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ILF Table Ronde Internationale 2026: « Constitution et Pratiques Anticonstitutionnelles »

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This year, 2026, the United States marked the 250th anniversary of its Declaration of Independence, the text of which is a statement of the core values that would inform the drafting of the Constitution a dozen years later. Its centrality to the national identity of the United States¹ and to an understanding of the purpose of the Constitution has been highlighted by conservatives and liberals alike.² No less a figure than Abraham Lincoln held the Declaration to be the “apple of gold”, the moral ideal “fitly spoken,” which the “silver picture [frame]” of the constitution was made “to *adorn* and *preserve*.”³

In addition to the Declaration’s better known and oft-cited introduction that asserts the “self-evident” moral truths of universal human equality and natural rights (“life, liberty, and the pursuit of happiness”), the document catalogued 27 grievances against King George III’s abuses of power. As author Stacy Schiff notes, “In Jefferson’s accounting, the king had undermined the rule of law, the common good, the judicial system and the political process.”⁴ The Declaration

¹ See Jill Lapore, *These Truths: A History of the United States*, New York: W.W. Norton and Co., 2018; the declaration became by the 19th century the nation’s “North Star, creed and covenant” (Stacy Schiff, “What Would the Nation’s Founders Think of Trump? 250 Years Later, Here Is the Answer,” NYT May 2 2026).

² Scott Gerber 1995 book; Alexander Tsesis 2016 article. It is also a subject of current debate within the Federalist Society. See <https://fedsoc.org/no86/module/the-founders/video/9#video-anchor> vs. <https://fedsoc.org/no86/module/the-founders/video/10#video-anchor>.

³ Fragment on the Constitution and the Union, ca. January 1861, CWL 4:169. Lincoln was referencing the biblical Book of Proverbs 25:11, which reads: “A word fitly spoken is like apples of gold in pictures of silver.” For more on Lincoln’s view of the Declaration as a lodestar for the country, see Harold Holzer, “Abraham Lincoln’s ‘Apple of Gold’: The Declaration of Independence,” *History Now*, Issue 67 (Summer 2023), at: <https://www.gilderlehrman.org/history-resources/essays/abraham-lincolns-apple-gold-declaration-independence>

⁴ Schiff NYT May 2 2026. Among the specific grievances Jefferson spelled out were: “He has refused his assent to laws, the most wholesome and necessary for the public good;” “He has forbidden his governors to pass laws of immediate and pressing importance unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them;” “He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries;” “He has affected to render the military

thus provided more than an aspirational statement of purpose for the establishment of the new nation; it also made clear what the country was breaking from and what it sought to avoid and transcend in the future. If we accept that the Constitution was subsequently written to serve these goals—these aversions and aspirations--,⁵ then it can be said that 2026 is an anniversary, if not of the US Constitution *per se*, then certainly of the project of US constitutionalism—that is, the theory that government at the highest level “be organized through and constrained by a set of constitutional rules”⁶ in order to prevent despotism and tyranny, safeguard liberty, and enable republican government.⁷

It is rather tragic, then, that in this milestone year, there is so much of current relevance to say on the topic of “Constitution and Anticonstitutional Practices” in the United States. Although practices that skirt, flout, or are asserted to be beyond the reach of the Constitution have been part of the American political landscape from the very beginning,⁸ in this report, I will contend that the patterns of action under the second administration of Donald J. Trump have moved beyond the merely unconstitutional and/or selectively (or even aggressively) anti-constitutional to become explicitly and systematically anti-constitutionalist. To build my case, I will first argue for the importance of distinguishing conceptually both between a ‘constitution’ and ‘constitutionalism,’ as well as between the terms ‘unconstitutional,’ ‘anti-constitutional,’ and

independent of and superior to the civil power;” and, in addition to “depriving us in many cases of the benefits of trial by jury,” and “transporting us beyond seas to be tried for pretended offenses,” “He has abdicated government here, by declaring us out of his protection and waging war against us.”

⁵ Kim Lane Scheppelle, Aversive and Aspirational Constitutionalism article INFO. For specific evidence of this purpose, see *The Federalist*, numbers 10, 32, 47, and 48 (James Madison)—online cite?

⁶ Jeremy Waldron, *Political Theory* ETC p. 25.

⁷ See *The Federalist*, op. cit note 5; Martin Loughlin, *Against Constitutionalism*, Harvard University Press 2022, pp. 2-3.

⁸ See Stephen Griffin, *American Constitutionalism*, INFO.

‘anti-constitutionalist.’⁹ As I will elaborate below, the term ‘constitution’ refers to the formal rules that structure political life, whose specifics vary from polity to polity but which are, today in most countries, embodied in a formal text, while ‘constitutionalism’ refers to “a set of interrelated concepts, principles, and practices of organizing and thereby limiting government in order to prevent despotism;”¹⁰ its “one essential quality...is a legal limitation on government” and “its opposite is...the government of will instead of law.”¹¹ I will argue that actions or practices that violate specific provisions of a constitution¹² should be labeled ‘unconstitutional,’ whereas ‘anti-constitutional’ should be reserved for specified actions or practices that are based on the claim that they fall within a sphere of discretion of political actors and should remain beyond the reach of constitutional review (that is, beyond review for conformity with constitutional standards). Anti-constitutionalism, then, is a term that applies to actions or practices based in a rejection of the “essential quality” of constitutionalism, namely that all governmental officers must accept and adhere to the protocols and limits established by the constitution and the laws. My key contention is that, while *unconstitutional* practices should concern anyone who cares about constitutional law and constitutionalism, *anti-constitutional* and *anti-constitutionalist* practices are on a different plane, and their proliferation indicates that the very political regime is under threat or is undergoing a fundamental change in nature.

In regard to the empirical record in the United States, I will make three points:

⁹ I fully recognize that some authors [at least in France] use the term anti-constitutional interchangeably with unconstitutional (see, e.g., Vidal Naquet, *autres*) but I will make the case that the prefix ‘anti-’ should be reserved for a particular type of practices, namely those that are at odds with constitutionalism.

¹⁰ András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (2017) at p. 13 (cited in VGL p. 54).

¹¹ Charles McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca : Cornell University Press, 1940, p. 13.

¹² (or recognized constitutional traditions, in cases, like the United Kingdom, that lack a single written document that embodies the “higher law”)

First, because of the terse and vague nature of the U.S. Constitution, and the difficulty of formal amendment thereof, debates over what is and is not ‘unconstitutional’—and whether this can change over time-- have been a constant of political life, and although discussions over different interpretations, and alternative interpretive theories, have been fierce,¹³ they have, at least since the end of the War of Secession (after 1865), been conducted within a framework of constitutionalism, as defined above.

