockean/Jeffersonian requirement of post-prerogative national judgment.

greater length its prior opinion against self-pardons. Courts could carve out self-pardons from the general nonjusticiability of pardon decisions.³³³ And Congress could legislate to “make clear that a self-pardon is not authorized by Article II and has no force or effect.”³³⁴

3. Reason-Giving Requirements

As an alternative to, or in conjunction with, substantive limitations on executive power, procedural requirements, especially around public reason-giving, could help encourage virtuous decision-making. First, a requirement that the President publicly provide reasons why a particular action comports with the requirement of virtuous decision-making could serve as a reminder, and thus a psychological nudge, toward actually acting virtuously.³³⁵ Second, a reason-giving requirement could empower executive branch officials who could use the reason-giving requirement as a way to advocate for actions that align with the executive virtues.³³⁶ Third, where the President’s reasons showed a lack of virtue, requiring the President to give accurate reasons for their actions can promote democratic accountability. As Benjamin Eidelson has argued, the Supreme Court’s invalidation of the Trump administration’s rescission of the deferred action immigration program, as well as its attempt to include a citizenship question on the census, stemmed from precisely this concern around pretext and its undermining of democratic accountability.³³⁷

Legally, the most straightforward path for reason-giving requirements is through Congress, which has frequently imposed

333. See *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (“[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”).

334. BAUER & GOLDSMITH, *supra* note 76, at 130. While there is some Supreme Court dicta suggesting that the pardon power is “unlimited” and “not subject to legislative control,” *Ex parte Garland*, 71 U.S. 333, 334 (1866), Bauer and Goldsmith argue that the “exclusive, ‘unlimited’ nature of the pardon power has been routinely overstated.” BAUER & GOLDSMITH, *supra* note 76, at 113.

335. See Short, *supra* note 315, at 777 (“[P]ublic interest standards force reasoned decision making grounded in transparent articulations of value.”).

336. See Roisman, *supra* note 15, at 59–60 (suggesting that such a requirement is likely to stop at least some self-interested exercises of power).

337. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752–53 (2021).

such requirements on executive action. For example, Congress took this approach in requiring the executive branch to explain decisions not to defend federal statutes, decisions which implicate the requirement of presidential loyalty to the constitutional separation-of-powers system.³³⁸ Thus, As Jonathan Gould observes, “[r]ather than passing a law requiring the Department of Justice to defend every federal statute, Congress opted for a disclosure requirement. When a President declines to defend federal law, the disclosure requirement has ensured that Congress knows about the decision and can take action of its own in response.”³³⁹ In this vein, Shalev Roisman proposes that Congress pass a statute “specifying that, before acting pursuant to a statutory delegation, the President must offer a public-interested reason for doing so, perhaps absent an emergency.”³⁴⁰

For courts, the legal path for such requirements is trickier. While such requirements could plausibly be grounded in the Administrative Procedure Act’s (APA) provision for arbitrary and capricious review of agency action,³⁴¹ the APA does not apply to the President.³⁴² Even if it did, the elaborate justifications that courts often require of administrative agencies are a poor fit for presidential action, which is both more democratically accountable and is often less technocratically motivated. A judicially created doctrine of presidential reason-giving would thus have to be more limited than full-blown arbitrary-and-capricious review.³⁴³

4. When Oversight Undermines Virtue

At the same time, there is a danger that reforms meant to encourage the executive virtues could undermine them. Many reforms risk weakening the sense of responsibility that the President needs to feel to act. This is a version of what the political scientist Scott Sagan memorably called “the problem of

338. 28 U.S.C. § 530D(a)(1)(B).

339. Gould, *supra* note 208, at 761.

340. Roisman, *supra* note 15, at 62.

341. 5 U.S.C. § 706(2)(A).

342. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”).

