Article II as a Fascist Instrument

Omer Aziz[♦]

Abstract: *This Article examines the relationship between fascism and the law. It explores how the law was actualized in Fascist Italy and Nazi Germany and how these two respective legal orders were taken over. It argues that through usurpation, co-option, and subjugation, the Party-State was created in both countries that undermined their respective legal systems from within. A legal state of emergency was generalized and made permanent. In Germany, the existence of the Prerogative State, to use Ernst Fraenkel's term, reigned supreme; a legal abyss was created as the law was manipulated to serve the Party's aims. Next, this Article moves to the American example and Article II of the U.S. Constitution to ask how such a fascist seizure of presidential powers—and resulting control of the legal order—could happen in the United States. It takes an originalist perspective, examining the debates from the Philadelphia Convention, the ideas of the Framers, Supreme Court precedent, and modern presidential practice, to argue that Article II and the modern presidency are not just vulnerable to a legal fascist attack; they are uniquely susceptible to such a takeover. It concludes with an urge to return presidential powers to the more limited Executive envisaged by some of the Framers.*

♦ Radcliffe Fellow, Harvard University, 2022–24. J.D., Yale Law School, 2017.

INTRODUCTION

America faces a legal challenge unprecedented in its history. This is a general challenge to the Constitution's structure, especially the separation of powers, and it comes with a lawful and expansive understanding of Article II and the powers of the presidency. The threat is that a single person—whether the next president, or the one after them—could use the presidency to usurp power, politicize the regime, and subjugate the State to the Party. As I show below, the threat America is facing is a legal and constitutional one, a challenge grounded in the historic powers of the presidency, and a challenge not unlike the ones that Italy and Germany—with their own vaunted legal systems—faced a century ago. The great specter before the nation is whether republican government will continue or turn into a fascist state.

The nature of a democracy, and perhaps its directional future, can be discerned by the lexicon of its citizenry. So language- and etymology-dependent is America that originalism remains the prevailing school of interpretation of the Constitution. It was Justice Scalia who said, "the Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring."[1]

Constitutional law as a field of study is itself a linguistic and historical exercise that requires investigating the dimensions of constitutional language—with respect to Justice Scalia, this would include original intent, or, we can say, original debates; historical understandings; judicial interpretations by courts; scholarly consensus or lack thereof; intratextual relations between the text and its moving parts; intertextual dependencies between words in the text and other Founding documents; pragmatic considerations; and also, deviations from what has been established and followed for years.[2] Constitutional law is a precept-driven exercise in linguistic interpretation.

Ours may be an era of "words matter,"[3] and yet there seems to be a general consensus that the valuation of words has gone down by overuse. Among the clearest examples is the increasingly ubiquitous and cavalier use

---

[1] Antonin Scalia, God's Justice and Ours, First Things, May 2002, at 17.

[2] See Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 788–95 (1999); see also Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982).

[3] See, e.g., Justice Gorsuch's Opening Statement before the Judiciary Committee: "Justice Scalia was a mentor too. He reminded us that words matter, that the judge's job is to follow the words that are in the law, not replace them with those that are not." Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary, 115th Cong. 65 (2017).

of the word "fascism" that began with the 2016 election of Donald J. Trump. Such use directly contravenes the term's seriousness.[4] Former President Joe Biden used the phrase "semi-fascism" to describe his opponent, and the right-wing movement he represents in 2022.[5] The word fascism is regularly employed as an insult.[6] To use the term in this way—to discredit and delegitimize—one is subconsciously or directly raising in the listener's mind the fascist states of Nazi Germany and Fascist Italy and immediately casting oneself as a kind of victim against Supreme Evil. When Donald Trump was convicted on 34 felony counts of falsifying business records in New York,[7] he claimed the United States government was a "fascist state."[8]

"Fascism" is now used generally. Yet, curiously, its intellectual coherence is still subject to debate. This presents a unique and intriguing challenge to the legal thinker. At one level, there is a political and ideological term employed with sincere urgency, often as a warning of impending doom via constitutional takeover, and at another level, its conceptions, implications, and relationship with constitutional principles is unclear. It may be the greatest "crying wolf" story of all time, or conversely, the moment when the warning finally proves real and the wolf actually comes for American democracy's throat, with potentially fatal consequences for America's constitutional system. The deeper issue is that there is no consensus on what, precisely, fascism *is*: whether it should be treated as a coherent ideological project with identifiable principles or as a fluid, situational phenomenon whose contours shift depending on the political context in which it emerges.[9] Much of the disagreement arises from the fact that fascism has never possessed a single canonical text or universally accepted definition. Its meaning shifts depending on whether one focuses on its intellectual

---

[4] See generally Timothy Snyder, On Tyranny (2017); Jason Stanley, How Fascism Works (2018). More recent treatments include Daniel Steinmitz-Jenkins, Did it Happen Here? (2023) and Rachel Maddow, Prequel (2023).

[5] Christopher Cadelago & Olivia Olander, Biden Calls Trump's Philosophy "Semi-Fascism," Politico, (Aug. 25, 2022, 10:01 PM), https://www.politico.com/news/2022/08/25/biden-trump-philosophy-semi-fascism-00053831.

[6] A painstaking classificatory analysis and comparison can be found in Stanley G. Payne, Fascism: Comparison and Definition (1980). For example, "Fascist ideology and culture deserve more attention than they normally receive, for fascist doctrine, like all others, stemmed from ideas, and the ideas of fascists had distinct philosophical and cultural bases, despite frequent assertions to the contrary." Id. at 10.

[7] See People v. Trump, 86 Misc. 3d 810, 811, 224 N.Y.S. 3d 832 (N.Y. Sup. Ct. 2024).

[8] "We're living in a fascist state," the former president said after his state conviction. Curtis Yee, Trump Delivers Remarks on his Guilty Verdict: Key Moments and Analysis, Associated Press (last updated Oct. 23, 2024, 11:51 AM), https://apnews.com/live/trump-guilty-verdict-updates.

[9] See Omer Aziz, Shadows of the Republic: The Rebirth of Fascism in America and How to Defeat It for Good (forthcoming Apr. 2026) (manuscript at 19–21) (on file with author) (elaborating on the conceptual instability of fascism and its implications).

aspirations, its organizational methods, or its real-world expressions across different national settings.

Despite the importance of the "fascism" debate, fascism's relationship with the law has received little scholarly notice.[10] The subject of how fascism subverted the legal orders of Fascist Italy and National Socialist Germany has received scant attention. While violence was central to fascism's seizure of power, the law was equally important. "Legal transformation not only insures the revolution, but actually *makes* it,"[11] noted the legal scholar H.A. Steiner in 1936. The legal dimension of the fascist state was critical to its historical success. Moreover, if "fascism" is a conceptually coherent political and legal ideology—as this Article argues—then the corollary of its effects on Article II and the U.S. Constitution writ large has been entirely unasked. This Article argues that fascism could reshape the law in America, as it did in Italy and Germany, and that the powers of the presidency as interpreted today give a future fascist leader the opportunity to create a "lawful" and ostensibly constitutionally protected fascist regime. The law and modern fascism, in other words, form a potential symbiosis.

This Article sets out to comprehensively provide intellectual and linguistic coherence to the use of the term "fascism" in the American context and to examine, for the first time, how such a doctrine could be wielded or curtailed by contemporary readings of Article II of the Constitution. If we abstract away its racial and social policies,[12] fascism-as-doctrine necessitates controlling the executive branch of a government. It can do so with legality, as with Weimar's takeover by the National Socialists and the institutionalization of the *Führerprinzip* as a matter of state policy; or it can do so informally, as with Mussolini's rule as prime minister under the Italian monarch for 22 years. Fascism's relationship with the law, as I will argue, is

---

[10] One must go far back to begin seeing serious legal treatment of fascism and its disposition toward the law. See H.A. Steiner, The Fascist Conception of the Law, 36 Colum. L. Rev. 1267 (1936). Another brilliant analysis was offered by A.H. Campbell, Fascism and Legality, 62 L.Q. Rev. 141 (1946). Much of the more recent literature comes from Europe. See, e.g., Darker Legacies of Law in Europe: The Shadow of National Socialism an Fascism Over Europe and its Legal Traditions (Christian Joerges & Navraj Singh Ghaleigh eds., 2003). Also, the immensely erudite work, Jens Meirhenrich, The Remnants of the Rechsstaat: An Ethnography of Nazi Law (2018). For a comprehensive, scholarly treatment on Nazi law, including the impact on professionals and judges, see The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice (Alan E. Steinweiss & Robert D. Rachlin eds., 2013).

[11] Steiner, supra note 10, at 1267.

[12] The creation of arbitrary racial classifications in both Italy and Germany and enforcing these separations by law was to be one of the unique elements of fascist law. While the racial laws and their interconnectedness with America is a subject for another day, fascism could exist, theoretically, without racial victims—although in historical practice, it has almost always led to a kind of racial violence against minority groups. See Aziz, supra note 10, at 151–77 (examining the gradual racialization of Italian Fascism, and Nazism's long record of engagement with American race law).

one of making legal a permanent state of emergency—a generalization of the exception—and manipulating the established legal order until permanence is considered acceptable.

In the American context, executive power according to Article II would be the most important—and most plausible—pillar of any fascist project. The question that concerns us is whether Article II of the Constitution, as reasonably construed and understood today by jurists, judges, and presidents, could be weaponized in a not-hypothetical fascist state. This Article includes the word "reasonably" with trepidation, for the standards of reasonability are fraying—and indeed, rule of law principles are now regularly, publicly assailed.[13] To "reasonably" construe Article II and the scope of the president's executive powers is to examine those actions at the outer limits of constitutional acceptability. Which is to say, if fascism exists as a cohesive politico-legal philosophy, with coherent intellectual roots and ontologies of its own, and is therefore more than a pejorative or misnomer, could its appearance and manifestation be accelerated by Article II? And what would an American fascism justified under Article II resemble?

Part I of this Article makes conceptual coherence of the fascist doctrine through investigation of what its chief intellectual exponents believed. Next, this Article examines how the fascist parties subjugated the legal orders in Italy and Germany. Both Italy and Germany represented vaunted legal traditions with respected histories of their own—that the structure of the legal order was conquered so quickly illustrates how the fascist regime manipulates the law. Through usurpation, co-option, and subjugation, the Italian legal regime quickly turned fascist. Meanwhile, in Germany, the "Dual State" was born, to use Ernst Fraenkel's term.[14] In the Dual State,

---

[13] See generally Heinz Klug, The Rule of Law, War, or Terror, 2003 Wis. L. Rev. 365 (discussing how the September 11 terrorist attacks and response to those acts undermined trust in the rule of law); David M. Driesen, President Trump's Executive Orders and the Rule of Law, 87 U.M.K.C. L. Rev. 489 (2019) (evaluating whether the large number of executive orders passed during the first thirty days of the Trump administration presented a challenge to the rule of law); Dawn Johnsen, Restoring Rule of Law Norms, 97 Tex. L. Rev. 1205 (2019) (arguing that President Trump's conduct subverted the rule of law by violating constitutional norms); Johanna Kalb & Alicia Bannon, Courts Under Pressure: Judicial Independence and Rule of Law in the Trump Era, 93 N.Y.U. L. Rev. Online 1 (2018) (discussing how President Trump's attacks on the judiciary indicate disrespect for the rule of law); Trevor George Gardner, Law and Order as the Foundational Paradox of the Trump Presidency, 73 Stan. L. Rev. Online 141 (2021) (noting how the Trump administration's fixation on curbing minority violent crime distracted the public from Trump's own criminal liability); Harold Hongju Koh, The Trump Administration and International Law, 56 Washburn L.J. 413 (2017) (analyzing the relationship between the Trump Administration and international law).

[14] Fraenkel was a prominent German-Jewish lawyer and political scientist who, after fleeing to the U.S. in 1941, published the seminal analysis of the Third Reich's legal system and coined the concept of the Dual State. Applying this concept to Germany, Fraenkel argued that the Nazi regime represented a tension between vestiges of traditional legal order and a new kind of extrajudicial power. See Douglas

there existed a Normative State, which administered the laws and legitimated the state apparatus; and there was the Prerogative State, which was fully discretionary and partisan. In Germany, fascism created a legal abyss where the law did not exist. It was the apotheosis of the fascist legal order, where the Prerogative State exercised police violence at night, while the courts, agencies, bureaucracy, and other parts of the Normative State functioned during the day. To place itself beyond law while using the law to legitimate itself, I will argue, is the essence of the fascist conception of the law—and in Nazi Germany, a perhaps mortal blow was struck to the historical development of the rule of law.

Part II of this Article examines the powers of the American presidency and how contemporary readings of Article II of the Constitution make America vulnerable to a fascist chief executive. This part returns to the 1787 Convention and the First Congress to demonstrate that the earliest debates by the Framers focused heavily on an expansive chief magistrate that would replicate in some form, in practice if not in name, the powers of Old-World monarchs. Madison's notes give credence to this, as does the structuring of executive power so broadly. Moreover, presidential power as read from the 1860s onwards and especially after 9/11 by the Supreme Court, legal scholars, and Executive Branch practitioners, is a generously capacious presidency. The Court's holding in *Trump v. United States*[15] is in line with its general view on presidential powers. In the field of presidential powers, there is virtual agreement—even by reluctant liberals—that the presidency as practiced in this millennium has certain unchecked and unrestrained powers when national security is at risk and when an emergency may be looming. As will be discussed, the Framers themselves intended for a strong, expansive executive that would also have the effect of unifying the Nation yet would still be structurally interdependent on the other two branches of government and thus, restrained.

Recent practice, policy, and precedent have given the president the ability to continually expand their sphere of power with or without Congressional oversight. As I will show, the executive power, in matters of force and violence, rules by what I call the Prerogative Power now—and this makes Article II especially vulnerable to a fascist takeover.

G. Morris, Legal Sabatoge: Ernst Fraenkel in Hitler's Germany 1–8 (2020) (providing an overview of Fraenkel's life and impact); Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship xiii–xvi (E.A. Shils, Edith Lowenstein & Klaus Knorr trans., 1941) (1941) (sketching out his theory and its application to Germany).

[15] Trump v. United States, No. 23-939, slip op. at 41–42 (2024).

Part III of this Article examines the post-War on Terror presidency, which has rapidly grown in scope under wartime exigencies, and the monumental decision in *Trump v. United States,* which effectively cloaked the presidency—and therefore Article II of the Constitution—in the royal garb of sweeping immunity. Part IV argues that the modern presidency as understood under Article II has devolved into what I term the "Prerogative Presidency," where occupants of the Oval Office operate within a zone of immunity; it is precisely in this legal darkness that dictators are born. This Article concludes with an urgent call to restrain the presidency in line with the Framers' design. Too much unchecked power in a single person—one who heads a branch of government, directs federal law enforcement, commands the armed forces, appoints federal judges, and controls the machinery of prosecution, among other powers—threatens America's constitutional system. It is imperative to ask how.

I. FASCIST LEGAL DISCOURSES

What is fascism? Is it an idea, system, praxis? Is it a form of political activism? It is routinely associated with violence[16]—but so is revolutionary communism, anarchism, and even post-colonial liberation. So overused had the term fascism become that in 1968, one scholar demanded that it be banned.[17] A decade later, another scholar likened the search of fascism to the search for the "black cat in a dark room"—the search itself presupposes that something will be found.[18]

According to a 1980s analysis by Professor Stanley Payne, the definition of fascism was bedeviled from the beginning because the Italian Fascists "developed a formal codified set of doctrines only ex post facto."[19] Whereas in revolutionary Marxism and anarchism, the canonical texts could be found in Marx or Bakunin, with fascism, the doctrine was only loosely outlined, so the practice became evidence for doctrine. The canonical Marxist view of fascism as a tool of "finance capitalism" was later seen as an incomplete view of the fascist movement.[20]

---

[16] See Robert O. Paxton, The Anatomy of Fascism 218 (defining fascism as "a form of political behavior . . . [that] pursues with redemptive violence and without ethical or legal restraints goals of internal cleansing and external expansion") (2004).

[17] See generally European Fascism (S.J. Woolf ed., 1969).

