# The Unwritten Rules of Liberal Democracy

Charles W. Collier

Professor of Law and Philosophy, University of Florida

collier@law.ufl.edu

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> The government . . . was armed with more power than any of the kings . . . had ever possessed. For it had become, in fact, an absolute sovereign, and in addition the heir of a revolution which had broken down all the barriers that laws, customs, and mores had previously opposed to the abuse and sometimes to the use of power.
>
> --Alexis de Tocqueville[1]

Liberal democracy is like a game in which some of the rules are unwritten. In both cases the importance of these unwritten rules becomes obvious as soon as they are discarded or disregarded. At some point it becomes unclear whether "the same" game is still even being played or not.

Since games are typically defined by their rules, the idea of "unwritten rules" introduces an element of uncertainty. But this is not the kind of uncertainty that makes the right decision harder to determine,[2] or the wrong decision easier to conceal, confuse,

or explain away.[3] It is also not the kind of uncertainty that general principles and broad norms bring to the relatively straightforward rules they underwrite and justify.[4] H.L.A. Hart wrote of the "open texture" of law.[5] There is much to be filled in (or out, as the case may be), many implications that need implementing, and many concrete details to be distilled from the spare language of a rule.

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

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

Since the 2016 Presidential Election and even before, threats to liberal democracy have emerged, in plausible form, as never before in American history. This is largely a

tale about the parlous state of "unwritten rules" in a thoroughly politicized polity. Part I traces out two of the most important stages in this development.

Liberal democracy depends not only on governmental institutions and officials but, indirectly, on the personal qualities those officials bring to their duties and responsibilities. Nowhere is this more important than at the top of the Executive Branch of government, where personality disorders of the President may take on constitutional significance. This is the subject of Part II.

Finally, Part III considers the role of both "Input Controls" and "Output Controls" in protecting liberal democracy against the threat of authoritarian tyranny. For purposes of discussion, a proposed constitutional amendment is introduced and defended. This is an important intellectual exercise, for "without the constant effort to repair and construct liberal institutions of government . . . it is only a matter of time before one or another zealot will seize the chance to impose his private nightmare on the rest of us."[7]

## I. A Legacy of Illegitimacy

### A. Reconstructing the Rules of a Supreme Court Appointment

On February 12, 2016, Supreme Court Justice Antonin Scalia took a trip to a remote resort ranch in Texas. The location--in the extreme Southwest corner of Texas, barely 40 miles from the Mexican border--was hundreds of miles from any major

highways, so the preferred way of getting there was by private plane from Houston to an airstrip on the vast, mountainous ranch. On the day of his arrival, Justice Scalia observed some of the activities and was driven to some hunting sites. In the evening he had dinner among friends and acquaintances at the main lodge, but he retired somewhat early, citing tiredness. Sometime during the night of February 12-13, Justice Scalia fell into a deep sleep--a sleep from which he was never to awake.

The next morning, when Scalia did not come to breakfast or subsequent events, a staff member was dispatched to his room to check on him. Justice Scalia was lying serenely in bed, seemingly undisturbed--but not alive. "You didn't have to be a doctor to see that he was dead," said the staff member who discovered him.

Chaos immediately ensued. There were no doctors or officials anywhere on the premises who could render any relevant assistance equal to the task at hand. So a sitting Supreme Court Justice was officially pronounced dead--over the telephone--by a Justice of the Peace hundreds of miles away, on the assurances of those random laymen present at the scene that the Justice was, indeed, dead.

The news quickly began to spread eastward, toward Washington, D.C. There, chaos ensued all over again, though on a much grander scale. The political, legal, and institutional significance of Scalia's death could hardly be overstated. He was the intellectual leader of the Court's conservative wing, the epicenter of its considerable moral force, an ideological inspiration to like-minded conservatives such as Clarence

Thomas, and a genial, gregarious friend to liberals like Elena Kagan and Ruth Bader Ginsburg. He was the proverbial "heavyweight," with a personality larger than life. Jeffrey Toobin wrote of him at the time of the *Citizens United* case:

> More than anyone, Scalia was responsible for transforming the dynamics of oral arguments at the Supreme Court. When Scalia became a Justice, in 1986, the Court sessions were often somnolent affairs, but his rapid-fire questioning spurred his colleagues to try to keep pace, and, as Roberts said, in a tribute to Scalia on his twenty-fifth anniversary as a Justice, "the place hasn't been the same since." Alternately witty and fierce, Scalia invariably made clear where he stood.[8]

The ground began to shift--and not in a good way--beneath conservative centers of power like Washington think tanks and the offices of Republican Senators and Congressmen all across Capital Hill. The portentous implications ran far beyond even the wildest dreams that liberal schemers could have concocted on their own. At the time, the Court was finely balanced between four solid, reliable conservatives and four solid, reliable liberals; the balancing point (and the fifth vote) was the fickle and unreliable Anthony Kennedy. Subtracting Scalia's vote from the conservative column and adding it to the liberal column portended a five-Justice liberal majority that could prevail indefinitely--*with or without* the help of Justice Kennedy. Replacing Scalia with an

Obama appointee would rival in magnitude the Court's greatest ideological shift ever, when ultra-liberal Thurgood Marshall was replaced by arch-conservative Clarence Thomas--a parting gift of President George H.W. Bush.

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

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

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

entire Scalia family.

But this was no ordinary letter of "condolences"; it ended with an ominous, dagger-like twist:

> *The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.*

(Just in case anyone missed the point, those last two sentences were set in bold-face type.) Thus, what purports to be a note of sympathy actually appears, on closer inspection, to be the vehicle for announcing a brazen political gambit: The Senate would not even *consider* a Supreme Court nominee during President Obama's final year in office--regardless of who that nominee might be.

The stated purpose of this unprecedented refusal was to give the American people "*a voice in the selection of their next Supreme Court Justice.*" But of course, the American people already had a "voice" in the selection of Justice Scalia's successor: they elected President Barack Obama (twice) who, according to the Constitution, "*shall nominate,* and by and with the Advice and Consent of the Senate, *shall appoint* . . . Judges of the Supreme Court."[9]

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

On this point there is substantial agreement with a maritime condition of extremity "for which all writers have prescribed the same rule":

> When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode; and, in some sort, as an appeal to *God* for selection of the victim.[10]

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

This Sen. McConnell could not abide--this matter was far too important to be left

to God. Thus the good Senator thought to himself: "It is as if *I* were God. For I, too, can shift the Scalia vacancy from the Obama Presidency into the Trump Presidency." *And so it was.* "God saw all he had made, and indeed it was very good."[11]

Sen. McConnell was aided in this grandest of larcenies by the fact that most of the "rules" governing Supreme Court appointments are unwritten. Again, the spare but imperative constitutional language states only:

> The President . . . *shall nominate,* and by and with the Advice and Consent of the Senate, *shall appoint* . . . Judges of the Supreme Court.[12]

All the rest is unwritten: the courtesy visits, the Judiciary Committee hearings, statements and testimony by the nominee, expert testimony before the Committee, a Committee vote, referral to the full Senate, debate on the Senate floor, and finally a Senate vote.

Again, Sen. McConnell undoubtedly thought to himself: "This case is far too consequential to risk all that. Chief Judge Merrick Garland [President Obama's nominee] may very well prove to be an exceptionally qualified jurist of the highest distinction. There is too much--politically--at stake here to risk that. There must be no Committee hearings, no Committee vote, no Senate vote--nothing. Not even so much as a handshake with that poor hostage Garland." *And so it was.*

I believe, though, that President Obama and perhaps Judge Garland himself could plausibly have invoked the legal system to argue the opposite. There is a federal common law of Supreme Court appointments, and no nominee in memory has been categorically denied the opportunity even to be considered.[13] In a court of law, McConnell's naked political calculus would count for nothing.

Nevertheless, the Senate Judiciary Committee endorsed McConnell's approach with a statement signed by all the Republican members of the Committee. The stakes could hardly have been higher, and it was crucially important to shape and frame perceptions quickly, even before they had time to form. (One hallmark of an illegitimate sales pitch is to deny the audience any opportunity to reflect on what it is being sold.[14]) *That meant:* shifting debate away from the merits of any particular nominee and toward the issue of whether there should be an election-year appointment at all. So, shortly after Justice Scalia's untimely death, the Republicans on the Senate Judiciary Committee issued a McConnell-style broadside--addressed to McConnell himself:

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

> arises, we wish to inform you of our intention to exercise our constitutional authority to withhold consent on any nominee to the Supreme Court submitted by this President to fill Justice Scalia's vacancy.[15]

A letter from eleven Senate Republicans to their Majority Leader is of no constitutional significance. But it could be considered a shot across the bow, an unofficial warning that the Senate might be planning to abdicate its constitutional duties and responsibilities that year. After all, the Constitution does *not* say:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court--*unless* the Senate elects not to participate in the appointments process that year.

In fact, the Constitution recognizes no way that the Senate could lawfully do this. "Not participating" is not a constitutionally recognized option under either the written or unwritten law. The President "*shall* nominate" and "*shall* appoint"; and with this second "shall" the Senate is brought imperatively into the process: "by and with the Advice and Consent of the Senate." Once President Obama nominated Chief Judge Merrick Garland, it was up to the Senate to "advise" and consent or not consent. Instead, the Senate did nothing.[16]

Thus it was left to President Obama to read these uncertain tea leaves as best he could. Rather than assume the Senate had unlawfully abandoned its constitutional role in appointments,[17] a more charitable interpretation of the Senatorial silence might be: "This is all the 'Advice and Consent' you are going to get." The Senate had every opportunity to consider Judge Garland's nomination *and vote it down.* That would have been constitutionally (as opposed to politically) unobjectionable and uncontroversial. But Sen. McConnell and his Republican colleagues did not do this--they were *afraid* to do this--because Judge Garland was rightfully perceived as one of the best and brightest candidates ever nominated to the Supreme Court.[18]

Under these circumstances, the Senate's silence could be understood as consent. Not all silences are equal, and in this case there may arguably have been sufficient surrounding circumstances to support a finding of consent. Unofficially, it would be hard to find any real criticism of Judge Garland himself from any Senator of either party.[19] Having dispensed with the unwritten law themselves, the Republican Senators could hardly complain if President Obama turned to the written law, which specifies no particular form for the Senate's "Advice and Consent." (Originally, this consultation was probably quite informal.) In many circumstances, silence may reasonably be understood as assent; e.g.:

> Dearly beloved: We have come together in the presence of God to witness

> and bless the joining together of this man and this woman in Holy Matrimony. . . . If any of you can show just cause why they may not lawfully be married, speak now; or else for ever hold your peace.[20]

Thus, in the absence of any express grant *or* withholding of "Consent" to his nominee, President Obama would have been well within his rights to declare the "Advice and Consent" requirement presumptively satisfied. (The party doing nothing constitutionally relevant cannot very well complain that its inaction should be interpreted in a particular way.) As a precaution, the President could have given the individual Senators a specified period, during which they could go officially on the record as *opposing* the appointment (a new, unwritten rule, according to which the officially expressed opposition--by a majority of the individual Senators--would constitute constitutionally relevant "advice" *against* an appointment). If this procedure did not yield negative "advice," the President could then have proceed to *appoint* Justice Garland and have had him sworn in.[21]

As it was, however, the Garland nomination simply languished in the Senate for 293 days--longer than any other Supreme Court nomination in U.S. history--and then expired with the end of the 114th Congress. Thus, the Senate's silence functioned unlawfully in this case to divest President Obama of his constitutional power of appointment, raising unacceptable separation-of-powers concerns.