343. See Manheim & Watts, *supra* note 4, at 1814 (suggesting that presidential orders should not be subject to administrative law’s complex deference doctrines); Roisman, *supra* note 15, at 63 (suggesting non-deferential review).

redundancy problem”: sometimes, adding more safeguards can actually *increase* the risk of failure.³⁴⁴ In particular, Sagan argues that “redundancy can backfire . . . when diffusion of responsibility leads to ‘social shirking’”—which occurs when “individuals or groups reduce their reliability in the belief that others will take up the slack”³⁴⁵—or through “overcompensation,” wherein “improvements in safety and security . . . lead individuals to engage in inherently risky behavior” because they believe the costs of such behavior to be lower.³⁴⁶

To take an extreme example, consider proposals to limit the use of nuclear weapons, a topic that has gained renewed interest given Donald Trump’s erratic behavior in office and his threats to unleash “fire and fury” on adversary nations like North Korea.³⁴⁷ One notable proposal suggests including additional government officials—such as the Secretary of Defense and the Attorney General—into the chain of command for the use of nuclear weapons.³⁴⁸

But one might worry that such a proposal is, at best, unnecessary and, at worst, counterproductive. In situations where the use of nuclear weapons is obviously justified, there is no need to add additional decision-makers. In situations where the use of nuclear weapons is obviously unjustified—the “mad president” scenario—existing checks, both formal and informal, may be sufficient.³⁴⁹ It is in the intermediate situations—where the use of nuclear weapons is plausibly, but not obviously, justified—that adding an additional decision-maker would likely have the most

344. See Scott D. Sagan, *The Problem of Redundancy Problem: Why More Nuclear Security Forces May Produce Less Nuclear Security*, 24 RISK ANALYSIS 935, 935 (2004).

345. *Id.* at 939.

346. *Id.* at 941.

347. Peter Baker & Choe Sang-Hun, *Trump Threatens ‘Fire and Fury’ Against North Korea if It Endangers U.S.*, N.Y. TIMES (Aug. 8, 2017) <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html> [<https://perma.cc/P3E7-X9N2>].

348. See, e.g., Richard K. Betts & Matthew C. Waxman, *The President and the Bomb: Reforming the Nuclear Launch Process*, 97 FOREIGN AFFS. 119, 119 (2018) (describing how the President is enabled to meet with their senior advisers before authorizing a nuclear launch).

349. See BAUER & GOLDSMITH, *supra* note 76, at 312 (noting that, under current law, the Secretary of Defense could “slow execution of the launch” by requesting the Attorney General’s view on the lawfulness of an unprovoked nuclear attack).

substantial effect. But, paradoxically, adding an additional decision-maker might make the use of nuclear weapons *more*, rather than less, likely, because the President will be able to rely—both psychologically and legally³⁵⁰—on other people’s approval. It may be that the President’s sole responsibility for the use of nuclear weapons is an important safeguard against their overuse.

Poorly crafted reforms can also undermine executive virtue more generally, through a number of pathways. Codification, like any “formal system of external rewards[,] can diminish intrinsic motivation to follow social norms.”³⁵¹ Put more bluntly, “[a] constitution designed for knaves . . . tends to crowd out civic virtues,”³⁵² because “when individuals perceive the external intervention to be ‘controlling’ in the sense of reducing the extent to which they can determine actions by themselves, intrinsic motivation is substituted by extrinsic control.”³⁵³ In addition, “[a]n intervention from the outside undermines the actor’s intrinsic motivation if it carries the notion that the actor’s intrinsic motivation is not acknowledged. The person affected feels that his or her competence is not appreciated which leads to an impaired self-esteem, resulting in a reduced intrinsic motivation.”³⁵⁴

Codification also requires difficult calibration and an inherent tradeoff between comprehensiveness and constitutionality. If reforms are drawn narrowly, they might be read as implicitly sanctioning behavior that, while not covered, is nevertheless normatively undesirable.³⁵⁵ A notable example is the War

350. Proposals for the Attorney General to sign off on the use of nuclear weapons might have the most distorting effect on presidential judgment, since it would legalize what is fundamentally a policy question. The pathologies of such an approach have been observed in other national security contexts, from surveillance, see Margo Schlanger, *Intelligence Legalism and the National Security Agency’s Civil Liberties Gap*, 6 HARV. NAT’L SEC. J. 112 (2015), to the conduct of war, SAMUEL MOYN, *HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR* (2021).