[18] See Gilbert Allardyce, What Fascism is Not: Thoughts on the Deflation of a Concept, 84 Am. Hist. Rev. 367, 368 (1979).

[19] Payne, supra note 6, at 4.

[20] See A. James Gregor, Mussolini's Intellectuals: Fascist and Political Thought 12 (2005) [hereinafter Gregor, Mussolini's Intellectuals]; Georgi Dimitroff, The United Front Against War and

In political and legal theory, fascism was, after its defeat in Italy and Germany, a subject not seriously explored. Perhaps the wounds that fascism inflicted—reaching its apotheosis in the Shoah—were too severe and horrendous to contemplate. It was better to render fascism as an idea beyond the pale, its policies so abhorrent that they had to be placed in what James Q. Whitman called the *Nefandum*[21]—the unspeakable evil that could not be touched.

Thus, fascism—at least in the hinterlands of academic discourse—unleashed a minor debate on what, in fact, fascism even was. Ernst Nolte, a conservative German historian and philosopher, considered it a metropolitan phenomenon—or a political movement emerging from the weaknesses of liberal democracy and one aspiring to create a new order.[22] German-born theorists and philosophers Erich Fromm, Wilhelm Reich, and Theodor Adorno—working independently and from different intellectual traditions—each traced the roots of fascism to psychological and social pathologies found within the European middle classes.[23] Crucially, while fascism borrowed revolutionary militancy from Bolshevism, it placed emphasis not on class struggle, but on identity and especially national (or racial) identity.[24] This identitarian ontology focused on the feelings of isolation, impotence, and frustration of modern, mechanized society. Meanwhile, Henry Ashby Turner, the renowned Yale historian of modern Germany, offered a counterpoint, arguing that fascism was a rejection of modernization—of urbanization, liberal education, and social differences.[25] To some extent, these debates continue.

Fascism: Report to the Seventh World Congress of the Communist International, (4th ed. 1936) (providing a primary documentation of the Stalinist fascist hypothesis). Marxists inconsistently and incorrectly labeled fascism. First "it was seen as a rural, agrarian reaction . . . . Then it was understood to be enlisted in the service of the urban middle classes. Then it was envisaged the creature of industrialists. Then it was conceived the instrument of finance capitalists." Gregor, Mussolini's Intellectuals, at 12. For the idea that fascism was merely a tool of finance being incorrect and incomplete, see A. James Gregor, Fascism and Modernization: Some Addenda, 26 World Pol. 370, 379 (Apr. 1974) ("Soviet theoretician Boris Lopukhov could argue by 1965 that the Stalinist interpretation of fascism as the 'terrorist tool of finance-capitalism' was a caricature of the actual historical sequence.").

[21] *Nefandum* literally means "that which must not be spoken" in Latin. See James Q. Whitman, Hitler's American Model: The United States and the Making of Nazi Race Law 3 (2017).

[22] See Ernst Nolte, The Three Faces of Fascism (Leila Vennewitz trans., 1966).

[23] See generally Wilhelm Reich, The Mass Psychology of Fascism (1969) (arguing that fascism draws its mass appeal from authoritarian character structures shaped by patriarchal socialization); Erich Fromm, Escape From Freedom (1941) (contending that individuals may embrace authoritarian movements as a psychological escape from the anxieties of modern freedom; Theodor Adorno et al., The Authoritarian Personality (1950) (empirically linking certain personality traits to authoritarianism and susceptibility to fascist ideology).

[24] See Payne, supra note 6, at 15–17.

[25] See Henry Ashby Turner, Fascism and Modernization, 24 World Pol. 547, 548–50, 564 (1972); Turner, German Big Business and the Rise of Hitler (1987).

What is agreed is that "fascism" as a political ideology has existed in the recent annals of history and in two young democracies. It first found voice in Benito Mussolini's defection from the socialist left—and later in his 1932 essay *The Doctrine of Fascism*.[26] In 1922, the ex-journalist and now lower-house parliamentarian led his militant fascists in the March on Rome, in which some 25,000 *fascisti* converged on the capital.[27] Mussolini ruled for 22 years. He successfully usurped executive power—but, critically, remained within the parameters set by Italy's constitutional monarchy. According to Mussolini, fascism rejected and inverted any belief "in democracy, the absurd conventional untruth of political equality dressed out in the garb of collective irresponsibility, and the myth of 'happiness' and indefinite progress."[28] Fascism was one-man rule, a stamping-out of dissent, and, most importantly for present purposes, an end to the rule of law, the basic principle that law and politics were distinct, that law was an impartial Ruler. Fascism's relationship to the legal order was an evisceration of the rule of law—first with an extreme politicization of law, later by owning and monopolizing the law for its own ends. As will be shown, fascism's relationship with the law followed a familiar pattern.

In Germany, fascists also ruled, seizing power in 1933 and remaining in power for 12 years. While there are historians who argue that National Socialism was distinct from fascism proper,[29] the majority view among political theorists, historians, and scholars is that National Socialism was a specific form of fascism, with a greater emphasis on the *Volk* and the "people's community," fusing nationalism and extreme racism.[30] Apart from perhaps Alfred Rosenberg—a pseudo-intellectual considered a superficial thinker even by fellow Nazis—there was no real chief exponent of Nazism as school of thought.[31] In his wartime Table Talks, Hitler attributed success of his program to fascism learned from Mussolini, and by imitating the Duce, Hitler had extended what the Italians had begun.[32]

---

[26] See Benito Mussolini, The Doctrine of Fascism (1932).

[27] See Stanley G. Payne, A History of Fascism, 1914–1945 83 (1995).

[28] Benito Mussolini & Giovanni Gentile, What is Fascism, 1932, Internet Modern History Sourcebook (last visited Nov. 22, 2025), http://www.fordham.edu/halsall/mod/mussolini-fascism.html.

[29] See Roger Griffin, Fascism: An Introduction to Key Concepts in Political Theory 54 (2018) ("No less a world expert on the Third Reich than Ian Kershaw was now prepared . . . to classify Nazism as a form of fascism"). Some of these differences are also examined by Payne, supra note 6, at 53–58.

[30] See, e.g., Richard J. Evans, The Third Reich in Power (2005); Payne, supra note 27.

[31] Although Rosenberg's works would still be important to Party doctrine, see Rosenberg, The Myth of the Twentieth Century: An Evaluation of the Spiritual-Intellectual Confrontations Of Our Age (Vivian Bird trans., Hist. Rev. Press 2004) (1930).

[32] See Adolph Hitler, Hitler's Table Talk 1941–1944: His Private Conversations 10 (Norman Cameron & R.H. Stevens trans., Enigma Books 3d ed. 2000) (1953) ("Don't suppose that events in Italy had no influence on us. The brown shirt would probably not have existed without the black shirt.").

While a full typology of different fascisms is beyond the scope of this Article, there are certain commonalities among all fascist regimes—historical or contemporary—and these constitute, in Nolte's formulation, a fascist "minimum,"[33] which includes: opposing Marxism and traditional liberalism and conservatism; emphasizing the principle of dictatorial fiat; achieving the objective of totalitarianism; securing the operationalization of mass politics through a radicalized mass party;[34] and, what I view as the last and distinguishing feature, fusing the Party and State. Fascism is a hodgepodge ideology anchored in the extreme right; where it distinguishes itself is subjugating the State to the Party. It implants itself into the existing legal regime, and then mutates it to serve Party ends, eventually owning the law itself.

It has been stated that everything Hitler did was legal at the time.[35] This is only partially true. The Weimar Constitution had been repeatedly violated under previous chancellorships, and Article 48, which gave the president emergency powers, allowed the Reichstag's necessary vote to be bypassed—absorbing the legislature's role within the executive.[36] The Weimar Constitution was moth-eaten by 1933, and Germany was governed according to the "temporary" martial law, reauthorized under the Weimar Constitution's generous Emergency Powers. Hitler's seizure of power would expand this running over of the Constitution. The Enabling Act of 1933 gave

---

[33] See Ernst Nolte, What Fascism is Not, 84 Am. Hist. Rev. 389, 389 (1979).

[34] See Ernst Nolte, Three Faces of Fascism: Action Francaise, Italian Fascism, National Socialism (Leila Vennewitz trans., 1966). This taxonomy has much in common with Robert Paxton, The Anatomy Of Fascism 219–20 (2004).

[35] See, e.g., Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), https://teachingamericanhistory.org/document/letter-from-birmingham-city-jail-excerpts/. King wrote,

> We should never forget that everything Adolf Hitler did in Germany was 'legal' and everything the Hungarian freedom fighters did in Hungary was 'illegal'. It was 'illegal' to aid and comfort a Jew in Hitler's Germany. Even so, I am sure that, had I lived in Germany at the time, I would have aided and comforted my Jewish brothers. If today I lived in a Communist country where certain principles dear to the Christian faith are suppressed, I would openly advocate disobeying that country's antireligious laws.

See id.

[36] A helpful summary of the changes to what Turner calls a "presidential cabinet" can be found in Henry Ashby Turner, Jr., Hitler's Thirty Days to Power 5–6 (1996) ("With the proclaimed goal of elevating the government above politics, Hindenburg began the practice of appointing chancellors of his personal choice who were not beholden to parliamentary majorities. He thus initiated what came to be known as a system of government by presidential cabinet." Virtually all national laws, by 1930, were enacted through presidential decrees instead of parliamentary majorities.).

him full control, and the post of "President" was unconstitutionally abolished the next year.[37]

The "constitutional charter" of the Third Reich was therefore the Emergency Decree of February 28, 1933—the Reichstag Fire Decree. By this decree, as one German lawyer observed at the time, "the political sphere of German public life ha[d] been removed from the jurisdiction of general law. Administrative and general courts aided in the achievement of this condition."[38] Fascism's relationship to the rule of law was parasitic—and it would fundamentally rewrite what the norms and principles of justice were by abolishing impartial law and fusing it completely with political motivations. Indeed, fascism's usurpation of the rule of law can be considered a radical inversion—an attempt to permanently overrule the Western legal tradition by eradicating the principle of the inviolability of law—that law stands above political actors and cannot be overridden at will. Hitler's suggestion that law has no intrinsic value of its own[39] was not entirely off the mark, and other jurists of the Third Reich, such as Hans Frank and Franz Gürtner, as well as officials of the Reich Justice Ministry, would articulate a more expansive view of the functions and purposes of law as an instrument of power.[40]

---

[37] Richard J. Evans has argued that the passage of the Enabling Act was procedurally invalid because the required number of parliamentarians were absent from the Reichstag. See Richard J. Evans, The Coming of the Third Reich 351 (2004) (explaining that Hermann Göring, as Reichstag president, unilaterally reduced the number of votes needed for quorum by not counting the duly elected Communist deputies—"a high-handed decision that had no legitimacy in law whatsoever.") Separately, Article 41 of the German Constitution established the office of president, which was then abolished by Hitler's decree merging the office with that of Chancellor, legitimated further by plebiscite. See Constitution of the German Reich/August 11, 1919/Translation of Document 2050-PS/Office of U.S. Chief of Counsel (Cornell Univ. Library Digital Collections), https://digital.library.cornell.edu/catalog/nur01840 ("Article 41: The Reich President is elected by the whole German people.").

[38] See Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship 3 (E.A. Shils trans., 1941).

[39] Id. at 46, 108. (Explaning National Socialism's atitude toward the law, Fraenkel quotes a speech where Hitler repudiates the idea that "Law as such has any intrinsic value," and states the Nazi view that formal justice has no intrinsic value).

[40] According to a 1936 manifesto by Hans Frank, the Reich Commissioner for Justice and head of Nazi Lawyers' Leave,

> The judge is not placed over the citizen as a representative of the state authority, but is a member of the living community of the German people. His role is to safeguard the concrete order of the racial community, to eliminate dangerous elements, to prosecute all acts harmful to the community, and to arbitrate in disagreements between members of the community. The Nazi ideology, especially as expressed in the Party programme and in the speeches of our leader, is the basis for interpreting legal sources.

See Richard J. Evans, The Third Reich in Power 73 (2005) (translating Rede des Reichsrechtsführers Reichsminister Dr. Frank auf dem zweiten Empfangsabend des Wirtschaftsrates der Deutschen

What is evident is that fascism in both Italy and Germany expressed a distinct relationship to the law and was perhaps the most successful political movement in recent memory to blur, erase, and then control the line between politics and law. It transformed the legal system from rational legal decisions made according to principles that had been upheld by time (and past practice) and, at the same time, given fascism's propensity to historicize its decisions, claimed that its actions were embodiments of the legal traditions it sought to overthrow. Law and justice would become mere political ends. And the core principle of law, in Anglo-America and Western Europe, that the law could not be violated at the whim of the Sovereign, was to be repudiated.

As we will see, Mussolini's Italy and Hitler's Nazi Germany approached the co-option—and ultimate subjugation—of the law in distinct ways, though with certain structural similarities that evince the deeper relationship between fascism and legal power.

A. Mussolini and the Rule of Law

Fascism began in Italy, so it is only appropriate to examine how the Fascist state thought of the rule of law. Mussolini was originally a socialist, and the organizational and bureaucratic structure of Italian Fascism—as well as impetus to revolutionary violence—came from its socialist origins.[41] Mussolini's favorite intellectual, Giovanni Gentile, who influenced Italian Fascism's original doctrine,[42] argued that history was made neither by heroes nor masses, but those heroes who sensed the "inarticulate, yet powerful, impulses that move masses."[43] Fascism was a mass movement, but one controlled and shepherded by an elite. Gentile viewed the state as supreme, an extension of pure idealism; its laws were inherently normative and subject to the general popular will.[44]

Italy in 1922 was a constitutional democracy that had witnessed (and overcome) several major changes, including the Risorgimento (the movement for Italian unification).[45] By the end of Mussolini's rule, it would

---

Akademie in Berlin über die Grundlagen der nationalsozialistischen Rechtsauffassung, 21 January 1936: document no. 59, in Paul Meier-Benneckenstein (ed.), Dokument der deutschen Politik (6 vols., Berlin, 1935-9), IV: Deutschlands Aufstieg zur Grossmacht 1936, 337- 46.)

[41] See A. James Gregor, Mussolini's Intellectuals: Fascist Social and Political Thought 53, 252 (2005).

[42] See Mussolini, supra note 26.

[43] See Giovanni Gentile, The Origins and Doctrine of Fascism ix (A. James Gregor trans., Transaction Publishers 2002) (1937).

[44] Id. at 5–11.

[45] David D. Roberts, The Monarchy and the Fascist Regime in Italy, Hist. of European Ideas (July 17, 2023) https://doi.org/10.1080/01916599.2023.2233065.

become a one-party dictatorship while retaining the ceremonial role of the king. Its main intentions towards law, soon to be enacted, would be followed by other fascist parties in Europe: the usurpation of power for itself, including the elimination of all separation of powers; the illegitimate blending of party and state; and the radicalization (and later racialization) of the administration of justice and function of the laws.

Gentile, who later played a role in reforming Italian education laws,[46] conceived of the state as an autonomous entity representing the general will of the masses. And the will of the state did not just reveal itself "by the enactments of positive legislation."[47] According to the Gentile, the private sphere was also part of the state:

> But the Will of the State does not manifest itself solely by the enactments of positive legislation. It opens to private initiative such courses of action as may presumably be carried on satisfactorily without the impulse and the direct control of the sovereign power. But this concession has a temporary character, and the State is ever ready to intervene as soon as the private management ceases to be effective.

The moral architecture upon which this is based is the general and popular will as embodied at the highest level of sovereign, i.e., the State. "The essence of law," Gentile [48] averred, "is not in its expression"—which is to say, not in positive law, judicial decisions, or legislation. The law's essence, rather, was "in the will which dictates it, or observes it, or enforces the observance of it."[49] This communal-social view permeated every point about fascism. The attitude could be summed up in Gentile's formulation: "My true volition is the will of the State acting as a particular will . . . My will is not only my own; it is a universal will."[50] At its foundations, fascism saw the human animal as an innately social creature—bound up in ties of family, soil, blood, and the apogee of political organization: the State.

