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TEACHING CONSTITUTIONAL LAW AFTER THE TRUMP PRESIDENCY

JOEL K. GOLDSTEIN*

ABSTRACT

Teaching Constitutional Law will not, and should not, be the same after the presidency of Donald Trump. President Trump conducted his presidency in a manner which disregarded constitutional limits and assaulted basic constitutional principles. At the most conventional level for Constitutional Law courses, the Supreme Court generated new doctrinal responses to some of Trump's presidential acts. Moreover, Trump's presidency engaged non-judicial actors in considering how relatively obscure constitutional barriers operated, such as the Emoluments and Pardon Clauses, provisions regarding presidential inability and impeachment, and even segments of the Twelfth Amendment related to the role of the Senate president during the count of electoral votes and of the Fourteenth Amendment regarding Insurrection and Rebellion. Those constitutional texts have traditionally not been part of basic Constitutional Law courses, but now, at least some should be—not simply for their own significance but for questions they raise about the Trump presidency and constitutional interpretation more generally. But in the aftermath of the Trump presidency, Constitutional Law courses should pay greater attention to identifying and exploring basic constitutional principles, many of which the Trump presidency disparaged, and considering the role of norms, conventions, and human behavior in vindicating those values. Finally, the Trump presidency points to a need for law schools, consistent with their missions, to expand their public educational activities regarding foundational constitutional values.

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INTRODUCTION

Like so much else, teaching Constitutional Law won't be the same after the presidency of Donald Trump. At least it shouldn't be. The election of 2016 brought to power an authoritarian demagogue who repeatedly assaulted American constitutional democracy in unprecedented ways. "Trump operated the presidency in ways that defied widely held assumptions about how a president might use and abuse the powers of the office,"¹ wrote Bob Bauer, former White House Counsel to President Barack Obama, and Jack Goldsmith, Assistant Attorney General for the Office of Legal Counsel under President George W. Bush. The Bauer-Goldsmith bipartisan indictment of Trump echoed and was subscribed to many times over by other thoughtful constitutionalists associated with both major parties. Trump's behavior triggered novel consideration of dormant constitutional provisions, trashed long-standing constitutional norms and conventions, and even challenged basic American constitutional ideals. And the enduring loyalty of his supporters notwithstanding these assaults raises existential questions for the future of American constitutional democracy.

Trump's presidency presents one of several sources which press for change in the content of basic Constitutional Law courses. Even in normal times, Constitutional Law is among the most dynamic subjects in the law school curriculum. Even as canonical cases anchor the basic Constitutional Law courses, most Supreme Court terms produce some decisions that require syllabus revisions. The current Court's composition, calendar, and arguments suggest a disposition to disrupt long-standing precedent, which may introduce major decisions with new doctrinal developments or approaches needing coverage. And traumatic, high-profile events, including the killings of George Floyd and other persons of color, have reminded this nation of the persistence of structural racism and other pernicious forms of discrimination against historically disadvantaged groups, thereby giving constitutional law teachers even more cause to reconsider the presentation of Constitutional Law. Perhaps some future volume of this *Law Journal's* "Teaching" series might address teaching about structural racism across the curriculum.

Yet, the fact that curricular revision should also respond to other calls should not preclude the important, and to some extent overlapping, task of responding to the issues that Trump's presidency raises. At the most particular level, Trump's conduct presented new issues for constitutional interpretation. In response to his presidency, the Supreme Court wrote some new doctrine, and other constitutional interpreters considered and applied obscure, rarely-invoked constitutional provisions. Trump was *sui generis*, and accordingly, his

1. BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY ix (2020).

presidency tested esoteric constitutional backstops not previously part of basic law school Constitutional Law courses.

Yet, Trump's presidency did not simply surface some obscure constitutional provisions to include in the syllabus under familiar categories. In addition, Trump brushed aside many long-standing norms and conventions that had been established to implement basic constitutional principles. Many such practices are not judicially enforced, and accordingly, most Constitutional Law courses probably allow them cameo appearances, if that. Still their connection to constitutional values and procedures and their centrality to constitutional government, as demonstrated by the fallout from Trump's behavior, invite Constitutional Law teachers to reconsider their role in the course.

The anomalous nature of the questions and clauses Trump brought into play and his disparagement of familiar norms signaled that his presidency inaugurated a critical moment for American constitutional democracy. It assaulted foundational American constitutional ideals, principles that animate the document and our best constitutional traditions. That Trump's presidency rejected basic constitutional ideals was most dramatically illustrated by the unwillingness of Trump and many of his supporters to acknowledge his clear defeat in 2020 and by their effort to retain power through extra-legal methods, behavior characteristic of autocratic regimes but foreign to American experience. The Trump-inspired events made January 6 a day of infamy, different from, but which will stand alongside, December 7 and September 11. However, that day's attack on constitutional institutions and the Capitol came from within, and the "insurrection" and "terrorism" it represented was inspired not by America's external enemies, but by Trump's words and those of some of his close allies.²

Nevertheless, curricular revision seems an inadequate response for law schools to this assault on basic principles of American constitutional democracy. What was most striking, unsettling, and indeed frightening about the Trump presidency was that he achieved and retained widespread support, notwithstanding his assault on bedrock American constitutional ideals. American law schools have a stake in preserving constitutional principles, and Trump's ability to sustain considerable public support notwithstanding the events of January 6 makes clear that many Americans do not understand or

2. See, e.g., 167 CONG. REC. S735 (daily ed. Feb. 13, 2021) (statement of Sen. Mitch McConnell) (stating that mob on January 6, 2021, used "terrorism" because President Trump fed them "wild falsehoods"); *id.* at S738 (daily ed. Feb. 13, 2021) (statement of Sen. Susan Collins) (stating that Trump "incited an insurrection with the purpose of preventing that transfer of power from occurring."); *id.* at S26 (daily ed. Jan. 6, 2021) (statement of Sen. Mitt Romney) (calling events at Capitol on January 6, 2021, "an insurrection incited by [Trump]"); *Statement by President George W. Bush on Insurrection at the Capitol*, GEORGE W. BUSH PRESIDENTIAL CTR. (Jan. 6, 2021) (referring to January 6, 2021, as an "insurrection" conducted "by people whose passions have been inflamed by falsehoods and false hopes.").

embrace basic ideals of the American constitutional system. That interest justifies educational activities that extend beyond students in Constitutional Law courses and mandates efforts to help educate the public about those basic ideals. Law schools should consider expanding curricular and extra-curricular opportunities for faculty and students to help educate others regarding American constitutional principles in a manner consistent with their mission.

This Essay continues in Section I by outlining some of the specific constitutional issues Trump's presidency raised which merit discussion in basic Constitutional Law courses. Section II argues that the Trump presidency assaulted foundational constitutional principles and illustrates that point by focusing on two such principles implicated by Trump's activities culminating in the January 6 insurrection. It also underscores a truth most of us have taken for granted, but which Trump's presidency shows deserves more emphasis in Constitutional Law courses, that the survival of basic constitutional ideals, indeed of American constitutional government, depends on the willingness of government officials and citizens to follow principle, even when doing so cuts against their immediate partisan preferences. The message of Section II deserves a larger audience than those who study Constitutional Law in law school. Accordingly, Section III suggests that law schools have an interest in and standing to educate more broadly regarding basic constitutional ideals.

Two disclosures may be useful in assessing my suggestions. First, since course design should serve curricular objectives, a word about my understanding of the purpose of basic law school Constitutional Law courses seems appropriate. Although most students will not practice constitutional law, some will, a larger group will occasionally find (or miss) a constitutional issue relevant to a client's problem, and virtually all will benefit in their practices from basic knowledge of the structure and purposes of American government.³ Moreover, lawyers often assume civic roles in which their performance can benefit from exposure to Constitutional Law.⁴ Indeed, some argue that the primary justification for requiring students to take Constitutional Law is better to prepare them to be "leading citizens."⁵ As such, basic Constitutional Law courses should educate students regarding constitutional structure and rights and the purposes behind such arrangements and provisions; the way lawyers, judges, and other officials make constitutional arguments and the strengths and weaknesses of different approaches to constitutional interpretation; the role of judges, other

3. Ernest A. Young, *Curricula and Complacency: A Response to Professor Levinson*, 117 YALE L.J. POCKET PART 12 (2008) (contending that knowledge of constitutional structure benefits lawyers in their practices).

4. See, e.g., Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 641 (2018) (suggesting that some law students will play an important role in civic society lending importance to constitutional law courses).

5. Sanford G. Levinson, *Reconsidering the Syllabus in "Constitutional Law,"* 117 YALE L.J. POCKET PART 8 (2008).

officials, lawyers, and citizens in making and applying constitutional law; and the fundamental ideals implicit in our constitutional system.

Second, having retired from full-time teaching in June 2019 and having last taught basic Constitutional Law courses the following January 2020 semester, I may not experience the syllabus and classroom challenges my recommendations will present. My last courses included some of the material discussed in Section I and some ideas in Section II below, but the concerns and suggestions in Sections II and III have grown and been influenced by the events of January 6, 2021, and its aftermath. Yet, my suggestions are not disciplined by the knowledge that I will have to practice in class or in faculty committee work what I preach in these pages. Nonetheless, the novelty of some of the issues raised and the severity of the threat posed to basic constitutional principles convinces me of the curricular and institutional merit of the suggestions made here.

I. CASES & CLAUSES

Most Constitutional Law courses focus on doctrine from Supreme Court decisions and the textual provisions at issue in those disputes. Accordingly, a natural, or at least comfortable, place to begin considering the impact of Trump's presidency on Constitutional Law courses are some Supreme Court cases associated with his presidency and the constitutional clauses that his behavior brought into frequent discussion. What follows is not a comprehensive list of those cases and clauses but some of those which are suggestive and may merit attention.⁶

A. *Trump & the Supreme Court*

1. The Muslim Ban: *Korematsu* Revisited

Courses on constitutional rights typically include *Korematsu v. United States*,⁷ the infamous decision in which the Supreme Court upheld military orders confining Japanese American citizens to specified areas during World War II. *Korematsu* was subsequently viewed as a colossal embarrassment of American history,⁸ and few, if any, expected behavior of a 21st century

6. For instance, I do not discuss claims in some litigation, such as Trump's attempt to invoke executive privilege against records requests made of the United States Archivist by the Select Committee to Investigate the January 6th Attack on the United States Capitol. See *Trump v. Thompson*, 20 F4th 10, 49 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022).

7. *Korematsu v. United States*, 323 U.S. 214, 214 (1944).

8. Harold Hongju Koh, *Symposium: Trump v. Hawaii — Korematsu's ghost and national-security masquerades*, SCOTUSBLOG (June 28, 2018, 11:00 AM), <https://www.scotusblog.com/2018/06/symposium-trump-v-hawaii-korematus-ghost-and-national-security-masquerades/> (asserting that "*Korematsu* was overruled in the court of public opinion ... decades" before Court's decision in *Trump v. Hawaii*). See also *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (expressing

American presidential candidate or president to cause reasonable people to compare their conduct to that of the federal government in the 1940s in creating and defending Japanese internment camps as a wartime expedient. Nevertheless, Trump's campaign rhetoric and earliest actions as president presented an analogy to *Korematsu*. Trump was widely-criticized, even by fellow Republicans,⁹ for his statement on December 7, 2015, the 74th anniversary of Japan's attack on Pearl Harbor, calling for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."¹⁰ Trump justified his campaign policy of banning Muslim's from entering the United States by pointing to Roosevelt's actions following Pearl Harbor.¹¹ Even for those who do not regard Trump as an authority on the Constitution or American history, his reliance on F.D.R.'s war-time orders to support his policy made the association with *Korematsu* inescapable.

In *Trump v. Hawaii*,¹² the Supreme Court considered questions of presidential power and religious liberty after Trump issued executive orders suspending entry of foreign nationals from certain (mostly Muslim) countries, while the Department of Homeland Security reviewed the adequacy of the information those countries provided to allow a determination regarding whether those individuals presented a security threat.¹³ After lower courts held Trump's initial order unlawful, Trump issued new orders twice in eight months, varying the affected countries, rationale, nature of the review undertaken, and procedures.¹⁴ As a candidate, president-elect, and president, Trump repeatedly made comments hostile to Muslims.¹⁵ Nonetheless, the Court, in a 5–4 decision, upheld Trump's third order against a constitutional challenge that it violated the Establishment Clause by discriminating against Muslims.¹⁶

"what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution."").