351. Michael C. Dorf, *How the Written Constitution Crowds Out the Extra-constitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 76 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

352. Bruno S. Frey, *A Constitution for Knaves Crowds Out Civic Virtues*, 107 ECON. J. 1043, 1044 (1997).

353. *Id.* at 1045.

354. *Id.*

355. Gould, *supra* note 208, at 739 (“Codification of a constitutional norm might crowd out norms against conduct that lie just beyond the scope of the codification.”).

Powers Resolution, which, by putting a sixty-day limit on presidentially initiated hostilities absent congressional approval, has been interpreted by numerous administrations as an implicit *approval* of short-term, presidentially initiated hostilities.³⁵⁶

But the broader the codification, the more likely the courts are to find the reform an unconstitutional encroachment on executive power. Judicial invalidation could further undermine the norm because constitutional law has a tendency to “crowd out” unwritten constitutional norms: “[b]ecause of the widespread but mistaken belief that the Constitution alone grounds legal authority, political actors feel the need to search for a constitutional hook for arguments that customary rules should be obeyed.”³⁵⁷

None of this is to say that reforms that codify norms of virtuous executive behavior are always ill-advised. Codification can express values and focus the attention of the public and of “pluralist norm enforcers” like the media, civil society, and the bureaucracy.³⁵⁸ And simply through the threat of legal sanction, it can create mechanisms that encourage virtuous behavior.³⁵⁹ But the difficulty in codifying executive virtues should not be underestimated.

C. SELECTING FOR VIRTUE

At the same time as the personal characteristics of Presidents have taken outsized importance, American democracy’s ability to select for virtuous Presidents has diminished. In particular, high levels of negative partisanship—the tendency of voters to focus on what they dislike about the other party, rather than what they like about their own³⁶⁰—leads to a win-at-all-costs mentality that excuses, and sometimes even embraces, the faults of one’s own candidate. If, like Michael Anton, author of the infamous “The Flight 93 Election” essay, one thinks that “a Hillary Clinton presidency is Russian Roulette with a semi-auto”

356. See BAUER & GOLDSMITH, *supra* note 76, at 287.

357. Dorf, *supra* note 351, at 75.

358. Renan, *supra* note 18, at 2279.

359. See Gould, *supra* note 208, at 747 (“Codifying a norm by passing a statute holds the promise of greater compliance.”).

360. See generally Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12 (2016) (analyzing the impact of negative partisanship on “electoral competition, democratic representation and governance”).

and would be “the mark of a party, a society, a country, a people, a civilization that wants to die,” it might make sense to “spin the cylinder and take your chances” with an extreme outlier like Donald Trump.³⁶¹

This is not to say that political conflict necessarily produces bad leaders—indeed, Abraham Lincoln was the product of the most disunited period in American history. But it does widen the pool of potential leaders, for good or ill, which compounds the importance of selecting for virtue and defending against vice. In this Section, I offer three ways in which the electoral process can better select for executive virtue—by (1) addressing information asymmetries to inform the electorate about candidate quality and to discourage unvirtuous candidates from running; (2) making the process of running for office such that it does not degrade the executive virtues, for example through campaign-finance reform; and (3) shifting power to institutions, like political parties, that can help decrease the risk of unvirtuous presidential candidates.

1. Addressing Information Asymmetries

A standard problem in many principal-agent situations is that of adverse selection, which results from asymmetric information. An agent generally has more information than the principal does about the agent’s fitness for the principal’s goals. Candidates for public office know their own motivations and dispositions better than the voters do. This can lead to adverse selection, whereby the seller—here, the political candidate who is offering their services to the electorate—provides a less socially-optimal, lower-quality product to the buyer.