---

[46] See Giovanni Gentile, The Reform of Education (Dino Bigongiari trans., Harcourt, Brace & Co. 1922) (1919); Giovanni Sale, SJ, Giovanni Gentile and the Italian School Reform, La Civiltà Cattolica (Dec. 30, 2024), https://www.laciviltacattolica.com/giovanni-gentile-and-the-italian-school-reform (noting "A century ago, the reform in educational matters desired and elaborated in 1923 by the then Minister of Education in the first Mussolini government, philosopher Giovanni Gentile (1885–1944), came into effect in all schools of the Kingdom of Italy.").

[47] Gentile, The Reform of Education, supra note 46 at 28.

[48] Id. at 29.

[49] Gentile, The Origins and Doctrine of Fascism, supre note 43 at 83.

[50] Id at 84.

For Mussolini, Gentile, and the earliest fascist intellectuals and thinkers, the source code of fascism's attitude towards the state was ready-made—the Roman Republic and Principate, and the stern administration of justice grounded in Roman traditions. This began with the symbology of "fascism" itself: the name was derived from the *fasces* or the bundle of rods with an axe that was used by the lictors of the state to "drive away the masses" and "carry out violent coercion" against those who disobeyed the laws.[51] The fasces had an axe attached when it was in the magistrate's hands—simultaneously signifying the legitimacy of the law and its administration, including its right and duty to control matters of life and death.

For Mussolini, the fasces symbol meant unity of force and the entire system of justice. "Fascism is not an enemy of true liberty," the Duce told an American newspaper reporter in 1924, "it's an enemy of false liberty."[52] The point of "fascismo" was to "assert the rights of society" against the individual, and in doing so, to administer and elevate "the rights of every member and of every element belonging to that society."[53] This social-communitarian aspect of Fascism underpinned its philosophy.[54] In this view, social "justice" equaled social equilibrium.[55]

Through and beyond the symbolism of its name, the Italian Fascist movement deliberately identified itself with the idea of "*Imperium Romanum* and the Roman theory of the state."[56] There was no attempt to substitute a new kind of common law or inculcate an entirely new attitude toward law. Romanity and Roman doctrine—and the Fascist State as the inheritor of Rome—were the ideological shade through which Italian Fascism was legally colored.[57] Romanity and Roman law were referenced by Mussolini even before the Fascist movement became a party.[58] The law

---

[51] See Cosimo Cascione, The Idea of Rome: Political Fascism and Fascist (Roman) Law, 129, *in* Roman Law and the Idea of Europe: Europe's Legacy in the Modern World 128, 129 (Kaius Tuori & Heta Björklund eds., 2019).

[52] E. Price Bell, Interview with Mussolini: Fascism and Liberty: A Record of Achievement, The Observer (May 25, 1924), at 15.

[53] Id.

[54] Id.

[55] Id.

[56] See Fraenkel, supra note 38, at 112.

[57] See generally Andrea Giardina, The Fascist Myth of Romanity, 22 Estudos Avançados 55 (2008). (Rome was a central feature of fascist symbology and ritual, down to the name of the ideology itself. Rome gave fascism mass cultural appeal because the fascists argued they were the inheritors and descendants of the Roman Empire).

[58] See id. at 57 (Mussolini gave a speech on April 21, 1922, a few months before the March on Rome, to mark his connection to the Roman Empire. He said, "To celebrate the Birth of Rome means to celebrate our kind of civilization, means to exalt our history and our race, means to lean firmly on the past in order to project better onto the future. As a matter of fact, Rome and Italy are two inseparable terms . . . . The Rome we honor is certainly not the Rome of the monuments and ruins, the Rome of the glorious ruins

was merely an instrument to advance the interests of the totality of society—and the Roman tradition, glorious and all-encompassing, proved a useful custom to appropriate. "Rome is our starting point and reference," Mussolini proclaimed before coming to power; "it is our symbol, or, if you will, our myth."[59] The Rome that was integrated and assimilated into the Italian Fascist State was a synchronous combination of the Republic, a State that was conceived as "totalitarian," while the Empire proffered the symbol of the "stable global domination."[60] The salute, the chants, the emulation of symbols and theories of justice, the dates and celebrations—all were replications of ancient Rome.[61]

What fascist intellectuals would articulate in theory, the Duce would implement in practice—and the Fascist judicial system would administer in time. As an example of how Fascism altered and manipulated the dictates of law, the sphere of criminal law and procedure is instructive. The "profound changes" that Fascism unleashed in criminal justice had the "fundamental purpose" of strengthening the dictatorship.[62] Nor were the Fascist reforms limited to areas where the Party had direct or indirect interests at stake; the arbitrary application of law by agents of the state extended to "ordinary homicides, larcenies, burglaries, frauds, embezzlements, etc., which had nothing to do with politics or with the regime in power." [63] Police, prosecutorial agencies, and administrative bodies were endowed with unchecked power to carry out the prerogatives of law. The Fascist Ministry of Justice and its prosecutors were granted greater powers and more discretion—effectively, the functions of the court and even parts of the legislature were absorbed in the executive, specifically its prerogative and coercive arms.

In other words, the police and prosecutors, as well as political officials, were above the law. They interpreted and implemented the law, molded the law to their political prejudices, and executed it with political motivations. A theoretical debate could be had as to whether this was "law" at all, as the term is understood in genuine constitutional democracies.[64] The Duce

---

among which no civilian walks without feeling a thrilling shiver of veneration . . . . The Rome we honor, but mainly the Rome we long for and prepare is another one: it is not about honorable stones, but living souls: it is not the nostalgic contemplation of the past, but of the hard preparation of the future").

[59] Id.

[60] Giardina, supra note 57, at 64.

[61] See Emil Ludwig, Talks With Mussolini 93 (1932).

[62] See generally Morris Ploscowe, Purging Italian Criminal Justice of Fascism, 45 Colum. L. Rev. 240, 240–64 (1945).

[63] Id.

[64] See, e.g., Frederic Bastiat, The Law 2 (1850) ("What, then, is law? It is the collective organization of the individual right to lawful defense?"); Arthur Allen Leff, Law and, 87 Yale L.J. 989 (1978); Joseph

proclaimed the law, and in his title was unified the power of both Caesar and Augustus—the symbolic and actual representation of the Sovereign. The police and prosecutors, of course, stood for the Sovereign, and this was Mussolini as head of the Fascist Party. Though Italy was still a constitutional monarchy throughout Mussolini's reign, legal and political power was de facto concentrated exclusively in his hands. A cult was made of his unrivaled executive authority; the Duce's power was unbounded, an extreme unitary executive wherein the singular power of one person extended over all the laws. Justice was impartial only insofar as the Duce decreed it to be so.

There were three broad ways in which the Fascists manipulated and altered the law. The first was the usurpation and aggrandizement of power in the Leader, which necessarily required eliminating any separate powers or checks, through official, customary, quasi-legal, and patently illegal means. The second, later perfected in Germany, was the blending of Party and State, with State functions and organs gradually absorbed into the Party, and the State itself eventually being subsumed within the Party. The third co-option of the law was in its radicalization, as the law became purely an instrument of politics and partisanship, and in the eventual racialization of the State's violence. In Italy, this took place under a constitutional monarchy whose nominal head was still King Victor Emmanuel III.

An early incident, however, exemplified the tension between the legal, constitutional executive, and the de facto Executive in Mussolini. The Fascists proposed making the Grand Council, then a Fascist Party organ, into a state body, charged with helping to select the prime minister.[65] The King had "serious misgivings" about this law, but went along anyway.[66] The King would sign off on other laws too that he may have disagreed with, including the later racial laws, even laws that diminished his own authority.[67] The Grand Council Law highlighted the tension between King and Prime Minister. It showcased the true extent of Mussolini's legal power. And it defined the parasitic relationship between Party and State, with the inevitable result of the latter becoming part of the former. The King would

---

Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823 (quoting H.L.A. Hart, The Concept of Law 2–3 (1961) ("Most educated people . . . have the idea that the laws in England form some sort of system, and that in France or the United States or Soviet Russia . . . there are legal systems which are broadly similar in structure in spite of important differences"); Ronald Dworkin, Law as Interpretation, 9 Crit. Inquiry 179 (1982) ("Law is . . . deeply and thoroughly political . . . . But law is not a matter of personal or partisan politics.").

[65] See generally Emilia Musumeci, Fascism and Criminal Law in Italy: An Outline, Forum Historiae Iuris (2017); Roberts, supra note 45, at 4.

[66] See Maura Hametz, In the Name of Italy: Nation, Family, and Patriotism: In the Fascist Court 53–54 (2012).

[67] Id.

not use his constitutional powers to dismiss Mussolini, including for his declarations of war, until it was too late. The Fascist Party would gradually insert itself into the various organs of state, and then reproduce itself and metastasize, beginning with the executive and judiciary.

As a constitutional matter, Mussolini was not the absolute sovereign, as was clear when the King met Hitler in Italy in his role as Head of State.[68] Fascist Italy was technically and constitutionally speaking a "dyarchy," with two sovereign heads and two loci of power, and in 1925, a law was passed making them co-equals.[69] Within this structure, Mussolini would gradually expand power, usurp and co-opt justices, reform the penal system, exert influence over prosecutors, and eventually take over official state functions and government displays most likely to draw crowds. The monarchy became a purely functional and ceremonial affair; the King's constitutional powers went unexercised or as mere signatures of the pen; power and the monopoly of legitimate violence were concentrated in the office of the Leader.[70] By 1926, the fasces became the official state emblem.[71]

The working-with-the-monarchy aspect of Italian Fascism is often overlooked and demonstrates the flexibility of the Party to adapt to an existing legal regime. The Grand Council Law was presented by the Fascist Justice Minister Alfredo Rocco not as a deviation from law but as its fulfillment.[72] In explaining why the Grand Council, formerly a Party organ, should have the primary role in selecting the prime minister, Rocco argued that the practice had been done according to convention, with the King meeting with party leaders in parliament,[73] and now in specifying and delimiting these powers in the legal code, the government was clarifying

---

[68] See Roberts, supra note 45, at 6 (The first meeting took place in May 1938. The German delegation could not understand why Mussolini didn not just overthrow the King, and ridiculed the King in private); David I. Kertzer, The Pope and Mussolini 283–86 (2014).

[69] See Antonio Barocci, A Geography of Repression: The First Years of the Fascist Special Tribunal in Italy, 1926–1928, 21 (2020) (Doctoral Dissertation, University of Connecticut) (OpenCommons@UConn) (Part of the Fascist legal reforms included Law 2263 (Dec. 1925), "placing the king and head of government on equal terms, and Laws 2318 and 100 (Jan. 1926) granting the government the ability to issue emergency decrees without repercussions").

[70] See Ploscowe, supra note 62, at 244.

[71] Id.

[72] See Julius Stone, Theories of Law and Justice in Fascist Italy, 1 Mod. L. Rev. 179, 193 (1937) ("The fascist state is the state that brings the legal organization of society to its maximum of power and coherence. And society according to the fascist idea is not a mere sum of individuals, but an organism having its own life, its own ends, transcending those of individuals, and its own spiritual and historic value. The state, too, the legal organization of society, is, according to fascism, an organism distinct from the citizens who at any given time compose it, and has its own life and its ends higher than those of individuals.").

[73] See Dennis Mack Smith, Italy and its Monarchy 5–7 (1980).

constitutional principles.[74] The Rocco reforms to public law would, collectively, terminate Italy's experiment in liberal and rule-of-law ideas and replace them with the budding Fascist order.

The monarchy was meant to be a check on any dangerous politicians and the whims of the times, yet by the time the King would exercise his prerogatives, it was arguably too late. The "whole organism" of the monarchy and its constitutional powers had been undermined "step by step, piece by piece."[75] The legal merging of Party and State was done from within. And it was led by the newly empowered Minister of Justice, Alfredo Rocco, the jurist of the fascist revolution, whose reforms from 1925 to 1932 institutionalized the Fascist Party in every part of the Italian legal state, the economy included.[76] For Rocco, the law protected individuals when "they use[d] their powers to further social solidarity."[77] His reforms to the Criminal Code were to be so sweeping that they merged the functions of the instructing judge and the prosecuting official; made any illegal conduct of the police dependent on the personal judgment of the Justice Minister; and placed "serious limitations" upon the accused person's right to make their defense.[78] While the old Italian code was liberal-democratic in principle, the new Fascist code "turned over a large field of action to agents of authority" and "abrogated many of the checks which were present in the old code as a guarantee against error or abuse in the use of powers."[79] In other words, discretionary power exercised by political officials in their official capacities replaced the administrative and judicial workings of the law.

Consider the practice of law in Italy. Like other European nations, in Italy, after law school, one could go through the process to become either a lawyer or a judge and be trained in that specific process.[80] The Minister of Justice had nearly complete control in determining who could be a judge—all appointments were made by him, without checks from parliament; the Minister even decided who could take the examination and had sufficient "moral and political character and conduct of the candidate"[81]—an easy way to axe anyone who was not a card-carrying Fascist.[82] Within six months of

---

[74] See Roberts, supra note 45, at 9.
[75] See id. at 14.
[76] See Hametz, supra note 66, at 53–54.
[77] Id. at 52.
[78] See Stone, supra note 72, at 197.
[79] See Morris Ploscowe, The Criminal Procedure of Fascist Italy, 55 Revue des Sciences Politiques 497, 522–23 (1932).
[80] Id. at 523.
[81] See Ploscowe, supra note 62, at 240–64 (for a specialty analysis of Italian law).
[82] Id. at 242.

passing an examination, a judge-to-become could be named magistrate in the lower courts. The Minister of Justice was responsible for promotions and prosecutors' roles. The singular objective was to bring the judiciary in line with political wishes.[83]

The Fascist Party made other adjustments as well, such as expanding the power and ambit of the prosecuting attorney. The police were also empowered to act as they wished. Fascist law made these administers, adjudicators, and executers of justice immune from the law itself—found in Article 16 of the Fascist Code of Criminal Procedure which permitted police officers to use maximal violence in the exercise of their duties.[84] Law, in effect, became casuistry, to be determined by the discretion of officials whose authority traced back to Mussolini.

With firm control of the legal order in Italy, a new kind of justice was formed—one of worshipping the State. This was not a mere difference in opinions; it was a fundamentally distinct conception of law. It took as its philosophical baseline that all power and authority was for the State, and that the social organism of society was a corporative part of this great State.[85] The State made law but was not bound by its own laws. There were no politics that could be oppositional to the State or its laws. In fact, so comprehensive was the substituting of a new legal order for the old, that the Fascist Party took *political offenses* with especial seriousness. The Fascist State did not trust its own subservient judiciary to handle cases dealing with politics. All cases involving dissent, spreading subservice propaganda, "offenses against the life, liberty and honor of the members of the royal family and the head of the Government,"[86] espionage,[87] and "defeatism" were considered offenses against the State and handled by the Special Tribunal for the Defense of the State. The Special Tribunal was used to punish people the regime considered enemies, and it created a vacuum in the legal system the Fascists already dominated.[88]

Fascism's control of the State and its laws was a stranglehold. Its creation of a Fascist legal order was all-encompassing, simultaneously inverting the

---

[83] Id. at 243. The Minister of Justice used promotions to politically advance certain judges. "It is evident," notes Morris Ploscowe, "that the decisive factor in making judicial promotions has been the Minister of Justice, a political figure, the representative of the dictator. Promotions could and have been used as a means making the judiciary subservient to the dictatorship. Under the Fascist system, promotions became prizes for services rendered."

[84] Id. at 246.

[85] See Steiner, supra note 10, at 1267.

[86] Ploscowe, supra note 62, at 244.

[87] Id.

[88] See Barocci, supra note 69, at 151 ("The fascists repeatedly used emergency measures to enforce a range of laws that allowed them to penalize victims of violence that they themselves had provoked.")

existing regime and exploiting its vulnerabilities. Although one scholar noted in 1946 that Italian Fascism had "maintained in principle, though not always in practice, the idea of legality, of respect for law, at least in non-political cases,"[89] it eventually came to own and dominate the entire legal sphere. It usurped power, subjugated the State to the Party, radicalized the justice system's administrators, and eventually passed its own racial laws to create second- and third-class citizenship. That these laws followed juridical and statutory principles of codification in an altered justice system is beside the point—the legal order had been compromised. The rule of law was not merely conquered by the Fascists; it was wholly redefined and re-articulated to suit the Fascist Party. Nazi Germany emulated some of these approaches to law while repudiating others, to fully bring Law under the control of fascist politics.