9. Jessica Taylor, *Trump Calls for a 'Total and Complete Shutdown of Muslims Entering' U.S.*, NPR (Dec. 7, 2015), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s> (quoting comments of Governors Jeb Bush and Chris Christie and Senators Lindsay Graham and Marco Rubio denouncing Trump's statement).

10. *Id.*

11. Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015), <https://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban/story?id=35648128>.

12. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

13. *Id.* at 2403.

14. *Id.* at 2403–04.

15. *See, e.g., id.* at 2417 (summarizing Trump's statements calling for "total and complete shutdown of Muslims entering the United States," referring to "Muslim ban"). *See also id.* at 2435–38 (Sotomayor, J., dissenting) (providing a more complete statement of Trump's anti-Muslim comments).

16. *Id.* at 2423.

The majority opinion, which Chief Justice John G. Roberts, Jr. wrote, characterized Trump's third order as facially neutral and one which addressed a matter within the "core of executive responsibility"¹⁷ and reasoned that courts typically were very deferential to presidential actions regarding whether to admit foreign nationals given national security implications. The issue was not whether to denounce Trump's statements, the Court wrote, but to determine the significance of those statements in assessing the third order. The Court applied a deferential standard of review to facially neutral provisions in entry cases,¹⁸ and it found that the lenient test of some legitimate national security basis was met in this case by the articulated purpose of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."¹⁹ The Court, in part, cited the facts that the policy did not specifically identify a religion, and affected countries with only eight percent of the world's Muslims and which prior administrations and Congress had designated as posing national security concerns.²⁰

In dissent, Justice Sonia Sotomayor found the majority's summary of Trump's anti-Muslim rhetoric incomplete. She catalogued Trump's statements which demonstrated his anti-Muslim animus in greater detail than the majority had and concluded that the "full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith."²¹ Given Trump's pronouncements, Justice Sotomayor's dissent found "stark parallels between the [majority's] reasoning" and *Korematsu*.²² The majority forcefully rejected that analogy, characterizing the government order upheld in *Korematsu* as one which forcibly relocated "U.S. citizens to concentration camps, solely and explicitly on the basis of race."²³

Yet, the majority's dismissal of *Korematsu* as having "nothing to do with this case"²⁴ seems at least an overstatement and more likely raises inferences appropriately drawn in response to excessive protestation. Even if distinctions can fairly be made since, for instance, Trump's orders excluded certain foreign nationals rather than confining American citizens, those variations did not eliminate the resemblance between the "reasoning" in the two cases, which was, after all, the point Justice Sotomayor made. In both cases, Harold Hongju Koh pointed out,

17. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

18. *Id.* at 2418–21.

19. *Id.* at 2420–21.

20. *Id.* at 2421.

21. *Id.* at 2435.

22. *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018).

23. *Id.* at 2423.

24. *Id.*

[T]he president had invoked an amorphous national security threat to justify a sweeping discriminatory policy limiting the freedom of a particular group. In both cases, the government asserted a grossly overbroad group stereotype that presumed that membership in that group, standing alone, signaled a hidden desire to harm the United States.²⁵

And the fact that the targeted category in both cases was a minority group subject to prejudice made the parallels more obvious.

And still, even as the Court upheld Trump's third order, it went to lengths to distance itself, and the Constitution, from Trump's rhetoric. Chief Justice Roberts used the case "to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history" and was inconsistent with the Constitution.²⁶ That judicial pronouncement will forever link *Trump v. Hawaii* to *Korematsu* in ironic contradiction of the Chief Justice's earlier statement separating the two cases. Moreover, the majority went out of its way to point out that the president "possesses an extraordinary power to speak to his fellow citizens and on their behalf" and to articulate inclusive themes, an implicit criticism of Trump's rhetoric.²⁷ Justice Anthony M. Kennedy was more explicit in his concurrence. He instructed that "the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."²⁸ And he recognized "an urgent necessity that officials adhere to these constitutional guarantees and mandates [in the First Amendment's religion clauses] in all their actions, even in the sphere of foreign affairs."²⁹ Those admonitions would not have been necessary had the pronouncements of candidate and President Trump sounded inclusive themes.

2. The President's Amenability to Legal Process

Trump's conduct also gave the Supreme Court occasion to reaffirm and broaden doctrine regarding the president's obligation to comply with judicial process concerning their private conduct in a pair of cases. As will be seen

25. HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 201 (2019).

26. *Hawaii*, 138 S. Ct. at 2423.

27. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417–18 (2018).

28. *Id.* at 2424 (Kennedy, J., concurring).

29. *Id.* The Court's opinion left questions regarding handling of future cases involving allegations of bad governmental motive. *See, e.g.*, Cristina M. Rodriguez, *Trump v. Hawaii and the Future of Presidential Power Over Immigration*, <https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/>; *First Amendment — Establishment Clause — Judicial Review of Pretext — Trump v. Hawaii*, 132 HARV. L. REV. 327 (2018). *See also* Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold that Travel Ban is Lawful—Anything But*, JUST SEC. (July 2, 2018), <https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible/>.

below, a committee of the House of Representatives sought Trump's tax returns to aid in its legislative work, and a New York grand jury issued a subpoena *duces tecum* to third party banks and accounting firms for the returns incident to a criminal investigation. Trump sought to quash the subpoenas.

Trump v. Vance,³⁰ which considered whether Trump's tax returns were subject to state judicial process, contributed to doctrine from earlier cases regarding the amenability of a president to the rule of law in criminal³¹ and civil cases.³² In an opinion by Chief Justice Roberts, the Court rejected Trump's claim of immunity from a state-issue subpoena *duces tecum* regarding a grand jury investigation into possible criminal conduct of his companies. After citing and reaffirming long-standing practice to the contrary regarding federal prosecutions,³³ the Court unanimously concluded that the president lacked immunity from state process,³⁴ and a majority rejected Trump's alternative claim that a state grand jury subpoena for a president's private papers was subject to a higher standard.³⁵

In *Trump v. Mazars*,³⁶ the Court considered whether Congress had power to subpoena Trump's tax records.³⁷ The Court's review of American history disclosed a longstanding tradition of the two political branches, resolving prior such disputes without litigation.³⁸ The Court concluded that Congress has power to subpoena records for a valid "legislative purpose" but not simply for law enforcement purposes, subject to the constitutional rights of recipients.³⁹ The Court rejected Trump's claim that Congress must show a "demonstrated specific need" for access to a president's private papers as it would for materials covered by executive privilege,⁴⁰ but also rejected the House's proposed standard, which would treat subpoenas directed to the president like those to anyone else and

30. *Trump v. Vance*, 140 S. Ct. 2412 (2020).

31. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (holding president subject to subpoenas in criminal case notwithstanding executive privilege); *United States v. Burr*, 25 F. Cas. 30, 38 (No. 14,692d) (CC Va. 1807) (Marshall, Cir. J.) (holding President Jefferson subject to judicial subpoena in criminal case against former Vice President Aaron Burr). For an interesting discussion of the different role the Court played in the *Nixon* and *Trump* cases, see Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125 (2021).

32. *Clinton v. Jones*, 520 U.S. 681, 705 (1997); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982).

33. *Vance*, 140 S. Ct. at 2421–24.

34. *Id.* at 2429 (describing agreement of dissenting justices with this holding); *id.* at 2431 (Kavanaugh, J., concurring) (stating agreement of Justices Kavanaugh and Gorsuch that president lacks absolute immunity from state criminal process).

35. *Trump v. Vance*, 140 S. Ct. 2412, 2429–30 (2020).

36. *Trump v. Mazars*, 140 S. Ct. 2019 (2020).

37. *Id.* at 2026.

38. *Id.* at 2029–31.

39. *Id.* at 2431–32.

40. *Id.* at 2432–33.

would raise separation of powers concerns.⁴¹ Instead, the Court prescribed a multi-factor test to balance the various separation of powers concerns at stake.⁴²

3. The Electoral College: Faithless Electors

Unlike the *Trump* cases discussed above, the Faithless Elector cases⁴³ did not involve constitutional issues Trump's misbehavior triggered, but assessed the constitutionality of the conduct of others. Notwithstanding this difference, they are included because of their connection to Trump's presidency, because the anomalous conduct that gave rise to them was predicated on a perception regarding Trump's unfitness for office, and because they raise important issues.

Although Trump received nearly three million votes fewer than his 2016 rival, former Secretary of State Hillary R. Clinton, he was elected because he secured an electoral vote majority.⁴⁴ Trump's election focused attention once again on a problematic feature of American democracy, the election of the president by the electoral college rather than through popular vote. Although virtually all presidents have won the most popular votes as well as an electoral vote majority, candidates who lost the popular vote were elected in two (2000, 2016) of the last six elections, and a small change of popular votes in a few states could have flipped the outcome of two other recent presidential elections (2004, 2020), notwithstanding the sizeable popular vote margins for the winners (George W. Bush, Joe Biden) of those two contests.⁴⁵

The potential perils of the electoral college extend beyond the possibility that the popular vote winner may not become president. Although the political parties choose electors and presumably select loyal partisans likely to be faithful, the Constitution does not require electors to support the candidates who won their state. In fact, electors were initially supposed to exercise discretion, a practice that largely disappeared as political parties developed and assumed control of elector selection. Some states statutorily require electors to support their state's popular vote winner.⁴⁶ In 2016, Clinton electors in some states violated their pledges to vote for the former Secretary of State and instead

41. *Trump v. Mazars*, 140 S. Ct. 2019, 2433–35 (2020).

42. *Id.* at 2435–36.

43. *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020); *Colorado Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (per curiam).

44. KAREN L. HAAS, OFF. OF THE CLERK, U.S. HOUSE OF REP., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION: NOVEMBER 8, 2016 83–84 (Feb. 22, 2017), <https://history.house.gov/Institution/Election-Statistics/2016election/>.

45. *See generally*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REP., ELECTION STATISTICS: 1920 TO PRESENT, <https://history.house.gov/Institution/Election-Statistics/Election-Statistics/> (last visited Feb. 12, 2022).

46. *Chiafalo*, 140 S. Ct. at 2321 (stating that thirty-two states and Washington D.C. had laws requiring electors to pledge to support the candidate they were elected to support); *id.* at 2322 (reporting that fifteen states sanction pledge violations).

supported other candidates. Their action was not a rejection of Clinton, but an effort to try to induce similar behavior from enough Trump electors to allow an alternative to a Trump presidency.⁴⁷ The effort failed yet it raised the specter of other abuses from unfaithful electors. Suppose a deep-pocketed, yet unscrupulous, politician or other person used bribes or threats to corrupt the electoral vote by trying to induce switches? In two related cases,⁴⁸ the Supreme Court unanimously held that states had power to penalize or prevent electors from deviating from the candidate they had pledged to support. Although the Constitution did not speak to whether states could sanction electors who violated pledges, long-standing practice supported such measures.

The cases focused attention on the use of the electoral college to decide presidential elections notwithstanding its anti-democratic character and the fact that it increasingly raises the possibility that the president and vice president will come from a party which received fewer popular votes. The case draws attention to the way some constitutional institutions, like the electoral college, operate in ways far different from intended, highlights the role of states in determining presidential elections, and demonstrates reliance on ongoing practice as a mode of constitutional analysis. The electoral college also offers a window into imperfections in the Constitution and the constitutional and political impediments to reform.⁴⁹ During the 1960s, some thought that the next election of a popular vote loser would produce a sufficient backlash to abolish the electoral college, but more recent experience has shown that expectation misguided since the beneficiaries tend to become more wedded to the institution that allows them to prevail.

4. Trump & the Constitution Outside the Court

Most constitutional issues Trump's presidency raised did not produce Supreme Court decisions on the merits. Sometimes, the Court dismissed the claims on justiciability grounds or failed to grant certiorari.⁵⁰ Often, Trump's behavior required non-judicial officials to engage in constitutional interpretation

47. *Id.* at 2322.