Two general solutions to this problem are *screening* and *signaling*. Screening is action taken by the information-poor party—in this case the voters—to generate useful information for selecting good agents. In the context of selecting for virtuous Presidents, screening would be enhanced by disclosure requirements for political candidates—for example, by mandating tax and financial disclosure information³⁶² and, more

361. Michael Anton, *The Flight 93 Election*, CLAREMONT REV. BOOKS (Sept. 5, 2016), <https://claremontreviewofbooks.com/digital/the-flight-93-election> [<https://perma.cc/47HR-UK2M>].

362. See BAUER & GOLDSMITH, *supra* note 76, at 82 (“The time has come to enact a federal requirement for the production of tax returns.”); Joshua D.

controversially, evaluations of physical, cognitive, and psychological fitness.

The problem of adverse selection can also be dealt with by signaling, in which the agent, who has more information, credibly proves to the principal, who has less information, that they are a good type. For a signal to be credible, it must be more costly for a bad agent than for a good agent. This can be achieved by changing the incentive structure facing the agent. Thus, although overbroad restrictions on presidential power can exacerbate negative selection if they lower the reputation of politicians for virtue,³⁶³ narrower restrictions can create a separating equilibrium that encourages self-selection by virtuous agents. For example, mandatory financial disclosures can discourage candidates with sketchy financial histories from running. Mandatory divestiture requirements, as well as prohibitions on candidates profiting financially from being President, will also make the presidency less appealing for candidates whose motives are not primarily public-interested.

2. Virtue-Enhancing Electoral Processes

A second way that selection procedures can be improved is by ensuring that the selection process itself encourages the executive virtues. For example, to add to the growing list of problems with the electoral college, one might add the fact that its regional structure decreases incentives towards inclusiveness by encouraging “particularism”: the pursuit of policies that “channel federal benefits disproportionately to certain politically important constituents at the expense of others.”³⁶⁴ Of course, there is little prospect that a constitutional amendment will abolish the electoral college, and alternative reforms, like the National

Blank, *Presidential Tax Transparency*, 40 YALE L. & POL'Y REV. 1, 62–71 (2021) (describing specific types of information that policymakers should subject to mandatory public disclosure).

363. See Frey, *supra* note 352, at 1049 (“Persons with particularly low civic virtue are especially attracted to a political career because they do not feel unjustly constrained by the constitutional rules. They feel perfectly at ease in an environment in which public spiritedness is absent. In contrast, persons with high civic virtue are confronted with an additional cost when they consider [entering] the political sphere.”).

364. Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 746 (2014).

Popular Vote Interstate Compact, face their own political, not to mention legal, headwinds.³⁶⁵

A potentially more tractable problem, because it is more sensitive to the composition of the Supreme Court, is campaign finance reform. In *Buckley v. Valeo*, and then again in *Citizens United v. Federal Election Commission*, the Supreme Court denied that independent expenditures would meaningfully contribute to either “the reality or appearance of corruption in the electoral process,” because the “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”³⁶⁶ Yet the Court has also held that, as a matter of due process, a judge was required to recuse from a case in which a party had made “extraordinary efforts” to get the judge elected, since the judge would “feel a debt of gratitude” to the party.³⁶⁷

Given the Court’s clear recognition of the importance of the perception of impartiality in the judiciary³⁶⁸ and the ways in which campaign expenditures could undermine that virtue, its rejection of the analogous virtue among elected officials as irrelevant to the First Amendment analysis of campaign-finance restrictions is puzzling. Perhaps this reflects the American legal culture’s focus on the “role morality” of judges to the exclusion of other government officials.³⁶⁹ Either way, even if considerations of the effect of campaign expenditures on presidential loyalty would not have trumped the First Amendment considerations in cases like *Buckley* and *Citizens United*, it is a weakness in the Court’s reasoning that it did not take these effects seriously.

365. See generally Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007) (arguing that the National Popular Vote Interstate Compact is unconstitutional).