B. Nazi Germany, the Rule of Law, and the Prerogative State

Where Fascist Italy created innovations within a legal architecture that it controlled, in Germany, the entire legal order was to be revolutionized. The Nazi attitude toward the rule of law was that of a discretionary police state exerting maximal force against the enemies of the regime. Germany had a proud juridical tradition, but National Socialist law would take what was done in Italy to its logical conclusion: creating a wholly unaccountable state that existed alongside the "ordinary" functioning of the legal order. In so doing, Nazi law would eventually create a legal abyss.

In Nazi Germany, there was a coherent, if reprehensible, idea of what law should be, and what its purpose was. Origins are important for legal doctrine, and at the Nazi Party's origins, one feature stands out. In the February 1920 Nazi Party platform, Article 19 states: "We demand substitution of a German common law in place of the Roman Law serving a materialistic world-order."[90] Here was a key difference between Fascist Italy and Nazi Germany's attitudes toward the law. While Hitler and Nazi Germany made much of the symbology of Rome, they had no time for Roman law. Hans Frank, the Nazi Party lawyer, was only the most explicit in his rejection. "Popular Germanic law has become alien to us in the course of recent

[89] Because Article One of the Fascist Criminal Code stated that no one is punished unless the act is proscribed by law, Professor A.H. Campbell noted that it could still lay claim to rationality. Even the most radical Fascist laws, such as the penalties placed on Jews, were "cruel and unjust," but at least were "expressed in the rules of law." Thus, as distorting and condemnable these laws were, they were rational and based on codified law. See Campbell, supra note 10, at 143–49.

[90] Gottfried Feder, The Program of the NSDAP [*Das Programm der Deutschen Arbeiterpartei*], *translated in* Off. U.S. Chief of Couns. for Prosecution of Axis Criminality, Doc. No. 1708-PS, art. 19 (Fred Niebergall trans., 1946) (1920).

centuries. One has to conclude that the reception of Roman law has exerted an overall malicious influence over the development of Germanic law."[91] The goal was to create an entirely new legal order, one that placed above the law what the Party decreed.

The clearest articulation of National Socialism's relationship to the rule of law was made by German-Jewish attorney, Ernst Fraenkel, in his 1941 book, *The Dual State*.[92] Fraenkel's observations are especially astute because he was a practicing lawyer within the regime, an "anti-National-Socialist participating observer"[93] who was examining Nazi law within the German tradition and how it had been subverted. He argued that the Nazi legal regime could be functionally split into two groups—what he termed the Prerogative State and the Normative State.[94] The Prerogative State was the coercive bodies of the state, including the police, military, and secret agents; this was the state that meted out punishment and revenge.[95] It was "the governmental system . . . [that] exercises unlimited arbitrariness and violence unchecked by any legal guarantees."[96] On the other side was the Normative State, which was the administrative bodies theoretically charged with safeguarding the legal order, including the statutes, court decisions, and rule-implementation of the administrative agencies.[97] The chimera of one state (Normative) provided official legal cover to the real state (Prerogative), in a regime that was obsessed with finding legal justifications for its policies. But it was the Prerogative State, run by the Nazi Party, that ultimately ruled. The fundamental principle of National Socialism's attitude towards the rule of law was the "complete abolition of the inviolability of the law"—that is, the Prerogative State elevated the idea that laws could be violated at whim.[98]

The principle that no one was above the law was as old as the common law itself, and perhaps canonical, to some degree, in other cultures' legal systems as well.[99] The German scholar Gustav Radbruch traced the origin to

---

[91] Johann Chapoutot, The Denaturalization of Nordic Law: Germanic Law and the Reception of Roman Law, *in* Roman Law and the Idea of Europe, supra note 52, at 113, 116.

[92] Fraenkel, supra note 38.

[93] Id. at xxvi.

[94] Id. at xviii.

[95] Id.

[96] Id.

[97] Id.

[98] Id. at 107. Fraenkel's analysis sometimes blurred the distinction, and the radicalization of the legal order would itself begin to erase the boundary between the Normative and Prerogative States. It is instructive to think of the distinction as one between formalistic processes of law and procedure and executive and police actions that are carried out with political discretion.

[99] For a comprehensive analysis of the global rule of law, see Jeremy Waldron, The Rule of Law, Stan. Encycl. Phil. (Fall 2023 ed. 2023), https://plato.stanford.edu/entries/rule-of-law/.

a principle in natural law, found later in positive law.[100] Simply put, once a sovereign had promulgated a law, that sovereign was not then permitted to violate that law at his discretion.[101] Even medieval kings were constrained in some way. "The medieval king was considered to be absolute and practically irresponsible, but his power was not an arbitrary one."[102]

But National Socialism was not just a rejectionism of the law; it was also a postulation for a totally different vision and conception. In the Reichstag on January 30, 1937, the fourth anniversary of the Nazi seizure of power, Hitler gave a concrete statement on the Third Reich's philosophy of the law. First, he said the law had no "intrinsic value."[103] The law, as he perceived it then, was a purely individualistic affair. And in National Socialism's view, the purpose of the law was "the maintenance and protection of the people against anti-social groups which desire to evade or who otherwise fail to fulfil all obligation required by the community."[104] Unlike liberal ideas of constitutional law, there were no rational, abstract constructions here but the overt expropriation of law as a function of politics. Within this intellectual framework, what formed in Germany was a form of juridical dualism in the tensions between the Prerogative and Normative States. The more coercive the former became, the more radical the latter morphed—requiring ever more elaborate legal justifications and retroactive rationalizations of increasingly heinous violence.

---

[100] Fraenkel, supra note 38, at 107.

[101] Id. at 113. Fraenkel has an answer for those who interject to argue that Old World kings were themselves the Sovereign—and could they not, therefore, act as they wished without violating the law? No, says, Fraenkel. "The King is bound by the Law of God and the Law of Nature." Id. For National Socialism, the expressed source of law was neither Sovereign nor State—but "people-nation," or the *Volk.*

[102] Id. at 113. Carl Schmitt, who would become a kind of legal theoretician of National Socialism stressed in an early work that the office of Dictator in Rome was not equivalent to unlimited powers for unlimited time. A dictator was appointed by the sovereign "to realize concrete objectives;" thus, the Roman dictator who, "was appointed by the consul [at] the request of the senate for six months to end a crisis." The nature of dictatorship, for Schmitt, was contingent on existing within a legal order. For Schmitt, Sulla and Cesar were exceptions. See David Ohana, Carl Schmitt's Legal Fascism, 20 Pol., Relig., & Ideology 273, 278 (2019).

[103] See Fraenkel, supra note 38, at 46–47. From the speech:

> For a long time our ideas of law and justice had been developing in a way that led to a state of general confusion. This was partly due to the fact that we adopted ideas which were foreign to our national character and also partly because the German mind itself did not have any clear notion of what public justice meant. This confusion was evidenced more strikingly by the lack of inner clarity as to the function of law and justice.

Adolf Hitler, Führer & Chancellor, Third Reich, On National Socialism and World Relations: Speech Delivered in the German Reichstag on January 30th 1937 (Müller & Sohn K.G. trans., 1985) (1937).

[104] Fraenkel, supra note 38, at 108.

As with Fascist Italy, the legal justification for the regime was not the constitution per se. The Weimar Constitution was never formally repealed in Nazi Germany,[105] but the regime's legal existence, technically, was owed to emergency powers it received through the Reichstag Fire Decree and the Enabling Law of March 24, 1933. Every democracy and constitutional system has made room in its text and practice for moments when the national security of the republic is under threat.[106] Constitutions allow for such exigencies, where certain constitutional and legal processes can be temporarily voided, so that the state may continue to exist. These are also the most vulnerable moments for a constitutional democracy. According to Fraenkel, one could go back to the year 1633 to find references to the potential political utility of emergency periods.[107] A "constitutional and temporary dictatorship" in Germany was transformed into an "unconstitutional and permanent" one.[108]

What was unique about National Socialism was its use of the Normative State, including the courts and plebiscites, to retroactively justify in the law today what was clearly outside the law yesterday. For example, the law of July 3, 1934, retroactively legalized the murderous purges in the Night of the Long Knives, after which Carl Schmitt—a leading political theorist in the Weimar Republic and the Third Reich[109]—published his essay on the law and noted that "the Führer protects the law from its worst abuse when in the moment of danger he, by virtue of his domain as Führer and as the supreme judicial authority, directly creates law."[110] The continual use of plebiscites and retroactive lawmaking was widespread in Nazi Germany; the extreme violence of the regime necessitated a proportionally extreme degree of post-facto legalization. The retroactivity of law was best exemplified by charges bringing capital punishment. The very first act of the regime after the Reichstag Fire Decree and resulting coup was the abolition of *nulla poena*

---

[105] Id. at 32–33 (noting the ways that Nazi Party officials simultaneously claimed that the Weimar Constitution had been overturned and asserted it when it was useful to them).

[106] It is generally understood that most democratic constitutions make room for emergency powers. Christian Bjørnskov & Stefan Voigt, Emergencies: On the Misuse of Government Powers, 190 Pub. Choice 1 (2022) ("Nine out of 10 constitutions contain explicit emergency provisions, intended to help governments cope with extraordinary events that endanger many people or the existence of the state").

[107] Fraenkel, supra note 38, at 11. In 1921, Carl Schmitt approvingly quoted Wallenstein, to the effect that privileges of the people can be stripped very quickly.

[108] Id. at 5.

[109] Michael Head, Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt 1 (2016).

[110] See Carl Schmitt, Der Führer Schützt das Recht: Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934 [The Führer Protects the Law: On Adolf Hitler's Reichstag Address of 13 July 1934], *translated in* The Third Reich Sourcebook 124, 125 (Timothy Nunan trans., Anson Rabinbach & Sander L. Gilman eds., 2013) (1934).

sine lege ("no punishment without law").[111] Until then, this was a bedrock principle of German law, as it has been for Anglo-American law.[112] The *Lex Vander Lubbe*—the Law for the Imposition and Implementation of the Death Penalty—retroactively applied the death penalty to crimes that previously only carried life sentences. This was the point of high legal treason and the abdication of normative rules for the Prerogative State's aims.[113] It "struck the intellectual revolt of the nineteenth century at its very heart."[114] It amounted to a repudiation of the history and tradition of Natural Law, as well as German law.

The eradication of the law's inviolability was replaced with a discretionary system of law to serve the Party's interests. The Party, in other words, had general jurisdiction in Germany over all public and private law—especially cases where it had an interest. The National Socialist starting point of law differed from that of Fascist Italy. In Germany, the State was glorified only because it embodied "the people." National Socialism viewed the "living people's community"—the *Volk*—as the source of all law.[115] And the *Volk* was channeled through and by the Führer, as well as the Nazi Party. The "sources of law," strictly speaking then, were the Nazi Party platform, *Mein Kampf,* Hitler's speeches, and only then came government ordinances, and last, the decisions of the courts.[116] Indeed, the Nazi legal regime should be thought of less as a State and more as a Party-State, where the Party both preceded and occupied the State. In Germany, the Nazi Party *was* the law.

In this regime, a legal black hole was created; law was unjustly bent, manipulated, and extrapolated to the point where the political sphere of Germany was no longer regulated by either public or private law. There was, for the first time in a country with vaunted legal traditions, a legal abyss. That tradition, to be sure, for many years, envisioned and practiced the norm of judges not questioning the "necessity and expediency"[117] of martial law, and thus such questions were beyond review by the courts.

---

[111] Fraenkel, supra note 38, at 109. For a comprehensive overview of this principle, see generally Beth Van Schaack, *Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals, 97 Geo. L.J. 119 (2008).

[112] Fraenkel, supra note 38, at 109.

[113] Id.

[114] Id.

[115] The debate over the meanings, implications, and semantics of the German words *Volk* and *Völkisch* is a symposium unto itself. The layered meaning of the word is difficult to translate into English, but the closest approximation would be "race" or "nation" or "soul." See, e.g., J. Laurence Hare & Fabian Link, The Idea of *Volk* and the Origins of *Völkisch* Research, 1800–1930s, 80 J. Hist. Ideas 575, 579–96 (2019).

[116] See Fraenkel, supra note 38, at 147.

[117] Id. at 5.

At the same time, formal legal processes still went on—now with Special People's Courts and other judicial and martial rule processes. "Martial law," noted Carl Schmitt, "is characterized by its practically unlimited authority . . . [and] it is characterized by the fact that the state continues to exist while the legal order is inoperative."[118] The step-by-step process of the law's radicalization infected the entire Normative State, so the entirety of law became politicized.

First, the courts were used to justify the seizure of power via the permanence of the Reichstag Fire Decree. When suits were brought in court, they were dismissed as either political questions left to the Executive, or else as moot from the beginning because there was no challenge to be made to the Decree per the terms of the Decree.[119] Thus, on March 3, 1933, the Prussian ministerial order declared, "[t]he police [we]re permitted to exceed the restrictions of their power specified in Subsections 14 and 41 of the Prussian Police Administrative Law."[120] Additionally, the Prussian Supreme Court ruled the same day that the Emergency Decree "remov[ing] all federal and state restraints" on police power "[wa]s not subject to appeal."[121] All of politics was now outside the legal sphere.

The Prerogative State—exercising unlimited powers, capable of unlimited violence, and usurping for the executive that which belonged to the judiciary—ruled by discretion. We can look at the case law of Nazi Germany to see the effects of the Prerogative State's dominance in even minor areas of law. The Prerogative State would extend its tentacles into traffic stops, matters of civil procedure, contract, and property disputes,[122] and in so doing, it would weaken legal principles as old as Western law itself.[123]

The extreme radicalization of law affected ordinary areas of law that had been apolitical before. Under the right circumstances, even traffic violations became serious transgressions. The highest court in Bavaria, having already held that the Reichstag Fire Decree applied to non-communists, found that the name of an executive member of the Taxi Drivers' Association "could be struck from the register" of that society if the police authority ordered so.[124] "It makes no difference," ruled the Bavarian high court, "whether the association in question is an economic one—such as a commercial enterprise

[118] Id. at 25.
[119] Id. at 29.
[120] Id. at 20.
[121] Id. at 16.
[122] Id. at 43.
[123] Id. at 46.
[124] Id. at 45.

or a joint stock company. Any previous laws concerning associations are now superseded by the relevant sections of the Decree of February 28, 1933."[125] In the District Court of Hamburg, a debtor failed to pay interest on a mortgage and invoked Article 11 of the National Socialist German Workers' Party (NSDAP) platform, which promised the "destruction of interest-slavery."[126] The Court ruled for the plaintiff, but stated that, since no law existed to that effect, it must be "left to the Leader and the government to decide" how and when to realize this goal.[127] In the Supreme Administrative Court of Saxony on November 25, 1938, the case before the Court was over a building permit. It would ultimately issue a denial, but the only question was whether the Court could do so without citing its grounds for refusal.[128] The Court held that the building permit could be denied "on grounds deriving from the [Reichstag Fire] Decree. It must also be recognized that in such case the reasons for the decision need not be adduced."[129] In a case involving a birth certificate request by a Jewish attorney, which registrars were required to provide by the German Law Regarding Vital Statistics,[130] the Municipal Court ordered the birth certificate to be issued.[131] But the District Court reversed and its ruling was upheld by the higher court. "The registrar is obliged to follow the instruction of the Gestapo. The court cannot review the grounds for the instruction."[132] The court's deference to the regime reaffirmed the juridical stance that "certain executive orders" are beyond review.[133] When necessary, the Prerogative State explicitly subsumed the Normative State, which made no pretense of what it was doing.

The transformation of the legal order took place early in the regime, before the Nuremburg Laws.[134] The early manipulation of the legal order in Germany is what permitted the creation of second- and third-class citizenship later, stripping of citizenship, criminalization of interracial marriage, and legal targeting of racial minorities like Jews and others. The groundwork was laid so that the law became completely dominated by the Prerogative State.