The product of an unlawful process is itself unlawful or--to use a term with perhaps greater currency: "illegitimate." The nomination and appointment of Neil Gorsuch--to the seat denied, in an unlawful way, to Merrick Garland--was thus the illegitimate product of an unlawful process. It follows that Justice Gorsuch's tenure at the Supreme Court is itself of doubtful legitimacy, along with all of his opinions, and all decisions--of which there already have been many--in which he provides the deciding vote.[22] This "aura of illegitimacy"--this enduring taint on the Court's reputation--is unlikely to recede anytime soon, at least not until Justice Gorsuch is gone and forgotten.

Finally, with the announced retirement of Justice Kennedy, the tactics surrounding Justice Scalia's replacement have come full circle. The Court conservatives now appear poised to attain exactly what the Court liberals would, and should, have attained with the appointment of Merrick Garland: a five-vote majority--without Justice Kennedy--that could prevail indefinitely.[23]

B. Relitigating the Rules of a Presidential Election

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

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

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

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

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

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

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

Here is some background information. The Department of Justice and the F.B.I.

began an investigation in July 2015 into former Secretary Clinton's use of a private email server. By the Spring of 2016, F.B.I. Director Comey and his investigators had determined that the evidence did not support a criminal prosecution.[24] Although a number of persons participated in drafting the July 5 press conference statement, Comey himself added the following gloss just a few days in advance; the tone is supremely confident, almost defiant--as if he is letting the American people in on a secret that his superiors at the Justice Department might not approve of:

> This will be an unusual statement in at least a couple ways. First, I am going to include more detail about our process than I ordinarily would, because I think the American people deserve those details in a case of intense public interest. Second, I have not coordinated or reviewed this statement in any way with the Department of Justice or any other part of the government. *They do not know what I am about to say.*[25]

In fact, his superiors were not pleased. In a subsequent investigation of the investigation, conducted by the Justice Department's Office of the Inspector General ("O.I.G. Report"), Comey is faulted mainly for two things, the first of which is essentially *hubris:*

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

Second, Comey is faulted for violating both the written and unwritten rules of the Department of Justice:

> Comey's unilateral announcement was inconsistent with Department policy and violated long-standing Department practice and protocol by, among other things, criticizing Clinton's uncharged conduct. [Also] Comey usurped the authority of the Attorney General.[26]

The F.B.I. investigation into Sec. Clinton's use of a private email server took a number of peculiar twists and turns, but a few general observations may be ventured. First, the so-called "email scandal" was largely a made-up, political controversy.[27] There is a simple and blindingly obvious explanation for Sec. Clinton's unusual email practices: the personal information-technology available to federal government employees (especially in a bureaucracy as vast as the State Department) is chronically

inferior to that available in the private sector.[28] This is not an excuse for Clinton's unsatisfactory solution (use of a private email server that was not continuously monitored), but it is an explanation. Reportedly, both Director Comey and even President Trump have sometimes failed to use their cumbersome but secure government-issue devices for conducting official business.[29] So much for consistency.

The F.B.I. bears approximately the same relationship to the Department of Justice as the Police Chief, in my example above, does to the District Attorney's office. It would be just as odd for the Police Chief to announce (at his public press conference) that "no reasonable prosecutor would bring such a case," as it was for Director Comey to do so in similar circumstances. Neither of them are prosecutors--reasonable or otherwise; so it is odd for them even to be pronouncing on what a prosecutor would or would not do. It is as if a defense attorney (in a case tried before a judge) were to announce in open court that "No reasonable judge would hold against my client."

It would be even odder for these statements about "reasonable prosecutors" to be made without coordinating with or even informing the prosecutors themselves. This Director Comey did not do. According to the O.I.G. Report,

> Comey acknowledged that he made a conscious decision not to tell Department leadership about his plans to make a separate statement because he was concerned that they would instruct him not to do it.[30]

> . . . We found that it was extraordinary and insubordinate for Comey to do so, and we found none of his reasons to be a persuasive basis for deviating from well-established Department policies.[31]

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

In a strange way, the July 5 press conference--bad as it was--set off a series of far-reaching reverberations that were to have far worse and more profound effects later. The initial reactions were bad enough. Legal commentators and the Trump campaign seized on the language of "extremely careless," which came perilously close to the statutory, criminal element of "gross negligence." Mr. Trump made the most of this, and chants of "Lock her up!" pervaded the remainder of his election campaign. But the deeper

significance of the July 5 press conference was not to be evident until much later, when in light of subsequent events it began to represent--in James Comey's mind above all--a *mistake* that had to be *corrected* at all costs.

Faced with a complicated series of events, it is always hard to single out just those that were truly *necessary* to the outcome.[32] Theoretically, the list could be infinite.[33] Perhaps a butterfly in northern Alaska might have noticed an especially bright and appealing flower and flapped its wings a little harder to investigate, setting off a barely perceptible air current which, when combined in just the right way with other, seemingly random currents of air, could contribute to an eventual strengthening of the air flow across the entire North American continent, across the North Atlantic Ocean, and into the Middle East, where the increased air flow could have a decisive effect on tremendous air currents that generally follow a path south of the Himalayas, but in this case could have been pushed into the northern route, setting off major atmospheric changes worldwide,[34] including Arizona, where devastating tornados might have criss-crossed the state, such that Attorney General Lynch's airplane, which was heading for Phoenix, might have been diverted, and a fateful meeting with former President Bill Clinton might never have taken place.

As it was, however, the butterfly in northern Alaska looked the other way and never saw the appealing flower. The weather in Arizona was calm and clear. Former President Clinton found his plane on the same tarmac as Attorney General Lynch's, and

saw no reason not to board her plane unexpectedly for a friendly chat (even as his wife was under investigation by the F.B.I. and the Justice Department). For James Comey, this was a "tipping point" in his decision to hold the July 5 press conference on his own, without bringing in the compromised Attorney General.[35]

Another series of "necessary causes" began with the investigation of electronic devices used by Sec. Clinton and her senior staff aides. In the Clinton investigation--unlike the ongoing Trump-Russia investigation--Director Comey and his investigators were not looking primarily for a "smoking gun" or guns. They provisionally accepted Sec. Clinton as a hard-working, patriotic, head of an unwieldy, far-flung agency who truly believed she could not do her job with the information technology provided by the government. (All of her predecessors, in the "computer age" at least, came to the same conclusion.) The fact that her solution(s) fell short of the governing standards presumptively reflected the *mens rea* not of a treasonous spy but of a harried and impatient administrator. Thus, the investigators were looking primarily for a "pattern of practice."

> They stated that they discovered persistent practices of State Department employees, including both political and career employees, discussing classified information on both unclassified government email accounts and personal email accounts, and that this culture predated Clinton's tenure as Secretary of State.[36]

Even a representative sample of Clinton's practices could provide sufficient evidence of her failure to follow "best practices."

Practical limits were also placed on the scope of the investigation from the very start.

> [A]t the outset of the investigation, former Deputy Director [Mark F.] Giuliano generally advised the team that the purpose of the investigation was not to follow every potential lead of classified information. . . . Giuliano told the team, "[T]his is not going to become some octopus. . . . The focus of the investigation [is] the appearance of classified information on [Clinton's] personal emails and that server during the time she was Secretary of State." [T]he FBI's "purpose and mission" was not to pursue "spilled [classified] information to the ends of the earth."[37]

Likewise, "in the beginning of the investigation, the Midyear team wanted to obtain every device that touched the server, but . . . over time the team realized that this would not be 'fruitful.'. . . OTD personnel told the team that 'it was not likely that there would be anything on the devices' themselves."[38]

Perhaps most significantly, the team of investigators "*[d]id not seek to obtain every device, including those of Clinton's senior aides,* or the contents of every email

account through which a classified email may have traversed. [T]he reasons for not doing so were based on limitations . . . imposed on the investigation's scope, the desire to complete the investigation well before the election, and the belief that the foregone evidence was likely of limited value."[39] Thus, for example,

> The Midyear team obtained 2703(d) orders for noncontent information in Mills's Gmail account and Abedin's Yahoo! account and a search warrant for Sullivan's personal Gmail account. However, the Midyear team did not obtain search warrants to examine the content of emails in Mills's or Abedin's private email accounts *and did not seek to obtain any of the senior aides' personal devices*.[40]

Specifically, "the investigators did not seek access to the private devices used by Sullivan, Mills, or Abedin during Clinton's tenure at State."[41]

Since the F.B.I. did not systematically round up all electronic devices that could possibly have been used by Sec. Clinton's staff to send and receive messages from her, it left itself open and vulnerable to the pure workings of chance. Again, perhaps another butterfly in northern Alaska might have noticed an especially bright and appealing flower and flapped its wings a little harder to investigate, setting off a barely perceptible air current which, when combined in just the right way with other, seemingly random

currents of air, could contribute to an eventual strengthening of the air flow across the entire North American continent, such that it could have rained every day that week in North Carolina, where after high school a pretty young cheerleader might have been waiting forlornly in the rain for a bus, when the captain of the football team pulled up in his sports car and offered her a ride home, after which he asked her out on a date that weekend, which she gladly accepted, as she already had a bit of a crush on him; and she might very well have resolved--then and there--never again to communicate with "that creep Anthony Weiner," deleted all messages on her computer and phone to and from him, and changed her email address and phone number, so that she never heard from him again.

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

And lo and behold, on that very laptop were *hundreds of thousands* of emails to and from Sec. Clinton and one of her senior aides, Huma Abedin, Clinton's Deputy

Chief of Staff, who happened to be Anthony Weiner's estranged wife, from whom he happened to have "inherited" his laptop computer.