366. *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976) (per curiam); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357 (2010) (holding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

367. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 882 (2009).

368. See *Solum*, *supra* note 27, at 196 (“Judges should not identify more strongly with one side than the other . . .”).

369. See *Siegel*, *supra* note 21, at 113.

3. Electoral Institutional Choice

Ultimately, the choice of who becomes President lies with the electorate. Due to the steadily increasing personalization of politics,³⁷⁰ it has long been recognized that voters care a lot about the character traits of presidential candidates,³⁷¹ although their evaluations are often filtered through partisanship³⁷² and their own values.³⁷³ The theory of executive virtue developed in this Article offers a way for civic-minded voters to understand their obligations to vote for the candidate who better exemplifies the executive virtues, even if a different candidate would better match the voter's policy preference. How to encourage such behavior—itsself a question of what we might call *electoral virtue*—raises its own difficulties, of course. But to the extent that civic education is back on the agenda as a tool of democracy promotion,³⁷⁴ the executive virtues could be a useful component of the curriculum.

Our system, however, is not one of direct presidential plebiscites. Rather, two institutions mediate between the people and their choice of leader. On the back end, after votes are cast, sits the electoral college, whose members actually select the

370. See generally Ian McAllister, *The Personalization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL BEHAVIOR 571 (Russell J. Dalton & Hans-Dieter Klingemann eds., 2007) (explaining the causes and examining the effects of the personalization of politics).

371. Arthur H. Miller et al., *Schematic Assessments of Presidential Candidates*, 80 AM. POL. SCI. REV. 521, 522–23 (1986). For more recent empirical studies, see, for example, Jeffrey E. Cohen, *Voters and Presidential Intelligence*, 71 INTEL. 54, 55 (2018) (finding that voters both identify and prefer smarter candidates); David B. Holian & Charles Prysby, *Candidate Character Traits in the 2012 Presidential Election*, 44 PRESIDENTIAL STUD. Q. 484, 486 (2014) (finding that, in the 2012 presidential election, Barack Obama “secured a substantial advantage on character traits . . . and that these trait perceptions influenced the behavior of voters”).

372. Alessandro Nai et al., *Personality Goes a Long Way (for Some). An Experimental Investigation into Candidate Personality Traits, Voters' Profile, and Perceived Likeability*, 3 FRONTIERS POL. SCI., Article 636745, Mar. 2021, at 1, 2 (2021) (discussing how partisanship affects voter perception of candidates).

373. See, e.g., David G. Winter, *Leader Appeal, Leader Performance, and the Motive Profiles of Leaders and Followers: A Study of American Presidents and Elections*, 52 J. PERSONALITY & SOC. PSYCH. 196, 201 (1987) (describing a study in which leader appeal and leader performance are evaluated).

374. See, e.g., Linda C. McClain & James E. Fleming, *Civic Education in Circumstances of Constitutional Rot and Strong Polarization*, 101 B.U. L. REV. 1771, 1771 (2021) (arguing that civic education is crucial to remedying “constitutional rot”).

President. As noted above, one reason for the electoral college was to empower elites to check the people in the case of a populist selection of an unfit President.³⁷⁵ Thus one might ask whether individual electors should take more seriously their ability to vote their conscience. The most recent example of such “faithless electors” occurred in 2016, when several Republican delegates refused to vote for Trump.³⁷⁶

Yet there are good reasons to hesitate before encouraging faithless electors. First, there’s no guarantee that the electors themselves will possess the necessary virtues to use their power wisely; at the very least, the current process of elector selection, which is controlled by the parties themselves and differs from state to state, would have to be carefully examined.³⁷⁷ Second, and more importantly, normalizing faithless electoral-college votes would be a profound break in American history, as the Supreme Court noted in *Chiafalo v. Washington*, when it upheld the power of states to punish faithless electors.³⁷⁸