---

[125] Id.
[126] Id. at 85.
[127] Id.
[128] Id. at 44–46.
[129] Id. at 58.
[130] Id. at 44–45.
[131] Id.
[132] Id. at 44.
[133] Id.
[134] For the best examination of the racial laws, see James Q. Whitman, Hitler's American Model (1st ed. 2017).

Interestingly, perhaps because its legal foundations were so fraudulent, this regime had a zeal for public legitimacy. The regime held national plebiscites for the German public to "support" state policies, even criminal ones, giving the regime's actions post-facto legitimation.[135] Thus, the 1934 referendum sought to nominally validate Hitler's merging the offices of President and Chancellor. This referendum was to make "lawful" by referendum what had already been decreed by law. The Cabinet had passed the Law Concerning the Head of State of the German Reich on August 1, 1934, which forbade the merging of the two offices.[136] Three hours after Hindenburg's death, Hitler issued his decree announcing the assumption of presidential powers in accordance with the law. The referendum merely gave the veneer of law to what was a constitutional abrogation.[137] Another case was that of the Rohm Purge or the "Night of the Long Knives," when the head of the German government, pistol in hand, personally arrested his political opponents surrounded by the regime's secret police.[138] The violent purge was legalized post-facto in the decree on the Law Regarding Measures of State Self-Defense. "The means adopted on the 30th of June and the 2nd of July," noted the Decree, "to suppress acts of treason are legal, and they constitute acts of self-defense by the state."[139] That the firmly entrenched Nazi Party took the extraordinary step of formally legalizing its murderous activities is sufficient to indicate its desire for legal legitimation.

Why do this? The desire for *ex post facto* legalization, superfluous in legal terms, was for the legal legitimation that National Socialism so desperately craved.[140] The "ethnic-people's community" that underlay the regime was fickle and needed constant public legitimation after the fact. The other reason was the convenience. It brought to mind Schmitt's comment from 1932, that "the cloak of plebiscitary democracy is very broad and covers a great deal."[141] Schmitt's remark captured how formal legality and popular acclamation could conveniently mask arbitrary executive power.

---

[135] Richard J. Evans, The Third Reich in Power 120–22 (2004).

[136] See Josef W. Bendersky, Carl Schmitt: Theorist for the Reich 209 (2014).

[137] See Ohana, supra note 102, at 296.

[138] Joachim Fest, Hitler 468 (1973).

[139] Ohana, supra note 102, at 299.

[140] See Bendersky, supra note 136, at 199–200 (highlighting the importance of legal legitimation to Nazi Party leaders and grounding this conclusion primarily in Schmitt's writings and letters between Schmitt and Party officials). Evans, supra note 40, at 109 (noting that under the Third Reich, plebiscites and elections became propaganda exercises used to manufacture the appearance of popular legitimacy for controversial policies).

[141] See Fraenkel, supra note 38; Carl Schmitt, Legality and Legitimacy 93–94 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2004) (1932).

The National Socialist Party-State was a hegemony of the Prerogative State. Its murderous violence in the concentration camps and death camps was conducted out of the legal abyss it had created within the German legal order. It violated the constitution openly while proclaiming to defend it, and then took the usurpation and co-option of the law to the final degree, initially allowing the courts and judicial system to continue when political matters were not before them, but later seizing and manipulating the same legal apparatus to serve the Party's aims. The Prerogative State occupied a space outside law, while the regime received public legitimation, and the Normative State continued its official processes. It was the most complete subjugation of the Rule of Law to partisan ends, and it was done with tact, strategy, and a shrewd understanding of how the judicial functions could be used to legitimate the Party-State's politics. National Socialism defined what the law was while redefining what the law's purposes were, and the law eventually became nothing more and nothing less than another arm of the Party.

C. General Principles of Fascism's Relationship to the Rule of Law

Fascist Italy and Nazi Germany both subjugated the Rule of Law, but the National Socialist legal order was a more radical and deliberate obliteration and replacement. In the Italian Fascist case, the judiciary, courts, and lawyers, though now polluted with the Fascist ideology, continued to go on. Political questions were by definition dealt with under the Party's mechanisms, removing whole areas of law from the ambit of the judiciary. But even under Fascism, the Italian State maintained a rigidly codified set of rules that were at least discernable and recognizable by the mass of people. It met some bare threshold of rationality. In National Socialist Germany, however, fundamental principles of European and Western legal tradition were erased, and a new system put in its place, one where the Dual State replaced the Rule of Law State. Courts, judges, and lawyers became mere functionaries for political ends. A legal philosophy was constructed, justifications made by Carl Schmitt and others, and the law as an entire body was radicalized. The elimination of *nulla poena sine lege* led to the arrests and punishments of people who had not committed any crimes defined as such by the criminal codes.

Fascism's conception of law is for politics to rule over law. It exists through legal emergency powers and in making lawful—by force of the State—what may have been unlawful before. The Fascist justification is in the name of the people as led by the ruler in their control of the executive functions of the State**.** The Fascist conception of law was grounded in an

appreciation for law's utility but not its inherent value; the merging of the Party with the State was the latest (and most successful) attempt to overwhelm natural and positive law to the whims of politics.[142] The National Socialists took this position *in extremis* to subjugate and overwhelm the legal order, while predicating its own legitimacy on the same legal system's validation: a vicious and circular argument that eventually removed an entire realm of life, and political will, from the legal system and built up the Prerogative State to exercise full police powers at the Leader's discretion. The aim was to make permanent the state of exception and to make the Leader the ultimate adjudicator and executer of the boundary between lawful and unlawful, instantiating Carl Schmitt's famous remark that the "Sovereign is he who decides the exception."[143] Under fascist law, the Sovereign would also decide the duration, viability, and generalization of the emergency.

What can be said for certain is that fascism exhibited an entirely new conception between the people and the law. It was a radicalizing populist vision of law that claimed to speak on behalf of the people—or at least that segment of the population considered real citizens. It created a legal emergency and then generalized this state of exception into one of permanent constitutional overthrow. This was even before the racial laws of fascism were enacted which, in the case of Germany, were modeled on both federal and state law in America.[144] The classification of people into different racial and ethnic categories was the final aim of this process of taking over the legal order. Totalitarian control was to be exercised over the legal order in two countries where legal traditions had existed for centuries. They both serve as use cases for how the original version of fascism took control of the legal order, and how the legal and constitutional order changed because fascism seized the State.

---

[142] It brings to mind a complaint from an Italian judge from 1945, noting the difficulty of his job. "At first, it was easy. If one of the parties was a Fascist one gave judgement for him. But now everybody is a Fascist and it is more difficult. One sometimes even has to go into the merits of the case." See A.H. Campbell, Fascism and Legality, 62 L. Q. Rev. 141, 142 (1946).

[143] See Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 5 (George Schwab trans., Mass. Inst. Tech. Press 1985) (1922).

[144] See Whitman, supra note 21, at 76 (stating that "American law was expressly invoked in the key radical Nazi document establishing the initial framework for the Blood Law, the so-called Preußische Denkschrift, the Prussian Memorandum, circulated by Nazi radicals in 1933"); id. at 11 (describing Nazi references to American state law, noting "[i]mportant programmatic Nazi texts made a point of invoking the example of Jim Crow segregation, and there were leading Nazi lawyers who made serious proposals that something similar ought to be introduced into Germany.")

II. THE ORIGINS OF ARTICLE II OF THE U.S. CONSTITUTION

After the ratification of the Constitution in 1788 and the establishment of the new federal government, one of the earliest controversies the young Republic faced was over the title of the new president. The "President" who had been created under Article II of the Constitution was not like the "president" from the Confederation Era, who was at most a presiding officer.[145] The "president" under the Articles of Confederation was weak; he was appointed by Congress to a one-year term, and little more than a figurehead. A desire for a stronger executive, especially in a world changing through revolution and violence, formed part of the impetus for the Framers gathering in Philadelphia.[146] Indeed, it would be no stretch to say that in Philadelphia, the powers of the executive were "the chief and the most difficult problem to be solved."[147] The Constitution, like the American Revolution that preceded it, was bathed in the deepest republican rhetoric going back to Rome and Athens—and the creation of a new chief magistrate for America would unleash a furious debate.[148]

George Washington, the first Article II president, had already taken on a dignified role among Founding-era Americans. Article II grew out of the frustrations of a subordinate or non-existent president, and from the beginning, was molded with the powers of the British monarchy in mind.[149] So animating was the debate around the new office, that both the Philadelphia Convention and later the First Congress debated the titles of the new President.[150] In the First Congress, which included sixteen members of the Constitutional Convention, the debate continued. John Adams argued that if the Governor of Massachusetts should carry the title "His

---

[145] See Akhil Reed Amar, America's Constitution 130–35 (1st ed. 2005) (stating that the powers of these various "presidents" were quite limited, and the "president" from Confederation was a figurehead and administrative leader). The Confederation president was appointed "in Congress for no more than a year in any three-year stretch. His position was largely honorary, with no powers of appointment or veto, no official military command." Id. at 131.

[146] See Steven Calabresi & Saikrishna Prakash, The President's Power to Execute the Laws 104 Yale L.J. 541, 600–04 (1994); Gordon S. Wood, Empire Of Liberty: A History Of The Early Republic, 1789–1815 (2009).

[147] Charles Thach, Jr., The Creation of the Presidency, 1775–1789: A Study in Constitutional History 76 (1923). When James Wilson proposed the executive "consist of a single person" an uneasy silence followed. See Gordon S. Wood, Revolutionary Characters, What Made The Founders Different 49 (2006).

[148] See Bernard Bailyn, The Ideological Origins of the American Revolution (1967) (for a useful primer on classical republican thought and its influence).

[149] See Michael W. McConnell, The President Who Would Not Be King: Executive Power Under The Constitution 19–21 (Stephen Macedo ed., 2020).

[150] See Wood, supra note 146, at 83–85.

Excellency," the new president of the United States should carry a similar title.[151] Indeed, per the Pickney Draft of the Constitution, the full Article II originally read: "The Executive Power of the United States shall be vested in a President of the United States of America which shall be his style & his title shall be His Excellency. He shall be elected for — years & shall be reeligible."[152] Washington was said to have favored "His High Mightiness, the President of the United States and Protector of Their Liberties."[153] A Senate committee finally came up with a title: "His Highness the President of the United States of America, and Protector of Their Liberties."[154] It was James Madison who convinced his fellow Senators to go for the simpler title: "President of the United States."[155]

This was not mere window-dressing; the title of the first president would signify the role, responsibilities, and grandeur of the new executive's power. The Founders wanted a stronger executive—learning from the failure of the Articles of Confederation and recognizing that a potential continental Republic needed a vigorous chief magistrate. The text of the Constitution itself gives credence to this.[156] Here, we can proceed with a textual, structural, and historical understanding of Article II to demonstrate its capacities and potentialities.

Article II comes second. Does this suggest subservience to the Congress of Article I? After all, the Framers could have first outlined the powers of the president—an entirely new role certain to arouse fears and suspicions—but chose to put it second. Sequencing, however, may not matter, and Madison himself asked not to read too much into the matter.[157] We know that the "firstness" of the First Amendment, for example, is immaterial to its textual and structural importance.[158] The branches of government were to be co-equal, but America knew something about functioning legislatures and could draw from English courts and common law in creating Article III

---

[151] See Wood, supra note 146, at 83.

[152] See James Madison, 1 The Journal of the Debates in the Convention Which Framed The Constitution of the United States 28 (Gaillard Hunt ed., 1908).

[153] See Wood, supra note 146, at 83–84; Wood, supra note 147, at 54.

[154] Wood, supra note 146, at 84.

[155] Id. at 84–85.

[156] See, e.g., Letter from Alexander Hamilton to Gouverneur Morris (May 19, 1777), *reprinted in* 1 The Papers of Alexander Hamilton, 1768–1778 254 (Harold C. Syrett ed., Colum. Univ. Press 1961) ([T]here is a want of vigor in the executive.").

[157] Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *reprinted in* 2 The Writings of James Madison: Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed 169 (Gaillard Hunt ed. 1901) ("*The Executive Department*. Though it claims the 2d place is not in my estimation entitled to it by its importance.").

[158] See Akhil Reed Amar, The First Amendment's Firstness, 47 U.C. Davis L. Rev. 1015, 1017–19 (2014).

courts. What was unprecedented for the country was the vestiture of executive power in a single person.

"The executive Power shall be vested in a President of the United States of America."[159] So begins the constitutional clause that creates the executive branch of government. From a strict textualist perspective, the first word here is revelatory. The Framers chose not to include the first word in Article I in defining the powers of the Congress: "All legislative Powers herein granted shall be vested in a Congress of the United States."[160] Referring to "the executive Power" versus the more capacious "all legislative Powers" is an important distinction. The Framers were careful with their words; their discussions brought a hot summer in Philadelphia to rhetorical boiling points, and the usage of the word "the" was critical for later developments. The word "all" suggests maximal inclusion of residual powers in the legislative branch, whereas "the executive Power" suggests a definite and limited scope of total executive power distinct from, say, the maximally expansive executive powers of a monarch. The difference between *all* and *the* marks a critical distinction.

The Constitution next outlines the executive's term to four years and then explicates the Electoral College and indirect election of America's chief executive.[161] The Constitution gives description as to what shall happen in the event of removing the president, those allowed to serve in the office, the existence of presidential compensation, and the oath of the office.[162] It is in the subsequent Part III where the point is reiterated that the President "shall take Care that the Laws be faithfully executed."[163] Article II's construction was subject to lengthy debate, and it was one of the last sections hashed out.[164] The radicalism of the American Revolution had given way to the conservatism of the Constitution, and the experience of a council-run executive under the Articles of Confederation had lapsed certain fears about an overly expanded executive power. The Philadelphia Convention, in fact, took place at a time when it was the state legislatures that needed to be reined

---

[159] U.S. Const. art. II, § 1.
[160] U.S. Const. art. I, § 1.
[161] U.S. Const. art. II, § 1.
[162] Id.
[163] U.S. Const. art. II, § 3.
[164] Joseph Story, 3 Commentaries on the Constitution of the United States § 1407 (1833) ("Under the confederation there was no national executive. The whole powers of the national government were vested in a congress, consisting of a single body; and that body was authorized to appoint a committee of the states, composed of one delegate from every state, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine states, as nine states should consent to. This want of a national executive was deemed a fatal defect in the confederation.")

in.[165] In Philadelphia, republican monarchists would square off against legislative supremacists; proponents for a strong, central executive would debate those who wanted a structurally dependent one; and Article II would become a contest between competing interests and visions for the new Republic.

James Madison himself had a curious evolution in his thinking on executive power through this period. His views were vague at the beginning of the Convention. In 1785, two years before the Convention, he wrote in a letter that, "I have made up no final opinion" on whether the chief magistrate should be chosen by the legislature or the people,[166] and he noted that the "Executive" of the Articles "is the worst part of a bad Constitution."[167] In a letter to Washington in 1787, he said similarly that he had yet to decide how the executive ought to be chosen.[168]

Indeed, monarchism was the talk of the town at the Philadelphia Convention. According to Luther Martin, who was a participant at the Convention, the delegates could be grouped into three parties: the first represented those "whose object and wish it was to abolish and annihilate all State governments" and bring forward a new general government.[169] This would have created an executive of some kind that would have "a monarchical nature, under certain restrictions and limitations."[170] The second group were those who would give their own states "undue power and influence" in the government.[171] The third wanted federal equality.[172] While this taxonomy is loose and can be quibbled with, as a general outline, it holds—if "monarchy" is replaced with "adherents of a strong executive."[173] The first two groups would be the ones to carry the Constitution.

---

[165] Rosemarie Zagarri, The Historian's Case Against the Independent State Legislature Theory, 64 B.C. L. Rev. 637, 650–51 (2023) (stating that in 1787, many politicians agreed that state legislatures had been given too much power and the Framers thus explicitly sought to constrain that power).

[166] Letter from James Madison to Caleb Wallace, supra note 157, at 169 ("I have made up no final opinion whether the first Magistrate should be chosen by the Legislature or the people at large or whether the power should be vested in one man assisted by a council or in a council of which the President shall be only primus inter pares.").