Second, however, alongside this, we can trace a long history of what I identify as anti-constitutional practices, that is, patterns of action, mostly by the executive, based in arguments that certain matters and/or circumstances fall within an alleged sphere of discretion or prerogative, and are or should be beyond any institutional or legal oversight. Although we can find periodic examples of such practices across U.S. history, these increased significantly with the onset of the Cold War and (again) with the “war on terror,” fueled by executive claims that responding to national security threats required that the executive be freed from constitutional constraints. In addition, the development of the Unitary Executive Theory during the Reagan years introduced a novel interpretation of Article II language that offers formally constitutional but substantively anti-constitutionalist reasoning¹⁴ for the sidelining of Congress from the regulation and oversight of the federal bureaucracy and enabling the President to unilaterally command and control all federal employees.¹⁵ In short, anti-constitutional practices (and arguments justifying them) have been part of the US political landscape for many years.

Nonetheless, my third observation is that the current administration has, both quantitatively and qualitatively, gone far beyond the unconstitutional and even the anti-

¹³ Stephen Griffin 1998, op cit note XX, at PAGES; Tushnet in Goldsworthy

¹⁴ This might be understood as a (slow-motion?) example of “abusive constitutionalism” (Landau 2013).

¹⁵ Although the Supreme Court excepted the Federal Reserve from this rule in *Trump v. Cook* (June 29, 2026).

constitutional practices of the past, engaging in patterns of behavior that systematically and continuously ignore, circumvent, undermine, ridicule, and sometimes even defy the structures and limits established by the U.S. Constitution. As historian Heather Cox Richardson has put it, “From the time he took office in January 2025,” Trump and his collaborators “have not simply challenged laws or constitutional provisions. They have acted as if the Constitution doesn’t exist.” Rather than “accept[ing] the constitutional order [and] working within it to challenge it,” they have, in word and deed, shown that they “reject[] the constitutional order entirely.”¹⁶ This is evident in three categories of practices: those that reject the core principles of limited and enumerated powers; those that reject due process, accountability, and the autonomy of law; and those that reject the idea that the people are sovereign and that the government is supposed to serve the public (“We the People”).¹⁷

To make this argument, this article will proceed in four parts. Part I will offer a conceptual clarification of the terms constitution and constitutionalism, and flesh out the distinction between unconstitutional, anticonstitutional and anticonstitutionalist practices. Part II will provide a brief overview of past unconstitutional and anticonstitutional practices in the United States, establishing the *de facto* contours of and limits to American constitutionalism that predated the current administration. Part III will categorize the anticonstitutional practices of the Trump II administration and elaborate the ways in which they are grounded in anticonstitutionalism. Part IV will briefly summarize what the role in and/or responses to these anticonstitutional practices have been, from the other branches and from society, and underscore

¹⁶ Heather Cox Richardson, Letters from an American, July 26, 2026, https://open.substack.com/pub/heathercoxrichardson/p/july-26-2026?r=9bqd5&utm_campaign=post&utm_medium=email

¹⁷ Jamelle Bouie, “Trump Has Gone From Unconstitutional to Anti-Constitutional,” *New York Times*, March 19, 2025, at <https://www.nytimes.com/2025/03/19/opinion/trump-musk-constitutional-unconstitutional.html>

the challenges of checking anticonstitutionalist forces and moving beyond this anticonstitutionalist moment.

I. Conceptual clarifications

Before offering my reflections on the U.S. case, it is important to clarify my understanding and use of the two main concepts invoked in the title of the 2026 International Round Table, namely ‘constitution,’ and ‘anticonstitutional practices.’ I begin with the distinction between “large-C” and “small-c” constitutions as outlined by David Law.¹⁸ According to Professor Law, a “large-C” constitution is a text (or set of texts) that “(1) proclaims its own status as supreme or fundamental law, (2) purports to dictate the structure, contours, and powers of the state, and (3) may also be formally entrenched, in the sense of being harder to amend or repeal than other laws.”¹⁹ It consists of the norms “on paper,” the express text or letter of the law that establishes the *de jure* structure, procedures, and limits for the legitimate exercise of state power. Most countries in the world today have a formal, large-C constitution thus defined, the texts of which are easily accessible and comparable online.²⁰ Yet, contemporary analysts interested in classifying and explaining political behavior and outcomes point to the gap between large-C constitutional text and political practice, noting that almost nowhere can the latter be read off or predicted by the former.²¹ In many countries, especially though not exclusively in the common

¹⁸ See David S. Law, “Constitutions”, Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 377.

¹⁹ Ibid. It is what Karl Loewenstein called some 50 years ago “a Constitution in the formal sense,” consisting “of a single (or, as the case may be, of several) written documents that verbally articulate, in logical sequence of topics, the most important, though not necessarily all, rules by which the political process of the community is operated.” Karl Loewenstein, CONSTITUTIONS AND CONSTITUTIONAL LAW IN THE WEST AND IN THE EAST *The Indian Journal of Political Science*, July—September 1969, Vol. 30, No. 3 (July—September 1969), pp. 203-248 at 207.

²⁰ Constitute.org

²¹ CITE.

law tradition, “the constitution”—that is, what counts as binding “higher law”— is understood also to include judicial decisions, doctrine, treaties, and conventions (i.e., unwritten rules of behavior).²² Some label these additional sources, written and unwritten, the “small-c” constitution.²³ Others adopt David Law’s definition of a small- c constitution as “the body of rules, practices, and understandings, written or unwritten, that actually determines who holds what kind of power, under what conditions, and subject to what limits.”²⁴ This definition, which focuses on *de facto* practices or patterns of action,²⁵ recalls the more traditional, “material” conception of a constitution that dates back to Aristotle.²⁶

This conceptual distinction between a large-C and small-C constitution reminds us that the conduct of political life will almost never be contained perfectly within the four corners of the written constitutional document. There is always a gap between the letter and the practice of the law.²⁷ Yet neither does this imply that we can or should only identify ‘the constitution’ in Professor Law’s broad small-c terms, i.e., in observable practice. To be sure, this would render the term ‘anticonstitutional’ nonsensical. The criterion for labeling an action to be against or in violation of any given constitution, then, cannot merely be that it is not explicitly codified in the constitutional text.

For this reason, comparative constitutional scholars have often insisted on distinguishing between a constitution (in the large-C sense) and constitutionalism, emphasizing that while all

²² David Strauss; Adam Chilton and Mila Versteeg, “Small-c Constitutional Rights”, Coase-Sandor Working Paper Series in Law and Economics, No. 894 (2019).

²³ Chilton and Versteeg 2019;

²⁴ David S. Law, “Constitutions”, Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 377.

²⁵ Marilies Glasius CITE

²⁶ Aristotle, *Politics* – CITE; Loewenstein 1969; Maddox?