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

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

A standard, one-sentence "Declination of Prosecution" notice from the Justice Department would have had none of the broader implications that Director Comey's press conference introduced, which were to haunt him later. And normally, the discovery of additional emails or even an additional device in the Clinton investigation should not have surprised or alarmed anyone, since there had been no effort to round up *all* of those emails and devices anyway, even those of Clinton's senior aides. Indeed--stated one

prosecutor--"the only reason the FBI later obtained the Weiner laptop was because 'it had ended up in our laps.'"[42] Then, however, Anthony Weiner's laptop computer sat unexamined for over a month in the normal queue for processing evidence at the F.B.I. No one thought it necessary to notify Director Comey. Whether the laptop was processed before or after the election was of no particular concern.[43]

But for Director Comey, once he found out about the additional, hundreds of thousands of emails on October 27, this immediately became a matter of tremendous, self-imposed concern. He viewed the American public as going to the polls under false pretenses--false pretenses that he himself had wrongly set in place, with his assurances at the July 5 press conference. Those assurances of extraordinary "transparency" and of a definitively closed Clinton email investigation were no longer necessarily true (even though, given the unsystematic collection of the Clinton emails, the additional emails were not considered significant by Comey's own investigators).

Director Comey's own, distinctly personal bind, his perceived need to set the record--*his record*--absolutely straight, at all costs (and in doing so to correct his own, self-inflicted mistakes), took precedence--for him--over both the written and unwritten rules of a presidential election.[44] So, the very next day, on October 28, 2016--over strenuous objections at all levels of the Department of Justice--Comey notified the majority and minority chairmen of all the relevant congressional committees as follows:

> In previous congressional testimony, I referred to the fact that the Federal Bureau of Investigation (FBI) had completed its investigation of former Secretary Clinton's personal email server. Due to recent developments, I am writing to supplement my previous testimony.
>
> In connection with an unrelated case, the FBI has learned of the existence of emails that appear to be pertinent to the investigation. I am writing to inform you that the investigative team briefed me on this yesterday, and I agreed that the FBI should take investigative steps designed to allow investigators to review these emails to determine whether they contain classified information, as well as to assess their importance to our investigation.
>
> Although the FBI cannot yet assess whether or not this material may be significant, and I cannot predict how long it will take us to complete this additional work, I believe it is important to update your Committees about our efforts in light of my previous testimony.[45]

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

Comey's notification immediately threw the election into complete disarray. An instantly re-energized Trump gleefully pounced on the new information as "bigger than Watergate" and warned against electing a candidate who was clearly "about to be indicted." Double-digit percentage changes in voter sentiment were soon detected in

both state and national polling.

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

> Huma looked stricken. Anthony had already caused so much heartache. And now this.
>
> "This man is going to be the death of me," she said, bursting into tears.
>
> . . . At the time, the FBI had no idea if the emails were new or duplicates of ones already reviewed, or if they were personal or work related, let alone whether they might be considered classified retroactively or not. They didn't know anything at all. And Comey didn't wait to learn more. He fired off his letter to Congress two days before the FBI received a warrant to look at those emails.
>
> Why make a public statement like this, which was bound to be politically devastating, when the FBI itself couldn't say whether the new material was important in any way? At the very end of his July 5 press conference, Comey had declared sanctimoniously, "Only facts matter," but here the FBI didn't know the facts and didn't let that stop it from throwing the presidential election into chaos.[46]

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

> I write to supplement my October 28, 2016 letter that notified you the FBI would be taking additional investigative steps with respect to former Secretary of State Clinton's use of a personal email server. Since my letter, the FBI investigative team has been working around the clock to process and review a large volume of emails from a device obtained in connection with an unrelated criminal investigation. During that process, we reviewed all of the communications that were to or from Hillary Clinton while she was Secretary of State.
>
> Based on our review, we have not changed our conclusions that we expressed in July with respect to Secretary Clinton.[47]

All the "app[arently] pertinent" emails on Weiner's laptop were copies or backed-up versions of emails from Abedin's accounts, which were already well known to investigators. There was nothing new or relevant. But "[b]y then it was too late," writes Clinton.

> If anything, that second letter may have energized Trump supporters even more and made them more likely to turn out and vote against me. It also guaranteed that undecided voters saw two more days of headlines about emails and investigations.[48]

With his statements and actions, James Comey violated many of the written and unwritten rules of a presidential election. The determination of the Justice Department's Office of the Inspector General, that Comey's July 5 press conference statement "was inconsistent with Department policy and violated long-standing Department practice and protocol," has already been discussed; as well as his usurpation of the Attorney General's authority, which the O.I.G. found "extraordinary and insubordinate" and a "deviati[on] from well-established Department policies."

The Department of Justice (of which the F.B.I. is a part) and its prosecutors and investigators observe a "quiet period" (of at least sixty days) prior to an election, during which sensitive information is not publicly released. This unwritten rule is presumptively to be observed unless there is a very good reason to the contrary. The voting public needs time to process and "digest" news, to put it into perspective before an election. Emotionally-charged, last-minute revelations may not fulfill their dire potential when reassessed in the cold morning light of counter-arguments and further developments. "Quiet" does not mean "cover-up" though, as Deputy Attorney General

Rod Rosenstein has explained. "When federal agents and prosecutors quietly open a criminal investigation, we are not concealing anything; we are simply following the longstanding policy that we refrain from publicizing non-public information. In that context, silence is not concealment."[49]

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

> [W]e found . . . that the Midyear team:
>
> . . . .
>
> Did not seek to obtain every device, including those of Clinton's senior aides, or the contents of every email account through which a classified email may have traversed. . . . We further found that [this was], in part, *in tension with* Comey's response in October 2016 to the discovery of Clinton emails on the laptop of Anthony Weiner.[50]

Yet Comey might have reasoned to himself: "If I wait two more days for a search

warrant, that would be only *nine* days before the election. And if I wait two more days to assess the hundreds of thousands of emails, that would be only *seven* days before the election." So he rolled the dice with what little he knew--only to "unroll" them later, *two* days before the election.

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

The Department of Justice, like other federal agencies, is subject to applicable provisions of the Hatch Act (1939).[51] The very first provision states:

> (a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not—
>
> (1) *use his official authority or influence for the purpose of interfering with or affecting the result of an election.*[52]

One commentator states that:

> [T]he Hatch Act . . . proscribes acting with improper "purpose" to influence an election and in engaging in certain discrete partisan activities like receiving

> political contributions. It has little direct application here, where *there is no evidence indicating that Comey acted with any improper purpose.*[53]

Let's examine that proposition.

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

Comey certainly knew that his intervention(s) in the election would *affect* its result. "[A]s any remotely sentient observer could have predicted," writes Jeffrey Toobin, "his interjection created a sensation that was damaging to Clinton's chances."[54] Yet, that still speaks only indirectly to Comey's purpose or intent. The question might be put as: Did Comey intervene in the 2016 election *because* he knew his intervention would affect the result; or did he do so *in spite of* the fact that his intervention would affect the result? According to standard legal doctrine, "A person is presumed to intend

the natural and probable consequences of his voluntary acts."[55] But a presumption may be rebutted.

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

Likewise, at a parlous and decisive moment in our history, much depended on a man already predisposed to soaring flights of independence bordering on authoritarianism--for which he had been richly rewarded all his life, with positions of increasing authority and discretion. This was exhilarating; this blinded him. So, faced with a delicate situation that demanded finely-balanced certainties rather than imponderable probabilities, he instead rolled the dice one time too many and came crashing down into the perfect chaos his miscalculation created for us all. The O.I.G. Report concludes that "[as] with his July 5 announcement . . . in making this decision [to notify Congress] Comey engaged in ad hoc decisionmaking based on his personal views even if it meant rejecting longstanding Department policy or practice. . . . [T]he burden was on him to justify an extraordinary departure from these established norms, policies, and precedent."[56]

Burden-shifting is what presumptions are all about: the burden of proof, the burden of producing evidence.[57] Comey was ultimately laboring under the burdens of

*two* presumptions: (1) the presumption that he intended to "affect" if not change the result of the 2016 election (which would have been "the natural and probable consequence of his voluntary acts"[58]--in notifying Congress as he did); and (2) the presumption that the established norms, policies, and precedent of the Department of Justice should be followed. Rebutting these two presumptions would not be easy under the best of circumstances.

In his memoir, Comey gives his most considered defense. He begins in a confessional tone: "I have many . . . flaws. . . . I can be stubborn, prideful, overconfident, and driven by ego. I've struggled with those my whole life."[59] This is like the question in the job interview when the interviewer asks what your "greatest weakness" is. You are supposed to say something like: "Well, sometimes I probably work too hard at my job." So, Comey's "flaws," reported *sua sponte,* may be assumed to be underestimated. In fact, 200 pages later, he is still "struggling" with his ego and his pride: "I have long worried about my ego. . . . [T]here is danger that all that pride can make me blind"[60] (like Icarus, no doubt).

Comey's main defense is as follows:

> I had assumed from media polling that Hillary Clinton was going to win. I have asked myself many times since if I was influenced by that assumption. I don't know. Certainly not consciously, but I would be a fool to say it couldn't have had

> an impact on me. It is entirely possible that, because I was making decisions in an environment where Hillary Clinton was sure to be the next president, *my concern about making her an illegitimate president* by concealing the restarted investigation bore greater weight than it would have if the election appeared closer or if Donald Trump were ahead in all polls. But I don't know.[61]

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

James Comey figuratively pointed a loaded gun at the heart of the Clinton campaign and pulled the trigger. He knew this would "affect" the result of the election. Again, "as any remotely sentient observer could have predicted, his interjection created a sensation that was damaging to Clinton's chances."[62] Comey also knew his interjection might possibly even *change* the result of the election, such that Trump would win. That was a chance he was willing to take. But that was not a chance he was lawfully authorized to take.

Nowhere in the job description of *F.B.I. Director* does it say he is "personally authorized and empowered to assure the 'legitimacy' (as he sees it) of our elected

Presidents--even if that means influencing the results of elections and departing from the established norms, policies, and precedent of the Department of Justice." Nevertheless, this was Comey's justification to himself, as he intentionally "affected" the result of the election and also knowingly took the chance that he might possibly even *change* the result altogether. His actions and statements thus fall well within the provision of the Hatch Act prohibiting a federal employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election."[63] Comey's considered "defense" does nothing to rebut either of the two presumptions he was subject to.

Ironically, the "aura of illegitimacy" Comey was so concerned about did in fact materialize; it simply enveloped a different candidate. And it happened, not *despite* Comey's best efforts, but precisely *because of* them.