48. *Id.* at 2320 (Court, 9–0, upholds Washington law fining electors who violate pledges); *Colorado Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (Court, 8–0, with Justice Sotomayor recused, upholds Colorado law replacing electors who act contrary to pledge).

49. *See, e.g.*, SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: WHY THE CONSTITUTION MUST BE REVISED: IDEAS TO INSPIRE A NEW GENERATION* (2007).

50. *See, e.g.*, *Trump v. New York*, 131 S. Ct. 530 (2020) (dismissing on standing and ripeness grounds challenge to Trump order to exclude from census apportionment base aliens not in lawfully documented status); *Bogert v. Degraffenreid*, 141 S. Ct. 2508 (2021) (granting certiorari but vacating judgment and instructing lower court to dismiss case as moot); *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir., 2020), *cert. den.*, 141 S. Ct. 553 (2020) (denying certiorari on lower court dismissal of foreign emoluments challenge for lack of standing).

relating to presidential power, thereby affording examples of constitutional interpretation outside the judiciary.

The instances typically involved obscure constitutional texts that traditionally have not been part of Constitutional Law courses. The unique nature of these issues meant that they were beyond the expertise of most law professors who generally had never previously researched, taught, or perhaps even read the constitutional texts involved.⁵¹ More importantly, the recourse to constitutional limits and procedures that are almost never tested or used was instructive regarding the deviant nature of the Trump presidency and his willingness to abuse constitutional power and norms in novel ways.

a. Emoluments

For instance, Trump's behavior as president regarding his vast business holdings focused attention on the Constitution's Emoluments clauses. Whereas the Foreign Emoluments Clause precludes various office-holders from accepting, absent congressional consent, "emoluments" from foreign countries,⁵² the Domestic Emoluments Clause prohibits the president from receiving any "emolument" from the United States or any state.⁵³ The two provisions have different sweeps,⁵⁴ yet both reflect the Constitution's effort to prevent governmental corruption and undue deference of covered officials to certain actors. The Foreign Emoluments Clause is among the constitutional provisions, seemingly directed at preventing foreign governments from achieving undue influence over American decision-making. Cases brought by various plaintiffs asserted violations of one or the other Emoluments clauses based on foreign officials patronizing Trump's hotels, Trump's businesses receipt of foreign licensing fees, and Trump's rental of governmental property.⁵⁵ Following Biden's inauguration, the Court directed some of the cases dismissed as moot and denied certiorari on one the appellate court had dismissed on standing.⁵⁶

51. Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 73, 76–78 (2018) (discussing numerous instances where leading scholars misconstrue aspects of Section 4 of the Twenty-Fifth Amendment due to unfamiliarity with it).

52. U.S. CONST., art. I, § 9, cl. 8 ("and No Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State.").

53. U.S. CONST., art. II, § 1, cl. 6 ("and [the president] shall not receive . . . any other Emolument from the United States, or any of them.").

54. BAUER & GOLDSMITH, *supra* note 1, at 51–52 (explaining that the Constitution does not explicitly subject the president to the Foreign Emoluments Clause although Congress has presumed in legislation that he or she is so subject).

55. THE EMOLUMENTS CLAUSES OF THE U.S. CONSTITUTION, CONG. RSCH. SERV. (2021), <https://fas.org/sgp/crs/misc/IF11086.pdf>.

56. *Id.*

b. Amenability to Criminal Prosecution

The president's amenability to criminal prosecution again became an issue during the Trump presidency. Trump's action in firing FBI Director James Comey, whose agency was overseeing an investigation of concerns regarding Russia's interference with the 2016 election to benefit Trump, resulted in the appointment of Robert Mueller, a widely respected former Deputy Attorney General and FBI Director, as a special counsel. Mueller was appointed to conduct a counterintelligence investigation regarding links between the Russian government and the Trump campaign and matters arising from that investigation. Mueller's investigation discussed multiple instances of Trump's behavior that potentially constituted obstruction of justice, but did not make a decision to prosecute or not prosecute Trump so as "not to apply an approach that could potentially result in a judgment that [Trump] committed crimes" as president since, under DOJ regulations, Trump could not be prosecuted until he left office. Mueller reasoned that a statement asserting Trump had committed crimes would be unfair to him since he would lack an adversarial forum in which to contest the special counsel's conclusion of his guilt.⁵⁷ Mueller's Report stated that the special counsel would exonerate Trump if a thorough investigation left him confident that Trump did not obstruct justice but that the Special Counsel was unable to determine "conclusively" that no criminal conduct occurred, and accordingly the report did not exonerate Trump.⁵⁸

The Office of Legal Counsel of the Department of Justice had concluded during the Nixon⁵⁹ and Clinton⁶⁰ administrations that the president could not be prosecuted while in office. Was that the correct conclusion? Although the Constitution states that someone "convicted" of impeachment "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law,"⁶¹ that provision seems designed to negate an impeached party's claim of a Double Jeopardy defense to criminal prosecution,⁶² not to dictate that impeachment and removal must precede

57. ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2 (2019).

58. *Id.* at 2, 8, 182. Attorney General William Barr determined that Trump had not committed an obstruction of justice offense. *See* Letter from William P. Barr, Att'y Gen., to Lindsay Graham, Dianne Feinstein, Jerrold Nadler, Doug Collins, U.S. Sen. (Mar. 24, 2019).

59. Memorandum from Robert G. Dixon, Jr. on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) (on file with Department of Justice at <https://fas.org/irp/agency/doj/olc/092473.pdf>).

60. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 237 (2000).

61. U.S. CONST., art. I, § 3, cl. 7.

62. U.S. CONST., amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

criminal process.⁶³ The Impeachment Judgment Clause⁶⁴ applies to any officer subject to impeachment, not just the president, and other officers, including the vice president, are subject to criminal prosecution while in office.⁶⁵ The special immunity for the president instead rests upon his or her uniqueness.⁶⁶ Yet, does that privileged status place the president outside the rule of law?

c. Impeachment/Removal & Incapacity

The Constitution includes two different ways to separate a president involuntarily from presidential powers and duties before the four-year term expires, presidential impeachment and removal,⁶⁷ and transfer of presidential powers and duties to the vice president under Section 4 of the Twenty-Fifth Amendment.⁶⁸ Both drastic procedures achieved an unusual degree of prominence during the Trump presidency. The first applies to a president who has committed “treason, bribery or other high crimes and misdemeanors,”⁶⁹ and the second to one who is “unable to discharge the powers and duties of his office.”⁷⁰ The two provisions allocate decision-making authority quite differently, reflecting disparate visions of the appropriate way to handle the different determinations. Impeachment and removal are committed to Congress, with the House of Representatives possessing the sole power to impeach (by majority vote),⁷¹ and the Senate being given the sole power to try impeachments and convict the president by a two-thirds adverse vote.⁷² By contrast, high-ranking officials of the executive branch (i.e., the vice president and a majority of the “principal officers of the executive departments”) must initiate Section 4, and Congress participates only to resolve an intra-executive branch dispute

63. BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 26 (2012) (labeling the textual argument as “specious” since intended to negate Double Jeopardy defense).

64. U.S. CONST., art. I, § 3, cl. 7.

65. *See, e.g.*, KALT, *supra* note 63, at 26.

66. *See* A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 236, 246, 247 (2000).

67. U.S. CONST., art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

68. U.S. CONST., amend. XXV, § 4.

69. U.S. CONST., art. II, § 4.

70. U.S. CONST., amend. XXV, § 4.

71. U.S. CONST., art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

72. U.S. CONST., art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

regarding the president's capacity.⁷³ Impeachment-removal and Section 4 also have different legal consequences. Although both transfer presidential powers and duties to the vice president, impeachment and removal terminates a presidency whereas Section 4 leaves the president in office with the possibility of resuming his or her presidential powers and duties once the inability ends.⁷⁴ Section 4 simply transfers presidential powers and duties to the vice presidency for the duration of the inability.

Significantly, both procedures are constitutional anomalies. Only two presidential impeachment trials occurred during America's first forty-four presidencies, covering fifty-seven presidential terms and 228 years from 1789 to 2017;⁷⁵ a third president, Richard M. Nixon, would have been impeached and convicted but resigned to avoid those indignities.⁷⁶ And, not only had Section 4 never been invoked in the roughly half century since it became part of the Constitution, prior to Trump's presidency it had rarely, and then only briefly, even been considered or discussed.⁷⁷

Trump's four-year term changed all of that. The number of presidential impeachment trials doubled during Trump's single term. Whereas Trump's predecessors experienced only one impeachment trial every twenty-two presidencies or every 28.5 presidential terms, Trump's single term produced two impeachment trials! He was impeached by the House of Representatives on December 18, 2019, for abuse of power and obstruction of Congress relating to his action withholding foreign aid to Ukraine to pressure its president to do him "a favor" by announcing an investigation of former Vice President Joe Biden and his son to help Trump in his presidential campaign.⁷⁸ He was impeached again on January 13, 2021, for encouraging an insurrection to disrupt Congress

73. Section 4 does allow Congress, through normal legislative process, to replace the "principal officers of the executive departments" with an "other body" to act with the vice president. Congress has never done so.

74. See Goldstein, *supra* note 51, at 121–24.

75. HISTORY, ART & ARCHIVES, U.S. HOUSE OF REP., LIST OF INDIVIDUALS IMPEACHED BY THE HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> (last visited Feb. 12, 2022).

76. See, e.g., Keith E. Whittington, *A Formidable Weapon of Faction?: The Law and Politics of Impeachment*, 55 WAKE FOREST L. REV. 381, 393 (2020) (stating that Nixon resigned when his political support collapsed making his impeachment and conviction inevitable); Joel K. Goldstein, *The Senate, The Trump Impeachment Trial and Constitutional Morality*, 95 CHI.-KENT L. REV. 475, 493–94 (2020) (same).

77. Its use was considered, but rejected, when President Ronald Reagan was shot on March 30, 1981, and again when former Senate majority leader Howard Baker became Reagan's third chief of staff in February 1987. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 273 (3d ed. 2014); Goldstein, *supra* note 51, at 79.

78. 165 CONG. REC. H12205-06 (daily ed. Dec. 18, 2019).

from fulfilling its constitutional duty to count the electoral votes which would establish his defeat.⁷⁹

The Trump impeachments raise various constitutional questions, some more serious than others: What constitutes an “other high crime or misdemeanor” for which a president may be impeached and convicted?⁸⁰ May a president or other civil officer be tried after he or she has left office?⁸¹ Does impeachment and removal of a first-term president inappropriately interfere with the electorate’s prerogatives in a democracy? Should a president be impeached when the Senate clearly will not convict him or her?⁸² What responsibility do Senators have in considering a presidential impeachment?⁸³ To what extent can an impeachment proceeding serve as a means of establishing or vindicating constitutional norms?⁸⁴

Section 4 was not invoked but it became the subject of repeated and continuous discussion, not simply from pundits and scholars, but from members

79. 167 CONG. REC. H191 (daily ed. Jan. 13, 2021).

80. See, e.g., Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST LOUIS. U. L. J. 905, 913–19 (1999) (concluding that phrase was not limited to indictable crimes); Richard J. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS. U. L. J. 859, 866–78 (1999) (discussing question historically and in context of Clinton impeachment).

81. See, generally, KALT, *supra* note 63, at 106–32 (discussing issue generally); THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT, CONG. RSCH. SERV. (2021), <https://crs.reports.congress.gov/product/pdf/LSB/LSB10565>. Compare Keith E. Whittington, *Can a Former President Be Impeached and Convicted?*, LAWFARE (Jan. 15, 2021), <https://www.lawfareblog.com/can-former-president-be-impeached-and-convicted> (arguing yes) with Harold J. Krent, *Can President Trump be Impeached as Mr. Trump? Exploring the Temporal Dimension of Impeachment*, 95 CHI-KENT L. REV. 537 (2020) (arguing that “Congress can only initiate impeachment when an officer is in office”).

82. See, e.g., Keith Whittington, *The Role of Norms in Our Constitutional Order*, 44 HARV. J. L. & PUB. POL’Y 17, 23–24 (2021) (discussing whether impeachment should precede absent bipartisan support).