²⁷ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*, 2018, p. 12: “Practice in almost every nation will fail to correspond with some aspects of that nation’s formal constitution, at least from some perspective” but the “shortfalls [are] of varying degrees of severity.”

countries have a constitution, not all embrace or practice constitutionalism.²⁸ As noted in the introduction, ‘constitutionalism’ describes “a set of interrelated concepts, principles, and practices”²⁹ that establish “a legal limitation on government.”³⁰ It denotes adherence to a system of beliefs and practices, “a certain ethos of governing,”³¹ that aims to ensure that “governmental authority [is] exercised only in accordance with constitutional norms” which “cannot be suspended, circumvented or disregarded by the political organs of government.”³²

Constitutionalists take constitutional norms seriously as a means of organizing and constraining government power, and while constitutions may differ in their specific provisions, constitutionalism is grounded in an opposition “to various forms of absolutism.”³³ To be sure, constitutionalism as a regulative ideal-- was developed in response to and as a rejection of the unbridled power of absolute monarchies, where the sovereign could function as *legibus solutus*, unconstrained by higher law.³⁴ Constitutionalism’s opposite, and what it aims to prevent, is “despotic government, the government of will instead of law.”³⁵ As Giovanni Sartori argued, (large-C) constitutions detached *de jure* or *de facto* from the constitutionalist *telos* of guaranteeing citizens’ political freedoms through the restricting arbitrary power and limiting government are either “nominal” (descriptive but not constraining) or “façade” (sham) documents.³⁶

²⁸ Mila Versteeg, Tom Ginsburg, and David Landau, *Comparative Constitutional Law* INFO, p. 53. Giovanni Sartori, “Constitutionalism. A Preliminary Discussion,” *American Political Science Review* 56, pp. 855- Charles McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca : Cornell University Press, 1940, p. 13.

²⁹ András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (2017) at p. 13 (cited in VGL p. 54).

³⁰ Charles McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca : Cornell University Press, 1940, p. 13.

³¹ Martin Loughlin 2022, at 3.

³² Louis Henkin, “Elements of Constitutionalism,” *The Review: International Commission of Jurists* 60 (1998), pp. 11-12, cited in Mila Versteeg, Tom Ginsburg, and David Landau, *Comparative Constitutional Law* INFO, p. 54.

³³ Jeremy Waldron, *Political Theory*, pp. 24-5.

³⁴ Stephen Holmes, *Passions and Constraint*, INFO p. 6:

³⁵ Charles McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca : Cornell University Press, 1940, p. 13.

³⁶ Giovanni Sartori, “Constitutionalism. A Preliminary Discussion,” *American Political Science Review* 56, pp. 855-

Bringing constitutionalism into the discussion thus draws our attention to two things beyond the constitutional text itself: 1) the institutionalized processes for determining if and when the actions of political actors are in violation of constitutional standards; and 2) how political actors—especially executives—operate vis-à-vis constitutionalism, working within the system of constitutional control/oversight, or, alternatively, seeking to evade it altogether. This, I argue, prompts us to consider conceptual distinctions in various practices that are at odds with the constitution. Specifically, my claim is that we can and should distinguish between *unconstitutional* practices, namely those that designated constitutional interpreters (most often judges) deem to be in violation of specific provisions of a constitution; *anti-constitutional* actions or practices,--those based on the claim that they fall within a sphere of discretion of political actors and should remain beyond the reach of review for conformity with constitutional standards; and *anti-constitutionalism*, that is, actions or practices based in a rejection of the “essential quality” of constitutionalism, namely that all governmental officers must accept and adhere to the protocols and limits established by the constitution and the laws.

This distinction can be justified at the basic semantic level, given that the prefix “un-” is used to indicate the absence or opposite of the term it precedes, whereas “anti-” suggests active resistance or hostility to the concept that follows it. When the term ‘unconstitutional’ is applied to something (a proposal, action, or practice) that lacks support in the constitution, the burden falls on the individual or body charged with determining constitutionality to demonstrate, through reasoned argument, that it violates one or more specific constitutional provisions. Different actors can in good faith argue over what the constitution does or does not permit,--before, during and after an official decision on constitutionality. But all accept that the constitution matters (i.e., that its norms are valid and binding), that is, that the boundaries and

rules it establishes should generally anchor, structure and (sometimes) limit, political decision making and action. By contrast, when a proposal, action, or practice is explicitly or implicitly grounded in a claim that it is beyond the reach of review for conformity with constitutional standards, the term ‘anti-constitutional’ seems more appropriate. Unlike *unconstitutional* practices, such intentional evasion or circumvention of the norms and/or processes that the constitution establishes indicate active opposition to or rejection of constitutional boundaries, at least in select (exceptional) circumstances or subject areas (such as emergencies or national security). When this hostility to constitutional oversight and constraint becomes generalized, and actors move to “dismantle legal and constitutional checks upon executive and/or legislative powers, thus distorting [or] seeking to subvert democratic and constitutional rules of the game,”³⁷ the practices can be described as ‘anti-constitutionalist.’ Anti-constitutionalist practices reflect contempt for constitutionalist principles, norms, and institutions and are part of an effort to replace these standards and sources of legitimacy with alternatives that allow for consolidated, unchecked power.³⁸

The perennial challenge of constitutional government is to ensure adherence to higher law norms which political actors have “the motive, means, and opportunity to render...ineffective.”³⁹ The defense and preservation of the constitution require eternal vigilance (especially but not exclusively by jurists) to identify and bring before the designated institutional fora (often courts) those practices deemed to violate specific constitutional provisions. Although the struggle to get courts to recognize and condemn certain practices as unconstitutional can be

³⁷ Krygier 2022 pp. 6-7.

³⁸ See Gábor Halmai’s description of the regimes of Hungary under Viktor Orban and Poland under the Law and Justice Party (PiS) as “anti-constitutional to the core” (Krygier 2022 DETAILS). See also Konciewicz “Anti constitutional commandments” article on Poland...break with constitutional principles. CITE.

³⁹ Stephen Griffin 1998, p. 15.

long and hard, insofar as all parties accept the process and outcome for assessing their constitutionality, constitutionalism, as defined above, is holding. However, the emergence and expansion of anticonstitutional practices in a regime that otherwise accepts and adheres to constitutionalism and the rule of law should put constitutional defenders on high alert. As Ernst Fraenkel's "dual state" model suggests, the "prerogative state" has an expansionary nature;⁴⁰ thus, when political actors begin to carve out and seek to justify zones of discretion, asserting that they are and should be beyond the reach of independent legal review, constitutional defenders should react energetically to check such expansion. Moreover, if and when political actors begin systematically demonstrating outright contempt for constitutionalist "values, practices, and institutional constraints,"⁴¹ then the entire regime is under threat. It is time to declare a "five alarm fire" and go beyond traditional forms of and outlets for legal argumentation, for, ultimately the defense of constitutionalism must be political.