## II. The Authoritarian Personality

### A. Present at the Destruction

Out of the rubble and ashes of World War II emerged a new world order, and a new appreciation of the role played by psychological factors in the social and political process. Former U.S. Secretary of State Dean Acheson entitled his postwar memoir *Present at the Creation,* as a metaphor for the task of reconstruction at war's end, which

was "just a bit less formidable than that described in the first chapter of Genesis. That was to create a world out of chaos; ours, to create half a world, a free half, out of the same material without blowing the whole to pieces in the process."[64] But how had so much been reduced to rubble and ashes in the first place?

Many years earlier, in Munich, an unknown man of no consequence arose at five o'clock in the morning. He had

> gotten into the habit of throwing pieces of bread or hard crusts to the little mice which spent their time in the small room, and then of watching these droll little animals romp and scuffle for these few delicacies.[65]

For him, watching the mice fight over bread crumbs was more than a sadistic amusement. It was the Darwinian "struggle for existence," playing out on a small scale.

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

> [T]he authoritarian person lives in a world which may be conceived . . . as a sort

> of jungle in which man's hand is necessarily against every other man's, in which the whole world is conceived of as dangerous, threatening, or at least challenging, and in which human beings are conceived of as primarily selfish or evil or stupid. To carry the analogy further, this jungle is peopled with animals who either eat or are eaten, who are either to be feared or despised. One's safety lies in one's own strength and this strength consists primarily in the power to dominate.[66]

In Erich Fromm's analysis, this "struggle for existence" was moderated and channeled into a stable social order by the "natural" bonds and roles of medieval society--family, trade, guild, religion, community. At the same time, psychological factors played an active role in the social process.[67] The traditional "identity with nature, clan, religion, gives the individual security. He belongs to . . . a structuralized whole in which he has an unquestionable place."[68] (In this traditional social ordering, a mere real estate developer--lacking any experience in government, politics, academia, or the military--could hardly aspire to become President.) But all this changed with the transition from the "golden age" of *Gemeinschaft* (community) to the not-so-golden age of *Gesellsschaft* (society).[69]

> The medieval social system was destroyed and with it the stability and relative security it had offered the individual. Now with the beginning of capitalism all

> classes of society started to move. There ceased to be a fixed place in the economic order which could be considered a natural, an unquestionable one. *The individual was left alone; everything depended on his own effort, not on the security of his traditional status.*[70]

In the new economic order, "the unpredictable laws of the market decided whether [one's] products could be sold at all and at what profit."

> Each individual must go ahead and try his luck. He had to swim or to sink. Others were not allied with him in a common enterprise, they became competitors, and often he was confronted with the choice of destroying them or being destroyed.[71]

Yet this new economic individuation also offered *freedom from* the static, unchanging bonds, roles, and limits of traditional society. Now a mere real estate developer--a very, very wealthy real estate developer--could indeed aspire to become President. The sky was the limit; but it is lonely at the top. "They were more free, but they were also more alone."[72] Security and community were traded for the fruits of ambition and the chance for fame. And the masses?

> The masses who did not share the wealth and power of the ruling group had lost the security of their former status and had become a shapeless mass, to be flattered or to be threatened--but always to be manipulated and exploited by those in power. A new despotism arose side by side with the new individualism.[73]

In this setting the appeal of authoritarianism makes perfect sense. The dominating leader promises a way to overcome the unbearable feeling of powerlessness: by "becom[ing] a part of a bigger and more powerful whole outside of oneself, to submerge and participate in it. . . . By becoming part of a power which is felt as unshakably strong, eternal, and glamorous, one participates in its strength and glory."[74] This same dynamic (or dialectic) applies to the leader as well: "the '*authoritarian character*' . . . admires authority and tends to submit to it, but at the same time he wants to be an authority himself and have others submit to him."[75] As Abraham Maslow puts it, in psychological terms:

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

superior person, even if he himself is the object of the cruelty.[76]

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

"The political brutality of the Trump era," writes a liberal commentator (Bruce Shapiro in *The Nation*), "is rooted in the Rehnquist right's decades-long campaign to undo the modern American social contract--New Deal business regulations, civil rights, environmental protections, and sexual equality--and to restore executive power to the days before civil-liberties-minded judges and a post-Watergate Congress reined it in."[77] Or, from the conservative side (George Will in the *Washington Post*):

> America's child president . . . has a weak man's banal fascination with strong men whose disdain for him is evidently unimaginable to him. And, yes, he only perfunctorily pretends to have priorities beyond personal aggrandizement. But just as astronomers inferred, from anomalies in the orbits of the planet Uranus, the existence of Neptune before actually seeing it, [Special Counsel] Mueller might infer, and then find, still-hidden sources of the behavior of this sad, embarrassing wreck of a man.[78]

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

> This is not treason as such. It is not an attack on America, but on a version of America, the liberal democratic one . . . . It is an attack on those institutions that Trump believes hurt America--like NATO and NAFTA and the E.U. It is a championing of an illiberal America, and a partnering with autocrats in a replay of old-school Great Power zero-sum politics, in which the strong pummel and exploit the weak. Trump is simultaneously vandalizing the West, while slowly building a strongman alliance that rejects every single Western value. And Russia--authoritarian, ethnically homogeneous, internally brutal, internationally rogue--is at its center.[79]

In 1965, Erich Fromm wrote that "[t]he United States has shown itself resistant against all totalitarian attempts to gain influence."[80] Would he write the same thing today?[81]

B. The Narcissist-in-Chief

> As adults, we have forgotten most of our childhood, not only its contents but its flavor; as men of the world, we hardly know of the existence of the inner world . . . . Our capacity to think, except in the service of what we are dangerously deluded in supposing is our self-

> interest and in conformity with common sense, is pitifully limited: our capacity even to see, hear, touch, taste and smell is so shrouded in veils of mystification that an intensive discipline of unlearning is necessary for *anyone* . . . .[82]

Under the U.S. Constitution, no one can become President who has not "attained to the Age of thirty five Years."[83] Does this ensure that American Presidents will be mature enough--mentally, intellectually, emotionally--for the job? This question began receiving the attention it deserved at about the same time as Donald Trump started ascending the presidential opinion polls.

"Honestly, I don't think people change that much," says Mr. Trump himself.[84] "When I look at myself *in the first grade* and I look at myself now, I'm basically the same."[85] Distinguished anthropologist James Harvey Robinson states for the record:

> Accumulating evidence seems to indicate that when bodily maturity is once reached, the increase of knowledge and intelligence slackens or even almost ceases in many cases. By 13 or 14 the child has acquired an overwhelming part of the knowledge, impressions, cautions and general estimates of his fellow creatures and the world in which he lives, which he continues to harbor with slight modifications during his lifetime. . . . We have had time before 13 to take over

> the standardized sentiments of our elders, to learn all that they know, to accept their views of religion, politics, manners, general proprieties and respectabilities.[86]

(Prof. Robinson based these conclusions partly on millions of intelligence tests administered by the military.) Thus, when Sen. Rand Paul points to "a sophomoric quality that is entertaining about Mr. Trump," and asks: "My goodness, that happened in junior high. Are we not way above that?"[87]--the answer must be "No, we are not." How could we be?

According to a standard manual of mental disorders, a clinically significant *personality disorder* can generally be traced back to adolescence or at least early adulthood. It forms "an enduring pattern of thinking, feeling, and behaving that is relatively stable over time"[88]--which fits in well with Trump's claims that "I'm a solid, stable person" and that, anyway, "people don't change much."[89] The extreme manifestation of this phenomenon would be Peter Pan, the boy who never grew up at all:

> The difference between him and the other boys . . . was that they knew it was make-believe, while to him make-believe and true were exactly the same thing. This sometimes troubled them, as when they had to make-believe that they had had their dinners.
>
> . . . Peter would not budge. He was tingling with life and also top-heavy

with conceit. "Am I not a wonder, oh, I am a wonder!" he whispered . . . .

> Peter was not quite like other boys; but he was afraid at last. A tremor ran through him, like a shudder passing over the sea; but on the sea one shudder follows another till there are hundreds of them, and Peter felt just the one. Next moment he was standing erect on the rock again, with that smile on his face and a drum beating within him. It was saying, "To die will be an awfully big adventure."[90]

Peter Pan appears to be suffering from a number of serious mental disorders. Even so, "overweening ambition and confidence may lead to high achievement,"[91] as the diagnostic guidelines concede and as the example of Donald Trump confirms. (Such people tend to have biographies written about them with titles like *Never Enough;* according to George Will, they also tend to "nurse . . . innumerable delusions.")[92] Several standard psychology textbooks feature Trump as an example, one of which states:

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

winning and losing.[93]

Within the mental health disciplines, *narcissism* is understood as a normal and healthy stage of childhood development and psychological growth. "In healthy development," writes one analyst, "the child's normal initial sense of grandiosity ('when I cry, milk is produced') is gradually modified and transformed into energy, ambition, and self-esteem."[94] By contrast, however, arrested development of these attributes may lead to *narcissistic personality disorder.*[95] An adult with this disorder:

> --Has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements).
>
> --Requires excessive admiration. Individuals with this disorder . . . may be preoccupied with how well they are doing and how favorably they are regarded by others.
>
> --Shows arrogant, haughty behaviors or attitudes. Vulnerability in self-esteem makes individuals with narcissistic personality disorder very sensitive to "injury" from criticism or defeat. . . . They may react with disdain, rage, or defiant counterattack.[96]

("I hope they attack me," says Trump, "because everybody who attacks me is doomed."[97])

When his beloved Wendy falls into a frightful faint, Peter Pan springs boldly into action. Instead of moving her (which "would not be sufficiently respectful") he decrees that a whole new house shall be built right around her--on the spot. None of the other boys objects; indeed, "they were all delighted" with such a grand idea, and soon "they were as busy as tailors the night before a wedding."[98] Afterwards, Peter inspects the finished house and notes only that it lacks a chimney and a knocker on the door, both of which are quickly supplied.

Likewise, none of Donald Trump's stated policy prescriptions seems at all beyond the appreciation of an average teenager. Indeed, they verge on the blindingly obvious.[99] Illegal immigrants? "Build a wall. A Great Wall. A very long and costly wall. And make those dirty *banditos* pay for it!"[100] (Somehow.)

Trump offers--as one commentator puts it--"a simpler and more appealing narrative than the realities of the current global economy."[101] It is probably no accident that his campaign slogan ("Make America Great Again!") is not something like "America--Whistling Past the Graveyard?" or even "America, Just Do It." (Mr. Trump, ever the enterprising businessman, has actually *trademarked* "Make America Great Again!" and warned other candidates against using the phrase for "promoting public awareness of political issues" or "fundraising in the field of politics."[102] So, be careful

what you say about America. Be very careful.)