83. See Goldstein, *supra* note 76.

84. See, e.g., Whittington, *supra* note 76, at 401–02 (discussing use of impeachment for these normative purposes).

of Trump's own administration⁸⁵ and party.⁸⁶ The constitutional procedure was frequently misunderstood, even by academics and constitutional law teachers.⁸⁷ Although, whether Trump was able was discussed at various times during his presidency, the most serious consideration occurred after Trump's unprecedented behavior on January 6, 2021, where he encouraged his partisans to disrupt the electoral vote count, and after his prolonged failure to act to protect the constitutional procedure and the officials engaged in conducting it.⁸⁸ Whether Trump was "unable" as Section 4 contemplated was committed initially to the vice president and Cabinet. In response to Trump's behavior on January 6, a number of long-time Trump associates resigned.⁸⁹

d. The Pardon Power

The president's pardon power generally receives little attention, perhaps because most presidents follow guidelines that circumscribe its use and treat it as a power for public purposes, not personal benefit. President George W. Bush, for instance, resisted enormous pressure from Vice President Dick Cheney and others and, as his administration ended, refused to pardon I. Lewis "Scooter" Libby, Cheney's chief of staff and a high-ranking Bush aide, because he concluded that Libby's petition did not meet Department of Justice standards.⁹⁰

85. See, e.g., Michael Stratford, *Devos Resigned After Believing 25th Amendment was off the Table*, POLITICO (Jan. 8, 2017), <https://www.politico.com/news/2021/01/08/devos-resignation-trump-rioters-456574>; Devan Cole, *Trump's ex-White House Chief of Staff John Kelly Supports Using 25th Amendment to Remove the President*, CNN (Jan. 7, 2017), <https://www.cnn.com/2021/01/07/politics/john-kelly-trump-25th-amendment-capitol-riot-cnntv/index.html>; Adam Goldman & Michael S. Schmidt, *Rod Rosenstein Suggested Secretly Recording Trump and Discussed 25th Amendment*, N.Y. TIMES, Sept. 21, 2018, at A13; Moses Taylor, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> (Chief of Staff at Homeland Security department describing "early whispers" in Trump Cabinet regarding Section 4 based on Trump's "instability" and "erratic" behavior); Sharon LaFraniere, *New Book Details Tumult That Led to Russia Inquiry*, N.Y. TIMES, Oct. 7, 2019, at A20 (reporting that Deputy Attorney General Rod J. Rosenstein discussed possibility of invoking Section 4 to declare Trump unable and said Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly would support that action).

86. Michael Warren et al., *Angry Republican Leaders Float Removing Trump from Office*, CNN (Jan. 7, 2017), <https://www.cnn.com/2021/01/06/politics/trump-capitol-impeachment-25-amendment/index.html>.

87. Goldstein, *supra* note 51 (discussing mistakes in writings about Section 4 by scholars and reporters).

88. See, e.g., Mychael Schnell, *Mnuchin, Pompeo Mulled Plan to Remove Trump After Jan 6: Book*, HILL (Nov. 16, 2021), <https://thehill.com/homenews/administration/581688-mnuchin-pompeo-mulled-plan-to-use-25th-amendment-to-remove-trump/>; see also Joel K. Goldstein, *What You Need to Know About the 25th Amendment, Section 4*, WASH. POST (Jan. 8, 2021), <https://www.washingtonpost.com/politics/2021/01/08/what-you-need-know-about-25th-amendment-section-4/>.

89. *The Trump Administration Officials Who Resigned Over Capitol Violence*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/article/trump-resignations.html>.

90. GEORGE W. BUSH, DECISION POINTS 103–05 (2010).

Trump, however, used the pardon power frequently to benefit political and personal associates, including his campaign manager Paul Manafort, associate Roger Stone, Jr., and high-ranking White House Aides Michael Flynn and Stephen K. Bannon, among others,⁹¹ and seemed disposed to pardon himself and various family members.⁹² Bauer and Goldsmith write that “no other president has, like Trump, used pardons systematically to serve political and personal goals.”⁹³ The text of the Constitution, of course, says that the president “shall have Power to grant Reprieves and Pardons from Offenses against the United States.”⁹⁴ It does not explicitly preclude the president from a “self-pardon,” but, as any constitutional interpreter knows, the Constitution does not explicitly state all of the limits it imposes.⁹⁵ Some are discerned from reading clauses within the context of the entire document⁹⁶ or in concert with common sense or other constitutional principles.⁹⁷ Self-pardons seem to conflict with the principle against self-judging⁹⁸ and elevate the president above the law.

e. Counting the Electoral Votes

America’s presidential elections have almost always been resolved with the defeated candidate and party recognizing reality, accepting the adverse outcome, and acting to unify the nation. In 1961, Vice President Richard M. Nixon announced the election of his rivals in a high-minded statement.⁹⁹ Forty years

91. Nina Totenberg, *Can Trump Pardon Himself?*, NPR (Jan. 9, 2021), <https://www.npr.org/2021/01/09/955087860/can-trump-pardon-himself> (citing academic study showing late in Trump’s presidency more than ninety percent of Trump’s pardons to date benefitted personal or political associates); *Here Are Some of the People Trump Pardoned*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/article/who-did-trump-pardon.html> (listing those Trump pardoned).

92. Michael S. Schmidt & Maggie Haberman, *Trump is Said to Have Discussed Pardoning Himself*, N.Y. TIMES, Jan. 7, 2021, at A13.

93. BAUER & GOLDSMITH, *supra* note 1, at 111.

94. U.S. CONST. art. II, § 2, cl. 1.

95. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803) (articulating the judiciary’s power of judicial review).

96. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 6 (2012) (stating that “no clause . . . exists in textual isolation” but that the document must be read “as a whole.”); KALT, *supra* note 63, at 47 (stating that limits on pardon power must be found in entire Constitution, not just in Pardon Clause).

97. *See, e.g.*, Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial? A Critique of Bare Textualism*, 44 ST. LOUIS UNIV. L.J. 849, 865–66 (2000) (arguing that constitutional principles would preclude vice president from so presiding notwithstanding text).

98. *See* KALT, *supra* note 63, at 50 (discussing self-judging issue but not reaching definitive conclusion).

99. 107 CONG. REC. 287 (1961) (statement of Vice President Richard Nixon) (“I do not think we could have a more striking and eloquent example of the stability of our Constitutional system and of the proud tradition of the American people of developing, respecting and honoring institutions of self-government. In our campaigns, no matter how hard-fought they may be, no

later, Vice President Al Gore magnanimously accepted¹⁰⁰ the adverse Supreme Court opinion terminating the Florida recount,¹⁰¹ and in presiding over the electoral count, repeatedly held out of order Democratic members of the House of Representatives who raised challenges to the Florida electoral votes as contrary to the rules.¹⁰² Similarly, in 2017, outgoing Vice President Joe Biden strictly complied with the rules in presiding over the electoral count, refusing to entertain challenges to Trump's electoral votes because not made in compliance with law.¹⁰³

Trump's behavior could not have been more different. By contrast to Nixon's and Gore's gracious patriotism, as will be discussed later, Trump encouraged other office-holders to ignore their legal duties, and his actions encouraged insurrection.

Congress has limited discretion in counting electoral votes,¹⁰⁴ and virtually everyone has recognized the entirely formal and ceremonial role the President of the Senate plays in presiding over the proceedings—everyone but Trump and a handful of his partisans. Prior to the January 6, 2021, session to count the electoral votes, Trump implored Vice President Mike Pence to reject the electoral votes certified by various states for Biden. Trump repeatedly insisted that Pence was empowered to return certifications to states.¹⁰⁵ Like his factual claims, Trump's legal assertions were meritless. The Constitution does not empower the President of the Senate or Congress to return the opened certificates to the states for recertification. On the contrary, it states that once the certifications the states sent are opened by the President of the Senate in the presence of the Senate and House of Representatives, “the votes shall then be counted.”¹⁰⁶ The Constitution does not entitle the President of the Senate to count electoral votes, and a range of textual, structural, and historical considerations make it clear that he lacks such authority. The Constitution does not even designate the President of the Senate as the presiding officer over the

matter how close the election may turn out to be, those who lose accept the verdict, and support those who win.”).

100. *Text of Gore's Concession Speech*, N.Y. TIMES (Dec. 13, 2000), <https://www.nytimes.com/2000/12/13/politics/text-of-goreacutes-concession-speech.html> (calling, in part, for an end to “partisan rancor” and asking God’s blessing on Bush’s presidency).

101. *Bush v. Gore*, 531 U.S. 98 (2000).

102. 147 CONG. REC. 101, 101–02, 104–06 (2001).

103. 163 CONG. REC. H185-90 (daily ed. Jan. 6, 2017).

104. Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 556 (2004).

105. Transcript of Trump's Speech at Rally Before U.S. Capitol Riot, ASSOC'D PRESS (Jan. 13, 2021), <https://www.usnews.com/news/politics/articles/2021-01-13/transcript-of-trumps-speech-at-rally-before-us-capitol-riot> (“All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people.”).

106. U.S. CONST. amend. XII.

proceedings, a role based on custom and statute.¹⁰⁷ Instead, it simply says that they are the addressee of the lists of electoral votes from each state and “shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]”¹⁰⁸ Significantly, the Constitution directs the President of the Senate to “open” the certificates in this specified, accountable venue but then shifts to passive voice regarding the counting, leaving the counter unidentified. If the Constitution intended the President of the Senate to count the votes, one would expect it to provide that they count the votes as well as receive and “open the certificates,” but it does not do so.¹⁰⁹ Longstanding practice confirms that the Senate president does not count the votes and has largely a ceremonial role.¹¹⁰ By 1793, Congress had already designated tellers to count the votes once the Senate President opened the certificates,¹¹¹ and that practice has been followed ever since.¹¹²

And structural considerations confirm the propriety of entrusting the counting to others. It would hardly be consistent with democratic practice to allow one person to determine the outcome of a presidential election by his or her count of the electoral votes, especially when that person is a co-partisan of some candidates. The insult to democratic principles becomes even greater when, as is often the case, the President of the Senate is a candidate for president or for re-election as vice president. Just as no person should judge his or her own case, no national candidate should count the votes to determine the outcome of a presidential election. Accordingly, the Twelfth Amendment gives the President of the Senate a very narrow assignment—receiving and opening the certificates—and requires that he or she act in public before the assembled members of Congress.¹¹³ Indeed, the Twentieth Amendment rested on the principle that any decisions Congress must make in determining the outcome of a presidential election should not be made by those with an expiring mandate.¹¹⁴

Remarkably, Trump refused to accept Pence’s determination regarding his lack of discretion under the Constitution and laws.¹¹⁵ Trump berated Pence

107. Joel K. Goldstein, *A Mail Addressee and an Opener: The President of the Senate and Counting Electoral Votes*, 81 OHIO ST. L.J. ONLINE 203, 203, 204 (2020).

108. U.S. CONST. amend. XII.

109. See generally Goldstein, *supra* note 107, at 203–04.

110. *Id.*

111. 3 ANNALS OF CONG. 645 (1793) (stating that once Vice President Adams opened, read and delivered the certificates to “the tellers appointed for the purpose” the tellers “examined and ascertained the votes” and prepared a list which they gave the vice president); 6 ANNALS OF CONG. 2096–98 (1797) (stating that Adams, upon opening the envelopes and reading the certificates, asked the Senate Clerk to read the report which were then handed to the tellers who noted the contents).

112. Goldstein, *supra* note 107, at 204.

113. U.S. CONST. amend. XII.

114. Goldstein, *supra* note 107, at 206.

115. Michael Pence, *Dear Colleague Letter*, CNN (Jan. 6, 2021, 1:25 PM), <https://www.cnn.com/2021/01/06/politics/pence-trump-electoral-college-letter/index.html>.

during remarks at a rally, and following his statements and those of others, the mob of Trump supporters descended on the Capitol, assaulted law enforcement officials, and presented a threat to the lives and safety of government officials and others lawfully at the Capitol. Trump was aware of the attack on the Capitol from telephone conversations and television coverage, yet failed to act immediately to protect Pence and the other assembled officials as well as the constitutional process, praised the motivation behind the disruption, and did little and only belatedly and weakly to quiet the situation.¹¹⁶

f. Insurrection Clause

Consistent with its impact on constitutional jurisprudence,¹¹⁷ the Fourteenth Amendment is central to basic Constitutional Law courses. But those courses typically focus on the Equal Protection and Due Process Clauses in Section 1 and give some coverage to the adjacent Citizenship and Privileges or Immunities Clauses and to Section 5's grant of legislative enforcement authority to Congress. By contrast, the Insurrection Clause,¹¹⁸ the heart of Section 3, is part of the Amendment's flyover text where law professors and their students never stop.¹¹⁹

It's easy to understand why. The Insurrection Clause was included to preclude from holding national or state office those who, having previously taken an oath to support the United States Constitution, had engaged "in insurrection or rebellion" against the Constitution by siding with the

116. *A Timeline of How the Jan. 6 Attack Unfolded — Including Who Said What and When*, NPR (Jan. 5, 2022), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>; Shelly Tan et al., *How One of America's Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/>.

117. WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 1–2 (2015) (stating that "it is nearly impossible to exaggerate the importance of the Fourteenth Amendment."); Joel K. Goldstein, *Teaching the Transformative Fourteenth Amendment*, 62 ST. LOUIS UNIV. L.J. 581, 582 (2018).

118. U.S. CONST., amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.").

119. See, e.g., Graber, *supra* note 4 (referring in 2018 to Section 3 of the Fourteenth Amendment as part of the "forgotten Fourteenth Amendment"); Gerard Magliocca, *Enforcing the 14th Amendment's Bar on Insurrectionists Officers and Candidates*, AM. CONST. SOC'Y (Feb. 15, 2021), <https://www.acslaw.org/expertforum/enforcing-the-14th-amendments-bar-on-insurrection-ist-officers-and-candidates/> (calling Section 3 "perhaps" the Constitution's "most obscure part" before Jan. 6, 2021).

Confederacy during the Civil War.¹²⁰ Section 3, of course, speaks more broadly and its text is not confined to the Civil War,¹²¹ a limit that would have been easy to state if intended. Even so, Section 3 of the Fourteenth Amendment never becomes relevant because in America, officers who have sworn to support the Constitution, do not routinely, in modern times, engage “in insurrection or rebellion”—at least not until January 6, 2021.

The actions that day of Trump and some of his co-partisans to disrupt the lawfully-prescribed electoral vote counting through extra-legal methods were labelled as “insurrection”¹²² and “terrorism”¹²³ even by some leading Republicans. Professor Mark A. Graber and other leading scholars on the Fourteenth Amendment¹²⁴ directed American Constitutional Law professors to Section 3 to address the actions of Trump and some of his supporters. It does not explicitly state who must make a finding that a covered official “engaged in insurrection or rebellion” or gave “aid or comfort” to enemies of the American Constitution or the applicable standard for that determination.¹²⁵ Section 5 does, however, empower Congress “to enforce” legislatively the Amendment.¹²⁶ Graber pointed out that Section 3 uses mandatory language (“shall”) in disqualifying from office-holding one who, having taken an oath to support the Constitution “engaged in insurrection or rebellion” against the Constitution.¹²⁷

120. Mark A. Graber, *Their Fourteenth Amendment, Section 3, and Ours*, JUST SEC. (Feb. 16, 2021), <https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/>.

121. See U.S. CONST. amend. XIV, §3 (stating that “No person” shall hold federal or state office who “having previously taken an oath” as a federal or state official “to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same . . .”); Graber, *supra* note 120 (stating that although Section 3 was designed to disqualify from future office-holding those who violated oaths by supporting confederacy, “Section 3 would, of course, apply to any future insurrection.”); see also Gerard Magliocca, *The 14th Amendment’s Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6> (discussing limited authority regarding what constitutes an “insurrection”).

122. See, e.g., *Statement by President George W. Bush on Insurrection at the Capitol*, *supra* note 2.

123. See 167 CONG. REC. S735 (daily ed. Feb. 13, 2021) (statement of Sen. Mitch McConnell) (stating that mob on January 6, 2021, used “terrorism” because President Trump fed them “wild falsehoods”).

124. Bruce Ackerman & Gerard Magliocca, *Impeachment Won’t Keep Trump From Running Again. Here’s a Better Way*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/opinions/2021/01/11/impeachment-wont-keep-trump-running-again-heres-better-way/>.

125. U.S. CONST., amend. XIV, § 3; see Magliocca, *supra* note 121 (discussing roles of Congress, courts, and state officials in various scenarios and whether presidential pardons are relevant).

126. U.S. CONST., amend. XIV, § 5; see Magliocca, *supra* note 119 (pointing out advantages of Congressional action under Section 5); Magliocca, *supra* note 121 (discussing whether Section 3 is self-executing).

127. Mark A. Graber, *Section Three to the Rescue*, CONSTITUTIONALIST (Jan. 11, 2021), <https://theconstitutionalist.org/2021/01/11/section-three-to-the-rescue-by-mark-graber/>.

The provision would seem to apply to a president,¹²⁸ and it would allow Congress to determine that Trump and others who engaged in the insurrection after taking oaths to support the Constitution are precluded from future office-holding.¹²⁹ Graber argued that a subsequent finding by Congress signed by President Biden that Trump participated in an “insurrection” on January 6, 2021, would nullify his actions as president from that date on.¹³⁰ Graber pointed out that those who supported Section 3 denied that it was a Bill of Attainder since it merely set qualifications of office-holding rather than imposed a punishment; in any event, as a constitutional text, it would supersede inconsistent prior provisions.¹³¹ Some scholars identified political hazards in using Section 3 regarding Trump.¹³²

g. Conclusion

Trump’s presidency accordingly should cause Constitutional Law teachers to consider including discussion of some traditionally ignored constitutional provisions which Trump’s behavior introduced into contemporary discussion. There are advantages to giving some class attention to subjects of recent public discourse, and they raise interesting questions about constitutional interpretation: What does it tell us that these long-dormant clauses emerged during the Trump presidency? Are there other such provisions? To what extent should clauses, like Section 4 of the Twenty-Fifth Amendment, be bound by their original purpose to address instances of physical, mental, or logistical inability and to what extent are they capable of broader application? How are textual silences, in, say, the Pardon Power, interpreted? What problems arise when a clause is subject to initial application or when issues of first impression

128. *Id.*; Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide>.

129. Graber, *supra* note 127.

130. *Id.*

131. Mark A. Graber, *Section 3 and (Not) Bills of Attainder*, BALKINIZATION (Jan. 13, 2021), <https://balkin.blogspot.com/2021/01/section-three-and-not-bills-of-attainder.html>; Magliocca, *supra* note 121 (discussing Bill of Attainder argument).

132. See Andrew Coan, *Section Three and Politics by Other Means*, BALKINIZATION (Jan. 12, 2021), <https://balkin.blogspot.com/2021/01/section-three-and-politics-by-other.html>. A number of legal actions have been filed to block some members of Congress and others from seeking office for allegedly violating Section 3. See Jonathan Weisman, *Legal Effort Expands to Disqualify Republicans as ‘Insurrectionists,’* N.Y. TIMES, (Apr. 7, 2022), <https://www.nytimes.com/2022/04/07/us/politics/insurrectionists-congress.html>. See also Camila Pedrosa, *Appeal Planned After Dismissal of Suit Seeking to Keep 3 GOP Candidates Off Arizona Ballot*, KTAR NEWS (Apr. 26, 2022), <https://ktar.com/story/5027438/appeal-planned-after-dismissal-of-suit-seeking-to-keep-3-gop-candidates-off-arizona-ballot/> (reporting appeal planned of dismissal of three Jan. 6, 2021 lawsuits for lack of standing).

arise in politically polarized circumstances? Many require non-jurists to construe the Constitution, a common experience in American government and one which some students may experience in their careers but one which introduces some novel features. How should partisans go about deciding such constitutional questions?

II. THE CONSTITUTIONAL ASSAULT

The simplest pedagogical response to Trump's presidency is just to tweak the syllabus to include a few cases and arcane clauses which Trump's presidency spotlighted and otherwise proceed as we did before. That would be a mistake. It would badly underestimate the impact of Trump's presidency on the Constitution by focusing on discrete constitutional provisions at the risk of obscuring the more fundamental challenge it presented to foundational constitutional ideals. That assault occurred not only in the behavior considered by the previously addressed cases and clauses, but by Trump's pervasive disparagement of norms and conventions which had been established to vindicate constitutional ideals. Focusing only on cases and clauses would miss an important opportunity to make Constitutional Law courses richer by giving greater consideration to three inter-related areas that now deserve more attention: (1) the role of constitutional norms and conventions in implementing the Constitution and its ideals; (2) the foundational ideals behind the Constitution; and (3) the dependence of our constitutional system on officials and citizens giving priority to constitutional ideals in public behavior even when so doing does not serve their immediate partisan advantage. This section considers them in turn.

A. *Trump's Disparagement of Constitutional Norms & Conventions*

Trump was distinctive in his disregard for long-standing constitutional norms and conventions.¹³³ A full listing here is neither possible nor necessary to suggest the extent to which Trump violated and defied long-standing norms developed to vindicate constitutional values.¹³⁴

Trump's anti-Muslim messages described in the discussion of *Trump v. Hawaii* was part of a corpus of rhetoric attacking racial and other disadvantaged minority groups in violation of a norm of respect for human dignity which has

133. See, e.g., Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 190 (2018) (stating that Trump stands alone in his disregard of political norms and constitutional conventions); James P. Pfiffner, *Donald Trump and the Norms of the Presidency*, 51 PRS. STD. Q. 96 (2021) (describing Trump's defiance of presidential norms critical to American democracy).

134. On the difference between norms and conventions, see Siegel, *supra* note 133, at 179–90; Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1433–34 (2018). Hereafter, I often use “norm” to refer to both concepts.

constitutional underpinnings.¹³⁵ Trump is not the first president to clash with the press, but his “rhetoric and the centrality of press animus to his political program” were distinctive.¹³⁶ A range of measures sought to limit media access to government officials, especially of those journalists Trump deemed unfriendly,¹³⁷ and Trump’s attacks sought to delegitimize the press by attacking it as the purveyor of “fake news” and as the “enemy of the . . . people,” a term Soviet dictator Joseph Stalin used.¹³⁸

Trump acted to politicize criminal law contrary to the post-Nixon norm that partisan considerations should not animate criminal investigations and prosecution decisions.¹³⁹ From his “Lock her up!” campaign rhetoric directed at his opponent, former Secretary of State Hillary Clinton,¹⁴⁰ to his insistence on “loyalty” from the intended-independent FBI director James Comey and ultimate dismissal of him in response to an FBI investigation of links between Russia and Trump’s campaign, to his attempts to shut down the investigation of Special Counsel Robert Mueller, to his calls for his predecessor and successor to be indicted¹⁴¹ and beyond, Trump treated the Department of Justice as an instrument to reward friends and settle scores against enemies in blatant defiance of the norms implicit in his constitutional duty to “take Care that the Laws be faithfully executed.”¹⁴²

Although there has been a long-standing norm of executive branch officials treating the federal judiciary and federal judges with respect, even when disagreeing with their decisions, Trump repeatedly disparaged federal judges and courts.¹⁴³ In defiance of a bipartisan norm extending more than forty years and eight presidencies, Trump refused to release his tax returns as a presidential candidate in 2016 and 2020, and throughout his presidency.¹⁴⁴ His excuse, that

135. See Siegel, *supra* note 133, at 191–92; Pfiffner, *supra* note 133, at 98–99; Chafetz & Pozen, *supra* note 134, at 1451.

136. BAUER & GOLDSMITH, *supra* note 1, at 88.

137. *Id.* at 97–101.

138. Siegel, *supra* note 133, at 192–93.

139. BAUER & GOLDSMITH, *supra* note 1, at 137, 142; Pfiffner, *supra* note 133, at 108; Chafetz & Pozen, *supra* note 134, at 1451.

140. Siegel, *supra* note 133, at 200–01.

141. BAUER & GOLDSMITH, *supra* note 1, at 147–53; Pfiffner, *supra* note 133, at 108–09; Siegel, *supra* note 133, at 199, 200–01.