KEEP HERE OR MOVE? EITHER WAY NEED TO ELABORATE:

[The question is where and how to draw the distinction between a generally constitutionalist regime with some (significant) anticonstitutional practices, and an anticonstitutionalist regime, where the "scale, scope, and underlying motivation"⁴² are such that it changes nature/form/classification. There is no objective line to cross, but when respected jurists across partisan divides start agreeing, and taking risks of different kinds, to expose and critique what is going on as "unprecedented" or beyond the pale...something has changed. (Physics/chemistry phase change?)]

⁴⁰ Ernst Fraenkel, *The Dual State*, INFO 1941.

⁴¹ Krygier 2022, p. 6

⁴² Cite source with this quote from Jack Smith; OTHERS?

II. Brief Overview of Past Unconstitutional and Anticonstitutional Practices in the U.S.

The United States is often credited with having produced the world's first written constitution and invented the idea of judicial review -- leading what would eventually become a global trend toward what Mauro Cappelletti called the "positivization of natural law."⁴³ Yet despite having insisted on committing to writing the principles and rules binding on rulers and ruled alike, "the specific words of the text [have] play[ed] at most a small role" in debates over what the Constitution requires.⁴⁴ This derives in part from the document's brevity, the general and "more or less equivocal"⁴⁵ nature of many of its terms, and the lack of clarity regarding "how the branches should relate to each other."⁴⁶ Moreover, the amendment rule set forth in Article V (generally, 2/3 of both houses of Congress, plus ratification by 3/4 of the states) "comes close to requiring unanimity to approve any amendment as a practical matter,"⁴⁷ making formal, large-C constitutional change extremely difficult and rare. Thus, with the passage of time, many terms of the Constitution "seem archaic and unsuited to dealing with the social and economic issues that have emerged."⁴⁸

The large-C text is not irrelevant; the written Constitution has remained at the center of political debate, anchoring political practice. But because of its brevity, generality, and formal rigidity, it cannot and does not set the boundaries for all legitimate government conduct.⁴⁹ Indeed, as Mark Tushnet notes, some aspects of the U.S. Constitution, such as inter-branch relations, "ha[ve] been 'interpreted' by political practice rather than by reasoned decision,...The

⁴³ CITE; on early trend see Lepore 2018, p. 240

⁴⁴ David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 1996 p. 877.

⁴⁵ The Federalist number 37

⁴⁶ Mark Tushnet, "US: Eclecticism and Pragmatism," in Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study*, 2006, at p. 17.

⁴⁷ Griffin 1998, p. 29

⁴⁸ Tushnet 2006, p. 17.

⁴⁹ Griffin 1998, p. 41

political accommodations reached by the president and Congress simply *are* what the Constitution means.”⁵⁰ Thus, Stephen Griffin argues, American constitutionalism is best defined as “a text-based political practice in which authoritative interpreters can create new constitutional norms”.⁵¹

Yet even if what is accepted as constitutional is often determined through practice, political actors frequently “invoke the rhetorical resources offered by the [large-C] Constitution”⁵² and turn to the courts to challenge the constitutional validity of political decisions or actions. Indeed, since *Marbury v. Madison* (1803), the official story of U.S. constitutional interpretation is that it is “emphatically the province and the duty of the judicial department to say what the law is,” with judicial supremacy rearticulated and reinforced in *Cooper v. Aaron* (1958).⁵³ Vast tomes have been written, generations of lawyers trained, and entire careers made around theories regarding how judges can and should decide what is ‘unconstitutional’. These interpretive theories range from textualism and originalism, to structural considerations and appeals to justice, to representation-reinforcing review (associated with John Hart Ely), as well as precedent⁵⁴ and even “considerations of administrability.”⁵⁵ However, there is no consensus on which of these theories is best, much less consistency in their application, even by individual judges across time.⁵⁶ The Supreme Court itself regularly divides on whether and how a matter

⁵⁰ Tushnet 2006, pp. 20-21.

⁵¹ Griffin 1998, p. 56.

⁵² Tushnet 2006, p. 21

⁵³ Decision issued to address the desegregation crisis in Little Rock, Arkansas (following the *Brown v. Board* decisions of 1954 and 1955 and political resistance thereto).

⁵⁴ David Strauss explains that, in keeping with the common law tradition, the meaning of the constitution evolves, and has often been decided with reference to precedents (“doctrine”) and “to considerations of morality and public policy” (Strauss 1996, PAGE).

⁵⁵ Tushnet 2006, pp. 27-43.

⁵⁶ Tushnet 2006; LSR article on originalism; Mark Lemley 2022 <https://harvardlawreview.org/forum/vol-136/the-imperial-supreme-court/>

before it violates the constitution, and a determination of unconstitutionality may ride on a single judge's vote.⁵⁷

Despite this messiness (or “eclecticism”⁵⁸), political actors, and the society as a whole, have long accepted the process and outcomes of judicial review and the spirit of constitutionalism (i.e., government limited by law) that animates it, including high court rulings that limited executive muscle-flexing and/or dealt a blow to powerful political interests at the federal level⁵⁹:

- Some examples (DECIDE WHICH TO CITE IN TEXT OR IN FOOTNOTE...these or others?):
 - *Ex Parte Milligan* 71 U.S. 2, 120-21 (1866): ruled unconstitutional (former) President Lincoln's use of a military tribunal to prosecute civilians, stating that “The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” They underscored that any doctrine that justifies the suspension of constitutional provisions “during any of the great exigencies of government...leads directly to anarchy or despotism....”
 - *Humphrey's Executor v. U.S.* (1935): unanimous ruling establishing that “Congress could limit the president's ability to fire a commissioner on the Federal Trade Commission” (recently overturned in *Trump v. Slaughter...*)
 - *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952): declared unconstitutional President Truman's executive order to seize private steel mills

⁵⁷ Examples necessary?

⁵⁸ Tushnet 2006, p. 47.

⁵⁹ Although very important in US constitutional history, Supreme Court decisions constraining state-level (i.e., subnational) political actors arguably have a different dynamic than those challenging federal actors. CITE.

without explicit congressional authorization, arguing that “the Founders of the Nation entrusted the lawmaking power to the Congress alone in both good and bad times.” (Established a three-tiered schema for assessing the constitutionality of executive leeway.)

