Essay

Should Courts Make It Personal? Virtue-Dependent Doctrine and the Law of Executive Power

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INTRODUCTION

With *The Virtuous Executive*, Professor Alan Rozenshtein has given us an impressive and wide-ranging analysis of the relevance of Presidential character to the law of executive power.[1] The article's central claim is straightforward: The Constitution reflects a "commitment to proper presidential character," and scholars of and participants within the U.S. constitutional system would do well to recognize and respect this commitment on its own terms.[2] In particular, Rozenshtein argues, the Constitution's text, history, and structure together make salient a set of six "executive virtues"—"loyalty,"[3] "honesty,"[4] "responsibility,"[5] "justice,"[6] "inclusiveness,"[7] and "judgment"[8]—all of which "play an essential role in the proper understanding and functioning of Article II."[9] And it therefore follows that constitutional actors should seek to promote these virtues when engaging in such

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1. Alan Z. Rozenshtein, *The Virtuous Executive*, 108 MINN. L. REV. 605 (2023).
2. *Id.* at 611.
3. *Id.* at 634–35.
4. *Id.* at 636–38.
5. *Id.* at 638–41.
6. *Id.* at 641–42.
7. *Id.* at 642–43.
8. *Id.* at 643–44.
9. *Id.* at 610.

endeavors as selecting Presidential nominees,[10] delineating the powers of the executive branch,[11] and overseeing a President's actions in office.[12]

Unfortunately, a constitutional commitment to Presidential virtue is not the same thing as a constitutional guarantee against unvirtuous Presidents; indeed, as Rozenshtein himself observes, one need look no further than the past election (and quite possible future re-election) of Donald Trump for confirmation of this fact.[13] As a result, constitutional actors must sometimes confront the difficult task of dealing with Presidents who openly flout the virtues that those same Presidents are, constitutionally speaking, supposed to embrace. Put differently, if a virtuous President is something that the Constitution anticipates but cannot assure, then there will sometimes arise circumstances in which a basic assumed feature of the constitutional design—i.e., a President who manifests the executive virtues—has failed to materialize. That in turn poses a host of difficult questions about how other actors within the political system—i.e., members of Congress, judges, White House lawyers, agency officials, party leaders, and so forth—should respond to the reality of an unvirtuous Commander in Chief.

Rozenshtein's article grapples with these questions at length,[14] and I lack both the page-space and expertise to canvas his many insights and proposals. Instead, I will limit my focus

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10. *Id.* at 685–92 (highlighting potential reforms for purposes of helping the "electoral process [to] better select for executive virtue").

11. *Id.* at 676–85 (noting ways in which the law of executive power might be structured so as to "encourage virtuous decision-making").

12. *Id.* at 652–76 (highlighting ways in which Congress, the courts, and other constitutional actors might "respond[] to virtue violations").

13. *See id.* at 613–14 (noting that "Trump's presidency casts a long shadow over my account" and that "Trump's extreme character defects and the damage they caused to the country and its constitutional system were widely discussed during his presidency and were the central theme of the House January 6 Committee"); *see also id.* at 694 ("As Trump campaigns to retake the presidency in 2024, the nation faces, in the starkest terms so far, the question of whether to elect someone without the requisite virtues for the nation's highest office."). As of the time of this article's publication, Trump appears to hold a narrow lead over Joe Biden in public polling of the 2024 general election. *See* 538, Latest Polls (April 29, 2024), https://projects.fivethirtyeight.com/polls/president-general [https://perma.cc/FVA2-WZHL].

14. *See generally* Rozenshtein, *supra* note 1, at 651–84 (highlighting a range of different ways in which constitutional actors can both deter and respond to actions undertaken by unvirtuous Presidents).

to one particular issue raised by the implementation-focused portion of Rozenshtein's analysis: To what extent should *courts* adjudicate claims of executive power by developing and applying what we might call "virtue-dependent doctrine"?[15] Put differently, when it comes to the judicial enforcement of constitutional (and other public-law) limits on executive power, how (if at all) should courts consider the virtuousness of the particular President whose actions they are called on to review?

To be clear, what I mean by "virtue-dependent doctrine" is not a set of freestanding rules that would deny enforcement of Presidential action because and only because it reflects disloyalty, dishonesty, a lack of responsibility, or another constitutionally salient vice. Rather, what I want to consider is the practice of enforcing already-existing limits on executive power in a manner that either directly or indirectly takes account of the virtuous or unvirtuous character of the President whose actions are under review. For example, a virtue-dependent approach to Justice Jackson's *Youngstown* framework might treat Presidential virtue as relevant to the question of whether executive action that is neither authorized nor prohibited by statute exceeds the scope of the President's inherent Article II authority.[16] A virtue-dependent application of rights-based doctrine might deny

15. For Rozenshtein's views of the courts' role in enforcing the executive virtues, see generally *id.* at 652–58 (highlighting the reasons why, notwithstanding the executive virtues, courts generally adhere to a "presumption of regularity," according to which "courts assume, absent clear evidence to the contrary, that executive branch officials 'have properly discharged their official duties'" (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 15 (1926))), *id.* at 652–66 (suggesting that the Court's decision in *Trump v. Hawaii*, 585 U.S. 667 (2018), contained rhetoric indicating that "at least in principle, the presumption of regularity has its limits, and that when the President conspicuously fails to exhibit the executive virtues, the courts need not be blind to that fact"), and *id.* at 682 (suggesting that courts' enforcement of certain types of reason-giving requirements could in theory have virtue-promoting effects). As will become apparent, my views about judicial enforcement of the executive virtues are substantively quite similar to Rozenshtein's, though I do employ a somewhat different framework for thinking through various aspects of the problem.

16. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (suggesting that, where the President acts against a backdrop of congressional silence, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law"); *see also* Michael Coenen & Scott M. Sullivan, *The Elusive Zone of Twilight*, 62 B.C. L. REV. 741, 760–74 (2021) (highlighting the various ways in which courts have applied this sort of "twilight zone" analysis).

otherwise-available deference to a President's justifications for rights-abridging action under circumstances in which the court has reason to suspect that the President acted unvirtuously.[17] A virtue-dependent application of the APA's arbitrary-and-capricious standard might demand more in the way of policy-based explanations for agency initiatives that an unvirtuous President helped to spearhead.[18] The unifying feature of such a jurisprudence would be a judicial willingness to apply legal limits on executive power in such a way as to incentivize virtuous Presidential decision-making.

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In this Response, I identify and tentatively evaluate three possible approaches to incorporating considerations of Presidential virtue into the (judicially enforceable) law of executive power. I begin my analysis by considering the possibility of *directly virtue-dependent* decisions—decisions that openly and directly point to a President's constitutionally salient character defects as a reason to apply doctrinal limits on Presidential power

17. *See infra* Section II.B (highlighting ways in which virtue-based considerations might be incorporated within rights-based doctrines that accord heightened scrutiny to actions that were animated by an improper motive).

18. *See* 5 U.S.C. § 706(2)(A). To be sure, the APA itself does not apply directly to the President, *see* Franklin v. Massachusetts, 505 U.S. 788 (1992), meaning that, under current law, courts could not apply such an approach to the President's own official actions. But to the extent that the President pushes an agency to adopt a particular rule or order, one might point to the President's lack of virtue as a reason to review the agency's decision with some skepticism. This is, in effect, an offshoot of Professor Kathryn Watts's suggestion that courts can and should consider "presidential prodding" as a legitimating factor when conducting hard-look review of value-laden agency choices. *See* Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 58 (2009) (noting, for instance, that "if the President communicated to an agency his desire to see certain issues appear on the agency's rulemaking agenda or to see certain discretionary rulemaking proceedings treated with priority over other issues, the relevant agency should be able to explain its discretionary decision to move forward with high-priority rulemakings and not to move forward with others by reference to the President's clearly expressed executive priorities" (internal footnote omitted)). The suggestion here would be that a court that generally adhered to Professor Watts's approach of deferring more to administrative action that derives from presidential prodding might decline to do so if and when an unvirtuous President does the prodding. *Cf. id.* at 60 (noting that "presidential prodding should *not* be allowed to help explain agency action where the President directs an agency to act in a way that would flout congressional will as set forth in the statute being implemented" or where "the President asks the agency to act in a way that would conflict with the existing evidence").

in an especially stringent manner. Not surprisingly, and largely echoing Rozenshtein's sentiments on this score, I argue that courts should be extremely hesitant to render decisions in this way. Second, I consider the possibility of *indirectly virtue-dependent* decisions—decisions that involve the application of rules that, though virtue-neutral on their face, might operate to mitigate harms that unvirtuous Presidents are uniquely likely to cause. I am somewhat more sanguine about the workability of these rules, though I also emphasize they are likely to carry only limited effectiveness as a virtue-promoting tool. Finally, and most bleakly, I consider (primarily as a descriptive matter) the possibility of *perversely virtue-dependent* decisions—decisions in which courts silently treat a President's lack of virtue as a reason to afford that President *more* constitutional leeway rather than less. The underlying intuition here is that a President's lack of virtue might sometimes make courts especially concerned about being on the receiving end of executive-branch retribution for decisions that go against the President; in particular, to the extent that a President's lack of virtue makes the President especially willing to defy an adverse judicial decision, a court worried about such a constitutional showdown might have reason to treat the lack of virtue as reason not to render such a decision in the first place.

I. DIRECTLY VIRTUE-DEPENDENT DECISIONS

Let's start with directly virtue-dependent decisions—decisions, that is, that would directly appeal to a President's lack of virtue as a reason for applying amplified restrictions on Presidential power. The case for rendering decisions of this sort would go something like this: If Rozenshtein is correct that the Constitution reflects a commitment to the executive virtues, then courts should pay heed to those virtues when deciding difficult questions about the scope of executive power. Directly virtue-dependent doctrine would in this sense operate no differently from the variety of other doctrines that permit courts to engage with constitutionally salient "values"—e.g., federalism,[19] individual

19. *See, e.g.*, Bond v. United States, 572 U.S. 844, 859 (2014) (noting that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute").

liberty,[20] democratic accountability,[21] and so forth[22]—when applying and delineating the scope of an open-ended rule. If Presidential virtue is a goal that the Constitution pursues,[23] then courts would have every reason to inquire into a President's virtuousness (or viciousness) as one factor among others to consider when answering asking whether an action undertaken by that President comports with the relevant constitutional rules. Or to put the point differently, if the Constitution's capacious grants of power to the President are premised on the expectation that the President has virtue,[24] then the manifest absence of virtue in a particular President could furnish a plausible legal basis for construing those grants of power in a narrower-than-normal way.

But even if the case for directly virtue-dependent doctrine is in some sense conceptually sound, it becomes considerably more difficult to maintain when one starts to consider the practical effects of making directly virtue-related inquiries a formal part of the law. The most obvious such effect is that of enabling either inadvertent or bad-faith judicial misapplication of directly

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20. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 557 (2012) (adverting to principles of individual liberty in the course of concluding that the commerce power cannot authorize laws that "compel[] individuals to become active in interstate commerce by purchasing a product" (emphasis omitted)).

21. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (appealing to values of democratic accountability, among others, in advocating for a significantly more restrictive version of the nondelegation doctrine); *see also* Michael Coenen, *The Shaky Structural Foundations of the Nondelegation Doctrine*, 26 U. PA. J. CONST. L. (forthcoming 2025) (manuscript at 37–44) (on file with the author) (highlighting and critiquing this aspect of Justice Gorsuch's reasoning).

22. *See, e.g.*, Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1096–98 (2016) (noting ways in which courts sometimes point to the values and objectives associated with one constitutional provision when interpreting and applying another).

23. *See* Rozenshtein, *supra* note 1, at 651 (emphasizing that constitutional actors can and should pursue the goal of "encouraging virtuous decision-making").

24. *See id.* at 626 (emphasizing that "our constitutional system gives enormous discretion" to the President and that "[t]his is the most important reason why the personal qualities of the President are so critical"); *see also id.* at 622 (highlighting Hamilton's assurance that the electoral college system would give rise to "a constant probability of seeing the station [of the President] filled by characters pre-eminent for ability and virtue" (quoting THE FEDERALIST NO. 68, at 410 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

virtue-dependent rules.[25] At the margin, directly virtue-dependent doctrine enables courts hostile to a President's agenda to invoke open-ended and value-laden concepts like "loyalty," "judgment," "justice," and so forth, as grounds for curtailing the scope of that President's executive power. It is not difficult to see how a judge predisposed to resist a President's administration on political or partisan grounds might embrace, even if subconsciously, conclusions about that President's lack of virtue for purposes of curbing the administration's agenda.[26] And if that is so, the judge's own mischief-making in applying directly virtue-dependent doctrine might pose a greater threat to the sound operation of the constitutional system than would judicial underenforcement (or even non-enforcement) of a legal principle rooted in the promotion of executive virtuousness.

There is another complication as well. Even if a principle of executive virtuousness offers enough in the way of discernible content to enable "neutral" and non-results-oriented judicial application (and even if judges had enough skill and self-control to adhere to such neutrality), we would still have reason to worry about other adverse effects likely to follow from directly virtue-dependent decisions. For example, Rozenshtein flags the possibility that the regularized application of directly virtue-dependent doctrine could "put the courts in conflict not only with the political branches but with the public as well, exacerbating the countermajoritarian tendencies of judicial review."[27] To say that a President is unvirtuous is not only to impugn the President's character in a strikingly direct way, but also to criticize, at least indirectly, all those persons who ally themselves with and voted for that person. Such a proclamation—especially when coupled

25. *See* Rozenshtein, *supra* note 1, at 656 (emphasizing that courts' general reluctance to inquire into questions of Presidential virtue helps them to "avoid being perceived as engaging in" problematic types of arguments, including "partisan arguments based on political approval or disapproval of the current President").

26. For example, a judge who believes as a policy matter that a given Presidential decision undermines national security might have an easier time concluding the President lacks the virtue of "loyalty"; after all, such a judge might think, why else would the President do something that was detrimental to nation's safety and wellbeing? If so, then a doctrine inviting judges to evaluate a President's "loyalty" for purposes of applying a constitutional rule may well have the undesirable effect of letting policy-based disagreements with the President drive the outcomes of executive-power cases.

27. *See id.*

with a holding that invalidates some aspect of the President's political program by reference to that proclamation—is likely to alienate a large portion of the population, which in turn might compromise the perceived neutrality and institutional stature of the federal judiciary as a whole.[28] Again, the resulting costs of virtue-promoting decision-making might well turn out to outweigh whatever virtue-promoting benefits it would otherwise yield.

Finally, as with any attempt to break new doctrinal terrain, the application of directly virtue-dependent doctrine would increase doctrinal uncertainty and complexity.[29] Any decisional framework that made the President's personal character relevant to the outcome of a particular case would demand intensive judicial engagement with a host of difficult question: What sorts of "virtues" matter for purposes of applying the relevant rule? What is the content of those virtues? What type of evidence can courts consider for purposes of identifying the presence of absence of that virtue within a particular President? Do demonstrable character defects manifested by a President's private life support adverse inferences about the President's inability to act virtuously within public life?[30] And to the extent that courts instead treat executive virtue as more of a "know it when I see it" sort of thing, what sorts of safeguards are in place to ensure the consistent and objective operation of such a rule?

In combination, these considerations suffice, in my view, to demonstrate why courts should steer clear of injecting explicitly virtue-related inquiries into the law of executive power.[31] By

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28. As Rozenshtein notes, "When courts strike down executive action on virtue grounds, they are implicitly rebuking the voters' character judgments." *Id.*

29. *See also id.* at 654 (making the related observation that virtue-neutral decision-making helps to "avoid drowning the courts in time-consuming litigation about the President's dispositions and motivations").

30. *Cf. id.* at 673 (suggesting that President Bill Clinton's affair with Monica Lewinsky "corrupted the public's virtues" insofar as it involved a "comfort with the most extreme sorts of sexual power imbalances" and a "willingness to lie under oath and to encourage others to do so").