A better strategy would be to empower the national parties themselves, which play a central role in presidential elections. One of the most important roles that parties—and party elites in particular—play in American democracy is deciding on the major presidential candidates.³⁷⁹ In particular, elite-driven parties can suppress populist insurgents. This can have bad consequences, if the “smoke-filled rooms” prevent grass-roots

375. See *supra* notes 61–63 and accompanying text.

376. Lilly O’Donnell, *Meet the ‘Hamilton Electors’ Hoping for an Electoral College Revolt*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433> [<https://perma.cc/NY7E-HEAA>]. The group called themselves “Hamilton Electors” after Hamilton’s argument in *Federalist 68* that the electoral college would ensure the selection of good Presidents. See, e.g., Christopher Suprun, *Why I Will Not Cast My Electoral Vote for Donald Trump*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html> [<https://perma.cc/YG2A-B755>].

377. *About the Electors*, NAT’L ARCHIVES (May 3, 2023), <https://www.archives.gov/electoral-college/electors> [<https://perma.cc/4HX4-6TN4>] (over-viewing selection of electors to the electoral college).

378. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020) (holding that a state instruction for electors to comply with the vote of its citizens is in accord-ance with the constitution); see also Whittington, *supra* note 62, at 929 (“Mis-understanding and breaching those conventional duties [of a presidential elec-tor] is tantamount to misunderstanding and breaching the Constitution itself.”).

379. See generally MARTY COHEN ET AL., *THE PARTY DECIDES* (2008) (ana-lyzing the influence of parties on presidential elections).

democratic reform.³⁸⁰ But the suppression of populist insurgency can also screen out extreme or unqualified actors who are not committed to the stability of the overall democratic structure.³⁸¹ And because these outsider candidates—which Richard Pildes calls “free-agent politicians”³⁸²—are screened out before, rather than after, the votes are cast, party influence on the front end is less of a slap in the voter’s face than is post-election faithless electoral-college voting on the back end.

This suggests that moves to weaken elite control over the political parties, which go back as far as the aftermath of the 1968 Democratic nominating convention,³⁸³ may be misguided. For example, in 2016, after the bruising fight between Hillary Clinton and Bernie Sanders, in which Sanders supporters argued (with some justification) that the Democratic Party establishment largely supported Clinton, the party voted to weaken the role of “superdelegates”: party elites that could vote for the party nominee, notwithstanding the state primary and caucus results.³⁸⁴

But the better lesson for Democrats would have been to look at the Republican example that election cycle. Because the GOP does not use superdelegates, Republican elites, despite their general opposition to Donald Trump, were powerless to prevent him from winning the nomination.³⁸⁵ Although Trump was thus in some way the (small-d) democratic choice of the GOP nomination

380. See Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 657 (2018) (recounting the traditional system of party bosses selecting nominees).

381. See *id.* at 651 (noting that the current “populist selection system” of presidential nominations “makes it more likely than in a peer review system that candidates who lack relevant experience will succeed, as will candidates who are more politically extreme”).

382. Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CALIF. L. REV. 2051, 2066 (2022).

383. See Gardbaum & Pildes, *supra* note 380, at 659–66.

384. David Weigel, *Democrats Vote to Bind Most Superdelegates to State Primary Results*, WASH. POST (July 23, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/23/democrats-vote-to-bind-most-superdelegates-to-state-primary-results> [<https://perma.cc/HH56-WH4F>].

385. William G. Mayer, *Was the Process to Blame? Why Hillary Clinton and Donald Trump Won Their Parties’ Presidential Nominations*, 93 N.Y.U. L. REV. 759, 777–80 (2018) (arguing that Republican “superdelegates” were superdelegates in name only and that a more party-controlled primary might have obstructed Trump’s nomination in 2016).

process, his failure to uphold democratic and rule-of-law principles showed the downside of a view of party politics that always views increased democratic participation as an unalloyed good, even for democracy. At a deeper level, “[t]he nominating process is more democratic to the extent that it enables voters to select candidates who are committed to the democratic process.”³⁸⁶