- *United States v. Nixon* (1974): unanimous ruling that Nixon could not invoke "executive privilege" to withhold subpoenaed Oval Office tape recordings from a criminal proceeding.
- *Morrison v. Olson* (1988): Court ruled 7-1 (Scalia dissent) for constitutionality of the independent counsel established by the Ethics in Government Act after Watergate.
- *Clinton v. City of New York* (1998): Court struck down (6-3) the Line Item Veto Act (1996), on grounds that the Constitution does not allow the president to unilaterally amend or repeal parts of laws enacted by Congress.
- *Boumediene v. Bush* (2008): Court declared unconstitutional the Congress's 2006 Military Commissions Act (MCA), which denied the availability of *habeas corpus* appeals to enemy combatants: "To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'" (Justice Anthony Kennedy majority opinion)

Moreover, as is well known, practices deemed to conform to constitutional norms at one moment in history have often, through sustained and coordinated legal mobilization by civil society actors working within a constitutionalist framework, later come to be judged unconstitutional.⁶⁰

⁶⁰ Simple Justice CITE: Charles Epp, *The Rights Revolution* (1998).

At the same time, however, and increasingly since the start of the Cold War, political actors in or supportive of the executive branch have engaged in what I defined above as anti-constitutional practices, namely actions justified on grounds that certain matters and/or circumstances are or should be left to their discretion, beyond the reach of checks and balances and therefore outside constitutional control.

As numerous analysts note, such assertions of executive prerogative are at odds with the intent of the framers,⁶¹ and their generalization and normalization, are a departure from historical practice (from the founding through mid-20th century).⁶² In Charlie Savage's words, "the Founders were mindful that...one of the ways in which the British king had acted as a tyrant was through the "prerogative power--" the authority to dispense with a law if the king, at his own discretion, asserted that setting a statute aside would be good for the public."⁶³

Things began to change with the Cold War,⁶⁴ when President Harry Truman, "for the first time in American history, asserted that the title commander in chief brought with it the inherent, unwritten power to take the country into a major overseas war" without prior permission from Congress (**Savage 2007, p. 19**). Two years later he cited these same powers in an executive order to seize the country's steel industry, but (as noted above), the Supreme Court struck down the order as an unconstitutional usurpation of Congress's law-making power (**Savage 2007, p. 19; Youngstown**).

⁶¹ See, e.g., CITES: Christine Chabot, Julian Davis-Mortenson, Peter Shane and Jed Handelsman Shugerman

⁶² Savage, *Takeover* ETC 2007, pp. 124-127; Jeffrey Crouch, Mark J Rozell, Mitchel A Sollenberger, *The Unitary Executive Theory: A Danger to Constitutional Government*, University Press of Kansas; 2020

⁶³ Savage, p. 15. As some have argued, "political questions" outside the "strictly legal" judicial purview, are "incompatible with American constitutional theory"; the executive should not be the judge of its own cause. (Franck 1992).

⁶⁴ Arthur Schlesinger, *The Imperial Presidency*, New York: Houghton Mifflin, 1973.

- Subsequent presidents (Eisenhower, Kennedy, and Johnson) also invoked urgency and the need for secrecy to justify the exercise of unilateral war powers and foreign policy decisions (**Savage 2007, p. 20**).⁶⁵
- The stage was thus set for Richard Nixon, who took the idea of presidential prerogative to new heights, declaring, even after his resignation, that “presidents have the inherent power to authorize government officials to break laws if the president decides that doing so would be in the national interest.” In a statement that rings sadly familiar in 2026, Nixon told British journalist David Frost: “When the President does it, that means it’s not illegal.” (**Savage 2007, p. 21**).
- Nixon also sought to inflate presidential power over the bureaucracy by installing officials not confirmed by Congress in key posts that answered to him and “impounding” funds that Congress had appropriated for programs he opposed (**Savage 2007, p. 21**). In addition, “asserting that he had exclusive authority...across the entire realm of foreign policy and national security,” he “authorized warrantless domestic wiretapping, burglaries, mail openings, and other...intelligence collection on U.S. soil in order to eavesdrop on his political enemies, including war protesters and civil rights leaders.” (**Savage 2007, p. 22**).
- This proliferation of anticonstitutional practices and creeping anticonstitutionalism were halted and discredited when the Watergate scandal and the quagmire in Vietnam turned the public, and the Congress, against Nixon.

⁶⁵ It should be noted that the “powers of the President with respect to war and foreign affairs [have generally] not [been] implemented or enforced by the judiciary” (Stephen Griffin, “That National Security Constitution and the Bush Administration,” *Yale Law Journal* Vol 120, 25 March 2011, [LINK](#)).

- In the wake of this debacle, Congress passed a number of laws aiming to check executive power, including the Congressional Budget and Impoundment Control Act, Ethics in Government Act, and the War Powers Resolution.⁶⁶ But these laws “ended up as merely temporary dams before the rising tide of presidential power” (**Crouch et al 2020, p. 20**)
- Under the Reagan administration, conservative lawyers seeking to restore far-reaching executive power began elaborating the Unitary Executive Theory, which interprets Section 1, Clause 1 (the “vesting clause”) together with Section 3 (the “take care” clause) of Article II of the Constitution to mean that *all* executive power is concentrated exclusively in the hands of the President (**Shane 2026 VB**), and that all executive branch personnel are subject to the supervision of and serve at the pleasure of the president. This formally constitutional but substantively anti-constitutionalist reasoning began to move the Overton window⁶⁷ for acceptance of executive assertions of sweeping prerogatives in the decades that followed, including an explosion in the use of “signing statements,” particularly by Republican administrations, indicating to executive branch agencies that, on varying claims of executive prerogative, certain provisions of laws passed by Congress could be ignored—a kind of stealth line-item veto.⁶⁸
- Following the attacks of September 11, 2001, the George W. Bush administration made a renewed push for extraordinary presidential powers. As Charlie Savage explains, the “Bush-Cheney legal team...fused” the older (Cold War) idea of inherent presidential

⁶⁶ Were any formal amendments introduced (even if they went nowhere, given difficulties posed by Article V, as well as political support for a powerful executive)? FIND.

⁶⁷ Find cite on Overton window – how ideas shift from *unthinkable* and *radical* to *acceptable*, *sensible*, *popular*, to eventually be embraced as official *policy*.