Of course, a teenage politician's target audience would be his fellow teenagers. And none of their commonly stated "reasons" for supporting Trump seems beyond the intellectual range of a teenager either. ("When he gets in there," said one, "he'll figure it out."[103] Somehow.)

"I play to people's fantasies," Trump once wrote in explaining his alleged business success. "I call it truthful hyperbole."[104] This approach seems to resonate particularly well with youthful audiences:

> Young people . . . predominated outside Jack Trice Stadium, where the Iowa State Cyclones hosted the Iowa Hawkeyes.
>
> Mr. Trump offered a speech of less than a minute on the state party's stage. But that was beside the point, as star-struck supporters greeted him like a stadium rocker during a sprawling tailgate party before kickoff.
>
> Though he said nothing about the issues of the day, the audience seemed satisfied. "It was pretty cool; we got to see him," said Braiden Loreno, a sophomore. "I'm definitely voting for him."[105]

It is probably inadvisable to take Trump's stated "policy views" too terribly seriously. (Indeed one commentator has written an article entitled "The Serious Problem

with Treating Donald Trump Seriously.")[106]

> That we're even talking about his "positions" means that we've already progressed to the dangerous Stage Two of the Trump phenomenon, as if his stated views are the standard by which Trump ought to be judged . . . . But looking for some kind of ideological thread in Trump's various positions is a fool's errand (and another victory for Trump). The appeal of Trump's alleged views on every issue is their extremeness. That, and their seeming simplicity.[107]

The football tailgater is Trump's true *métier* and the standard by which he should be judged.[108] "Though he said nothing about the issues of the day, the audience seemed satisfied."[109] (What more do you need to know?) "I'm definitely voting for him."[110]

But I digress. For a contest worthy of our teenage candidates and their teenage constituents, we need something lofty, inspiring, and transcendent--like the "Patriot King" of yore, a *deus ex machina* who swoops in, out of nowhere, and saves us from ourselves and our petty politics. We got a glimmer of that possibility when Trump swooped grandly into Iowa on his very own, personal helicopter, offering rides to all the children. And they got along just fine, it seems; The Donald was decidedly in his element.

One young boy sized him up cautiously and asked: "Are you Batman?" Yes,

replied Trump solemnly, "I am Batman."[111]

* * *

There will always be Batmen to entertain our children, and a Peter Pan to fly them off into the night on fairy wings to a place called Neverland. But we already know how that story ends: the children grow up.

When Peter returns for Wendy, she can no longer fly away with him, for she is no longer young and innocent and has forgotten how to fly.[112] That, in a way, is the saddest part of the whole story . . .

And the politicians (presidential or otherwise)? They too will need to grow up, somewhat, in order to thrive in their chosen marketplace of ideas. But our judgment of them should be tempered by the realization that intellectual development in the normal, average adult is not much above that of a callow youth (and remains still lower in cases of arrested development). "The Child is Father of the Man."[113]

## III. A Proposed Constitutional Amendment

### A. The Threat of Authoritarian Tyranny

In a liberal democracy, the most significant bulwarks against authoritarian tyranny may be classified as follows:

Input Controls

Process Controls

Output Controls[114]

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

> Imagine a totalitarian clique taking advantage of an economic crisis to exploit popular discontent. The propaganda machine spreads the word: If only Adolf or Benito or Vladimir were in command, they would have the wisdom to make the sun rise once more in the heavens. This messianic message gains a powerful political following, both on the streets and in the ballot box. What then?[115]

Of course, as Ackerman acknowledges, "crudities like barring totalitarian groups from parliament must be recognized as the acts of desperation they are."[116] (On the other hand, as has also been well observed, the Constitution is not a "suicide pact."[117]) Among the more indirect approaches,

> it is possible to imagine structural measures that will affect the long-term liberality of the social forces that push their way into the governmental arena. The question here is political education in its broadest sense.[118]

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

> The goal is to remove law-making authority from the hands of a single statesman or easily organized clique. No official's word becomes law when it is spoken; each power holder is constitutionally obliged to persuade others whose tenure does not depend on their passive acquiescence. This idea is taken to its extreme in the American system, where President, Supreme Court, and the two Houses of Congress are deprived of the power of unilateral command in the hope of forcing each to engage the others in a convincing effort at conversation.[119]

These Process Controls are supposed to "make it *costly* for statesmen to indulge authoritarian pretensions."[120] (But what if the statesmen are billionaires?)

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

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

B. A Constitutional Amendment

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

*Section 1.*

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

*Section 2.*

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

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

*Section 3.*

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

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

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

C. Education As a Fundamental Right

The U.S. Constitution makes explicit and implicit references to the virtues and value of education. In Article 1, the Congress is empowered to "promote the Progress of Science and useful Arts" by protecting authors and inventors with copyright and patent laws.

The First Amendment protects "the freedom of speech, [and] of the press" against any "abridg[ment]" by Congress or the States.[121] This language has been judicially interpreted to include an implied right of "freedom of association"[122] as well as an implied "right to receive information."[123] Together, these express and implied provisions underwrite a grand intellectual and educational project known as "the marketplace of ideas," which was given its seminal expression in a 1919 opinion of Justice Oliver Wendell Holmes:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted

> in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[124]

What would it mean for education to be a "fundamental," constitutional right? "Typically," writes John Hart Ely, "what we mean by labeling something a constitutional right is that the state cannot deny it to everyone and that when it denies it to some but not others it had better have a very good reason for doing so."[125] Here, some background may be useful.

In *Skinner v. Oklahoma* (1942), an Oklahoma law labeled as "habitual criminals" those who committed three felonies involving "moral turpitude." Habitual criminals were subject to being "rendered sexually sterile."[126]

Skinner's first felony was chicken stealing, obviously a crime of high "moral turpitude." But the Oklahoma law made some conspicuous exceptions: "[O]ffenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."[127] Thus, one could *embezzle* as much as one liked, and receive the same sentence as for comparable *larceny*--without ever being subject to sterilization.

This the Supreme Court (*per* Douglas, J.) could not abide:

> [T]he nature of the two crimes is intrinsically the same and they are punishable in the same manner. Furthermore, the line between them follows . . . highly technical [distinctions] . . . .
>
> [T]he instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of [previous] cases requires.[128]

The Court here refers to the rule, authoritatively expounded by James Bradley Thayer, that judicial review should generally defer to legislative choices (the so-called "presumption of constitutionality"). The legislature is the lawmaker in the first instance, and only if someone happens to challenge a law will it ever be judicially reviewed. (Both courts and legislatures know this.) In striking down legislation on grounds of unconstitutionality, the courts are in effect "intruding" on the work of a coordinate branch of government--the branch primarily entrusted with legislation.[129] Thus, to overturn an allegedly mistaken law, the mistake must be so obvious that

> those who have the right to make laws have not merely made a mistake, but have made a very clear one,--so clear that it is not open to rational question.[130]

If the Oklahoma law involved only the legislative categorization of crimes, no

substantial constitutional question would be presented. ("States may do a good deal of classifying that it is difficult to believe rational . . . ."[131]) In *Skinner* though, as the Court emphasized:

> We are dealing . . . with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. . . . [Oklahoma] has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[132]

A few years earlier, Justice Stone had unveiled a new theory of heightened judicial review, several aspects of which seem to coalesce here:

> There may be narrower scope for operation of *the presumption of constitutionality* when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See [Stromberg v. California; Lovell v. Griffin].

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exacting judicial scrutiny* under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see [Nixon v. Herndon; Nixon v. Condon]; on restraints upon the dissemination of information, see [Near v. Minnesota; Grosjean v. American Press Co.; Lovell v. Griffin]; on interferences with political organizations, see [Stromberg v. California; Fiske v. Kansas; Whitney v. California; Herndon v. Lowry]; and see Holmes, J., in [Gitlow v. New York]; as to prohibition of peaceable assembly, see [De Jonge v. Oregon].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious [Pierce v. Society of Sisters], or national [Meyer v. Nebraska; Bartels v. Iowa; Farrington v. Tokushige], or racial minorities [Nixon v. Herndon; Nixon v. Condon]; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for *a correspondingly more searching judicial inquiry.* Compare [McCulloch v. Maryland; South Carolina v. Barnwell Bros.; and cases cited].[133]

As an initial matter, the "right to marry and have offspring" is arguably at the level of those explicitly protected liberties in the Bill of Rights (Stone's first paragraph). (Stone himself, writing separately, argues that the Oklahoma statute violates *due process.*)[134] Second, in creating a disfavored underclass of "blue-collar felons," Oklahoma has made "as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment"[135] (Stone's third paragraph). Nowadays, the right to procreation would be considered a "fundamental right" and benefit from heightened judicial review on either of the above rationales.

A constitutional amendment explicitly deeming education a fundamental right would, by definition, benefit from heightened review under Stone's first paragraph. (Legislation inconsistent with such a right would then "appear[] on its face to be within a specific prohibition of the Constitution."[136]) But any restriction on the *right to vote* raises fundamental questions of its own, some of which are touched on in Stone's second paragraph (the conceptual framework of "representation-reinforcing review"[137]).

> One of the things we mean by labeling something a right is that it shall not be denied, or granted in only watered-down form, to some subset of persons unless there is a good reason for doing so. . . . [I]t is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one.[138]

D. The Right To Vote

Justice Stone cites two voting rights cases (twice) in *Carolene Products. Nixon v. Herndon* (1927) involved a suit by a black man who was denied the right to vote pursuant to a Texas statute providing that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[139] Justice Holmes, writing for the Court, dismissed defendants' main argument--that the suit was "political"--as "little more than a play upon words. . . . That private damage may be caused by . . . political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years."[140] (Holmes then proceeds to cite a case from 1703, reported partly in Latin.)[141]

The invalidity of the Texas statute was not open to doubt, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment]," writes Holmes. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits . . . ."[142] Little more than a decade later, those *limits* would have a new name (and a new theory): Stone's "heightened judicial review."

The *Herndon* decision created "an emergency" in Texas--and the chilling prospect that a black man might vote in a Democratic Party primary election. In response, the legislature of Texas hastily enacted a new statute providing, *inter alia:*

> [E]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party . . . .[143]

Pursuant to this new statute, the State Executive Committee of the Democratic Party promptly adopted a resolution limiting participation in primaries to "all white democrats . . . and none other."[144]

Writing for the Court in *Nixon v. Condon,* Justice Cardozo observed that the clear intention of the new legislation was to separate "state action" (restrained by the Fourteenth Amendment) from the decision to exclude blacks. "Private persons unconnected with the State"--for example, the plenary membership of the Texas Democratic Party, assembled in convention--might have prescribed the qualifications of its members.[145]

> Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.
>
> . . . Power so intrenched is statutory, not inherent. If the State had not

conferred it, there would be hardly color of right to give a basis for its exercise.[146]

Once again, "the great restraints of the Constitution" set limits to the power of the State.[147] Once again, the right to vote had to be wrested forcibly from the malign grip of Texas by a stubbornly persevering plaintiff, wielding the Fourteenth Amendment as a powerful sword.