142. U.S. CONST., art. II, § 3.

143. Siegel, *supra* note 133, at 193–95. See also BOSTON BAR ASS’N, JUDICIAL INDEPENDENCE: PROMOTING JUSTICE AND MAINTAINING DEMOCRACY 4 (August 2019) (discussing rhetoric and actions which threaten judicial independence); *id.* at 9–12 (discussing improper attacks by Trump and others on judges and their consequences).

144. BAUER & GOLDSMITH, *supra* note 1, at 73–78 (reporting that other than Trump, presidents beginning with Jimmy Carter in 1977 had released tax returns as did presidential candidates from 1976 on other than Gerald R. Ford who in 1976 released summaries of nine years of returns); see also FEERICK, *supra* note 77, at 142 (stating that Ford’s tax returns for seven years were examined by Congressional committees and that the Internal Revenue Service audited five years of returns

he was under audit, was problematic. The federal returns of the president and vice president have been subject to automatic audit since 1977, and the practice of presidents over four decades established a disclosure norm to promote transparency, accountability, and faith in the governmental process.¹⁴⁵ While a private citizen might be reluctant to subject themselves to the intrusions or added scrutiny of public disclosure, a president or presidential candidate assumes a public role with different expectations, including those of the disclosure norm.¹⁴⁶

The recitation of these few examples omits many others but should suffice to suggest the aberrational nature of Trump's presidency. The norms and conventions outlined here all trace to, and implemented, constitutional clauses and values. Accordingly, Trump's behavior resisted constitutional practices that his predecessors, and successor, have followed on a bipartisan basis. The following subsection will say more about the significance of this conduct for the Constitution. Yet the topic also presents possibilities to expand the discussion in basic Constitutional Law courses in ways that will enrich students' understanding of the subject: What is the role of constitutional norms and conventions? How do we determine that a norm exists?¹⁴⁷ Why do they exist? Are they enforceable and, if so, by whom?¹⁴⁸ How do norms change?¹⁴⁹ Is it desirable that norms be stable as opposed to dynamic?¹⁵⁰ Is it more troubling that Trump violated substantively appealing norms than simply that he flouted norms?¹⁵¹

B. *Trump's Assault on Constitutional Values*

The obscure constitutional backstops Trump's behavior put into play, and the norms and conventions he violated, suggest a more basic point: Trump's behavior was inconsistent with and attacked certain fundamental principles which animate the Constitution. Jurists and other people can and do have good faith differences regarding constitutional meaning on any number of controversial topics, many of which have traditionally formed the heart of Constitutional Law courses. That's not what is distinctive about Trump's

incident to his nomination to be vice president under Section 2 of the Twenty-Fifth Amendment in 1973); *id.* at 175, 178 (discussing consideration of Nelson R. Rockefeller's tax returns incident to his nomination to be vice president under Section 2 in 1974).

145. BAUER & GOLDSMITH, *supra* note 1, at 74–75.

146. *Id.* at 77–78.

147. *See* Whittington, *supra* note 82, at 21.

148. *See id.* at 24–26.

149. *See id.* at 20 (discussing whether accumulation of norm violations changes norm); Chafetz & Pozen, *supra* note 134, at 1435–38 (discussing norm destruction, decomposition, and displacement by law as separate phenomena).

150. *See, e.g.,* Chafetz & Pozen, *supra* note 134, at 1445–47.

151. *See id.* at 1450–52 (arguing that substantive appeal of norms Trump violated is more important than fact of violating norms).

presidency. Rather, Trump's presidency was a deliberate, sustained, and undeniable assault on bedrock constitutional values which have traditionally united most Americans even as they disagreed on discrete constitutional questions. And the support given to Trump by office-holders and citizens notwithstanding his Constitution-defying behavior, even after he resorted to improper means or incited insurrection, suggests that many Americans do not understand or accept fundamental ideals behind our Constitution or are willing to sacrifice them to advance their partisan interests.

These propositions have consequence for basic Constitutional Law courses. The Constitution is not simply a collection of discrete phrases creating national government, allocating and limiting governmental powers and duties, and conferring rights. It articulates and rests on certain fundamental principles and purposes which direct our national aspirations. As Richard H. Fallon, Jr. wrote, although Americans "are a dramatically diverse people in many ways," generally "we are joined by our allegiance to the Constitution and our shared acceptance of the governmental structure that the Constitution creates,"¹⁵² even if we find some procedures deficient.¹⁵³ It's worth taking note and acting when presented with unmistakable evidence that many do not understand or subscribe to foundational principles of the Constitution. Perhaps basic courses should place greater focus on those principles as a start.

The Constitution's Preamble makes some principles and purposes explicit—forming "a more perfect Union," establishing "Justice," insuring "domestic Tranquility," providing "for the common defense," promoting "the general welfare," and securing the "Blessing of Liberty" for "the People of the United States" and their "Posterity."¹⁵⁴ The Preamble also signals a relationship between persons who are part of "We, the People" and a belief that government can and should achieve common goods in a just way respectful of individual freedom. The Constitution, as amended and interpreted, makes other basic precepts implicit since they animate its clauses and cases. One such principle is a commitment to pluralism, inclusivity, and equal citizenship among persons of different races, religions, genders, national origins, and other demographic features.¹⁵⁵ Another bedrock premise is a conviction that public decision-making should be based on civil discourse, rational consideration of facts and

152. RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* xviii (2004).

153. *Id.* at xix.

154. U.S. CONST. pmb1.

155. *See, e.g.*, U.S. CONST., art. VI, § 1, cl. 3 (Prohibition of "religious Test" as qualification for office implicitly signaling the members of minority religions are not excluded from office-holding); amend. I (prohibition against establishment of religion, free exercise clause, free speech and free press clauses protecting minorities and dissidents); amend. XIII, XIV, XV, XIX, XXIII, XXIV, XXVI; *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954) (prohibiting government conduct that sends message to minority group members that they are outsiders).

arguments, and consensus.¹⁵⁶ Democracy¹⁵⁷ and commitment to the rule of law¹⁵⁸ count as other basic principles. If I were now teaching a basic Constitutional Law course, I would do more to expose these features of the Constitution as it has developed in addition to the more conventional tendency to emphasize historical development of doctrine and the use of constitutional arguments. Yes, they are structural ideas, but that character gives them a status that commands attachment.

There is not space here to demonstrate in detail the constitutional roots of each ideal or how Trump's presidency assaulted each although the cases can be made.¹⁵⁹ For present purposes, however, it is worth focusing on two of the bedrock constitutional principles the Trump presidency assaulted and how basic Constitutional Law courses might respond. The ideals of democratic decision-making and the rule of law clearly rank among the basic principles of the Constitution. In part, they commit America to choosing governors through free and fair elections with widespread participation, so decision-makers reflect and respond to public sentiment and to deciding elections in favor of candidates who are elected based on pre-existing rules as determined by impartial counters. The rule of law is a complicated and contestable concept,¹⁶⁰ but at a minimum in this context, it requires that elections are conducted in accordance with law, with disputes determined by impartial decision-makers in accordance with law, and with final decisions made pursuant to the system followed even by those who preferred a different outcome.

Trump challenged basic tenets of constitutional democracy in unprecedented ways. Even before his term began, unmistakable signs warned that he threatened American constitutionalism. In an influential work, political scientists Steven Levitsky and Daniel Ziblatt suggested a four-part test to anticipate prospective autocrats: a weak commitment to democratic rules, denial of the legitimacy of opponents, toleration or encouragement of partisan violence,

156. See, e.g., U.S. CONST., art. I, § 7, cl. 2 & 3 (setting forth bicameralism and presentment pre-requisites to law-making as encouraging deliberation); art. II, § 2, cl. 1 (Opinion Clause authorizing president to require written opinion from principal officer of executive departments with matters relating to their duties); cl. 2 (advise and consent requirements for treaty-making and confirmation of officers); § 3 (requirement that president provide Congress with information regarding State of the Union and "recommend to their Consideration such Measures as he [she] shall judge necessary and expedient"); art. III, § 1 (vesting the judicial power).

157. See, e.g., U.S. CONST., pmb. (identifying "We the People . . ." as source of Constitution); amend. I (guaranteeing free speech, free press, right of assembly and petitioning government); amend. XIV, XV, XIX, XXIII, XXIV, XXVI (expanding franchise).

158. See generally Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

159. I hope to do so in a future work expanding on some of the ideas set forth in my October 2019 Donald J. Sutherland Lecture at Hofstra University.

160. See Fallon, *supra* note 158.

and willingness to curtail civil liberties of non-supporters.¹⁶¹ They found that Trump tested positive on all four counts based on his pre-2016 election attacks on the legitimacy of the electoral process,¹⁶² his fabricated birtherism assault on the legitimacy of the presidency of Barack Obama, his penchant for labeling Secretary of State Clinton a “criminal” (“Lock her up!”),¹⁶³ his encouragement of violence, sometimes explicit, sometimes veiled but unmistakable, against his critics and opponents,¹⁶⁴ and his demonization of Clinton and his media critics.¹⁶⁵

Trump took his assault on democracy and rule of law to new levels in 2020–21. New information is ever-emerging, but reports to date portray an unprecedented assault on democracy and the rule of law by Trump and allies. Prior to the election, Trump and close associates plotted to withhold support for Ukraine in order to encourage an investigation into Biden and his son. During the 2020 campaign and following the election, Trump suggested without any basis that the election involved massive fraud and had been stolen from him. He and his supporters litigated the outcome to an unprecedented extent. Although judges (including conservative jurists appointed by Trump or other Republican presidents) ruled against Trump and his supporters in more than sixty cases (and for Trump’s position only once),¹⁶⁶ Trump refused to accept adverse results. In some cases, the nature of the litigation resulted in judicially-imposed sanctions being ordered against some attorneys acting for Trump’s side.¹⁶⁷

161. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 61–67 (2018).

162. *Id.* at 61.

163. *Id.* at 62.

164. *Id.* at 62–64.

165. *Id.* at 64–65.

166. Russell Wheeler, *Trump’s Judicial Campaign to Upend the 2020 Election: A Failure, But Not a Wipeout*, BROOKINGS (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> (finding that only twenty-eight of 194 federal or state judges or fourteen percent decided in favor of Trump’s position); William Cummings et al., *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> (reporting that Trump’s position failed in sixty-one of sixty-two cases challenging election).

167. See, e.g., Nicole Hong et al., *Court Suspends Giuliani’s Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html> (reporting on decision of highest court of New York temporarily suspending Trump attorney Rudy Giuliani’s law license for improper behavior while representing Trump in election disputes pending further proceedings); Alan Feuer, *Judge Orders Sanctions Against Pro-Trump Lawyers Over Election Lawsuit*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/us/politics/sidney-powell-election-sanctions.html> (reporting on decision of Michigan federal judge sanctioning nine Trump lawyers). Some aspects of the Michigan decision were appealed. See Clara Hendrickson, *Kraken Lawyers Appear to Comply with Sanctions Order for Conspiracy-Laden Election Lawsuit*, DET. FREE PRESS (Feb. 25,

Not only did Trump not accept final judicial decisions and the judgments of government officials whom he had appointed,¹⁶⁸ he instead pursued extraordinary action. After Chris Krebs, the Trump appointee who oversaw the Department of Homeland Security's effort to protect the election from foreign interference, rebutted the unsupported claims of fraud of Trump and his attorneys, Trump fired him.¹⁶⁹ Trump reportedly badgered Department of Justice officials to declare the election corrupt and refused to listen when leaders he appointed advised that his information was wrong and no evidence suggested a basis to challenge the outcome. After authorizing the Department of Justice to investigate allegations of vote fraud, Attorney General William Barr, a Trump loyalist, announced there was no widespread vote fraud that would change the election's outcome.¹⁷⁰ Barr reportedly told an outraged Trump that his effort to show fraud was a "clown show."¹⁷¹ After Barr resigned, Trump subjected his replacement as acting attorney general and his deputy to frequent phone calls pressuring them to declare the election corrupt, notwithstanding their conclusion that Trump's claims lacked any basis.¹⁷² They, too, refused to assert that the election was stolen from Trump. In a rambling call, Trump told the Republican Secretary of State of Georgia, Brad Raffensperger, and other election officials

2022), <https://www.freep.com/story/news/local/michigan/detroit/2022/02/25/pro-trump-lawyers-appear-comply-sanctions-order/6937886001/>.