⁶⁸ Savage 2007, pp. 224-249; OTHER CITES WITH DATA. While signing statements have been the target of multiple legal critiques, they have not been directly challenge in Court, in large part because of the case and controversy rule: as mere “statements” they have only advisory or interpretive status, making it difficult for parties to establish legal standing.

powers with the unitary executive theory's claim that "Congress could not regulate *any* executive power"; the combination meant that the "president could do virtually anything, without any check by Congress." (**Savage 2007 p. 124**)

- Declaring a "war on terror," the administration pursued anticonstitutional practices that included, most notably, "(1) indefinite detention without due process inside the United States and its possessions; (2) authorization of torture and other harsh interrogation techniques; (3) authorization of National Security Agency (NSA) surveillance outside of the framework set by the Foreign Intelligence Surveillance Act (FISA)." All three were grounded in the (convenient) assumption "that the President had the unilateral power under the Constitution to authorize the violation of federal law and judicial doctrine, even in the absence of a prior finding that the law in question was unconstitutional." (**Griffin 2011**)
- Stephen Griffin underscores that while some of these policies "were eventually evaluated by the judiciary and generally found wanting," the Supreme Court's decisions "made little difference to the situation of the detainees and did not address issues of interrogation or surveillance." He also highlights the dangerous subordination of the historically independent Office of Legal Counsel to the White House in the George W. Bush administration, noting that this effectively "took the executive branch out of the system of checks and balances during wartime" (**Griffin 2011**).
- "Following Bush's lead, Presidents Barack Obama and Donald J. Trump [in his first administration] also tried to expand the boundaries of their constitutional authority, although without the circumstance of an attack on the US homeland during their times in office." **Crouch et al 2020 151**

- Nonetheless, Trump’s “perpetual norm-breaking and impatience with legal constraints” during his first administration were alarming enough that two veteran lawyers of the executive branch and advocates of a strong executive, Robert Bauer (a Democrat) and Jack Goldsmith (a Republican), published a book, *After Trump: Reconstructing the Presidency*, arguing for the importance of reforming the formal laws structuring the presidency in order to strengthen the guardrails around the executive.⁶⁹ As they explain, “It is not just that Trump made plain that most of the great reforms of the presidency in the 1970s in the wake of Watergate, Vietnam and the Church Committee are today inadequate. The often-feckless Trump also revealed deeper fissures in the structure of the presidency that, we worry, a future president might choose to exploit in a fashion similar to Trump—but much more skillfully, and to even greater effect.”⁷⁰
- Unfortunately, this effort may have been too little, too late. Trump himself may not have become more skillful, but his coterie of political operatives, armed with specific plans (Project 2025)⁷¹ and no scruples, were ready to put their “playbook” into action when he was re-elected in 2024,⁷² opening the door to what I contend is a full-blown assault on the US constitutionalist tradition.

III. Trump 2.0: From Anticonstitutional Practices to Full-blown Anticonstitutionalism

In a March 19, 2025 column in the New York Times, columnist Jamelle Bouie wrote that the “defining attribute of [Trump’s second] administration thus far is its anti-constitutional

⁶⁹ Bob Bauer and Jack Goldsmith, *Why We Wrote ‘After Trump’*, Lawfare, September 15, 2020, <https://www.lawfaremedia.org/article/why-we-wrote-after-trump>

⁷⁰ Ibid.

⁷¹ For the full Project 2025 “playbook,” see <https://whatisproject2025.net/project-2025-mandate-for-leadership-pdf/>

⁷² Scott Cummings, « The Autocratic Legal Playbook, » Public Law & Legal Theory Research Paper No. 25-31, UCLA, 2026.

orientation,” which he defines as “reject[ing] the basic premises of constitutionalism[:] that sovereignty lies with the people, that ours is a government of limited and enumerated powers and that the officers of that government are bound by law.”⁷³ Although, per the terms I laid out in Part I above, I would call this orientation anticonstitutionalist, I agree with this definition and find the organization into these three categories very useful. I thus borrow it to organize my support for the claim that the second Trump administration has not “just” engaged in unconstitutional practices (such as violations of Fifth Amendment due process protections in deportation proceedings or the executive order to end birthright citizenship—found unconstitutional in *Trump v. Barbara*, June 30, 2026), nor “merely” in anti-constitutional practices to address alleged national emergencies (e.g., executive-imposed tariffs to address a trade imbalance “emergency”; deployment of military and National Guard personnel to address a border and immigration enforcement “emergency”—or, in DC, a crime “emergency”; mining on federal lands (without environmental reviews) to address an energy “emergency”),⁷⁴ but is engaging in patterns of action that seek to concentrate absolute power in the hands of the executive, undermining the norms, institutions, and practices of government under law and enabling the president to rule as a tyrant, through whim and caprice, fear and favor.

- A. Examples of practices that reject the core principles of limited and enumerated powers – between branches and levels of government, asserting unbridled federal executive power through which the president subjects everything/everyone to his will:

⁷³ Bouie, March 19, 2025.

⁷⁴ Notably, Trump issued in his first month in office the same number of emergency declarations that past presidents, going back forty years, have, on average, issued over four years (see “What Counts as a National Emergency, NYT video at <https://www.youtube.com/shorts/ION1eUgPGjo>). See also <https://www.npr.org/2025/06/09/nx-s1-5424666/trump-national-emergencies-democracy-supreme-court-constitution>

1. Despite that his party has control of both houses of Congress, Trump still circumvents Congress on numerous issues:
 - In April 2026, Trump was on track to issue six and a half times more emergency orders in his second term than any other president this century issued during his entire term—though probably an underestimate because many do not include the keyword “emergency” and so fly under the radar.” (Heather Cox Richardson, July 26; refers to Ben Diamond, Lawfare). See also Liz Oyer podcast.
 - Ignores and circumvents Congress on war powers:
<https://www.nytimes.com/2026/07/20/us/politics/gop-trump-iran-war.html?smid=nytcore-ios-share>
 - “arrogates to himself Congress’s power to levy tariffs,” based on the claim of a “national emergency” (and persists in this even after SCOTUS ruled against this—find cite); “usurps Congress’s spending and appropriation powers by attempting to impound billions of dollars that Congress designated for specific purposes” (story not over on this—e.g., federal research funding regulation proposal—find cite); “usurped Congress’s power to establish executive-branch departments—” dismantling the Department of Education and the Consumer Financial Protection Bureau, asserting control over the Federal Election Commission and Federal Trade Commission, plus fired thousands of federal employees. (list from Luttig 2025, p. 32 – though most of this the SCOTUS has since authorized, as well)
 - Claims unilateral power to tear down or build in federal spaces or to pursue projects on federal lands, without congressional authorization. Most emblematic examples are the White House ballroom and the black granite helipad on the South Lawn (Broadwater and

Hernandez, NYT, July 16, 2026). Such action ignores “the Constitution, numerous federal statutes and longstanding Supreme Court precedent” that grants Congress control over federal property (Montague, NYT, June 5, 2026), citing a lawyer for the National Trust that has sued in the ballroom case). Past presidents have worked with Congress and review panels for projects on White House grounds; Trump just acts without consulting anyone. [Now Supreme Court has authorized....]

2. Violates state sovereignty—“commanded state-level officials to aid him in his purge of undocumented immigrants” (Luttig) and asserted military command of cities over state objections.