[167] Id.; see also Thach, supra note 147, at 82.

[168] Letter from James Madison to George Washington (Apr. 16, 1787), *in* 2 The Writings of James Madison, supra note 157, at 348 ("I have scarcely ventured to as yet to form my opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.").

[169] See 3 The Records of the Federal Convention of 1787 255 (Max Farrand ed., 1911).

[170] Id.

[171] Thach, supra note 147, at 79.

[172] Id.

[173] Id. at 78–79.

By Madison's notes at the Convention, it is clear that (1) the delegates had considered a supreme council around the president; (2) there was a serious debate about making the executive purely dependent on the legislature, as it existed in multiple states; and (3) the question of the executive was one of the last to get resolved, and it provoked the thorniest debate to the point where, in the latter half of the Convention, only the veto power was firmly decided upon.[174] "The executive problem was thus primarily one of law enforcement," noted one authority on the creation of the presidency in 1923.[175]

The nature of the executive in question evolved throughout the summer Convention. The debates at the beginning featured the new executive being reliant on the legislature and having a council around him to vote in unison.[176] Madison's early executive would have been a "smaller committee of states, strengthened by the veto power, but confined to the business of carrying out the laws."[177] It was James Wilson of Pennsylvania who first put forward the argument for a completely independent executive.[178] According to Wilson, the new executive should maintain a certain independence from the legislature and be predicated on support from the whole people. The chief magistracy should be possessed by a single person, "as giving most energy, dispatch, and responsibility."[179] The new executive should be a representative of the whole body of people—not one faction or one state. Wilson's proposal was a marked departure from the models and arguments that many in the Convention had going into it.

The most consequential change over the course of the Convention was the idea of a council for the new executive. Every state but New York had a separate council which was part of its executive, drawing from British constitutional and government practice.[180] The new American executive born in Philadelphia would do away with this council-like organization, and this was a milestone victory for proponents of the unitary executive. It was to advance a "new principle of executive organization."[181] No longer would the executive be dependent upon or subordinate to the legislature. By mid-Convention, the debates were seeming to create a presidential prime minister

---

[174] See id. at 88–90.
[175] Id. at 77.
[176] See Id. at 88–102.
[177] Id. at 84.
[178] See Michael T. McConnell, James Wilson's Contributions to the Construction of Article II, 17 Geo. J.L. & Pub. Pol'y 23, 32 (2019).
[179] Thach, supra note 147, at 85.
[180] Id. at 89.
[181] Id.

as the executive, a single person accountable and appointable by the legislature with officers drawn from the legislature. This plea for ministerial government was eventually dropped, but the independence from the legislature was not. "Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office," noted Governor Morris, who, along with James Wilson and James Madison, was one of the architects of the single executive of Article II. "The Magistrate is not the King, but the prime minister. The people are the King."[182]

The new American president would be a creation of "the people," and would function to channel sovereignty through them and his executive officers.[183] Still, for much of the Convention, the powers of the chief executive, while growing, were still restrained. The Senate initially had full control of foreign affairs; the new President's only role in foreign affairs would have been to receive ambassadors.[184] But after the Committee of Detail Draft of the Constitution made revisions, the Executive changed. "The executive which had gone into the committee with only the appointing power, the veto power, and the power to execute the laws, came out, not only with additional power, but with all of them granted in terms which left no loophole for subsequent legislative interference."[185] The council that had been envisaged—in some iterations to include the Chief Justice and President of the Senate—never came to pass.[186]

Not that avowed republican monarchists were not in the Convention. Alexander Hamilton's plan was infamously expansive. Hamilton's chief executive, the "Governour," using the stronger term, and chosen by special electors, was largely free from restraint by the legislature.[187] He was to have an absolute veto, control all appointments, and would serve for life.[188] At the Convention, the charge of monarchy was near. "It will be objected," noted Madison

---

[182] 2 The Records of the Federal Constitutional Convention of 1787 69 (Max Farrand ed., 1911).

[183] The Federalist No. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961) ("The President is indirectly derived from the choice of the people, according to the example in most of the States.").

[184] Thach, supra note 147, at 113.

[185] Id. at 116.

[186] See Merrill Jensen, The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774–1781 126 (1970) (The new President was to be called the "Gouvernour of the United People and States of America.").

[187] See Alexander Hamilton, Constitutional Convention Plan of Government [18 June 1787] (Nat'l Archives, 2013), https://founders.archives.gov/documents/Hamilton/01-04-02-0099 ("The Supreme Executive authority of the United States to be vested in a "*governor*" to be elected to serve "*during good behaviour*.").

[188] Id.

> probably, that that such an Executive will be an *elective monarch*, and will give birth to the tumults which characterize that form of government. He [Hamilton] would reply, that *monarch* is an indefinite term. It marks not either the degree or duration of power. If this Executive magistrate would be a monarch for life, the other proposed by the Report from the Committee of the Whole would be a monarch for seven years. The circumstance of being elective was also applicable to both.[189]

Hamilton's plan, though rejected, was a sign of the ever-widening outer limits of the executive conceived at Philadelphia.

What can be ascertained is that two schools of thought existed at the Convention: those for a more limited executive structurally dependent on the legislature and with weaker unilateral powers in foreign relations, and those for a unitary and powerful executive interdependent with the legislature but autonomously empowered to act on its own. The model the delegates had in mind was George III[190] and the prerogative powers that were exercised in England.[191] The President of the United States that emerged in the text, structure, and history of the Constitution born in Philadelphia was a compromise between monarchists and populist republicans—with newfound powers of appointment, wide freedom in foreign policy, discretion over his officers (with dependence on the Senate), and the absolute power to pardon for federal offenses, subject neither to Congress nor the courts.[192] He did not have the power to make and declare war or peace, which had been a prerogative power of the King.[193] Of course, George Washington being the all-but-certain first holder of the new office eased worries about such a powerful new first magistrate. What the delegates had created was a kind of limited republican monarchy—one that subsequent centuries would turn into

---

[189] See James Madison, Debates in the Federal Convention of 1787, a Member 99 (Gordon Lloyd ed., 2014).

[190] Jacques Condon, *Whom Do I Want As My King?*, Marquette Univ. Law Sch. Faculty Blog (Oct. 15, 2016), https://law.marquette.edu/facultyblog/2016/10/who-do-i-want-as-my-king/ ("Second, the delegates used England's King George III as a counter-point to an executive. They wanted no part of a monarchy, or despotic leader, yet needed the executive position to have some teeth.").

[191] See McConnell, supra note 149, at 28–29 (The arguments for prerogative powers were well-known to the Framers. They were grounded firmly in Lockean political theory.).

[192] Seen from one angle, the pardon power was absolute and an indication the Framers wanted an expansive presidency. But it was still less than that of the British monarch, who had total pardon power for all offenses committed in the realm. See Akhil Reed Amar, America's Constitution: A Biography 187 (2006).

[193] See McConnell, supra note 178, at 38.

an even greater office with much wider Prerogative Powers that both the courts and Congress would uphold.

A. Cases and Controversies

Indicative of Article II powers and limitations is the president's power to remove executive officers. Structurally, there were executive powers that only the president possessed and others that were shared with Congress, but a central question remained: was the executive authority to remove executive officers subject to the legislature? In *Myers v. United States*, Chief Justice Taft based the majority opinion on the Decision of 1789 and the proviso, urged by Madison, that the Secretary of State be removable by the President at will.[194] "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[195] The Court held in *Myers* that the president's removal power of executive officers was absolute.[196] Chief Justice Taft considered *Myers* to be "one of the most important opinions"[197] he had written as chief justice; it was the first decision in the Nation's history to invalidate a congressional statute for impinging on Article II powers.[198] The removal power still elicits widespread debate;[199] for our purposes, the 1789 Debate and *Myers* point to an expanding executive whose officers could not, in text or in practice, be removed by the Congress. The Sovereign was to be sovereign in his exclusive domain.

A decade before his decision in *Myers*, after he had served as the nation's twenty-seventh President, Taft had critiqued the idea that the president might possess an "undefined residuum of power"[200] because of the Constitution's silence. Rather, Taft claimed that all presidential powers had to be "fairly and reasonably traced to some specific grant of power or justly implied and

---

[194] Myers v. United States, 272 U.S. 52, 176 (1926). ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power the exclusive power of removal.")

[195] Id. at 163–64.

[196] Id. at 106, 176.

[197] See Robert Post, Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of *Myers v. United* States, J. U.S. Hist. 167 (2020).

[198] Id.

[199] See Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 282–84 (2020) (Kagan., J., dissenting).

[200] William Howard Taft, Our Chief Magistrate and his Powers 140 (1916).

included"[201] within an express grant. He had Theodore Roosevelt in mind.[202] In his view, the President and Congress certainly overlapped in areas, but between the two was a "wide field of action in which individual rights are not affected in such a way that they can be asserted and vindicated in a court."[203] The construction of power of each branch "must be left to itself and the political determination of the people who are the ultimate sovereign."[204] Though Taft spelled out limitations of the president's powers, he still observed what was obvious by the mid-1900s: "The Constitution does give the President wide discretion and great power, and it ought to do so."[205] Even absent the undefined residuum, the president maintained vast powers under the Constitution.

Three decades later in *Youngstown Sheet & Tube Co. v. Sawyer*,[206] Justice Jackson and Justice Douglas's concurring opinions, respectively, added greater texture to the arguments over the President's powers.[207] *Youngstown* involved President Truman's seizure of the steel mills during the Korean War.[208] Truman's justification was that his broad constitutional powers as Commander-in-Chief authorized the seizures.[209] The Court held that neither the Constitution nor the laws of the United States authorized the President to take such an action, and that such an action amounted to legislating new power, which was vested in Congress alone.[210]

Still, despite ruling against Truman and limiting the president's unilateral authority, Justice Douglas was at pains to note the general powers of the presidency: "[t]he great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other in the land. It gives a position of leadership that is unique."[211] Justice Jackson, meanwhile,

---

[201] Id. (noting that "[s]uch [a] specific grant, must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof." The critique of the "undefined residuum" was also a rebuke of President Theodore Roosevelt.

[202] Post, supra note 197, at 170.

[203] Taft, supra note 200, at 1–2.

[204] Id.

[205] Id. at 157.

[206] 343 U.S. 579 (1952).

[207] Id. at 634–55 (Jackson, J., concurring); id. at 629–34 (Douglas, J., concurring).

[208] Id. at 582.

[209] Id. at 587–89.

[210] See id. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.").

[211] Id. at 633.

delivered a now-doctrinal concurrence which outlined a three-pronged framework for presidential power: those areas where Congress has expressly or implicitly spoken, where the President has maximal power; those areas in the absence of Congressional action, where the President is in a "zone of twilight";[212] and finally, those areas when the President acts against the expressed will of Congress, where his power is at its lowest.[213] The Justices found President Truman's actions to be in what would become the third category of Jackson's canonical framework. And Justice Jackson explicitly rejected the Solicitor General's argument that Article II, Section I's usage of the phrase "[t]he executive power" amounted to "all executive powers."[214] Justice Jackson also referenced the Weimar Constitution and how it was weakened through executive power.[215] The President was not above the law, Jackson reasoned; he was subject to the constraints of the Constitution and Congress.

Even with this limitation on unilateral seizures, the president still possessed vast powers. The exclusive and discretionary powers of the president were in fact delineated much earlier. In *Marbury v. Madison*, Chief Justice John Marshall, before delving into the specific facts of *Marbury* and the Writ of Mandamus, wrote in a lengthy preface that, with respect to political officers, the President's power was absolute.[216] Under the Constitution, Marshall averred, "the President is invested with certain important political powers, in exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."[217] The political officer is "to conform precisely to the will of the President."[218] In his political execution of his constitution duties, "the decision of the Executive is conclusive."[219] The scope of the Appointment and Removal Power, debated early after the Nation's founding, was to guarantee the unique and exclusive discretionary powers of the chief magistrate.

From the perspective of the Framers, the debates that animated the Philadelphia Convention until the final moments, the practice of the first

---

[212] Id. at 637 (Jackson, J., concurring).

[213] Id.

[214] Id. In rejecting the argument that "the executive power" equaled "all executive powers," Justice Jackson said: "If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones." Id. at 640–41.

[215] Id. at 651.

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

[217] Id. at 165–66.

[218] Id. at 166.

[219] Id.

chief magistrate in Washington, and the development of case law and Supreme Court opinions, powers of a wide and capacious office are to inhere in the executive. The executive, in principle, now contains the sovereignty of the people and acts in their name, and unless explicitly violating a core constitutional duty or act of Congress, his powers are expansive. Article II powers as conceived and interpreted create a republican chief executive meant to speak for all the people. Article II also contains the seed of its own potential perpetual expansion—one that has continued in present times and set up the modern presidency.

B. Lincoln and Article II

The first great test of the presidency was during the Civil War. During that conflict, in which some 620,000 American soldiers perished,[220] President Lincoln had to defend the Union and quell an insurgency that was spreading across the South. Lincoln, it has been said, "melded his deep sense of the practical with his lifelong commitment to the law."[221] The Civil War posed a "fundamental legal dilemma"[222] in that it activated not just the domestic portions of the Constitution, but presidential powers and laws of international armed conflict as well. Lincoln perceived that the Civil War was both a war with a belligerent power and a violation by U.S citizens of the U.S. Constitution and federal laws,[223] so he suspended the writ of habeas corpus early in the conflict, when the fall of the Republic appeared likely.[224] Lincoln claimed that the powers vested in him by the Constitution, including as Commander-in-Chief, justified the suspension.[225]

This was an extraordinary act under emergency circumstances—the potential end of the United States being perhaps the most extreme of exigencies.[226] Lincoln based his argument on the Constitution and practicality.[227] Though in *Ex parte Merryman*, Chief Justice Taney argued

---

[220] James M. McPherson, Battle Cry of Freedom: The Civil War Era 854 (1988) (stating that at least 620,000 soldiers died and that the civilian death toll cannot be ascertained).

[221] Geoffrey R. Stone, Abraham Lincoln's First Amendment, 78 N.Y.U. L. Rev. 1, 28 (2003); McPherson, supra note 220; David Blight, Race and Reunion: The Civil War in American Memory (2001).

[222] Daniel A. Farber, Lincoln, Presidential Power, and the Rule of Law, 113 Nw. U. L. Rev. 667, 670 (2018).

[223] John Fabian Witt, Lincoln's Code: The Laws of War in American History 155–57 (2012).

[224] David Herbert Donald, Lincoln 299 (1995).

[225] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 Collected Works of Abraham Lincoln 430–31 (Roy P. Basler ed., 1953).

[226] See John Fabian Witt, A Lost Theory of American Emergency Constitutionalism, 36 L. Hist. Rev. 551, 571 (2018).

[227] See Ex parte Merryman, 17 F. Cas. at 148–49.

that the power to suspend the writ was in the hands of Congress alone,[228] the executive ignored the ruling. Taney concluded then that Lincoln's suspension went beyond the constitutional authority of the British king.[229] That ruling was a Circuit Court opinion,[230] and Taney spoke only for himself. That the author of *Dred Scott* was now limiting presidential powers was part of the legal conflict, and Taney's view was not accorded significant weight in history.[231] This was notable because Taney—the same Chief Justice who, in *Dred Scott*[232]—was now attempting to constrain the presidency during a moment of national emergency instigated by the very secessionist forces his jurisprudence had strengthened.

Lincoln's argument was more persuasive. As he famously asked: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[233] The then-Attorney General followed this with an opinion justifying the legality of the suspension.[234] Lincoln rested his argument on the Constitution, state of emergency, and Take Care Clause. As Lincoln told Congress in his July 4th message: "Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency . . . ."[235] Congress legitimated and legalized the suspension of the writ in 1863, passing the law that stated the "President . . . whenever, in his judgement, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus."[236] In times of emergency, America's chief executive had to act to keep the Constitution alive. Congress might not even be in session when an attack came, as it was not in session when Fort Sumter was fired upon.[237]

Claims that Lincoln would create a dictatorship or a tyrannical Union government were clearly overstated. There was not an equivalent suspension of the writ before the Civil War and none since, suggesting that the

---

[228] See id. at 148–49.