168. See, e.g., 167 CONG. REC. S14 (daily ed. Jan. 6, 2021) (statement of Sen. Mitch McConnell) (noting that "[d]ozens of lawsuits" considered Trump's claims but "over and over" courts rejected Trump's claims, "including all-star judges" Trump had nominated); *id.* at S26 (daily ed. Jan. 6, 2021) (statement of Sen. Mitt Romney) (stating that "scores of courts," Trump's "own Attorney General" and state election officials had "reached that unequivocal decision" that Biden had won and Trump lost); *id.* at S27 (daily ed. Jan. 6, 2021) (statement of Sen. Rob Portman) (noting that "after two months of recounts and legal challenges, not a single State recount changed the result. And of the dozens of lawsuits files, not one found evidence of fraud or irregularities widespread enough to change the result of the election."); *id.* at S31 (daily ed. Jan. 6, 2021) (statement of Sen. Lindsay Graham, R. S.C.) (stating that Trump had failed in challenges to various state elections and "enough is enough"); *id.* at S34 (daily ed. Jan. 6, 2021) (statement of Sen. Susan Collins) (stating that Trump had had opportunity over two months to challenge returns but his challenges had been rejected in nearly sixty cases).

169. Alana Wise, *Trump Fires Election Security Director Who Corrected Voter Fraud Disinformation*, NPR (Nov. 17, 2020), <https://www.npr.org/2020/11/17/936003057/cisa-director-chris-krebs-fired-after-trying-to-correct-voter-fraud-disinformati?>

170. Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, ASSOC'D PRESS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

171. Matthew Brown, *'It's Just a Joke': Former AG William Barr Derided Trump's False Election Claims*, USA TODAY (June 27, 2021), <https://www.usatoday.com/story/news/politics/2021/06/27/barr-describes-rift-trump-rift-over-election-fraud-claim-interviews/5365066001/>.

172. Devlin Barrett & Josh Dawsey, *Trump to Acting AG, According to Aide's Notes: 'Just say the Election was Corrupt + Leave the Rest to me,'* WASH. POST (July 31, 2021), https://www.washingtonpost.com/national-security/trump-rosen-phone-call-notes/2021/07/30/2e9430d6-f14d-11eb-81d2-ffae0f931b8f_story.html.

that he needed 11,780 votes to switch and suggested that they would be committing a crime if they failed to respond favorably to his election complaints.¹⁷³

Trump's behavior sent ominous signs. In a remarkable bipartisan action, all ten living former Secretaries of Defense joined in an Op-Ed on January 3, 2021, stating that the election was over and that it confirmed Biden's victory and Trump's defeat. The Op-Ed further asserted that the military has no role in determining election outcomes.¹⁷⁴ The ten signatories included Trump's two Secretaries of Defense as well as the living occupants of that position under Republican Presidents Gerald R. Ford, George H.W. Bush, and George W. Bush (Ronald Reagan's Pentagon chiefs having been deceased) and included four individuals (Donald Rumsfeld, Richard Cheney, William Cohen, and Chuck Hagel) who had been elected Republican members of Congress and, in Cheney's case, vice president.

Wow! Think about that! That this seasoned collection of national security officials, who had served presidents of both parties, including Trump, felt compelled to issue such an unprecedented statement speaks volumes regarding the threat they perceived that Trump would attempt extra-legal efforts to retain power.

Trump's efforts to direct the behavior of the Department of Justice and state officials in improper ways was not the totality of his effort. He tried to persuade Vice President Pence to abuse the narrow limits on his role as the presiding officer of the electoral count to reject Biden electors in some states. When Pence advised that he would not defy the legal restrictions on his role, Trump and close associates spoke to a rally on January 6, 2021, in inflammatory ways. The mob proceeded to the Capitol Building and Trump's supporters violently overwhelmed and injured law-enforcement officers and broke into the Capitol, disrupted the constitutional proceedings, and presented a threat to the lives of those present, including Pence and others in the line of presidential succession.¹⁷⁵ Trump was aware of the situation, which was covered on media

173. Amy Gardner & Paula Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html; Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>.

174. Ashton Carter et al., *Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html.

175. See, e.g., *Trump v. Thompson*, 20 F4th 10, 49 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022); Glenn Kessler, *The Jan. 6 Attack on the Capitol: A Guide to What We Now Know*, WASH. POST (Jan. 6, 2022), <https://www.washingtonpost.com/politics/2022/01/06/january-6-attack-capitol-guide-what-we-now-know/>; *A Timeline of how the Jan. 6 Attack Unfolded* —

and from communications, yet for hours failed to act to enforce the law or protect the constitutional proceedings and national officers,¹⁷⁶ in violation of his oath and his duty to act to protect constitutional processes.

Trump's conduct was, without question, far outside the boundaries of acceptable American political conduct. He proceeded without evidence, even when the leaders of the Department of Justice he had appointed advised his claims lacked any basis and in the face of judicial defeats. His action led to violence and disruption of the constitutional process of counting the electoral votes. He did not act promptly to stop the assault on the constitutional process. The Republican Senate leader, Mitch McConnell, referred to the January 6 assault on Congress as an "insurrection"¹⁷⁷ and later told the Senate that "the mob was fed lies" and "provoked" by Trump "and other powerful people" to prevent the "rule of law" and disrupt the certification of "the people's choice" of Biden as president.¹⁷⁸ Former President George W. Bush likened the protest to conduct in a "banana republic" and was "appalled by the reckless behavior of some political leaders since the election." The disruption was due to people "whose passions have been inflamed by falsehoods and false hopes."¹⁷⁹ President Bush was clearly talking about Trump and some of his supporters. On January 13, 2021, House Minority Leader Kevin McCarthy agreed that Trump "bears responsibility for Wednesday's attack on Congress by mob rioters" and criticized Trump for not "immediately" denouncing "the mob when he saw what was unfolding."¹⁸⁰

Indeed, Republican Representative Jaime Herrera Beutler reported that when McCarthy spoke to Trump on January 6, 2021, during the insurrection and implored Trump to forcefully tell his supporters to desist in the riot, Trump first claimed the mob was Antifa, and after McCarthy rebutted that and told him they consisted of Trump supporters, Trump responded, "Well, Kevin, I guess these people are more upset about the election than you are."¹⁸¹ Trump was impeached for an unprecedented second time but escaped conviction because only fifty-

Including who said what and when, NPR (Jan. 5, 2022), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>; Tan et al., *supra* note 116.

176. Kessler, *supra* note 175.

177. 167 CONG. REC. S18 (daily ed. Jan. 6, 2021).

178. 167 CONG. REC. S49 (daily ed. Jan. 19, 2021).

179. *Statement by President George W. Bush on Insurrection at the Capitol*, *supra* note 2.

180. 167 CONG. REC. H172 (daily ed. Jan. 13, 2021).

181. Press Release, Jaime Herrera Beutler, U.S. Congresswoman, Herrera Beutler Again Confirms Conversation with McCarthy Regarding Jan. 6 U.S. Capitol Attack (Feb. 12, 2021), <https://jhb.house.gov/news/documentsingle.aspx?DocumentID=402083>; *see also* Press Release, Jaime Herrera Beutler, U.S. Congresswoman, Herrera Beutler "Yes" on Impeachment (Jan. 12, 2021) (stating that McCarthy had described pleading with Trump to make a televised statement to "end . . . the mayhem" but "to no avail"), <https://jhb.house.gov/news/documentsingle.aspx?DocumentID=402082>.

seven (including seven Republican) senators voted to convict him, short of the two-thirds majority. Many of the forty-three Republicans who opposed convicting Trump argued that a former official could not be tried on impeachment.¹⁸² And following the impeachment vote, McConnell described the acts of January 6, 2021, as “terrorism” which occurred because Trump had “fed wild falsehoods” to the mob. Trump was “practically and morally responsible for provoking the events” of January 6,¹⁸³ McConnell said.

C. *Constitutional Morality*

Of course, Trump was unsuccessful. Congress recognized that Biden was lawfully elected, and he was installed as the new president, consistent with his 306-vote electoral majority which provided a comfortable cushion over the 270 necessary to elect. A possible verdict on the 2020 election is that the system worked, the democratic verdict was honored consistent with prevailing rules and authoritative decisions.

Yet the system only worked because some Republican (as well as Democratic) officials did not follow the lead of Trump and some of his associates in acting in defiance of the Constitution and law. Georgia’s Secretary of State Raffensperger refused to succumb to Trump’s entreaties to flip Georgia to him. Republican governors in Georgia and Arizona certified the Democratic electors in accordance with law. Most Republican senators agreed when McConnell implored them not to engage in a baseless challenge to Biden’s election, but a few, led by Senators Josh Hawley of Missouri and Senator Ted Cruz of Texas, did not abide by his call even after witnessing the insurrection.¹⁸⁴ Vice President Pence resisted Trump’s entreaties to abuse the limited powers of his position in presiding over the electoral count, perhaps influenced by the sentiment of majorities in both houses that included sizeable numbers of Republican senators and representatives. Conservative Representative Liz Cheney, who as House Republican Conference chair, had supported most of

182. See, e.g., 167 CONG. REC. S736 (daily ed. Feb. 13, 2021) (statement of Sen. McConnell) (claiming that the Senate had no power to convict and disqualify a former officer).

183. 167 CONG. REC. S735 (daily ed. Feb. 13, 2021). See also *id.* at H138 (daily ed. Feb. 13, 2021) (statement of Rep. John Katko) (“The President’s role in the insurrection is undeniable.”); *id.* at S27 (daily ed. Jan. 6, 2021) (statement of Sen. Rob Portman) (stating that mob thought the election was stolen because Trump had been so stating for two months); *id.* at S32 (daily ed. Jan. 6, 2021) (statement of Sen. Pat Toomey) (“We saw bloodshed because the demagogue chose to spread falsehoods and sow distrust of his fellow Americans.”).

184. See, e.g., 167 CONG. REC. S20 (daily ed. Jan. 6, 2021) (statement of Sen. Mike Lee) (arguing that Congress could simply open and count the votes not engage in review of the sort objectors sought); *id.* at S26 (daily ed. Jan. 6, 2021) (statement of Sen. Rob Portman) (stating that he stood with the Constitution which did not empower Congress to act as objectors sought); *id.* at S32 (daily ed. Jan. 6, 2021) (remarks of Sen. Pat Toomey) (stating that Sen. Hawley’s challenges to Pennsylvania vote would deny Pennsylvania’s voters the opportunity to choose their electors).

Trump's policy initiatives, was among the Republicans who voted to impeach. She announced before the vote:

The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President. The President could have immediately and forcefully intervened to stop the violence. He did not. There has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution.¹⁸⁵

That the 2020 election produced the lawful result should not encourage complacency regarding the efficacy of America's constitutional system. The 2020 election reminds us that constitutional provisions are not self-executing.¹⁸⁶ They must be interpreted and applied by human beings.¹⁸⁷ Trump's effort to prevent Biden's clear and lawful election failed because ultimately enough Republican office-holders, in Trump's administration, in Congress, and in states, and judges appointed by Republican presidents and governors joined with Democrats in giving priority to their legal duty over their partisan preferences. Such behavior is routine in most elections. Still Trump's abuse of the system and the subsequent effort to ostracize Republicans who place constitutional duty over partisan demands threaten to make the ordinary behavior that allows constitutional democracy to function exceptional, thereby subverting democracy and the rule of law.

The framers, of course, worried that selfish motives might interfere with the government's purpose to achieve public good. They appreciated human reason as an asset to be deployed but did not idealize human nature. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary," James Madison wrote in *Federalist* 51.¹⁸⁸ Since neither condition would exist, the Constitution's text and structure represented an effort to encourage virtuous behavior. They thought that a republic would provide decision-makers more likely to bring the wisdom to discern the public interest and the patriotism and commitment to justice which would override "temporary or partial

185. Press Release, Liz Cheney, Wyoming Congresswoman, Cheney: I Will Vote to Impeach the President (Jan. 12, 2021), <https://cheney.house.gov/2021/01/12/cheney-i-will-vote-to-impeach-the-president/>.