- “[I]n August 2025 to justify deploying troops to American cities” Trump asserted, “I have the right to do anything I want to do[;] I’m the president of the United States. If I think our country’s in danger—and it is in danger in the cities—I can do it.” HCR July 26.
- On this, he has had pushback from SCOTUS –Dec 28 2025 ruling
- See also recent Tostrud ruling in MN re unconstitutionality of efforts to force state enforcement of federal law — get cite; appealed?)

- B. Examples of practices that reject the basic principles of the rule of law (judicial independence, due process of law, accountability), as well as the autonomy of law (instrumentalization and loyalty to his person over loyalty to mission/constitution):

- Personal attacks on/threats to individual judges—cite the recent article that details these, provide examples at all levels, cite testimony from Kagan and Coney Barrett;

- Defiance of lower courts, from Boasberg to Minnesota courts during Metro Surge, even SCOTUS ruling re deporting undocumented immigrants without due process (Luttig p. 33).
- Ignoring the order by Judge Richard J. Leon (GW Bush appointee) to halt construction on the White House ballroom (East Wing) unless and until Congress authorizes. This creates a “fait accompli dynamic” (citing Washington University Law School Professor Andrea Katz, Montague, NYT, June 5, 2026).
- Although the Supreme Court ruled that tariffs, as a tax, were a power of Congress and could only be delegated to the executive “subject to strict limits” (cite). But in what Natasha Sarin calls an “unlawful usurpation of [congressional] authority,” DT plays tariff “Whac-a-Mole” and finds a way to extend temporary tariffs indefinitely (NYT July 24? 2026). “imposition of a new round of tariffs on products from more than 60 countries, making up 99.4% of trade with the U.S.” (HCR July 26)
- Firing of immigration judges and recruitment of “deportation judges” –refer to NYT The Daily episode, June 23, 2026, among others
- Department of Justice: Quote Jack Smith interview and assessment
<https://deanblundell.substack.com/p/breaking-jack-smith-just-told-america>
 - Attorney General: “supposed to be the lawyer for the people of the United States”, but Trump appoints personal lawyers/loyalists (Bondi and Blanche);
 - Purging of federal prosecutors, recruitment of weak candidates –deliberate ...loyalty above all
 - July 19 report that ICE agents were told FBI will no longer investigate confrontations with protesters, even if these are filed by ICE to claim assaults.

Basically, this leaves DHS to investigate cases involving its own agents and removes them from potential civil rights violation investigations/prosecution.

<https://www.commondreams.org/news/ice-fbi>

- Pardons – so many examples to cite

C. Examples of practices that reject the idea that the people are sovereign and that the government is supposed to serve the public (the entire governmental edifice is designed to serve “We the People”)

- Massive corruption ... including lavish, vanity projects

“multibillion-dollar spoils” “actual 19th-century-style self-dealing – at previously unheard-of scale and dare-you-to-stop-me openness” Homans NYT July 24, 2026

“a president enriches himself at a scale never seen before in the United States” (French NYT July 26)

- About half of the corporate donors that have contributed to the (unauthorized)

White House ballroom project have since “collectively received new or increased government contacts totaling more than \$50 billion” (Public Citizen report cited in Montague, NYT, June 5 2026).

- Between January and March of 2026, more than 3,600 stock trades, involving hundreds of millions of dollars in companies directly benefitting from his policies/decisions (per his filing of form 278T, a financial report required by the Office of Government Ethics for any transaction greater than \$1000). Past presidents have either sold stocks or put them in a blind trust. **Trump self-deals at unprecedented levels, and does so openly.** “The sheer volume of trading is

unprecedented for a sitting president. The data shows the president's accounts bought and sold companies that have extensive business dealings with the federal government, prompting accusations of insider trading and conflicts of interest”

<https://www.cbsnews.com/projects/2026/trump-stock-trades/>

- Attempt (seemingly thwarted): “the \$1.776 billion “[anti-weaponization fund](#)” that Acting Attorney General Todd Blanche unveiled in May to settle a \$10 billion lawsuit brought by Trump’s personal lawyers over the leak of his tax returns during his first term [<https://www.justice.gov/opa/pr/justice-department-announces-anti-weaponization-fund>]. A Treasury-financed pot of money ... would be distributed to people prosecuted by the Biden administration — presumably Trump’s allies. Donald K. Sherman, the president of the watchdog group Citizens for Responsibility and Ethics in Washington, [described the fund](#) as **“one of the single most corrupt acts in American history.”**

- Anti-reason, deliberation
 - i. Destruction of the state, attack on science/universities/indept agencies that operate on expertise;
 - ii. Hide and subvert the truth, regime of lies

- Rejection of duty to the future –stewardship, trust

Rights – given all of the above, all rights are threatened ... no protection of persons, no grounding in equality, come back to Declaration... attack on birthright citizenship is attack on the whole idea of the 14th amendment—post Civil War. Apple of gold.

IV Sanctions and Prevention of Anticonstitutional and Anticonstitutionalist Practices

[THIS SECTION IS IN SKELETON FORM, TO DEVELOP AFTER THE TRI]

Lower courts vs. SCOTUS

Lower federal courts have a solid record of defense of the constitution and constitutionalism.

They have performed admirably to scrutinize, call out, and check the legal violations and overreach of the current administration. Judges appointed by presidents from both political parties have taken strong stands in defense of constitutional principles, both as they pertain to particular cases and as they are threatened by broader patterns of behavior by federal government actors, especially the Department of Justice.

- Defeat rate of the administration: 75% in district courts and almost 50% in cases brought to appeal (NYT litigation count--UPDATE).
- More than 400 judges have ruled more than 4,400 times since October that immigrants were being illegally detained (Reuters, February 2026). UPDATE BASED ON RECENT

HRW REPORT

- CITE MANY EXAMPLES OF JUDGES WHO HAVE SOUNDED THE ALARM, STARTING IN EARLY 2025 THROUGH STATEMENTS BY SCHILTZ IN MN...

However, the administration's anticonstitutionalism has been enabled and justified by a captured Supreme Court, whose majority has engaged in a form of "abusive constitutionalism."⁷⁵ Despite a few notable rulings of unconstitutionality against the Trump administration (e.g., due process in deportation procedures, the deployment of the National Guard, tariffs, and birthright citizenship), the Supreme Court has largely decided in ways that enable and embolden the

⁷⁵ David Landau, Abusive Constitutionalism, ETC 2013

executive, giving a mantle of constitutionality to an administration that has, as I have argued, demonstrated itself to be anti-constitutionalist. While Justices Jackson, Kagan, and Sotomayor have issued powerful dissents that warn explicitly of the dangers to our constitutional order (CITES), the Court's majority has, in the words of Kate Shaw (NYT June 25 2026), "unshackled" the executive, creating a "permission structure" that "wildly empowers" the administration:

- *Trump v. United States*: For actions within the president's "exclusive" prerogative under the Constitution (including, explicitly, control over the Department of Justice), he enjoys absolute immunity:

"unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties." and "the executive branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute"

This gave Trump the green light to weaponize the department of justice without fear of criminal liability; gave him "an executive branch sword rather than [merely] an immunity shield" (Jack Goldsmith, Lawfare, Feb 10, 2025).