31. Throughout this Section, I have characterized "directly virtue-dependent decisions" as ones that link executive-power analysis with generalized assessments of a President's *overall* character. But we might imagine a more modest version of the practice that focuses less on the President's general virtuousness (e.g., "I am invalidating this action because the President is a bad person") and more on what is demonstrated by the particular Presidential

making the outcomes of public-law cases turn on courts' public assessment of a President's personal character, virtue-dependent decisions would likely yield costs that outweigh whatever virtue-promoting benefits they might bring.[32]

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action under review (e.g., "I am invalidating this action because it is reflective of Presidential disloyalty"). That approach, to be sure, would alleviate some of the problems I have identified above—perhaps, for example, action-focused decisions would seem less overtly partisan than character-focused decisions; perhaps they would be somewhat easier for courts to render; and so forth—but I remain skeptical of this approach as well. The central problem, as I see it, is that the virtues themselves remain difficult to define with precision, meaning that action-focused decisions about virtue will remain difficult for courts to defend as a product of objective legal assessment. To be sure, as I discuss in the next section, there may be some role for courts to play in assessing the question whether a particular Presidential action was undertaken for an unlawful *reason*—that is, I do not discount the possibility that courts can sensibly ask whether Presidential action was undertaken for the purpose of furthering certain proscribed *motives*. *See infra* Section II.B. But, relative to the question of whether a particular action qualifies as sufficiently or insufficiently virtuous to trigger application of a special rule, the question of whether that action was undertaken for improper reasons strikes me as both easier for courts to answer on a case-specific basis and less likely to involve either real or perceived criticism of the decisionmaker's own character-based defects. Put differently, without discounting the practical risks associated with motive-based analysis, *see, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Law*, 85 CAL. L. REV. 297, 321–25 (1997) (highlighting, while also criticizing, the argument that "courts lack both the legitimacy and the competence to engage in scrutiny of legislative ends"), I believe that asking whether a person did something for an impermissible reason is a considerably less fraught enterprise than is asking whether what the person did was virtuous or not.

32. A more difficult question is whether unstated assessments of Presidential character should ever influence judicial decisions in this way. My general inclination is to say "no," given my view that courts should generally strive to avoid deciding cases by reference to secret and undisclosed considerations. That said, as Rozenshtein notes, it may at some level be psychologically impossible for judges to wholly ignore such considerations when grappling with genuinely close cases. *See* Rozenshtein, *supra* note 1, at 657 ("It would be surprising if judges were able to . . . entirely exclude their perceptions of the President's character traits from their 'situation sense': 'the specialized form of cognitive perception . . . that reliably focuses their attention on the features of a case pertinent to its valid resolution.'" (quoting Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 355 (2016))). Put differently, where the applicable law is sufficiently indeterminate, and where the President's character defects are sufficiently egregious, it may ultimately be impossible for courts to adjudicate the underlying case in a completely virtue-neutral manner. *Cf.* Lochner v. N.Y., 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."). And it

II. INDIRECTLY VIRTUE-DEPENDENT DECISIONS

If directly virtue-dependent doctrine represented the only judicial means of operationalizing the executive virtues, then perhaps courts would have reason to pursue the project notwithstanding its practical risks. As it turns out, however, courts have at their disposal various other tools that might *indirectly* serve virtue-promoting goals. These tools are by no means capable of making unvirtuous Presidents become virtuous. Nor are they likely to stop sufficiently determined Presidents from achieving their unvirtuous aims. Even so, courts might sometimes manage to use certain types of virtue-neutral rules or frameworks for purposes of mitigating the damage that unvirtuous Presidents might do.

A. VIRTUE-PROMOTING PROPHYLACTIC RULES

Perhaps most obviously, courts can recognize and enforce any number of different constitutional requirements that limit or prohibit harmful actions that unvirtuous Presidents are especially likely to undertake. Rozenshtein is aware of this possibility, and he highlights a few potential examples of virtue-promoting prophylactic rules. Consider, for instance, the conflict-of-interest prohibitions set forth by the Foreign and Domestic Emoluments Clauses.[33] To the extent we worry that unvirtuous Presidents will abuse the powers of public office for private gain, that worry can be addressed by construing these clauses (and perhaps other similar legal requirements) to impose especially stringent restrictions on *all* Presidents' private business dealings. That initiative might have the incidental effect of imposing needless prophylactic safeguards on virtuous Presidents who have no desire to enrich themselves at the public's expense. But, the argument would go, occasionally excessive restrictions on harmless financial arrangements are a small price pay for the

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therefore might follow that privately virtue-dependent "judgment calls" of this sort are excusable, even if not something to be explicitly encouraged. *But see infra* Part III (suggesting that judges' private judgments about a President's lack of virtue may sometimes push them to rule in favor of, rather than against, the President in a close cases).

33. *See* Rozenshtein, *supra* note 1, at 679 (citing U.S. CONST. art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7).

benefit of curtailing the self-enrichment projects that unvirtuous Presidents would be inclined to pursue.[34]

In other contexts, however, the cost-benefit tradeoff presented by a virtue-promoting prophylactic rule will militate against its adoption. Consider, for instance, the Court's longstanding policy of affording significant deference to the executive with respect to matters of national security.[35] That practice, in conventional form, is to some degree premised on the expectation that the President will embrace the virtue of honesty and therefore abstain from deliberately misrepresenting the degree of a security threat said to necessitate constitutionally suspect actions.[36] But suppose the Court has come to conclude that such honesty has been lacking in some (though not all) recent Presidents.[37] Should the Court ratchet down the applicable deference standards for all future Presidents in light of that determination? On the one hand, doing so might help to prevent the judiciary from being hoodwinked by future unvirtuous Presidents who feel no shame about fabricating security-related justifications for policies that are intended to serve nefarious ends.

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34. Along the same lines, Rozenshtein suggests that courts might enforce an (uncodified) constitutional rule against self-pardons on the theory that a power to self-pardon would create "potentially overwhelming temptations for Presidents to act unvirtuously" and, if exercised, impose significant "expressive costs" by "undermining the public's commitment to loyalty and responsibility." *Id.* at 678–81.

35. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 704 (2018) ("Any rule of constitutional law that would inhibit the flexibility of the President to respond to changing world conditions should be adopted only with the greatest caution, and our inquiry into matters of entry and national security is highly constrained." (internal quotations omitted)).