There is, admittedly, an irony in looking to political parties to safeguard executive virtue, given that the Framers opposed political parties precisely because they thought it would harm public virtue.³⁸⁷ But parties have been central to American democracy for centuries, and an important tradition in the study of American government has held that “[d]emocracy is not to be found *in* the parties but *between* the parties.”³⁸⁸ Ultimately, as Jefferson observed, “[m]ay we not even say that that form of government is the best which provides the most effectively for a pure selection of these natural [aristocrats] into the offices of government?”³⁸⁹ This is the benchmark that we should evaluate our political parties: do they nominate virtuous candidates?³⁹⁰ If that requires more elite control, that may well be a price worth paying.

CONCLUSION

In this Article, I argued for centering executive virtue—not merely in the abstract but as specific to individual Presidents—in accounts of Article II and the broader separation of powers. But as recent history has demonstrated, the American political system cannot guarantee that the electoral process will result in virtuous Presidents, or that unvirtuous Presidents will be effectively checked once in office. What does this gap between ought and is mean for our constitutional system and how we understand it?

386. Dennis F. Thompson, *The Primary Purpose of Presidential Primaries*, 125 POL. SCI. Q. 205, 207 (2010).

387. James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 667–68 (2000) (giving examples of the Framers warnings about political parties).

388. E.E. SCHATTSCHEIDER, PARTY GOVERNMENT 60 (1942).

389. Jefferson Letter, *supra* note 64, at 1306.

390. See GALSTON, *supra* note 98, at 226 (“And, as Jefferson suggested, the ultimate test of systems of election or appointment is their tendency to select officeholders with the appropriate virtues.”).

The last several decades have seen increased interest in the question of what constitutes a “constitutional crisis.”³⁹¹ Scholars have correctly pointed out that mere political disagreement—which in public discourse is often enough to trigger concerns about constitutional crises—is insufficient for a crisis.

It is also unnecessary. Frequently in American history, the political system has operated perfectly well—harmoniously, even—while core constitutional requirements were continually violated. The most important such constitutional failure, the Jim Crow regime of racial subordination, demonstrates how the American political system can continue to operate in the face of a major breakdown in the constitutional system. We can thus divide the category of constitutional crises into two categories: *acute* crises (e.g., the Civil War) and *chronic* crises (e.g., Jim Crow).

The distinction allows us to better situate the Trump presidency in the broader story of American constitutional history—specifically by showing how the four years of the Trump administration constituted a chronic constitutional crisis. The Trump presidency was undoubtedly a chaotic and divisive one. It was also a particularly incompetent one. But none of these factors were the cause of the constitutional crisis. Nor was the fact that Trump was twice impeached a constitutional crisis.³⁹²

The argument that the Trump years were a chronic constitutional crisis is based on a constitutional violation simultaneously more diffuse—by not being limited to a single dramatic moment—and more direct. Specifically, the Trump years were a constitutional crisis because the constitutional requirement of presidential faithfulness was never satisfied. Trump’s mendacity, narcissism, and corruption were not just personal failings; they were *constitutional* failings, because they made it impossible for him to satisfy his constitutional obligations of faithful execution and defense of the Constitution. And the resulting crisis,

391. Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 707 (2009) (analyzing what constitutes a constitutional crisis).

392. Though, the fact that he was twice impeached and acquitted on almost total party lines *is* an indication of a chronic constitutional crisis, to the extent that it constitutes evidence that, like Trump, the vast majority of Republican lawmakers lacked the necessary virtue to carry out their constitutional responsibilities.

though never acute—at least not until the January 6 attack on the Capitol³⁹³—is nevertheless ongoing.

As Trump campaigns to retake the presidency in 2024, the nation faces, in the starkest terms so far, the question of whether to elect someone without the requisite virtues for the nation's highest office. This in turn raises an even more disturbing question: whether the public, in its exercising its most important democratic power, itself displays the necessary virtues to sustain constitutional democracy.

393. See Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 38 CONST. COMMENT. 275 (2023).