- Prolific use of the emergency/shadow docket "has given the president its imprimatur to continue his power grab" by "either effectively revers[ing] lower-court rulings against the president using the so-called shadow docket, or allow[ing] the administration to proceed until the Court determines the constitutionality of various actions, by which time the damage...will have been done." (Shane, Peter M.: *The Unbearable Lightness of the Unitary Executive Theory*, *VerfBlog*, 2025/3/11, <https://verfassungsblog.de/the-unbearable-lightness-of-the-unitary-executive-theory/>, DOI: [10.59704/6d74a675cc5b7cdc](https://doi.org/10.59704/6d74a675cc5b7cdc).)

- Example: *Noem v. Vazquez Perdomo*: allowing “targeted enforcement” of immigration law based on racial profiling of Latino people... so-called “Kavanaugh stops” due to Justice Brett Kavanaugh’s opinion concurring in the order. DHS ran with this, as evident in Minnesota during Operation Metro Surge, where ICE and CBP brazenly targeted any person of color, or people with an accent or a non-Western style of dress, regardless of their citizenship or immigration status.
- In sum, this Court has proven itself to be “the most executive-indulgent Court since World War II. It has enabled President Trump’s dreams of control.” (Shane 2025 VerfBlog)
- This undermines the valiant efforts of those in the rest of the federal judiciary who have worked to hold the government to the most basic legal standards of the US system.

Congress:

Senate has mostly been rubber stamp: confirmed first Pam Bondi and (recently) Todd Blanche as Attorney General, Pete Hegseth as Secretary of Defense (now War), Kash Patel (FBI), and Kristi Noem (DHS), etc.; funded ICE, fired thousands of federal employees...etc.

https://www.lawdork.com/p/three-examples-of-how-trumps-lawlessness?utm_source=substack&publication_id=899862&post_id=210398067&utm_medium=email&utm_content=share&utm_campaign=email-share&triggerShare=true&isFreemail=false&r=9bqd5&triedRedirect=true

Prevention FAILED in the US...in fact, emboldened in advance (*Trump v. United States*)

Need more explicit textual rules moving forward...but also overhaul at so many levels.

First, however, have to secure the elections ... maybe a Democratic majority in Congress will be able to reclaim Congress's legislative and oversight authority. Free and fair elections with candidates championing a vision of meaningful reform to address the population's needs in the short and medium term and to ensure more effective government representation and responsiveness in the future. (Also need to make sure they are seated – cite scenario(s) discussed in Edsell article NYT May 2026)

Cite in some form Krygier 2022, p. 21: “It is, perhaps a *déformation professionnelle* of lawyers concerned with anti-constitutionalism to focus on legal responses to attacks on the principles of constitutionalism and the rule of law more broadly. Within populist-[authoritarian] countries, the struggle is bound to be hard, since a central goal of the new powers is to de-fang the law in relation to their own activities, but sharpen its teeth to savage enemies – and anyway, as we have already seen, law is only one of the domains that is churning today. Still, Polish judges have had quite a few successes in their struggles, for example, and it is far too soon to suggest that they are doomed, particularly if they can connect with, and win support from, wider publics.”

Conclusion

Just months before the publication of the Declaration of Independence in 1776, Thomas Paine wrote: “so far as we approve of monarchy,...in America the law is king” (**Thomas Paine**, **Common Sense**, January 1776, <https://constitutioncenter.org/education/classroom->

[resource-library/classroom/primary-source-thomas-paine-common-sense](#)) It is thus ironic and lamentable that in this semiquincentennial year, the country is under the control of rulers with such blatant contempt for the Constitution and for this central idea of constitutionalism: that the law is king.

As I have attempted to make clear above, current unconstitutional and anticonstitutional practices are not a dramatic break from an idyllic past. Indeed, continuity can be identified in several respects, and some of what is unfolding is the logical extension of patterns or trends that have been present for many years. Nonetheless, what we have witnessed since January 20, 2025 is a set of practices that differ from those of the past not simply in degree, but in kind.⁷⁶ The second administration of Donald Trump performs anticonstitutionalism on a daily basis. They instrumentalize the constitutional framework and mock the idea that perceived violations of constitutional rules and principles can be challenged legally.

- As Kim Lane Scheppele put it in a March 21, 2025 keynote at the Global Summit on Constitutionalism at the University of Texas-Austin, the administration is not engaging in a contest over constitutional meaning; it is “steamrolling” the constitution.

The unfolding saga has revealed how important customs/mores are to the functioning of constitutionalism:

⁷⁶ This assessment is neither novel nor radical. Indeed, former federal judge of the U.S. Court of Appeals for the Fourth Circuit, J. Michael Luttig, well-known for his conservative legal and political views, has stated: “Trump is different from all prior presidents in his utter contempt for the Constitution and America’s democracy.” p. 31 (J. Michael Luttig, “President for Life,” *The Atlantic*, December 2025, pp. 31-33.)

- Quote from former deputy attorney general in the Reagan administration (cited in Savage 2007, p. 243): the system cannot work unless political leaders in each branch “exercise some self-restraint.”
- Reference Levitsky and Ziblatt (2018) on “soft guardrails”—forbearance.
- Maggie Haberman: it has become glaringly evident “how much of our system is norms [conventions or customs] and not laws. ... [Trump is] somebody who is willing to violate every norm—and, really, every norm...I don’t think I can think of one that...is still firmly in place.” (NYT interview with Ezra Klein, July 31, 2026).
- This administration has made clear that it believes that “rules are for suckers” (David French, NYT July 26, 2026)
- Reference the political cartoon from Substack, juxtaposing Nixon saying (as he famously did) “I am not a crook” and Trump saying “I am a crook. Who cares?” (which he has all but said and which certainly captures his attitude).

Close by calling attention to the fragility of law-based politics.

- Constitutionalism/Rule of Law is/are regulative ideals. They are never completely or perfectly realized; people must ceaselessly work to defend and advance them.
- Need to go beyond the juridical sphere to nurture democratic and humanistic attitudes and practices.
 - Reference Kim Scheppele and Sandy Levinson keynotes at 2025 Global Summit on Constitutionalism...need for collective action, popular mobilization.

- Scott Cummings, Hofstra Law Review 54:2, 2026: law school teachers and students should not “continue as if it is business as usual” but rather recognize that this is an existential crisis that should be at the center of everything we do.”

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