Today, the "American experiment" in enlightened self-governance must be written off--for now at least--largely as a failure. Domestic ideologies of an unmistakably autocratic and authoritarian tenor, imperialist nationalism as foreign "policy,"[148] willful disregard of scientific evidence, blinding ignorance enshrined in the administrative agencies, and routine lying on the part of the President[149]--these are all now firmly ensconced at the highest levels of government.

Despite all this, the right to vote continues to be described as a cherished or "precious" right. If this were so, voting would be pursued with all the excitement and vigor of finding diamonds strewn along the streets or searching for solid gold Easter Eggs hidden in every meadow. But it is not. Americans have "voted with their feet" (or, rather, not), producing a pitiful turnout rate of 55.4% in the most recent presidential election, based on voting-age population.[150]

The Census Bureau estimated that there were 245.5 million Americans ages

> 18 and older in November 2016, about 157.6 million of whom reported being registered to vote. (While political scientists typically define turnout as votes cast divided by the number of *eligible* voters, in practice turnout calculations usually are based on the estimated voting-age population, or VAP.) [I]n 2016 . . . the actual number of votes tallied [was] nearly 136.8 million.[151]

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

Voting is not a precious right, but it could be. Restricting the electorate on the basis of educational qualifications is a proposition fraught with all the usual possibilities of unintended consequences. But the consequences of inaction are evident for all to see. They amount, as Roger Cohen suggests, to a "seeping, constant attempt--one sacred value at a time--to disorient Americans to the point they accept the unacceptable, cede to the grotesque, acquiesce to total arbitrariness as a governing principle."[152]

The Supreme Court does not dispute that "education . . . bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution."[153] Thus, a constitutional amendment imposing an educational requirement for voting does not simply stand in opposition to voting rights--as an irrelevant obstacle--the way a poll tax[154] or a property requirement[155] would. Arguably, education *enhances* the right to

vote. Voting may be enhanced *indirectly* by education through greater and more insightful participation in freedom of speech (especially in the political "marketplace of ideas"); and *directly,* by counteracting the "characteristic lack of discerning judgment . . . [i]n modern society," of which Hannah Arendt wrote.[156] As the Supreme Court stated in *San Antonio Independent School District v. Rodriguez* (1973),

> [appellees contend] that education . . . is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.
>
> A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

> *We need not dispute any of these propositions.* The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote.[157]

Here the Court pauses. "Yet," observes Justice Powell, writing for the Court, "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[158] That those are "desirable goals . . . is not to be doubted"--but pursuing them would implicate *public policy* concerns foreign to the Court's strictly judicial mandate.[159] "[T]hey are not values to be implemented by judicial intrusion into otherwise legitimate state activities"--hence the need for constitutional amendment.[160]

The right to vote, and voting itself, are still ultimately something of a puzzle. Inside the voting booth--faced with an imponderable array of candidates for, say, Commissioner of Agriculture--the system seems primitive indeed. It is hard to see this as a rational way of imparting information, It is hard to see this banal, bureaucratic setting as the "primal scene" of democracy. On a strict cost-benefit analysis, voting in a national election (even in our convoluted Electoral College system) could be viewed as irrational.[161] No national election in the United States has ever been decided by a single vote, nor would it ever be. Instead, one must look beyond such considerations for a voting "rationale."

Perhaps the best analogy is to consider voting "symbolic"--not unlike school spirit, *esprit de corps,* and patriotism itself. In other words, the purpose of voting is to encourage others to vote. It is an act of "symbolic solidarity." "Individually"--the thinking goes--"we do not matter; our vote does not matter. But together we can make a difference." The strongest and most informative routes to this outlook and its associated insights run directly through the educational system. Thus, my proposed article of amendment, while formally introducing more restrictive voter qualifications, may actually lead to greater participation in voting by a more thoughtful, informed, and judicious electorate.

1. Alexis de Tocqueville, 2 The Old Regime and the Revolution 191 (François Furet & Françoise Mélonio eds., Alan S. Kahan trans., Univ. of Chicago Press 2001).

2. *See, e.g.,* James Comey, Op-Ed., A Critique That Strengthens the F.B.I., N.Y. Times, June 15, 2018, at A25 ("I was not certain I was right about those things at the time. That's the nature of hard decisions; they don't allow for certainty.").

3. *See, e.g.,* Julie Hirschfeld Davis & Maggie Haberman, Trump Embraces Shadowy Plots, Eroding Trust, N.Y. Times, May 29, 2018, at A1:

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

4. *See* Ronald Dworkin, Taking Rights Seriously 22-28 (1977) ("[R]ules . . . set out legal consequences that follow automatically when the conditions provided are met. . . . A principle . . . states a reason that argues in one direction, but does not necessitate a particular decision.").

5. *See* H.L.A. Hart, The Concept of Law 124-36 (2d ed. 1994) ("Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases. . . . The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance . . . between competing interests.").

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

Bob Dylan, The Times They Are A-Changin' (1964 original release).

7. Bruce A. Ackerman, Social Justice in the Liberal State 313 (1980).

8. Jeffrey Toobin, Money Unlimited, The New Yorker, May 21, 2012.

9. U.S. Const. art. II, § 2 (emphasis added).

10. United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842).

11. Genesis 1:31 (Jerusalem Bible).

12. U.S. Const. art. II, § 2 (emphasis added).

13. *See, e.g.,* Robin Bradley Kar & Jason Mazzone, The Garland Affair, 91 N.Y.U. L. Rev. Online 53, 73, 75 (2016):

> [T]here have been 103 prior cases in total in which--as in the case of Obama's nomination of Garland--an elected President nominated someone to fill an actual Supreme Court vacancy prior to the election of the President's successor. In all 103 cases, which go all the way back to the earliest days of the Republic, the sitting President has been able both to nominate *and appoint* a replacement Justice--by and with the advice and consent of the Senate. . . .
>
> [T]here is no case in U.S. history where an elected President nominated a Supreme Court Justice during an election year (but prior to the election of his presidential successor) and failed to appoint a replacement Justice.

14. *See, e.g.,* Time pressure of Milgram's experiment.

15. Judiciary Committee Letter Opposing Supreme Court Hearings, Feb. 23, 2016.

16. If, by simply doing nothing, the Senate could effectively divest the President of his constitutional powers of appointment, unacceptable separation-of-powers concerns would be presented. *See, e.g.,* Kar & Mazzone, *supra,* at 91, 92:

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

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

Thus, the reading in the text is preferred.

17. A standard principle of judicial restraint is not to address or decide constitutional questions that do not have to be addressed or decided.

18. *See, e.g.,* Statement of Karol Corbin Walker, on behalf of the Standing Committee on the Federal Judiciary, American Bar Assn. 4, 8-9 (June 21, 2016):

> In undertaking its extensive nationwide investigation of the professional qualifications of Judge Garland, the Standing Committee wrote to and invited input relevant to our investigation from 3,085 persons, including all federal appellate and district judges, and magistrate judges, as well as many state judges, lawyers, and community and bar representatives who were likely to have personal knowledge of his professional qualifications. . . .
>
> The unanimous consensus of everyone we interviewed was that Judge Garland is superbly competent to serve on the United States Supreme Court. This significant point warrants repeating: all of the experienced, dedicated, and knowledgeable sitting judges, several former solicitor generals from both political parties, legal scholars from top law schools across the country, and lawyers who have worked with or against the nominee in private practice, government or within the judiciary describe the nominee as outstanding in all respects and cite specific evidence in support of that view.

19. *See id.* at 5:

> Most remarkably, in interviews with hundreds of individuals in the legal profession and community who knew Judge Garland, whether for a few years or decades, not one person uttered a negative word about him.

20. The Celebration and Blessing of a Marriage, The Book of Common Prayer 423, 424 (2006).

21. Under the circumstances, President Obama clearly passed up some opportunities for creative thinking and some more moderate solutions than that suggested in the text.

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

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

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

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

22. *See, e.g.,* Elizabeth Dias and Sydney Ember, G.O.P. Tactics in 2016 Pay Off in Gorsuch, Who Proves Decisive Figure, N.Y. Times, June 27, 2018, at A17:

> The consequences of President Trump's nomination of Neil M. Gorsuch to the Supreme Court--and the Republican blockade of President Barack Obama's nomination of Merrick B. Garland in 2016 for that seat--became powerfully clear on Tuesday after the court's conservative majority handed down major decisions to uphold Mr. Trump's travel ban and in favor of abortion rights opponents.

23. In a kind of coda, garlanded with apparently unappreciated irony, Professor Akhil Reed Amar has championed Judge Brett Kavanaugh's nomination for the Kennedy seat:

> [W]ith the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh. . . .
>
> Except for Judge Garland, no one has sent more of his law clerks to clerk for the justices of the Supreme Court than Judge Kavanaugh has.

Akhil Reed Amar, Op-Ed., A Liberal's Case for Brett Kavanaugh, N.Y. Times, July 9,

2018 (online ed.).

24. A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, U.S. Department of Justice, Office of the Inspector General, Oversight and Review Division 18-04, at ii, iii (June 14, 2018) [hereinafter O.I.G. Report].

25. Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016) (emphasis added).

26. O.I.G. Report at vi (emphasis added).

27. *See* Lanny J. Davis, The Unmaking of the President 2016, part 1 (2017).

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

29. *See, e.g.,* Eliana Johnson, Emily Stephenson & Daniel Lippman, 'Too Inconvenient': Trump Goes Rogue on Phone Security, Politico, May 21, 2018:

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

*See also* O.I.G. Report at xii ("we learned during the course of our review that Comey, Strzok, and Page used their personal email accounts to conduct FBI business").

30. I.e., if the answer is likely to be "No," don't ask. As a small child, I found this defense surprisingly underappreciated.

31. O.I.G. Report at v, 241.

32. *See generally* H.L.A. Hart & Tony Honoré, Causation in the Law (2d ed. 1985).