[229] See id. at 152.

[230] Sherrill Halbert, The Suspension of the Writ of Habeas Corpus by President Lincoln, 2 Am. J. Legal Hist. 95, 99 (1958).

[231] See generally Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[232] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857) ("They are not included, and were not intended to be included, under the word 'citizens' in the Constitution . . . .").

[233] See Lincoln, supra note 225, at 430 (emphasis in original).

[234] See generally Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861).

[235] Lincoln, supra note 225, at 430.

[236] Halbert, supra note 230, at 103.

[237] Akhil Reed Amar, America's Constitution 122 (2006).

emergency nature of that decree was more important than any long-term damage it might do to the Constitution. In many respects, Lincoln's actions are unique in that the Civil War is *sui generis*. Thus far, American law has made no extra-constitutional exception for emergencies, or even vested any kind of Lockean prerogative that would permit the argument that the Constitution must be violated so that the nation may be saved. In modern times, with war and terrorism raging, questions of extra-constitutionality and emergency powers would give the president greater powers—and some important checks.

III. THE POST-WAR ON TERROR PRESIDENCY AND *TRUMP V. UNITED STATES*

The contemporary practice of the modern presidency is what is now at stake. There was the Constitution as deliberated in Philadelphia and ratified by the people thereafter; there was the Constitution developed in practice afterward; and today, with respect to presidential powers, there is the Constitution as applied and understood. For all of President Taft's concerns about the "undefined residuum" of power, the modern, post-World War II presidency is a vigorous, energetic, and perhaps even an "imperial" institution.[238]

Before the United States was attacked on 9/11, Article II was already expansively construed as giving the president sweeping powers, specifically in the realm of foreign relations.[239] The Constitution itself gave the president a wide-ranging set of powers to control both the Executive Branch and the nation's dealings with other countries, friendly and hostile. The president's duties are of "unrivaled gravity and breadth."[240] Today, they include: "commanding the Armed Forces of the United States; granting reprieves and pardons for offenses against the United States; and appointing public ministers and consuls, the Justices of [the Supreme] Court, and Officers of the United States."[241] While the authorization to "declare war" was originally vested in the Congress, presidents of both parties, since Franklin

---

[238] See generally Arthur M. Schlesinger, Jr., The Imperial Presidency (1973) (coining the term "imperial presidency" to describe the post-World War II expansion of executive power and the presidency's tendency to exceed constitutional limits.).

[239] See Myers v. United States, 272 U.S. 52, 135 (1926); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[240] Trump v. United States, No. 23-939, slip op. at 6 (2024) (quoting Trump v. Vance, 591 US 786, 800 (2020)).

[241] Id.

Roosevelt, have launched unilateral military action in the name of necessity or security of the homeland.[242]

After 9/11, the already extensive presidency would reinterpret itself to have new powers and extend the ones already granted. 9/11 was a great national trauma to the United States, and the President was duty-bound to respond. That the enemy of the United States was al Qaeda, a transnational network rather than a traditional nation-state, made the issue of laws of war and legal interpretation more complicated. The theory the Bush Administration proposed was that a unitary executive could launch preemptive wars in the name of emergency.[243] Even before the congressional authorizations for the use of force in Afghanistan and Iraq, the President, as Commander-in-Chief, made military decisions that, his lawyers argued, were fully justified under the Constitution.[244] Some of these decisions and the actions taken as a result are still unknown and may remain unknown for some years.[245]

In the exercise of his Article II duties, President Bush, inter alia, set up detention sites in foreign countries where prisoners could be extradited without being told why;[246] used "enhanced interrogation techniques" vigorously defended by the White House's Office of Legal Counsel that included methods of torture;[247] created a broad No-Fly List which even included American citizens, some of whom unaware of their listing and without any legal recourse;[248] unilaterally declared certain people, even U.S. citizens, "enemy combatants" [249] without trial; created a vast warrantless surveillance apparatus,[250] which was initially kept a secret even from

---

[242] See Rebecca Ingber, 133 Yale L.J. Forum 747, 754–57 (2024).

[243] See Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., O.L.C. & Robert J. Delahunty, Special Couns., O.L.C., U.S. Dep't of Just., to Alberto R. Gonzales, Couns. to the President, Authority for Use of Military Force To Combat Terrorist Activities Within the United States (Oct. 23, 2003), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memomilitaryforcecombatus10232001.pdf.

[244] See id.

[245] See generally Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals (2008); Charlie Savage, Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy (2007); S. Comm. on Armed Servs., 110th Cong., Inquiry Into the Treatment of Detainees in U.S. Custody (2008).

[246] See Rasul v. Bush, 542 U.S. 466, 470–71 (2004); S. Select Comm. on Intel., Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, S. Rep. No. 113-288, at 13 (2014).

[247] Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Couns. to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A 1–2 (Aug. 1, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf.

[248] See Latif v. Holder, 28 F. Supp. 3d 1134, 1141–42 (D. Or. 2014).

[249] Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

[250] See ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 648 (6th Cir. 2007).

Congress;[251] created an offshore prison camp on a remote island where even child prisoners were held, placed far from the continental United States with the apparent purpose of evading the Constitution itself;[252] and argued that all emergency actions by the executive were unreviewable by the Supreme Court.[253]

Under the Bush Administration's theory of the executive, the president was entitled to use any means necessary to protect the homeland, which included the constitutional authority as Commander-in-Chief to do so.[254] The constitutional vagueness of the vice-presidency allowed for the most powerful vice president in American history to implement or create a range of new policies.[255]

Consider the memos,[256] now retracted, drafted by the Deputy Assistant Attorney General of the United States and signed in 2002 by the Assistant Attorney General. The first argument deployed in these "Torture Memos" was that the president's power under the Vesting Clause and Commander-in-Chief Clause of the Constitution gave him "the primary responsibility, and therefore the power, to protect the security of the United States."[257] What was beginning to be constructed was a sturdy barricade around the already extensive powers of the presidency, especially in wartime. Nearly every argument[258] the Bush Administration lawyers made derived from this stated authority, including that the President was Commander-in-Chief and prosecuting a war within his exclusive constitutional domain. What the Bush

---

[251] See U.S. Dep't of Just., Off. of the Inspector Gen., A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq 72 (2008).

[252] See Boumediene v. Bush, 553 U.S. 723, 739 (2008). (with "[t]he Government contend[ing] that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus.").

[253] See Muneer I. Ahmad, Resisting Guantánamo: Rights at the Brink of Dehumanization, 103 Nw. U. L. Rev. 1683, 1707 (2009) (discussing the Supreme Court's holding in *Rasul v. Bush*).

[254] The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 189–90 (2001). ("Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.").

[255] See Joel K. Goldstein, Constitutional Change, Originalism, and the Vice Presidency, 16 J. Const. L. 369, 380–83 (2013) (asserting that because of the vice presidency's constitutional vagueness, the advent of original public meaning originalism allowed the Vice Presidency to transform from "an insignificant institution" to "a very consequential office" without any corresponding change in constitutional language).

[256] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., O.L.C., Dep't of Just. to William J. Haynes II, Gen. Couns., Dep't of Def. (Mar. 14, 2003) (on file with the U.S. Dep't of Just.).

[257] Id. at 4.

[258] See id. Much of the so-called "Torture Memos" depended on, or was derived from, the Vesting Clause, U.S. Const. art. II, § 2, cl. 1, and Commander-in-Chief Clause, U.S. Const. art. II, § 1, cl. 1, respectively, of the Constitution. U.S. Const. art. II.

Administration was arguing, in effect, was that the Executive Branch was sovereign to act as it wished if the security of the people was at risk.[259] As one noted scholar put it then, addressing the president's claimed power to suspend habeas for noncitizens, "the person would be indicted by a subordinate of the president based on evidence provided by subordinates of the president; the defendant would be tried by subordinates of the president; the defendant would be sentenced by subordinates of the president; and the only appeal would be to the president."[260] An attempt was made to remove the courts entirely from the purview of executive action.

Over the course of eight years, the Supreme Court would serve as a check on the executive, carrying out its constitutional duty to review policies and laws that might violate the Constitution. The cases started just three years after 9/11, with *Hamdi v. Rumsfeld*,[261] where the Bush Administration argued that the Executive Branch required judicial deference and this was a separation of powers issue.[262] The Court found that citizens held by the United States as enemy combatants could still challenge the bases for their detention.[263] The same day, the Court held in *Rasul v. Bush* [264] that the statutory right to habeas corpus was not dependent on citizenship and that U.S. courts had jurisdiction to hear detainees' claims.[265] Based on nearly three centuries of common law, the Court found that the right to habeas corpus can be exercised in "all . . . dominions under the sovereign's control."[266] The purported check on the executive was to grow. In *Hamdan v. Rumsfeld*, the Court held that the Bush Administration lacked both constitutional and congressional standing to create the military commission trying Hamdan.[267] It ruled that the military commissions violated the Uniform Code of Military Justice and the Geneva Convention, and it made

---

[259] The Supreme Court did not always feel this way. See, e.g., *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427–28 (1814) ("As to the authority of the president, we do not think it necessary to consider how far he would be entitled, in his character of commander in chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direction of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable.").

[260] James P. Pfiffner, Power Play: The Bush Presidency and the Constitution 104–05 (2008).

[261] 548 U.S. 557 (2006).

[262] Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004).

[263] Id. at 533.

[264] Rasul v. Bush, 542 U.S. 466 (2004).

[265] Id. at 481. Justice Scalia offered a vociferous dissent. Id. at 497–98 (Scalia, J., dissenting) ("Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.").

[266] Id. at 482.

[267] Hamdan v. Rumsfeld, 548 U.S. 557, 591–92 (2006).

those specific commissions enforceable by the Supreme Court.[268] "The most important doctrinal lesson of *Hamdan*," wrote the law professor and the attorney who represented the namesake of the case, "is its repudiation of the claim that the President is entitled to act alone."[269] Indeed, *Hamdan* was a "rare Supreme Court rebuke to the President during armed conflict."[270]

Finally, and perhaps most importantly, in *Boumediene v. Bush*[271] the Court ruled that the Guantanamo detainees, regardless of citizenship, had the right to the writ of habeas corpus protected in Article I, Section IX of the Constitution.[272] "[W]hen the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[273] Both *Boumediene* and *Hamdan* were razor-thin 5-4 and 5-3 decisions, respectively.[274] Though the Supreme Court had historically construed presidential powers as expansive, and though the Bush Administration made powerful arguments for nearly unlimited power in foreign affairs, these rulings made clear that those powers were still subject to review by the courts. To completely defer to Congress and the President, the Court declared, would be to cede the constitutional powers of the Supreme Court to say "what the law is."[275]

The 9/11 cases are a rare example—in a time of war no less—of the Supreme Court putting a limited check on a President when he crossed the line into illegality and outright violation of the Constitution. The Court was protecting its own domain, as Congress had legislated that the Guantanamo detainees could not seek redress in the courts.[276] Still, the Court found that "certain matters requiring political judgments are best left to the political

---

[268] Id.

[269] Neal K. Katyal, Hamdan v. Rumsfeld: The Legal Academy Goes to Practice, 120 Harv. L. Rev. 65, 70 (2006).

[270] *Id*. at 66.

[271] 553 U.S. 723 (2008).

[272] Id. at 771.

[273] Id. at 765 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

[274] *Hamdan* was a 5-3 decision, but with Chief Justice Roberts recusing himself, one wonders how that decision would go today.

[275] Marbury v. Madison, 5 U.S. 137, 177 (1803). Every lower court had rejected the idea that the detainees at Guantanamo had constitutional rights, so these cases indicated a willingness to check the Executive Branch as the Constitution countenanced. See Joshua A. Geltzer, Of Suspension, Due Process, and Guantánamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process, 14 U. Pa. J. Const. L. 719 (2012), https://scholarship.law.upenn.edu/jcl/vol14/iss3/4 ("Confronted once again by lower courts' dismissal of habeas petitions from Guantanamo . . . .").

[276] Benjamin Wittes, The Courts Can't Fix Guantanamo, Brookings (Feb. 22, 2007), https://www.brookings.edu/articles/the-courts-cant-fix-guantanamo/ (The court found first that Congress, rather than the executive, had stripped the courts of jurisdiction over Guantánamo detainees' claims and second, that the strip was within Congress's constitutional powers.)

branches."[277] Despite these wartime restraints on abuse of power, the Roberts Court repeatedly validated and then elevated the idea of a vast, robust, and powerful presidency whose actions must be protected from judicial intrusion in these cases.

The most recent example of a near-unlimited presidency has been *Trump v. United States*.[278] In this case, the Court examined to what extent the president could be immune from prosecution for their unlawful actions, official or unofficial, when in office. Chief Justice Roberts noted in the majority opinion that the existence of the case itself was unprecedented, the first criminal prosecution of a former president in American history.[279] Still, the Court was about to sketch out a vast zone of immunity for the president, one that generously gave carte blanche for any action that could be construed as "official." The Court held that for "core constitutional powers," the president has absolute immunity.[280] Otherwise, he may not be able to do his job out of fear of prosecution.[281] The Court also made clear that judges and juries' questioning could not stop the president from carrying out the constitutional duties he swore to uphold.[282] Thus, the conversation between Trump and the Acting Attorney General, whatever its contents may have been, was an official act within the "conclusive and preclusive" realm of presidential power, and therefore it was absolutely immune from judicial questioning.[283] For actions in the "outer perimeter" of presidential functions, the Court held that there is a presumption of immunity that the Government has to rebut.[284] Finally, for unofficial actions, there is no immunity.[285] The

---

[277] *Boumediene*, 553 U.S. at 765.

[278] Trump v. United States, No. 23-939, slip op. at 41–42, 603 U.S. ___ (2024).

[279] Id. at 9 ("We recognize that only a limited number of our prior decisions guide determination of the president's immunity in this context."). See id. at 5 ("This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency.").

[280] Id. at 6 ("At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute."); id. at 42 ("The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts.").

[281] Id.

[282] See id. at 13 ("The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under 'a pall of potential prosecution[]' raises 'unique risks to the effective functioning of government[.]' ") (first quoting McDonnell v. United States, 579 U.S. 550, 575 (2016); then quoting Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982)).

[283] Id. at 20 ("For that reason, Trump's threatened removal of the Acting Attorney General likewise implicates 'conclusive and preclusive' Presidential authority. . . Trump is therefore absolutely immune from prosecution.").

[284] Trump v. United States, No. 23-939, slip op. at 14, 603 U.S. (2024) (reaffirming that presidential acts within the "outer perimeter" of official responsibility are entitled to "at least *presumptive* immunity from criminal prosecution").

[285] See id. at 15 ("As for a President's unofficial acts, there is no immunity.").

lower courts were left to determine what constituted an official versus unofficial act.

The Court's holding may be more in line with precedent than has been acknowledged.[286] Proceeding with an originalist methodology, Roberts seeks guidance from the Framers. Citing Justice Breyer's Concurrence in *Clinton v. Jones,* he notes that the Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws" by empowering a "single, constitutionally indispensable, individual."[287] The Court had already found, in the Nixon cases, that the president was immune from civil damages liability for acts within the "outer-perimeter" of his official responsibilities.[288] Referencing *Myers*, Roberts finds, correctly, that the Court has previously held that Congress has no authority to control the president's "unrestricted power of removal" for executive officers.[289] For actions falling within the core duties of the president, neither Congress nor the courts can act on or examine those decisions. But, on the other side, when prosecutors seek evidence from the president for criminal process, the president has no claim of absolute immunity,[290] a principle going back to Chief Justice John Marshall rejecting President Jefferson's argument that the resident could not receive a subpoena to provide information.[291] But the president's actions themselves, within his core functions, could not come under scrutiny. Otherwise, "[t]he hesitation to execute the duties of his office fearlessly and fairly" could be the result.[292] The Court even said that a jury could not "consider" evidence of a president's actions, if they were construed as "official acts," even if they constituted a crime, such as bribery.[293] Though the Court cited *Youngstown* and said that if the president

---

[286] See William Baude, A Principled Supreme Court, Unnerved by Trump, N.Y. Times (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html (stating that "the court announced broad and novel principles of presidential immunity from criminal indictment for official acts . . ."); Akhil Reed Amar, Something Has Gone Deeply Wrong at the Supreme Court, The Atlantic (July 2, 2024), https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877/.