36. *See, e.g.*, Rozenshtein, *supra* note 1, at 653 (noting the relationship between the presumption of regularity and courts assumption that "executive branch officials 'have properly discharged their official duties,' both in terms of the procedures they have followed and the motivations that have led to their action" (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 15 (1926))).

37. *Cf.* Erik K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L.J.F. 688, 688, 694 (2019) (emphasizing that Executive Order 9066, which implemented Franklin Roosevelt's program of Japanese-American internment, was predicated on "falsified claims of group disloyalty" and that subsequent litigation concerning the Order would come to show that "the government had misled the courts and the American public about the ostensible threat posed by Japanese Americans, effectively deploying them as scapegoats"); *see also, e.g.*, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating Fred Korematsu's 1942 conviction on this basis).

On the other hand, ratcheting down the deference standards will also result in more (and more aggressive) judicial second-guessing of good-faith security assessments rendered by Presidents more committed to the virtue of honesty. At least when posed in the abstract, it is not clear whether this would be a tradeoff worth making.

To put the point more generally, once *directly* virtue-dependent decision-making is off the table—once, that is, a court has eschewed the possibility of distinguishing between virtuous and unvirtuous Presidents for purposes of formulating or applying executive-power doctrine—then it will often be the case that the only way to respond to one President's lack of virtue is to treat all Presidents as if they lack it. In many (though not necessarily all) contexts, courts' embrace of this approach could turn out to yield deeply problematic consequences.[38]

B. MOTIVE-BASED INQUIRIES

In addition to crafting and applying prophylactic rules, courts might also seek to promote the executive virtues by way of *motive*-based rules—i.e., rules that calibrate a court's review of Presidential actions by reference to the reasons why those actions were undertaken. Motive-based rules are virtue-neutral in the sense that they do not call for explicit judicial assessments of a President's personal character—we can coherently ask *why* a President took a particular action without further asking whether that President more generally possesses virtuous or unvirtuous traits. But motive-based rules might still qualify as

38. A less extreme possibility would be to justify reduced national-security deference to a President not by reference to an abstract conclusion about that President's dishonesty, but rather by reference to a provable past instance of lying about security-related facts. I would view such a rule as indirectly virtue-dependent insofar as it would not depend on an assessment of Presidential character as such. (I would also view the rule as "prophylactic" in the sense that it would impose the same "one strike and you're out" requirement on all Presidents, regardless of their perceived level of honesty.) Nevertheless, the rule would still have virtue-promoting effects by: (a) discouraging inherently dishonest Presidents from making false security-related representations to a court; and (b) reducing the power of Presidents who fail to suppress their dishonesty even when made aware of those consequences. Whether such a rule would indeed prove effective (and how it might operate on the ground) are questions that I can't fully attend to in this response. But such an approach strikes me as considerably less problematic than assessing the legality of particular action by way of a direct reference to a Court's assessment of a President's character.

indirectly virtue-dependent insofar as the constraints that they impose are likely to manifest themselves most sharply in cases involving unvirtuous Presidents.

Consider, for instance, the line of equal-protection cases involving *discriminatory animus*—cases, that is, in which the Court has suggested the Constitution's equality-based safeguards generally operate to prohibit decision-makers from pursuing actions that are motivated by a "bare desire to harm" a politically disfavored group.[39] All else equal, Presidents lacking in Rozenshtein's posited virtue of "inclusiveness" are more likely to act upon animus towards disfavored groups,[40] which in turn means that animus-based limits on executive power are likely to have a disproportionately large impact on Presidents who are bigoted, vengeful, or incapable of empathizing with members of perceived outgroups. At the same time, asking whether a particular action was motivated by animus does not require a broader assessment of the action-taker's embrace of the value of "inclusiveness."[41] Thus, motive-based rules that focus on animus

39. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446–47 (1985) (quoting U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 535 (1973)). For a general overview, see WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

40. *See* Rozenshtein, *supra* note 1, at 642–43.

41. To be sure, as Rozenshtein himself suggests, considerations of character might sometimes prove useful in resolving questions about motive—knowing, for instance, that a President lacks "inclusiveness" may bolster our conclusion that a particular action was motivated by animus, just as knowing that a witness is dishonest may help to resolve the question whether the witness committed perjury when making a particular statement or claim. *Cf.* Rozenshtein, *supra* note 1, at 618 (noting that "[i]n situations where we lack evidence about an agent's disposition, we can use what we know generally about the agent's character"); *see also id.* at 634 (defining "disposition" as "an agent's cognitive and emotional response to a particular situation"). In that sense, at least, a strict rule of virtue neutrality would compromise the virtue-promoting efficacy of motive-based rules: If courts cannot prove the existence of an improper motive by appealing to a President's characterological tendency to act on that motive, then difficulties of proof may sometimes prevent them from flagging and confronting some actions that were indeed improperly motivated (and hence at odds with the executive virtues). At the same time, however, I do not think that considerations of character are *necessary* to the drawing of conclusions about motive. Under many circumstances, the existence of an improper motive might be inferred from the President's own statements about the action in question, *see* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 137 (2017) (noting the evidentiary value of presidential statements "where an established legal test provides for the invalidity of government conduct when it is animated by a constitutionally impermissible purpose"), the

might help to promote the virtue of inclusiveness without requiring any judicial assessments or declarations about a President's characterological tendency to exclude.[42] And to the extent we can associate other improper "motives" with other constitutionally salient character defects, rules centered around those motives might similarly help to enforce indirectly the virtues with which they are associated.