33. On the "butterfly effect," see, for example, Edward N. Lorenz, Deterministic Nonperiodic Flow, 20 J. Atmospheric Sciences 130 (March 1963); Edward N. Lorenz, The Predictability of Hydrodynamic Flow, 25:4 Trans. N.Y. Acad. Sci. (Series II) 409, 423, 423-24, 431 (Feb. 1963):

> During the course of this investigation we encountered a rather striking phenomenon. At various times we found it desirable to repeat portions of previous computations. For this purpose we took the values which the machine had printed at one particular time step, and entered these values into the machine as new initial conditions. Sometimes the machine did not repeat its previous performance. Fairly soon, small differences between the solutions would appear, and these would grow until eventually there was no resemblance between the two solutions.
>
> The cause of the initial discrepancies was soon evident. The numbers had been carried in the machine to six significant figures [decimal places], but only three figures had been printed in the output. The new initial values had thus been rounded off to three figures, and we were unwittingly superposing a small disturbance upon the earlier conditions. In comparing the two solutions, we were observing the growth of a small disturbance. . . .
>
> This result had obvious implications for the atmosphere, in view of the inevitable inaccuracies of observed initial conditions. It suggested that two indistinguishable states could eventually evolve into entirely different states, and that a long-range prediction would fail completely in at least one instance.
>
> . . . One meteorologist remarked that if the theory were correct, one flap of a sea gull's wings would be enough to alter the course of the weather forever. The controversy has not yet been settled, but the most recent evidence seems to favor the sea gulls.

*See also* Ray Bradbury, A Sound of Thunder, Collier's Weekly, June 28, 1952, at 20, *reprinted in* R Is for Rocket (Bantam Books 1962) (Could the result of a U.S. presidential election turn on what happened to a little butterfly sixty million years ago?).

34. *See, e.g.,* Cohen, J., Barlow, M. & Saito, K., Decadal Fluctuations in Planetary Wave Forcing Modulate Global Warming in Late Boreal Winter, 22:16 J. Climate 4418 (2009); Cohen, J., J. Foster, M. Barlow, K. Saito & J. Jones, Winter 2009–2010: A Case Study of

an Extreme Arctic Oscillation Event, 37 Geophys. Res. Lett. L17707 (2010); Cohen, Judah & Justin Jones, Tropospheric Precursors and Stratospheric Warmings, 24 J. Climate 6562 (2011); Judah L. Cohen et al., Arctic Warming, Increasing Snow Cover and Widespread Boreal Winter Cooling, 7 Environ. Res. Lett. 014007 (2012).

35. *See* O.I.G. Report at v, 242-43.

36. *Id.* at 95.

37. *Id.* at 93; *cf. id.* at 95 (quoting Prosecutor 2):

> I think the idea was that, that this investigation had to be somewhat focused, otherwise it could spin off into a million different directions. And this investigation could take different forms for years and years and years to come. So, you know, the, the focus of the investigation was, was really the private email system.

38. *Id.* at 94.

39. *Id.* at ii (emphasis added).

40. *Id.* at 90 (emphasis added); *cf. id.* at 93: "Generally the witnesses told us that they could not remember anyone within the team arguing that more should have been done to obtain the senior aides' devices."

41. *Id.* at 93; *cf. id.* at 94:

> [T]he Midyear team asked Abedin whether she backed up her clintonemail.com emails and she responded that her email was "cloud-based" and she did not "know how to back up her archives." [B]ased on this testimony, the team assessed that finding helpful evidence on Abedin's devices was unlikely.

42. *Id.* at 95.

43. *See* William Saletan, Unread October, Slate, June 14, 2018; *see also* O.I.G. Report at 330:

> The FBI's neglect had potentially far-reaching consequences. Comey told the OIG that, had he known about the laptop in the beginning of October and thought the email review could have been completed before the election, it may have affected his decision to notify Congress.

44. *See* O.I.G. Report at 373:

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

45. Letter from F.B.I. Director James B. Comey to Congressional Chairmen (Oct. 28, 2016).

46. Hillary Rodham Clinton, What Happened 314, 315 (2017).

47. Letter from F.B.I. Director James B. Comey to Congressional Chairmen (Nov. 6, 2016).

48. Clinton, *supra,* at 405.

49. Rod J. Rosenstein, Deputy Attorney General, Memorandum for the Attorney General (May 9, 2017).

50. O.I.G. Report at ii (emphasis added).

51. 5 U.S.C. § 7323(a), § 7324(a).

52. 5 U.S.C. § 7323(a)(1) Political activity authorized; prohibitions (emphasis added).

53. Jane Chong, Pre-Election Disclosures: How Does, and Should, DOJ Analyze Edge Cases?, Lawfare, Nov. 8, 2016 (emphasis added).

54. Jeffrey Toobin, Clinton Investigation Mania, Part 2, The New Yorker, Nov. 14, 2016 (online ed.).

55. Black's Law Dictionary 1067 (5th ed. 1979).

56. O.I.G. Report at x, 371, 372.

57. *See* Charles Collier, Note, The Improper Use of Presumptions in Recent Criminal Law Adjudication, 38 Stan. L. Rev. 423-62 (1986).

58. Black's Law Dictionary 1067 (5th ed. 1979).

59. James Comey, A Higher Loyalty, at x (2018).

60. *Id.* at 206.

61. *Id.* at 204 (emphasis added).

62. Jeffrey Toobin, Clinton Investigation Mania, Part 2, The New Yorker, Nov. 14, 2016 (online ed.).

63. 5 U.S.C. § 7323(a)(1).

64. Dean Acheson, Present at the Creation, at xvii (reissued 1987) (1969).

65. Adolf Hitler, Mein Kampf 295 (Reynal & Hitchcock 1940) (1925).

66. A.H. Maslow, The Authoritarian Character Structure, 18 J. Social Psychology, S.P.S.S.I. Bulletin 401, 402-03 (1943):

> If one is not strong enough the only alternative is to find a strong protector. If this protector is strong enough and can be relied upon, then peace of a certain sort is possible to the individual.

A recent commentator has reached similar conclusions about the world-view of President Donald Trump:

> Magnanimity, fair dealing, example setting, win-win solutions, a city set upon a hill: All this, in the president's mind, is a sucker's game, obscuring the dog-eat-dog realities of life. Among other distinctions, Mr. Trump may be our first Hobbesian president.

Bret Stephens, Op-Ed., The Thomas Hobbes Presidency, Wall St. J., Feb. 7, 2017.

67. *See* Erich H. Fromm, Escape from Freedom 5 (Holt paperback ed. 1994) (1941).

68. *Id.* at 34.

69. *See generally* Ferdinand Tönnies, Gemeinschaft und Gesellsschaft (1887).

70. Fromm, *supra,* at 59 (emphasis in original).

71. *Id.* at 60, 61; *see also id.* at 99:

> The breakdown of the medieval system of feudal society had one main significance for all classes of society: the individual was left alone and isolated. He was free. This freedom had a twofold result. Man was deprived of the security he had enjoyed, of the unquestionable feeling of belonging, and he was torn loose from the world which had satisfied his quest for security both economically and spiritually. He felt alone and anxious. But he was also free to act and to think independently, to become his own master and do with his life as he could--not as he was told to do.

72. *Id.* at 47.

73. *Id.* at 46.

74. *Id.* at 154.

75. *Id.* at 162 (emphasis in original).

76. Maslow, *supra,* at 408 ("He will understand the bootlicker and the slave even if he himself is not the bootlicker or the slave.").

77. Bruce Shapiro, Keeping Kavanaugh off the Supreme Court, The Nation, July 18, 2018 (online ed.).

78. George F. Will, Op-Ed., This Sad, Embarrassing Wreck of a Man, Wash. Post, July 17, 2018 (online ed.).

79. Andrew Sullivan, Why Trump Has Such a Soft Spot for Russia, N.Y. Magazine, July 20, 2018 (online ed.).

80. Fromm, *supra,* at xv (Foreword II).

81. *See, e.g.,* Madeleine Albright, Fascism: A Warning (2018).

82. R.D. Laing, The Politics of Experience 26 (Ballantine Books 1968) (1967).

83. U.S. Const. art. II, § 1.

84. Maureen Dowd, Op-Ed., Introducing Donald Trump, Diplomat, N.Y. Times, Aug. 16, 2015, at SR9 (quoting Donald Trump).

85. Michael D'Antonio, Never Enough 40 (2015) (quoting Donald Trump) (emphasis added). Translated into age-brackets, Trump is essentially saying: *"I'm basically the same now as I was at age six."*

86. James Harvey Robinson, Civilization, 5 Encyclopædia Britannica 735, 739 (14th ed. 1956) (1929).

87. Frank Bruni, Op-Ed., An Overdose of Donald Trump at the G.O.P. Debate, N.Y. Times, Sept. 16, 2015 (quoting Sen. Rand Paul).

88. Diagnostic and Statistical Manual of Mental Disorders (DSM-5) 647 (American Psychiatric Ass'n, 5th ed. 2013) [hereinafter DSM-5].

89. Dowd, Introducing Donald Trump, Diplomat, *supra* (quoting Donald Trump).

90. James Matthew Barrie, Peter and Wendy, chs. 6, 8 (Jack Zipes ed., Penguin Books 2004) (1911) [hereinafter Peter Pan].

91. DSM-5 at 671 (discussing "associated features supporting diagnosis" of narcissistic personality disorder).

92. *See* Michael D'Antonio, Never Enough (2015); George F. Will, Op-Ed., Donald Trump Is a Counterfeit Republican, Wash. Post, Aug. 12, 2015 ("In every town large enough to have two traffic lights there is a bar at the back of which sits the local Donald Trump, nursing his fifth beer and innumerable delusions.").

93. Jerrold Lee Shapiro & Susan Bernadett-Shapiro, Narcissism: Greek Tragedy, Psychological Syndrome, Cultural Norm, *in* 1 Mental Disorders of the New Millennium 25, 38 (Thomas G. Plante ed., 2006).

94. *Id.* at 31 ("all theorists who address this syndrome agree that narcissism is a healthy and appropriate stage of childhood development").

95. *See* Joan Acocella, Selfie: How Big a Problem Is Narcissism? The New Yorker, May 12, 2014, at 77 (book review):

> In the *DSM,* narcissism is one of the so-called "personality disorders," a category different from neuroses. . . . Neuroses are afflictions of the "worried well." At a certain point in these people's lives, things become hard for them. They wake up in the middle of the night; they're swamped with dread; they don't know why. A personality disorder, by contrast, doesn't seem to start or to go away. The person's family will often report that he's always been like that.

Furthermore, he thinks that he is perfectly all right.