186. See, e.g., LEVITSKY & ZIBLATT, *supra* note 161, at 99 (explaining that constitutional guardrails are insufficient to prevent authoritarian behavior due to the failure of constitutional text to speak to all issues and to speak unambiguously and the tendency of officials to act to undermine constitutional spirit).

187. Cf. Goldstein, *supra* note 76, at 482–85 (discussing the need for officials to act with constitutional morality in impeachment proceedings).

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

considerations,”¹⁸⁹ that dividing governmental power would give those in different institutions incentive to check abuses, and that dependence on the people would help control government.¹⁹⁰

Those sworn to uphold the Constitution are obliged to give constitutional considerations higher weight than partisan preferences. That obligation is implicit in the Supremacy Clause as interpreted in *Marbury v. Madison*¹⁹¹ and consistent with numerous decisions confirming that the Constitution supersedes other forms of law. The Oath Clause compelling federal and state officials in the legislative, executive, and judicial branches to take an oath to support the Constitution provides further indication of its centrality to civic behavior.¹⁹² Moreover, our constitutional system depends on the commitment of officials and citizens to act with what Herbert Brownell, a long-time Republican leader and Attorney General under President Dwight D. Eisenhower, called “constitutional morality” or “constitutional propriety.” Brownell expressed this point in 1957 when he told a Congressional committee:

More important than any of the written safeguards are those provided by our political processes, for ultimately the operation of any constitutional arrangement, depends on public opinion, and upon the public’s processing a certain sense of constitutional morality. In the absence of this sense of constitutional morality on the part of the citizenry, there can be, of course, no guaranty against the usurpation of power or any coup d’etat. In other words, no mechanical or procedural solution will provide a complete answer, if one assumes hypothetical cases in which most of the parties are rogues and in which no sense of constitutional propriety exists.¹⁹³

Brownell echoed that insight in writings¹⁹⁴ and other testimony,¹⁹⁵ and it was included in congressional reports that provide part of the legislative history of the Twenty-Fifth Amendment to the Constitution.¹⁹⁶ Experience teaches that authoritarian regimes generally emerge when political elites fail to act to isolate

189. *Id.* No. 10, at 82 (James Madison).

190. *Id.* No. 51, at 322.

191. 5 U.S. (1 Cranch) 137, 180 (1803).

192. U.S. CONST. art. I, § 1, cl. 3; *see also id.* art. II, § 1, cl. 7 (prescribing presidential oath to “preserve, protect and defend” the Constitution).

193. *Presidential Inability: Hearings before the Special Subcomm. On Study of Presidential Inability of the H. Comm. On the Judiciary*, 85th Cong. 31 (1957) (statement of Herbert Brownell, Jr.).

194. Herbert Brownell Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 200 (1958).

195. *Presidential Inability: Hearings before the H. Comm. on the Judiciary*, 89th Cong. 242 (1965) (statement of Herbert Brownell, Jr.); *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong. 136 (1964) (statement of Herbert Brownell, Jr.).

196. H.R. REP. NO. 89-203, at 13 (1965); S. REP. NO. 89-66, at 13 (1965); S. REP. NO. 88-1382, at 11 (1964).

demagogues and when citizens elevate partisan preferences over constitutional principle.¹⁹⁷

Some gave voice to a similar ideal to implore colleagues to recognize constitutional duty as a higher calling than partisan preference or personal ambition. Senator Mitt Romney, the last Republican presidential nominee before Trump, said on January 6, 2021:¹⁹⁸

In light of today's sad circumstances, I ask my colleague: Do we weigh our own political fortunes more heavily than we weigh the strength of our Republic, the strength of our democracy, and the cause of freedom? What is the weight of personal acclaim compared to the weight of conscience?

The Trump presidency, accordingly, suggests that Constitutional Law courses should give greater attention to the basic ideals that animate the Constitution and the extent to which the survival of constitutional government depends on office-holders and citizens acting in a principled way even when so doing is inconsistent with their partisan preferences. That reality is reflected in the norms and conventions officials follow to implement the Constitution. The Constitution depends on governmental officials giving priority to constitutional provisions and principles. They are more likely to do so if the public values constitutional ideals and holds their leaders accountable when they deviate from them, and the public is more likely to do so if leaders treat constitutional principles seriously rather than as dispensable when inconvenient.

D. *A Pedagogical Note*

Some pedagogical considerations and challenges emerge from the circumstance that Constitutional Law courses include students from across the political spectrum. A Constitution, Justice Oliver Wendell Holmes, Jr. reminded, “is made for people of fundamentally differing views,”¹⁹⁹ and Constitutional Law courses include students with different political and ideological inclinations. To some extent, this circumstance is a variation of a more common challenge of teaching Constitutional Law courses since the controversial nature of some topics and the way they may impact some members of the class personally calls for special sensitivity in classroom discussion. To make class welcoming to all and to encourage students to develop and express their own views, when I taught, I generally discussed strengths and weaknesses of opinions, approaches to constitutional argument, and justices without generally expressing my conclusions or preferences, although students could discover some of them in my scholarship if they were moved to find and read it.

197. LEVITSKY & ZIBLATT, *supra* note 161, at 19–20, 69–71. See also TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY (2017).

198. 167 CONG. REC. S26 (daily ed. Jan. 6, 2021).

199. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Generally, issues Trump's presidency raised can be similarly handled. So, for instance, impeachment, presidential inability, and even January 6 can be discussed without the professor taking a position on the ultimate questions. Constitutional norms and practices can be stated, their constitutional underpinnings explored through questions (Why has there been a norm of tax return disclosure? Why has there been a norm not to disparage judges or the press?). Similarly, foundational constitutional concepts like the rule of law, democracy, pluralism, and rational decision-making can be presented as constitutional values and their importance, roots, and implications discussed without highlighting January 6, Trump's anti-Muslim rhetoric and his suggestion that people chug bleach to combat Covid-19.

Yet teaching doesn't always mandate apparent neutrality. The Constitution may be for people with different views, but it rejects racism and other exclusionary views, and rests on commitments to the rule of law, democracy, and civil exchange based on reasoned consideration of information, and rejects authoritarian leadership among other basic values. Constitutional Law teachers should not be neutral regarding such principles. It is, of course, easier to criticize the behavior of judicial and political actors from earlier centuries. The racist views Chief Justice Roger Taney or Justice Henry Billings Brown expressed, the Japanese internment order of Franklin D. Roosevelt's government, the demagogic behavior of Senator Joe McCarthy, and the oath violations of Richard M. Nixon all present more comfortable targets since the wrong-doers are long deceased and not subjects of contemporary controversy.

Yet unconstitutional behavior should not be immune from criticism simply because associated with one who, until recently was president of the United States. As educators, professors may choose to handle these matters differently, depending on their individual styles, the schools and locations where they teach, their perception of their students' views, and their assessment of the most effective way to present the material or the way that best fits their style. Information should be fairly presented and alternative viewpoints received. There may be times when Socratic questioning rather than professorial pronouncements are the most appropriate ways to proceed. Hypotheticals can also be used imagining behavior by other presidents, including Trump's predecessor or successor or some future, imaginary president of an unspecified party. Sometimes student questions or comments may bring behavior of Trump or other presidents into the discussion. Yet Constitutional Law professors should not ignore constitutional clauses, values, and issues Trump's behavior raised.

It's worth emphasizing that the purpose here is not to convert Constitutional Law class into a partisan forum. That would obviously be inappropriate. But neither should a rejection of constitutional principle be ignored because the parties responsible were also partisans. In educating students, Constitutional Law courses have considered numerous issues relating to behavior of various presidents during the last half century or more. It is also impossible, or at least

unwise, for Constitutional Law courses to ignore the Trump presidency as a historical event or to disregard the cases and clauses, norms and conventions, and constitutional ideals that his presidency spotlighted and the questions they raise about the present and future of American constitutional democracy.

III. THE ROLE OF LAW SCHOOLS

The role of law schools in educating about constitutional ideals does not end in the classroom of the basic Constitutional Law courses. There is a larger obligation to educate the public regarding constitutional ideals.²⁰⁰ The idea that law schools might constructively contribute to knowledge about the Constitution certainly did not begin with the Trump presidency,²⁰¹ although that four-year period of American history highlights the need for the undertaking and suggests the consequences of a population unschooled in or uncommitted to basic constitutional principle.

The Constitution is not perfect, something its text and history confirm, and Constitutional Law courses can and should discuss constitutional imperfections which have been corrected as well as those that remain.²⁰² Nonetheless, law schools rest on the basic premise that the Constitution generally reflects worthy principles and merits support. A lawyer's oath of admission to a state bar often requires that they swear to support the Constitution and that of the state.²⁰³

American law schools surely cannot and should not institutionally engage in partisan activity, but they should act to provide a fuller public discussion of the underlying principles and purposes behind the Constitution to benefit populations other than their students. Most law schools already do so, yet the recent challenge to basic constitutional principles should exhort them to do more. There are many ways law schools might contribute to that cause. They might fulfill that mission by, for instance, providing educational programs about constitutional principles for the public, lawyers (with Continuing Legal Education credits where they incentivize attendance), and students, on Constitution Day and on other occasions. They might create Constitutional Law Clinics to explore, write, and educate on topics. The Rule of Law Clinic that Professor Harold Hongju Koh has taught produced very useful guides regarding presidential inability and presidential impeachment, and various courses at the Feerick Center for Social Justice at Fordham Law School, taught by former Dean John D. Feerick and Professor John Rogan, provide other models. Perhaps

200. See, e.g., Nicholas W. Allard, *Sweet Are the Uses of Adversity*, 52 U. TOL. L. REV. 197, 232–36 (2021) (discussing the role of law schools in public education regarding proper functioning of government and system of justice).

201. See, e.g., Melissa Hart, *Foreword: Public Constitutional Literacy; A Conversation*, 90 DENVER L. REV. 825, 825 (2013).

202. U.S. CONST. art. V (providing means of amendment).

203. See, e.g., MO. SUP. CT. R. 8.15 (2007).

student organizations, like the American Constitution Society and the Federalist Society could collaborate in efforts to discuss to lay audiences some of the constitutional principles Trump's presidency raised.

Some schools have made impressive efforts to bring the Constitution to public school children. Many law schools sponsor Street Law programs in which law students teach public school students about legal issues relevant to their lives.²⁰⁴ Nearly a decade ago, then Professor (now Representative) Jamin B. Raskin described the Marshall-Brennan Constitutional Literacy Project whereby law students from eighteen law schools taught a course on the Constitution and Bill of Rights at area public high schools.²⁰⁵ Professor Raskin found that the program inspired and educated both the high school students and the law student-teachers who received "life-changing benefits" from the experience.²⁰⁶ At the University of Nebraska, Professor Eric Berger has advised the Community Legal Education Project ("CLEP") whereby law school students go to grade and middle schools (usually fifth and eighth grades) to educate students about the Constitution. Among their other contributions, programs like these might provide ways that law schools can interest students from disadvantaged backgrounds in Constitutional Law, thereby helping address structural barriers as well as disseminating information about the Constitution.

CONCLUSION

Trump's presidency presents reason to rethink basic Constitutional Law courses. It will be easiest and most natural to incorporate some materials regarding clauses or basic questions that Trump's presidency raised. The more challenging, yet more important task, is to focus greater attention on foundational constitutional ideals and their implications and the sort of behavior that is appropriate for officials and citizens when constitutional principles clash with their partisan preferences or personal ambitions. If I were teaching a basic course now, I would certainly devote more class time to exploring such questions. And that should be an undertaking not simply for Constitutional Law courses, but for law schools more generally, and one whose audience extends beyond the students assigned to the course and includes other students, lawyers, and citizens. Trump's presidency, including but not limited to the insurrection of January 6, 2021, has not only provided new material for students to consider

204. See Vicki Jackson, *Law Schools and Civic Education*, AALS NEWS (Fall 2019), <https://www.aals.org/about/publications/newsletters/aals-news-fall-2019/law-schools-and-civic-education/>.

205. See Jamin B. Raskin, *The Marshall-Brennan Constitutional Literacy Project: American Legal Education's Ambitious Experiment in Democratic Constitutionalism*, 90 DENVER U. L. REV. 833, 833 (2013).

206. *Id.* at 836.

but has illustrated the urgent need for public understanding of constitutional ideals and appropriate behavior.