Promising as this project might be in the abstract, however, it is worth being clear-eyed about how much in the way of virtue promotion the use of motive-based inquiries is likely to accomplish. In addition to requiring difficult, fact-laden inquiries concerning a President's actual or apparent mental state, such motive-based rules raise other nettlesome problems. One involves determining when a bad motive has been replaced by a good one.[43] Another problem concerns duplicity. In particular, to the

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effects of that action, *see* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (noting that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor"), the lack of a plausibly legitimate justification for that action, *see, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (pointing to a law's tenuous "relationship to legitimate state interests" in support of its conclusion that the law "seems inexplicable by anything but animus toward the class it affects"), and other circumstantial factors, *see, e.g.*, Village of Arlington Heights v. Metropolitan Housing Dev. Auth., 428 U.S. 252, 266–67 (1977) (highlighting, for equal-protection purposes, various ways in which courts might "determin[e] whether invidious discriminatory purpose was a motivating factor" underlying a governmental decision). That being so, motive-based analysis should at least sometimes enable courts to circumscribe the powers of an unvirtuous President without ever having to weigh in on the President's underlying character.

42. To be clear, I do not mean to suggest that courts actually apply motive-based rules in this manner. Indeed, the Court itself appears quite reluctant to sign off on such an approach. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 706 (2018) (upholding President Trump's "travel ban," notwithstanding strong evidence that it was motivated by discriminatory animus, on the ground that "it cannot be said that it is impossible to discern a relationship to legitimate state interests or that the policy is inexplicable by anything but animus"); *see also id.* at 740 (Sotomayor, J., dissenting) (accusing the majority of applying "a watered-down legal standard" on account of its "defer[ence] to the President on issues related to immigration and national security"). My suggestion, rather, is simply that animus-based inquiries could serve virtue-promoting purposes if courts were to make greater use of them in presidential-power cases.

43. One such question, which has recently received renewed attention in the literature, is when, and under what circumstances, government actors might cleanse the taint of an improper motive and re-implement a measure that was previously invalidated on motive-based grounds. For an especially helpful

extent that motive-based inquiries rely on the publicly offered justifications for Presidential action, their primary on-the-ground consequence might simply be to prompt unvirtuous Presidents to describe badly motivated policies in terms that mask or direct attention away from their actual nefarious purposes.[44] One might argue that this is a good thing; the less openly the President broadcasts an action's connection to an improper motive, the less severe the "expressive" harms inflicted by that action are likely to be.[45] From another perspective, however, merely telling Presidents not to "talk about" actions in a particular manner can be seen as enabling and encouraging accountability-defeating subterfuge.[46]

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To summarize the above, it is possible—at least as a conceptual matter—for courts to "enforce" the executive virtues without directly evaluating any particular President's virtuousness. But it must also be recognized that the available tools of indirect virtue enforcement carry only limited virtue-promoting promise. Prophylactic rules may occasionally curb some of the worst excesses of unvirtuous Presidents, but—precisely because of their general applicability—they are unlikely to furnish significant safeguards against the harms that an unvirtuous President can cause. Motive-based rules also might function as a proxy for virtue-dependent inquiries, but they too have significant limits. None of this is to say that such tools hold no potential to serve virtue-promoting ends. But the foregoing discussion does

analysis of this issue, see W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2022). For my own efforts to work through the problem, see Michael Coenen, *The Ends and Endings of Government-Motive Analysis*, 74 ALA. L. REV. 663 (2022).

44. Closely related to this point is the objection that motive analysis is futile because it results in the invalidation of laws that the relevant decisionmaker can immediately reenact by "stressing the 'right' factors the second time." *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214–15 (1970) (describing this "futility" objection in greater detail).

45. *See* Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 343–46 (2018) (highlighting the relationship between badly-motivated laws and concerns about expressive harm).

46. *See, e.g.*, Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. 50, 51 (2020) (noting that courts sometimes permit "animus-laundering" by enabling "government actors to reenact laws or policies only slightly different from laws or policies that lower courts have found to be discriminatory").

suggest that such tools will pose only minor obstacles to an unvirtuous President's pursuit of unvirtuous ends.

III. PERVERSELY VIRTUE-DEPENDENT DECISIONS

We have thus far considered the ways in which courts might either directly or indirectly incorporate considerations of executive virtue into rules and decisions that operate to constrain the scope of an unvirtuous President's power. But let us now consider the flipside possibility: perhaps as a real-world matter courts will more often treat a President's lack of virtue as a reason to afford that President more legal leeway rather than less. From a realpolitik standpoint, that is, courts might be tempted to render "*perversely* virtue-dependent" decisions—decisions that furnish unvirtuous Presidents with a greater scope of executive power than their virtuous counterparts would enjoy.

Why would courts render perversely virtue-dependent decisions?[47] The underlying rationale would have to do with judicial officials' efforts to safeguard their own authority. With virtuous Presidents, the reasoning would go, a court can assume that the typical executive-branch response to an adverse decision will be one of acquiescence and obeisance (even if accompanied by some level of grumbling or grandstanding). But with an unvirtuous President, the reviewing court must contemplate more extreme possibilities; in particular, the court must ask whether such a President, unbothered by the longstanding norm of executive-branch compliance with federal-court orders, would choose to defy the terms of a ruling that purports to limit that President's power or otherwise respond to that ruling in provocative and potentially dangerous ways. Such a response could have damaging long-term effects on the court's ability to secure broader compliance with its orders going forward. And a court wishing to avoid that long-term damage might thus choose to avoid any such conflict by embracing the unvirtuous President's preferred resolution of the case before it.[48]

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47. Importantly, I am assuming for purposes of this discussion that the federal judiciary is itself fully virtuous; that is, I want to suggest that even virtuous judges doing their best to act in the public interest will sometimes be inclined to extend special treatment to an unvirtuous President.