[287] Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

[288] *Trump*, No. 23-939, slip op. at 11.

[289] Id. at 8 (citing Myers v. United States, 272 U.S. 52, 106, 176 (1926)).

[290] See United States v. Nixon, 418 U.S. 683, 706 (1974); United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,694).

[291] *Trump*, No. 23-939, slip op. at 11–12 (citing *Burr*, 25 F. Cas. 187, at 192).

[292] Id. at 13.

[293] Id. at 30–31 ("The Government does not dispute that if Trump is entitled to immunity for certain official acts, he may not 'be held criminally liable' based on those acts. But it nevertheless contends that a jury could 'consider' evidence concerning the President's official acts 'for limited and specified purposes,' and that such evidence would 'be admissible to prove, for example, [Trump's] knowledge or notice of the falsity of his election-fraud claims.' That proposal threatens to eviscerate the immunity we have recognized. It would permit a prosecutor to do indirectly what he cannot do directly—invite the

acted from "individual will" or "authority without law," a court could say so,[294] it nevertheless found that once a determination is made that the president has acted within his exclusive authority, "his discretion in exercising such authority cannot be subject to further judicial examination."[295] Indeed, the Court's view on presidential immunity could not be summed up better than Justice Thomas's concurrence: "the President's immunity from prosecution for his official actions" is not above the law—it "*is* the law."[296]

The executive could therefore cloak its actions under the veneer of officialdom while being able to carry out outright criminal schemes. And how does such immunity relate to, for instance, the impeachable offenses of bribery or treason? The Court did not say.

In the modern era, the president has vast powers that are neither reviewable by courts nor examinable by Congress. His foreign policy powers may be restrained so that individuals the United States military captures and detains have some constitutional rights if held within the jurisdiction of the United States, but the president's powers themselves can still go unchecked. What has emerged is a kind of republican Prerogative Power for the executive—one that lends credence to the idea of a monarchical presidency. True, the president, unlike a king, is subject to the check of the American people and must win re-election. But what if this Prerogative Power is abused? Does misuse of constitutionally vested power extend to violating the Constitution itself? Taft's rejection of the "undefined residuum" of power has conclusively been rejected by the modern Supreme Court.

The modern presidency exists within the twilight of legality. What the modern presidency and Article II have become are Prerogative instruments, structurally akin to powers of monarchs before. The use of Prerogative Power means that anything can become legal, or at least given the reasonable construction of legality. Prerogative Power necessitates that any act can be said to be aligned with the Constitution if its official justifications are weighty enough. The "imperial" presidency may be passé, but the Prerogative Presidency—above and beyond the law—is only beginning.[297]

---

jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge.")

[294] Id. at 7 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952)) (The President's power, if any " 'stem[s] either from an act of Congress or from the Constitution itself.' " Otherwise, he acts in the realm of " 'authority without law.' ")

[295] Id.

[296] Id. at 8 (Thomas, J., concurring) (emphasis in original).

[297] Presumably, the Court will determine in the future what is an official act vs. unofficial. This

And it is in precisely this widening discretionary space of immunity, at the edge of legality, that constitutional systems can crumble. The history of fascist legal orders attests to this: when legality becomes whatever the executive proclaims it to be, the door opens to a mode of rule long associated with radical authoritarian movements.

IV. THE PREROGATIVE PRESIDENCY

Under Article II, modern and future presidents have maximal immunity for core constitutional duties. This immunity is absolute, and therefore so are these core powers. For these actions, the president is not subject to review by Congress or the courts.[298] With only four presidential impeachments in the history of the nation, impeachment is an unlikely and improbable check.[299] Which is to say, in his core duties and the outer limits of his core duties, the president governs by Executive Prerogative alone. His only check is the presidential election, which the president also has an outsize role in administering, and whereby the voters decide if he is fit to remain in office.[300] The rationale is that the president can make decisions unworried about future prosecution, as the Framers envisioned. At the same time, such a view places the president, de facto, outside the law. That the Prerogative Powers of the presidency exist within their own realm and are completely at the political discretion of the president returns to mind the Prerogative State that Ernst Fraenkel discussed in his 1941 book.[301] The Normative State of Article III courts and Article I congressional checks, in certain areas, have seen their powers voided. There is a legal abyss that is beginning to form around the executive.

---

inquiry alone may, however, be vitiated by the very act of asking the question, which could constitute intrusion into the Executive.

[298] If the President has committed bribery, treason, or high crimes and misdemeanors, the Impeachment Clauses are presumably not automatically voided—but the ball is then in Congress's court.

[299] The original Impeachment Power in Britain made officers and ministers impeachable for giving the King bad political advice. The Framers had narrowed this considerably to serious crimes. See Joseph Story, Commentaries on the Constitution of the United States § 788 (1833) ("Thus, persons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the advice of parliament; purchasing offices."); see also Michael J. Gerhardt, Putting the Law of Impeachment in Perspective, 43 St. Louis U. L.J. 905, 906 (1999) ("Of particular importance were the founders' desires to narrow or restrict the range of both impeachable offenses and the persons who would be subject to impeachment. This narrowing is in sharp contrast to the British system . . . .").

[300] And of course, it is the outgoing president that manages the transition to the next one. Recent history has made this political as well, with a difficult transition between President Trump and President Biden, and an equally cumbersome one between Presidents Clinton and Bush in 2000.

[301] Fraenkel, supra note 38, at xiii–xvi.

The president and the office he occupies now exist in a zone of immunity. In this legal darkness, it will be near impossible for any restraint on his core and outer constitutional functions. The only reliable check is the president's own character and that is not a check at all. If private interests and corruption were to merge within official acts, the president would still be immune from questioning. Those acts, should they be understood as "official," could not even be introduced as evidence in other cases where his absolute immunity may not reach—cases for which such evidence might point to criminal intent.[302] This view, while grounded in precedent, expands the powers of the presidency beyond what the Framers intended.[303] It arrogates exclusively to the president those Prerogative Powers distributed between the Congress and the Executive at the Philadelphia Convention.[304] The president can act alone, execute the law alone, commit crimes, and can now point to vast Article II immunity to protect himself and his associates. He is not a king, but he is much closer to being one than even the most monarchical Framers would have liked.

When ruling with absolute immunity in a twilight zone of the law, the president will govern by prerogative. This is the modern, functional workings of the presidency; it has brought back the royal prerogative that was once rejected in America. In England, the royal prerogative was gradually checked by Parliament until the moment Parliament was supreme.[305] Still, in the unwritten English Constitution, adopted by Dominion countries like Canada and Australia,[306] the royal prerogative was the residuum of power that belonged to the monarch.[307] British royal prerogative powers were "vast," even as Britain by the late 1700s began moving toward ministerial government and Parliamentary sovereignty.[308] The royal prerogative has become the Executive Prerogative as the modern U.S. president can defy or transcend the power of the law. Article II now can be read as vesting the Executive Prerogative. The enumerated powers in this reading are qualifications, not limitations, and it is the president who decides on the limitations of his power.

---

[302] Trump v. United States, No. 23-939, slip op. at 31, 603 U.S. (2024).

[303] Id. at 1 (Sotomayor, Kagan & Jackson, JJ., dissenting) ("Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law.").

[304] See McConnell, supra note 178, at 27–31.

[305] See Jack N. Rakove, Taking the Prerogative Out of the Presidency: An Originalist Perspective, 37 Presidential Studs. Q. 1, 85, 89 (2007).

[306] A.V. Dicey, Introduction to the Study of the Law of the Constitution 424–25 (10th ed. 1959).

[307] 1 William Blackstone, Commentaries on the Laws of England 232–33 (1765).

[308] Andrew Kent, Executive Power, the Royal Prerogative, and the Founders' Presidency, 2 J. Am. Const. Hist. 403, 410 (2024).

At first blush, the text of Article II itself obviates any textual support for implying royal prerogative powers. After all, the "executive Power" is distinct from the term "prerogative," and if the Framers wanted the president to have a royal residuum of powers synonymous with those of the British king, they would have said so. The kingly prerogative powers were split between Congress and the president[309], and there was no doubt, early on, that presidential powers were distinct from royal powers. The king's prerogatives—control over war, foreign affairs, appointments, commerce, and domestic governance—were deliberately divided between Congress and the president, leaving no unitary residuum of monarchical power in Article II. To put this another way, if the Article II president conceived of in Philadelphia in 1787 had [310], Article II's inclusion of treaty and appointment powers was superfluous. Judge Guido Calabresi has emphasized that any residual power that exists "is very limited in scope"[311] and reflects that presidential powers are a "historical grab bag of anomalies" that are unique to the President.[312] While these arguments are persuasive and supported by the text as well as the Philadelphia debates described above, contemporary readings of presidential power agree that there is *some* undefined residuum of power and that the president has prerogative here to exercise his duties. The Supreme Court—and modern presidential practice—has set up a de facto Prerogative Power under Article II for the president in times of peace and war. This power can extend to core constitutional functions as well. [313] It is a power ripe to be exploited by a future president. Alexis de Tocqueville, that great legal observer, was early in noting that "[t]he President of the United States possesses some nearly royal prerogatives that he does not have

---

[309] For example, only Congress could decide when it met, and only Congress could declare war, both royal prerogative powers in England. See Blackstone, supra note 307, at 249, 252–53.

> It is a branch of the royal prerogative, that no parliament can be convened by it's own authority, or by the authority of any, except the king alone . . . . It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes . . . . Upon the same principle the king has also the sole prerogative of making war and peace.

[310] J.D. Mortensen, Article II Vests the Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1184 (2019).

[311] Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 569 n.108 (1994).

[312] Id.

[313] See Blackstone, supra note 307, at *235. According to Blackstone, the king's prerogative also entailed: that "in the king can be no negligence, or *laches*," id. at *240; "the sole power of sending [a]mbassadors to foreign states, and receiving [a]mbassadors at home," id. at *245; the power "to make treaties, leagues, and alliances with foreign states and princes," id. at *249; "the sole prerogative of making war and peace," id.; "the prerogative of granting safe-conducts," id. at *251; and other powers.

the opportunity to use; and the rights that, up to now, he is able to use are very circumscribed."[314] Those opportunities are now manifold.

And yet, as Chief Justice Roberts noted in *Trump*, while responding to the dissents' view that the Court was reading into Article II executive powers that were unsupported by either text or history, "there is no separation of powers clause, either."[315] William Blackstone, in enumerating what the royal prerogative entailed, listed personal immunity from suit as his first characteristic.[316] In other words, regardless of the text and history of the Constitution, the modern practice of the presidency, as upheld by the Supreme Court, inheres a prerogative power that is greater than its execution of the laws. Absolute immunity entails absolute power, and this, taken to its conclusion, is a rejection of republicanism.

A modern president with the Prerogative Power is dangerous for democracy and the rule of law. It puts the Constitution in contradiction with itself. With the "executive Power" morphing into the executive Prerogative, can a future President sell ambassadorships to the highest bidder? Can he assassinate a private U.S. citizen because this Commander-in-Chief authority and the Vesting Clause require it for national security? Could he pardon those whom he has commissioned to commit a crime? Could he appoint federal bench judges and Supreme Court Justices with the tacit understanding they uphold his actions? And could he appoint U.S. Attorneys who then carry out federal prosecution of his political rivals—or vulnerable people—to enforce the president's partisan wishes? Given that appointment of executive officers is the duty of the president, could a future president incorporate his political party into the functioning of the government? Perhaps by relabeling certain political activities as "official"? He could fill an Acting Attorney General and Acting Defense Secretary without sending nominees to the Senate for confirmation, the former able to legally validate all executive actions, and the latter capable of operationalizing a war the president desires. The executive *executes* the laws, and the chilling effects of such policies may be severe before the courts can intervene.

The point is that a conniving future president could easily blend political with official, a slow and accretive process of fusing Party with State, with himself at the apex of both. Such a president, while he may be thwarting the letter and spirit of the Constitution, could make a reasonably strong argument that he is merely acting in line with the express and implied powers

---

[314] Alexis de Tocqueville, Democracy in America 209 (1835).
[315] Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 227 (2020).
[316] Blackstone, supra note 307, at *235.

of the presidency, historical executive practice, and Supreme Court precedent.[317] With outsized influence on the execution of the laws, he could use the federal law enforcement agencies to spread terror across the country. Moreover, the executive could stretch to influence the federal judiciary, and only swear-in those lawyers who meet certain political criteria. The gradual fusing of Party with State would compromise the impartial functioning of the entire government, and this possibly could cause America's clockwork constitutional system of checks and balances to freeze, perhaps even collapse.

In other words, the Prerogative Presidency is uniquely susceptible to a fascist takeover. The Italian Fascist State and the German National Socialist State were examples of where a political party usurped and co-opted the legal order and made itself sovereign. In the case of Germany, the Party proceeded to parasitically overwhelm the entire State and to both use the legal system to justify its takeover while creating an abyss of law where the Prerogative State dominated. The modern reading of Article II lends itself to such a legal fascist coup by granting the president undefined powers that go beyond the Constitution and federal statutes.

This is a dangerous scenario, and the only way to rein in the modern Prerogative Presidency is to return to the Philadelphia debates and re-elevate the Article II leader that was envisaged there. The Philadelphia debates were a contest for competing visions, and some limits on the president were part of both schools of thought. The executive was to be broad, but not to have kingly powers. The courts and Congress must therefore begin the process, vigorously checking the president when his actions exceed his authority. Indeed, the existence of such a powerful Prerogative Presidency should encourage Article III courts and Congress to *double down* on their respective constitutional functions. Congress can pass statutes to delimit and hold accountable certain implied presidential powers. The courts can more thoroughly exercise their powers of judicial review and refrain from invoking the scapegoat of the political question doctrine and insert itself in these constitutional crises. The only remedy for a vast, kingly president is for the other powers in the Constitution, and the separation of powers as a structure, to work as designed.

Yet one fears that the Prerogative Presidency will only expand its authority, and a future president, reliant on his political party and commanding a great military, will further usurp power, including the powers

[317] This is before even considering how such a future fascist President could read congressional statutes overbroadly and reading powers that are not in the statutes.

of the other branches, leading to single-man rule of the kind that was rejected at Philadelphia. The Prerogative Presidency is well-situated to create lawful despotism in America; once that happens, it may be impossible to restrain.

CONCLUSION

This Article has examined the relationship between fascism and the law and explained that by usurpation, co-option, and subjugation, the fascist Party-State comes into existence. Referencing the Italian Fascist and German National Socialist examples, such a step-by-step process eventuates in a regime that is legitimated by law; indeed, the regime controls the meaning and interpretation of the law itself, including the people's supreme law in the constitution. We have seen how the legal apparatus in Italy was fused with the Fascist Party, and how this was taken to its logical extreme with Germany; the takeover of the law is something possible in the United States.

While one seeks to refrain from the "chilling doom" that the Chief Justice of the Supreme Court bemoans,[318] it is all but necessary to conclude that the modern Prerogative Presidency is uniquely susceptible to a fascist despot claiming power and ruling by fiat. Not only would such a usurpation create an abyss of law, but it also would use the law to its own advantage, laying ruin to the structure and functioning of the federal government. The Constitution such a president was sworn to uphold would be little more than a piece of paper. In such a scenario, the Constitution, it would be claimed, protects and indeed empowers a president to act according to his will or general mandate. If that were to happen, the Prerogative Presidency would show its true colors.

Restraining such residual, expansive power is the only possible solution. The executive—not just the current one, but all subsequent ones—needs to be transformed and brought in line with the original vision of the presidency. Returning to a more limited president, interdependent on the other branches, could stave off the accumulating militias, mobs, and manpower that would back a fascist takeover of the law. Article II is what presidents make of it, but the courts, Congress, and the people have a say as well. One can only hope that their voices are heard, and that responsible checks are returned to an office that was never meant to be fit for a king, much less a royal emperor.

---

[318] Trump v. United States, No. 23-939, slip op. at 37 (2024).