96. DSM-5 at 669-71; *see also* Mark Leibovich, Donald Trump Is Not Going Anywhere, N.Y. Times Magazine, Oct. 4, 2015, at 28, 52, 32-33:

> I observed to Trump that I had never encountered a candidate who talked so much to me about the latest polls. He knew precisely why that was. "That's because they're not leading," he said. . . .
>
> Trump makes no attempt to cloak his love of fame and, admirably, will not traffic in that tiresome politicians' notion that his campaign is "not about me, it's about you." The ease with which Trump exhibits, and inhabits, his self-regard is not only central to his "brand" but also highlights a kind of honesty about him.
>
> . . . I, too, have grown exceedingly weary of this world--the familiar faces, recycled tropes and politics as usual--and here was none other than Donald J. Trump, the billionaire blowhard whom I had resisted as a cartoonish demagogue, defiling it with resonance.
>
> . . . Was Trump the logical byproduct of a cancerous system in which American democracy has mutated into a gold rush of cheap celebrity, wealth creation and narcissistic branding madness? Or has he merely wielded the tools of this transformation--his money, celebrity and dominance of the media--against the forces that have engendered this disgust in the system to begin with?

97. Monica Langley, Donald Trump's One-Man Roadshow, Wall St. J., Sept. 14, 2015, at A1 (quoting Donald Trump).

98. Peter Pan, ch. 6; *cf. id.* at ch. 10:

> Peter thought it his due, and he would answer condescendingly, "It is good. Peter Pan has spoken."

99. *Cf.* Wilhelm Reich, The Mass Psychology of Fascism 83 (Vincent R. Carfagno trans., Mary Higgins & Chester M. Raphael eds., 1970) (3d rev. German ed. 1942):

> Hitler repeatedly stressed that one could not get at the masses with arguments, proofs, and knowledge, but only with feelings and beliefs. In the language of National Socialism . . . the nebulous and the mystical are . . . conspicuous.

100. *See* Immigration Reform That Will Make America Great Again, Donald J. Trump for President, Inc. (position paper):

> *A nation without borders is not a nation.* There must be a wall across the southern border.
>
> For many years, Mexico's leaders have been taking advantage of the United States by using illegal immigration to export the crime and poverty in their own country (as well as in other Latin American countries).
>
> . . . They are responsible for this problem, and they must help pay to clean it up.
>
> Mexico must pay for the wall . . . . We will not be taken advantage of anymore.

101. Brendan Nyhan, Donald Trump, the Green Lantern Candidate, N.Y. Times, The Upshot: Road to 2016 (David Leonhardt ed., Aug. 25, 2015) (blog).

102. *See* Trademark Registration for *MAKE AMERICA GREAT AGAIN,* Reg. No. 4,773,272 (registered July 14, 2015), U.S. Patent and Trademark Office, available at: http://online.wsj.com/public/resources/documents/makeamericagreatagain.pdf

> Mr. Trump's attorney explained that:
>
> The issue is not whether it is being used verbally by others in public. The problem is that it is repeatedly being used by others as a slogan or catchphrase. That is what the trademark filing protects against.

David Martosko, Trump Trademarked Slogan "Make America Great Again," Daily Mail Online (May 12, 2015).

103. Alan Blinder, Trump Fails To Fill Alabama Stadium, But Fans' Zeal Is Hardly Diminished, N.Y. Times, Aug. 22, 2015, at A11 (New York ed.):

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

104. Donald J. Trump with Tony Schwartz, Trump: The Art of the Deal 40 (Random House 1987).

105. Trip Gabriel, Trump Gets Rock Star Greeting in Iowa, N.Y. Times, Sept. 13, 2015, at A22 (New York ed.).

106. Michael Kinsley, The Serious Problem with Treating Donald Trump Seriously, Vanity Fair, Oct. 12, 2015, at http://www.vanityfair.com/news/2015/10/the-serious-problem-with-treating-donald-trump-seriously

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

108. *Cf.* Hannah Arendt, The Origins of Totalitarianism 305 (new ed. 1968) (1951):

> Hitler . . . during his lifetime exercised a fascination to which allegedly no one was immune . . . .
>
> The "magic spell" that Hitler cast over his listeners . . . rested indeed "on the fanatical belief of this man in himself," on his pseudo-authoritative judgments about everything under the sun, and on the fact that his opinions . . . could always be fitted into an all-encompassing ideology.
>
> . . . Society is always prone to accept a person offhand for what he pretends to be, so that a crackpot posing as a genius always has a certain chance to be believed. In modern society, with its characteristic lack of discerning judgment, this tendency is strengthened, so that someone who not only holds opinions but also presents them in a tone of unshakable conviction will not so easily forfeit his prestige, no matter how many times he has been demonstrably wrong. Hitler, who knew the modern chaos of opinions from first-hand experience, discovered that the helpless seesawing between various opinions and "the conviction . . . that everything is balderdash" could best be avoided by adhering to *one* of the many current opinions with "unbending consistency." The hair-raising arbitrariness of such fanaticism holds great fascination for society because for the duration of the social gathering it is freed from the chaos of opinions that it constantly generates.

109. Gabriel, Trump Gets Rock Star Greeting in Iowa, *supra.*

110. *Id.*

111. Thomas Lake, "I am Batman," Trump Tells Boy on Helicopter Ride, CNN.com (website), Aug. 17, 2015.

112. [T]he years came and went without bringing the careless boy; and when they met again Wendy was a married woman, and Peter was no more to her than a little dust in the box in which she had kept her toys. . . .

> She let her hands play in the hair of the tragic boy. She was not a little girl heart-broken about him; she was a grown woman smiling at it all, but they were wet smiles.

Peter Pan, ch. 17.

113. William Wordsworth, My Heart Leaps Up, *in* 2 Poems, in Two Volumes 44 (London: Longman, Hurst, Rees & Orme, 1807).

114. *See* Bruce A. Ackerman, Social Justice in the Liberal State 302-13 (1980).

115. *Id.* at 304.

116. *Id.* at 305.

117. *See* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

118. Ackerman, *supra,* at 305.

119. *Id.* at 306.

120. *Id.* at 303 (emphasis added).

121. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (First Amendment guarantees are "incorporated" in the 14th Amendment).

122. *See* NAACP v. Alabama, 357 U.S. 449 (1958).

123. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

124. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

125. John Hart Ely, Democracy and Distrust 234 n.30 (1980).

126. Skinner v. Oklahoma, 316 U.S. 535, 536-37 (1942).

127. *Skinner,* 316 U.S. at 537.

128. *Id.* at 539, 541.

129. *See* James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 135-37 (1893):

> Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. . . . In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.
>
> . . . Now, it is the legislature to whom this power is given,--this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court. . . .
>
> It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law. . . . As the opportunity of the judges to check and correct unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

130. *Id.* at 144:

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

131. Nixon v. Herndon, 273 U.S. 536, 541 (1927).

132. *Skinner,* 316 U.S. at 541.

133. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (emphasis added, citations omitted); *see generally* John Hart Ely, Democracy and Distrust, ch.5 (1980).

134. *See Skinner,* 316 U.S. at 544-45 (Stone, C.J., concurring):

> There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned . . . .
>
> . . . A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process.

135. *Skinner,* 316 U.S. at 541.

136. *Carolene Products,* 304 U.S. at 152 n.4.

137. *See* Ely, *supra,* at 75-88.

138. *Id.* at 118 n.*, 120.

139. *See* Nixon v. Herndon, 273 U.S. 536, 540 (1927).

140. *Id.*

141. *See* Ashby v. White, 2 Lord Raymond 938, 950, 953, 954, 957; 92 English Rep. 126, 134, 135-36, 136, 138 (1703), in which Chief Justice Holt stated:

> It is not to be doubted, but that the commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of England vested in them . . . . A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes.
>
> . . . If then when a statute gives a right, the party shall have an action for

> the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it.
>
> . . . Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents; but on the reason of the law, and ubi eadem ratio, ubi idem jus. This privilege of voting does not differ from any other franchise whatsoever.

142. *Herndon,* 273 U.S. at 540-41.

143. *See* Nixon v. Condon, 286 U.S. 73, 82 (1932).

144. *See id.*

145. *See, e.g., id.* at 85:

> [In State conventions] platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally, is true more particularly in Texas, where the statute is explicit in committing to the State convention the formulation of the party faith.

146. *Id.* at 84, 85; *see also id.* at 86-87 (the statute in question constituted an express "grant of power" to the State Executive Committee to determine who shall participate in primary elections; the Legislature granted this power "in language too plain to admit of controversy") (quoting Texas caselaw).

147. *Id.* at 89.

148. *See, e.g.,* Thomas L. Friedman, Op-Ed., Trump Is China's Chump, N.Y. Times, June 28, 2017 (online ed.).

149. President Trump's Lies, the Definitive List, David Leonhardt & Stuart A. Thompson, N.Y. Times, June 23, 2017 (Opinion); *cf.* Jack Shafer, Trump's Losing a Tabloid War to His Own Lawyer, Politico (Swamp Diary), July 27, 2018:

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

lawyer says in his defense?

150. 2016 Election, Wikipedia.

151. U.S. Trails Most Developed Countries in Voter Turnout, Pew Research Center (May 21, 2018).

152. Roger Cohen, Trump 2020 Is No Joke, N.Y. Times, June 24, 2017, at A18 (New York ed.); *cf.* George Packer, Get Out and Vote, The New Yorker, Aug. 6 & 13, 2018:

> The midterm elections in November are the last remaining obstacle to President Trump's consolidation of power. None of the other forces that might have checked the rise of a corrupt homegrown oligarchy can stop or even slow it. The institutional clout that ended the Presidency of Richard Nixon no longer exists. The honest press, for all its success in exposing daily scandals, won't persuade the unpersuadable or shame the shameless, while the dishonest press is Trump's personal amplifier. The federal courts, including the Supreme Court, are rapidly becoming instruments of partisan advocacy, as reliably conservative as elected legislatures. It's impossible to imagine the Roberts Court voting unanimously against the President, as the Burger Court, including five Republican appointees, did in forcing Nixon to turn over his tapes. (Brett Kavanaugh, Trump's nominee to succeed Anthony Kennedy, has even suggested that the decision was wrong.) Congress has readily submitted to the President's will, as if legislation and oversight were burdens to be relinquished. And, when the independent counsel finally releases his report, it will have only the potency that the guardians of the law and the Constitution give it.

153. Summarizing arguments, *see below,* that the Court does "not dispute." *Rodriguez,* 411 U.S. at 36.

154. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

155. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

156. Hannah Arendt, The Origins of Totalitarianism 305 (new ed. 1968) (1951) (citations omitted).

157. San Antonio Independent School District et al. v. Rodriguez et al., 411 U.S. 1, 35-36 (1973) (emphasis added, citations omitted).

158. *Id.* at 36.

159. *Id.*

160. *Id.*

161. *See, e.g.,* Anthony Downs, An Economic Theory of Democracy (Harper & Row 1957).