48. This is, of course, a familiar explanation for the Court's decision in *Marbury v. Madison*, 5 U.S. 137 (1803), not to issue a writ of mandamus against James Madison. The underlying concern was that Madison (at Thomas Jefferson's behest) simply would have ignored the writ and accordingly embarrassed

This point seems especially salient with respect to Rozenshtein's posited virtue of loyalty. Presidents who are incapable of "subordinat[ing] their interests to those of the nation, the public, and the Constitution" would seem to pose a heightened risk of defying judicial decisions they dislike.[49] From the perspective of the public interest, after all, this sort of conduct can be very harmful indeed, undermining such values as judicial independence, reliance interests, checks and balances, and the rule of law itself.[50] But those values will matter little to Presidents

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the Court. *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 26 (Sanford Levinson rev. ed., 6th ed. 2016) (highlighting this possibility). To be sure, Marshall's potential concern about executive-branch noncompliance in *Marbury* might not have derived from any particular conclusions he had drawn about Madison's (or Jefferson's) lack of virtue, and it is certainly possible that the fear instead derived from different considerations.

49. Rozenshtein, *supra* note 1, at 634.

50. In making this assertion, I do not mean to state as a categorical matter that it could never be in the public interest for a President to ignore a court order. To the contrary, I concede that there might be circumstances in which a particular judicial order is itself so contrary to the public interest that a virtuous President could indeed articulate a legitimate reason for ignoring it. *Cf.* Rozenshtein, *supra* note 1, at 639 (connecting up the executive virtue of "responsibility" with the idea of a "prerogative power"—that is, "the ability, perhaps even responsibility, for the President to act outside the law during emergency situations"—and citing as examples various emergency measures taken by President Lincoln during the Civil War). My suggestions are only: (a) that the norm of executive-branch compliance with federal-court judgments generally helps to further important public values; (b) that any responsible decision to disregard that norm must account for those values in a meaningful way; and (c) that "disloyal" Presidents (relative to "loyal" Presidents) are on the whole more likely to discount those values in deciding how to proceed. Nor for that matter do I intend to suggest that it would be contrary to the public interest for Presidents to engage in "departmentalism," which I understand to be the practice of adhering to and enforcing the federal courts' *judgments* without necessarily accepting or agreeing to the principles or positions set forth in those courts' opinions and precedents. As many commentators have elsewhere argued, a good-faith constitutional commitment to complying with federal-court orders need not entail a further commitment to accepting as correct all aspects of the opinions that accompany those orders. *See* Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1080 (2020) (emphasizing that, from a departmentalist perspective, the "judgment/opinion distinction is essential" and that "[u]nlike the judgment to which parties are bound, the opinion has no independent legal force"). To be sure, some have suggested that departmentalism is itself problematic and the Presidents should instead adhere to a model of full-scale judicial supremacy. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997) (criticizing departmentalism on the ground that it undermines the

who view everything through the lens of their own personal interest. Instead, such Presidents will view the end goal of marginalizing an executive-power-limiting court as compelling enough to justify whatever systemwide damage an attack on the courts would cause.

That, in turn, gives rise to the troubling possibility that a self-preservationist court will regard a President's manifest lack of loyalty as a reason for affirming rather than denying the President's power to do a legally dubious thing. From the court's perspective, surrendering to the President on the merits might represent the lesser of two evils. Yes, that court would acknowledge, ruling in favor of the President would have the effect of sanctioning an unvirtuous person's arguably unlawful conduct. But, such a court would reason, that outcome is better than the feared alternative scenario in which the unvirtuous President actively resists an adverse ruling. Normally, we might say, courts can count on a President's "loyalty" to deter such a President from embarking on such a crusade. But Presidents predisposed to prioritize their personal interests over the public interest would harbor no similar qualms. And thus, rather than provoke a fight that could erode its authority more broadly, such a court might simply decide to keep its powder dry and live to fight another day.[51]

"settlement function of law"). Here, I am simply bracketing that question—that is, I am suggesting only that courts have good reason to suppose that disloyal Presidents are, all else equal, more likely than their loyal counterparts to refuse to enforce or comply with duly issued court orders.

51. Here's a thought experiment that might help to illustrate the point. Recently, the Colorado Supreme Court held that President Trump's conduct in the aftermath of the 2020 election amounted to an effort to "engage[] in insurrection" against the United States, thus disqualifying him from again serving as President under Section 3 of the Fourteenth Amendment. *See* Anderson v. Griswold, 543 P.3d 283 (Colo. 2023). But the (U.S.) Supreme Court quickly reversed that decision, with all nine Justices agreeing that states lacked the authority to enforce Section 3 against would-be federal officials in the absence of implementing legislation from Congress. *See* Trump v. Anderson, 144 S. Ct. 662 (2024); *see also id.* (Barrett, J., concurring in part and concurring in the judgment); *id.* (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment). Suppose, however (and highly counterfactually), that prior to the Court's decision in *Anderson*, Trump had repeatedly broadcast his intention to respect any judgment issued by the Court in the case and—notwithstanding his steadfast personal belief that he was not disqualified—to withdraw immediately from the election if the Court were to hold otherwise. Might that alternative course of conduct have prompted the Court to reach a different outcome in *Anderson*? It's impossible to know for sure, but it's not inconceivable that some Justices might at

The underlying calculus, to be sure, is complex. After all, even disloyal Presidents will have self-interested political reasons for acceding to judicial decisions that go against them, and those political incentives might sometimes suffice to assure on-the-fence courts that such Presidents will not in fact resist their authority.[52] Perhaps unvirtuous Presidents are in this sense just as likely as virtuous Presidents to realize that open defiance of the courts would reduce their popularity, invite pushback from members of Congress and administration officials, and, in the worst-case scenario, trigger impeachment and removal. To the extent these political incentives hold sway, a court would have no particular reason to afford special treatment to Presidents lacking in loyalty. Those Presidents may not care about the rule-of-law harms likely to flow from their defiance of the courts, but they still have every reason to care about the personal political harms that *they* would suffer as a result of such action.

In the end, these are all contingent variables. The strength of the competing considerations will vary with the circumstances, and one can easily imagine conditions under which an avowedly disloyal President could anticipate minimal—or even positive—political fallout resulting from an open assault on the courts. Indeed, I suspect that a re-elected President Trump would operate under such conditions; having only further consolidated his control over the Republican Party in the wake of his efforts to overturn the results of the 2020 election,[53] a victory

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least have been tempted to vote differently in that counterfactual scenario precisely because they would have had less reason to fear an aggressive and defiant response from one of the most politically powerful and influential figures in the country. And if the scenario I describe seems plausible, then it provides reason to wonder whether some of the Justices' votes in *Anderson* were at least to some degree driven by self-preservationist concerns.

52. *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 4, 18–21 (2007) (highlighting various ways in which "political incentives facing elected politicians . . . often lead politicians to value judicial independence and seek to bolster, or at least refrain from undermining, judicial authority over constitutional meaning").

53. *See generally* FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES, H.R. REP. NO. 117-663, at 103–12 (2022); *see also* Lakshya Jain & Armin Thomas, *Trump Has Devoured the Republican Establishment*, N.Y. TIMES (Jan. 30, 2024), https://www.nytimes.com/2024/01/30/opinion/trump-republican-establishment.html [https://perma.cc/S5WF-34EQ] (emphasizing that Trump "now controls the Republican Party by virtually every conceivable measure").

in 2024 would give him every reason to suppose that he could blow through other seemingly sacrosanct norms without inviting meaningful political reprisals from his co-partisans within Congress and the executive branch. Under these circumstances, it seems fair to suppose that a court adjudicating a future case against a future President Trump could not dismiss out-of-hand the possibility that he would react to an adverse ruling in a defiant and destructive manner.

The foregoing discussion has been descriptive. I have attempted only to suggest that courts will feel tempted to extend more latitude to unvirtuous Presidents in light of those Presidents' greater willingness to challenge those courts' authority. What I have not yet asked is the normative question of when, if ever, courts *should* follow this impulse: That is, assuming that a President's lack of virtue makes that President especially likely to defy an adverse order, should a court bow to the reality and give in to the President? Or should it instead maintain a posture of determined virtue-neutrality, choosing simply to "declare what the law is" and let the chips fall where they may?

At the risk of disappointing some readers, I'll admit that I don't have a simple answer to this question, and I think reasonable responses can be given in both directions. On the one hand, perversely virtue-dependent decision-making might sometimes be defended on the ground that acceding to an unvirtuous President in a low-stakes present-day case is necessary to preserve the court's authority to intervene in a higher-stakes future case. On this view, in other words, one cannot fully disaggregate the "law" that courts must declare from the rule-of-law values that are furthered by an independent judiciary; losing short-term "battles" for purposes of winning the long-term "war" might ultimately represent a legally appropriate (if not necessary) thing for courts to do.

On the other hand, one might say that perversely virtue-dependent decision-making is itself a hallmark of a non-independent judiciary—one that already has shown itself to lack the independence necessary to defend the rule of law. One might further say that if the perversely virtue dependent nature of a court's decision is sufficiently obvious to the public—that is, if everyone can surmise that the court is permitting an obvious violation of the Constitution because it being cowed by an unvirtuous President—then the Court will have already lost its public legitimacy and, indirectly, further compromised its ability to

"stand up" to the President at some future point in time. And beyond that, there may perhaps be some affirmative value in communicating to the public that a law-breaking President has indeed violated the law, even where the result of the Court's doing so requires the issuance of a judgment that the President will predictably proceed to defy.[54]

In sum, the issue strikes me as a complicated one, and I'm not sure there's a straightforward normative conclusion to be drawn. Perhaps in some circumstances, courts should decline to pick fights that they are bound to lose; perhaps in other circumstances, courts should stand their ground and identify whatever unlawfulness they see. Either way, though, I think it's important to recognize that a President's lack of virtue won't always convince a court to rein in the scope of that President's authority. Indeed, and somewhat ironically, I suspect that it is precisely when the President's lack of virtue is most obvious (and hence when judicial conclusions about that lack of virtue would be easiest to reach), that courts will be most hesitant to take any power-constraining actions in response to it.

CONCLUSION

If there's an overall takeaway to be had from this Response, it is that courts are unlikely to provide much useful assistance in the promoting the presidential virtues that Professor Rozenshtein has identified. That is so in part because doing so directly is probably not a good idea, in part because doing so indirectly is not likely to make much of a difference, and in part because courts might actually have a diminished institutional incentive to issue rulings against demonstrably unvirtuous Presidents. All of that in turn helps to underscore what I take to be a key point of Rozenshtein's article: the executive virtues he identifies are reliably enforceable only by way of the election of Presidents that possess these virtues or, short of that, the

54. *Cf.* Korematsu v. United States, 323 U.S. 214, 246 (1952) (Jackson, J., dissenting) ("A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.").

installation of enough other non-judicial officials with the power and resolve to keep an unvirtuous President in check.[55]

55. *See* Rozenshtein, *supra* note 1, at 651–52 (anticipating "a limited role for courts, at least when it comes to policing executive virtue violations," and emphasizing that "especially where the courts will not act, Congress, the executive branch, and the public itself have an important role to play in furthering executive virtue as a matter of binding law").